

The London School of Economics and Political Science

*The New Political Economy of Trade:
Understanding the Treatment of Non-Tariff
Measures in European Union Trade Policy*

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Abstract

Non-tariff measures have become a central topic to the debate of how international trade rules and domestic regulatory choices are to co-exist. They are an essential feature of the trade in goods and services, investment, and public procurement regimes. Moreover, different ideas on what is fair and legitimate and how this is justified co-exist. The evolution of the inclusion of non-tariff measures can be explained by rational choice explanations looking at the changed composition and patterns of trade and resulting domestic-international dynamics. However, this explanation is only partial since it does not tell us which factors explain the different understanding of non-tariff measures and how this varies in different periods and contexts. While the constructivist literature and mainly, the literature on the role of ideas in EU trade policy have brought a stronger understanding of the content and influence of ideas, we are still missing an understanding of the content and ideas vis-à-vis non-tariff measures and regulatory issues due to the principal focus on neoliberal ideas.

The dissertation aims to provide a theoretically and empirically grounded analysis of the policy process behind what we term negotiability or the overlap between what agents perceive as negotiable in the coordinative and communicative discourse. Through a combination between theory-induced and data-induced thematic and discourse analysis, we identified which factors affect negotiability. The empirical material uses a combination of primary sources, official EU documents, and in-depth elite interviews. Building on existing ideational theories, we show how two different problem definition of non-tariff measures as regulatory protectionism and as regulatory heterogeneity affect their treatment and lead to discrimination across partners. Drawing on existing theories about ideational change, we also show the meeting between the trade and regulatory regimes have brought slow, gradual change in EU trade policy through inconsistencies, ad-hoc processes, and experimentation thus creating space for discontinuities in neoliberal ideas. By analysing the international political economy causes of the treatment of non-tariff measures, we contribute new aspects to EU trade policy and on the role of ideas in understanding change-continuity.

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List of abbreviations

APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
BE	BusinessEurope
BEUC	Bureau Européen des Unions de Consommateurs / the European Consumer Organisation
BU	Business
CCP	Common Commercial Policy
CDI	Confederation of Danish Industry
CEO	Corporate Europe Observatory
CETA	Canada Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSO	Civil society organisation
DDA	Doha Development Agenda
DG ENTR	Directorate-General for Enterprise and Industry (now merged in DG GROW)
DG GROW	Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs
DG JUST	Directorate-General for Justice and Consumers
DG MARKT	Directorate-General for Internal Market (now merged in DG GROW)
DG SANTE	Directorate-General for Health and Food Safety
DG TRADE	Directorate-General for Trade
EC	European Commission
EESC	European Economic and Social Council
EP	European Parliament
EPA	Economic partnership agreement
EPHA	European Public Health Alliance
ESF	European Services Forum
EU	European Union
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product

GES	Global Europe Strategy
GFC	Global Financial Crisis
GMO	Genetically modified organism
GRP	Good Regulatory Practice
GTA	Global Trade Alert
GVC	Global value chain
ICS	Investor court system
IMF	International Monetary Fund
IPE	International Political Economy
IPR	Intellectual property rights
IRC	International regulatory cooperation
ISDS	Investor-state dispute settlement
KORUS	United States–Korea Free Trade Agreement
MAAC	Market Access Advisory Committee
MAP	Market Access Partnership
MAS	Market Access Strategy
METI	Ministry of Economy, Trade and Industry, Japan
MRA	Mutual recognition agreement
MRTA	Mega-regional trade agreement
MS	Member states
NGO	Non-governmental organisation
NTB	Non-tariff barrier
NTM	Non-tariff measures
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
PTA	Preferential trade agreement
QMV	Qualified majority voting
RCF / RCB	Regulatory Cooperation Forum / Regulatory Cooperation Body
RoO	Rules of origin
RTA	Regional trade agreement
SEM	Single European Market
SME	Small and medium enterprise
SPS	Sanitary and phytosanitary measures

TBCD	Transatlantic Business and Consumer Dialogues
TBT	Technical barriers to trade
TCE	Trade Cost Equivalents
TEC	Transatlantic Economic Council
TEU	Treaty of the European Union
TfA	'Trade for All' Strategy
TFEU	Treaty on the Functioning of the European Union
TPC	Trade Policy Committee
TPP	Trans-Pacific Partnership
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
WB	World Bank
WTO	World Trade Organisation

Chapter 1. Introduction

... the expression “non-tariff” barriers includes an infinite number of measures which appear to be limited only by the inventiveness of the governments that erect them (Trepte, 2004, p. 235)

JUST as all the world is against sin, so all the world is against non-tariff barriers (NTBs) to international trade-well, at least against everybody else's sin and non-tariff barriers. Similarly, just as the world has yet to discover a way of eliminating sin, it has a long way to go on removing NTBs. (Winters, 1987, p. 465)

1.1. ‘Tilting at windmills’ or how to think about non-tariff measures?

Even though we often tend to think that the challenges we face today differ from previous periods, the current backlash to trade policymaking¹, the different conceptions of liberalisation, and the complexity of dealing with regulatory issues have been recurring topics in International Political Economy (IPE). In the 1987 seminal work of Robert Gilpin, he highlighted that the ‘advent of industrial policy, new modes of state interventionism, and the existence of domestic institutions that act in themselves as nontariff barriers have become formidable challenges to the liberal international economic order’ (Gilpin, 1987, p. 393). He gives the famous example of Japanese non-tariff barriers, where, quoting Sayle, he states ‘[a]s one Japanese business executive vehemently stated, foreign requests concerning Japan’s non-tariff barriers [to imports] are tantamount to raising objections to Japan’s social structure [...] there is little possibility that those requests will be met’ (Gilpin, 1987, p. 393). Similarly, he quotes Gary Saxonhouse for the fact that:

... a good share of the expanded agenda of international economic diplomacy, and, in particular, a good share of the interest in the harmonization of domestic economic practices in the name of transparency has been motivated by a desire to ensure that the very successful, but traditionally illiberal Japanese economy is competing fairly with its trading partners (Saxonhouse, n.d., p. 29, as quoted in (Gilpin, 1987, p. 391)).

Twenty years later, these same domestic regulatory issues and their legitimacy have become central to the process of negotiating a free trade agreement (FTA) between the European Union (EU) and Japan, and bilateral and mega-regional agreements between other countries. The quotes preceding this section illustrate that one way to look at non-tariff measures is to see them as a persistent part of the landscape and

¹ By trade policy we refer to the constellation of policies, which ‘regulate the trans-border movement of goods and services’ (Gstöhl and De Bièvre, 2017, p. 3).

acknowledge that any policies aimed at them would fail due to their eventual reappearance in a different shape or form, just as Don Quixote's imaginary enemies. However, due to their preponderance, numerous initiatives at the multilateral, plurilateral, and regional level try to make sense of which sins can be negotiated away.

The clash between international trade norms and domestic regulatory autonomy underpins the current discussions in international trade cooperation. As Gabrielle Marceau and Joel P. Trachtman point out: ‘The search for an appropriate balance between trade liberalisation and regulatory autonomy lies at the heart of the WTO system.’ (2014, p. 351)² In particular, policymakers and observers are facing questions how far liberalisation can go, what liberalisation in regulatory aspects entails, and what approaches to managing globalisation co-exist. The idea that integrating markets need to be managed or harnessed has also become part of daily discussions among the community of élites as well as the broader public with the perception that governments have failed in addressing the problems of globalisation. In a period of backlash against integration and challenges created by technology and the digital transformation, it is vital to grasp how deeper integration alters the political economy of trade. More importantly, this dissertation shows that it is not only the redistributive but also deliberative elements of trade policy that are being contested by the general public.

Within the European Union, different stakeholders have started asking difficult questions with direct implications for trade policy: What is trade policy for? What are trade agreements supposed to achieve? This emerges as a new form of crisis where there seems to be a lack of agreement of the primary aims and objectives of one of the most developed areas of EU policymaking. This dissertation will show regulatory issues have a central role to play in this backlash by tracing the interaction between the inclusion of regulatory issues and the agency of trade policy actors within this changing context. It attempts to link abstract notions about ideational development to the specific processes at play between agents in a world defined by the increased complexity in managing integrating markets and uncertainty due to the difficulty to evaluate different courses of action and assess the future regulatory context.

² Similarly to what we trace in this dissertation, the authors see the ‘search for the right balance between disciplining protectionist measures and allowing states to maintain justifiable regulatory autonomy’ as the main principle in the evolution of the rules regarding trade in goods, enshrined in the General Agreement on Tariffs and Trade (GATT), the Technical Barriers to Trade Agreement (TBT), and the Sanitary and Phytosanitary Measures Agreement (SPS).

The dissertation uses three different time periods to highlight the development of the thinking behind non-tariff measures. The first one looks at the emergence of the understanding of non-tariff measures: non-tariff measures in European and multilateral context (1996-2006). From a theoretical perspective, the first period looks at how ideas of the intersection of trade and regulation emerged within the international and European context. The second tackles the transformation of the understanding of non-tariff measures with the Global Financial Crisis (GFC) and negotiations with Japan (2007-2013). The second period expands the theoretical argument and looks at how these ideas were transformed in the process of the negotiations with Japan and how different levels of ideas interact. The negotiations with Japan necessitate a stronger focus because they fixated on defining the negotiability of non-tariff measures, approaches for negotiating non-tariff measures before, during, and after the formal negotiations, as well as the discursive framing of such processes. The last substantive chapter looks at the challenge to the understanding and treatment of non-tariff measures: negotiations of Trans-Atlantic Trade and Investment Partnership (TTIP) and EU-Canada Economic and Trade Agreement (CETA) (2013-2017). From a theoretical point of view, the last period looks at what happens when ideas are challenged.

The backlash towards EU's trade policy placed non-tariff measures and regulatory issues at the forefront of the debate, but this did not lead to overhaul in the ideas, only in the discursive framing. While these three different periods reflect different contexts in terms of multilateral dynamics, international events, and also domestic tensions within the European Union, carefully tracing the changed conception of non-tariff measures and regulatory issues allows us to capture the rationale for their treatment. The rest of the introduction frames these puzzles within the broader field of International Political Economy; it explains why we focus on the social construction of trade barriers and highlights existing explanations. Finally, we outline the contribution and set out the rest of the dissertation.

1.2. The social construction of trade barriers

1.2.1. Defining non-tariff measures

Non-tariff measures have a particularly interesting development within the multilateral trading system. The move to negotiations and potential cooperation over behind-the-border NTMs increased the need for the conceptualisation of NTMs leading to the establishment of the Group of Eminent Persons on Non-Tariff Barriers (GNTB)³ to define, classify and collect data on NTMs. To facilitate this work, the GNTB set up a multi-agency support team (MAST)⁴, whose first task was to agree on a definition of what constitutes a non-tariff measure. They agreed the following: ‘NTMs are policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both’ (UNCTAD, 2012, p. 1). The lack of adjudication whether those are lawful or not is also the key difference with non-tariff barriers (NTBs).⁵ The resulting classification⁶ made sure that it ‘does not judge on legitimacy, adequacy, necessity or discrimination of any form of policy intervention used in international trade’. Instead, the classification reflected on a broad range of possible measures, organised in sixteen chapters, depending on scope and design (see *Appendix 5*).

Not unlike UNCTAD, in this dissertation, we highlight that NTMs are best defined by what they are not. As Ederington and Ruta elaborate:

³ Group consisted of six economists and policymakers: Alan Deardorff, Professor of Economics and Public Policy, University of Michigan; Marcelo de Paiva Abreu, Professor of Economics, Pontifical Catholic University, Rio de Janeiro; L. Alan Winters, Director, Development Research Group, World Bank; Rufus H. Yerxa, Deputy Director-General, World Trade Organization, Anne O. Krueger, First Deputy Managing Director, International Monetary Fund (IMF), and Amit Mitra, Secretary General, Indian Federation of Chambers of Commerce and Industry.

⁴ For full membership list, see (UNCTAD, 2010, p. 119).

⁵ Vis-à-vis technical barriers to trade, Baldwin et al. take this point even further: ‘the extent to which a particular regulation or testing procedure is a trade barrier is extremely difficult to ascertain. Much product regulation is highly technical and thus industry experts can only understand its impact. Since these experts usually work for companies whose bottom lines are affected by the rules, it can be difficult or impossible to get unbiased advice’ (European Commission, 2005, p. 7). In comparison to the potential effects of NTMs, NTBs ‘surely affect quantity traded and prices and have proven discriminatory effects against foreign firms’ (Peters, 2013, p. 8).

⁶ For an extensive review of different approaches to measuring NTMs, see Cadot et al. (2018). As the authors explain multiple tools can be used to assess the incidence of NTMs across geographies and sometimes also across sectors. These include the inventory approach, which measures ‘NTMs as a share, either of the total number of tariff lines for which there are imports (frequency ratio), the total value of imports covered by NTMs (coverage ratio), or the pervasiveness score, which takes into account the possibility that one product may face more than one NTM policy’ (Cadot et al., 2018, sec. 673). Measuring the restrictiveness of NTMs is most often done by calculating an Ad Valorem Equivalent, which assesses the price or quantity cost generated by the presence of NTM.

This definition implies that the set of NTMs is extremely diverse in terms of intent (i.e., whether the purpose of the measure is to lower trade or to achieve a public policy goal), type of policy (i.e., whether it is a price, quantity, or regulatory measure), or where the action takes place (i.e., whether the measure applies at the border, discriminating between foreign and domestic producers, or not). (J. Ederington and Ruta, 2016, p. 214).

Due to this broad definition, we use non-tariff measures and regulatory issues to highlight those measures that produce trade costs behind the border (rather than at the border) since we aim to disentangle how policymakers understand them. We use non-tariff measures and regulatory issues to signify both those measures such as technical barriers to trade (TBT)⁷ and sanitary and phytosanitary measures (SPS) that are often understood by actors to be NTMs and measures, resulting from other regulatory choices that may affect trade.

1.2.2. A natural development in trade policy?

Why is it that the trade regime has increasingly turned to tackle non-tariff measures⁸, i.e. all measures which are not tariffs, and started including such disciplines in comprehensive trade agreements? One of the answers found in the study of International Political Economy can be simplified as follows.⁹ Since tariffs have been mostly dealt with in consecutive multilateral negotiations, exporting firms started focusing on the different obstacles and barriers to trade found ‘behind the border’. Once these barriers were deemed to cause significant distortions to access foreign markets, businesses put pressure on their governments to address those measures via international cooperation. Governments can then raise the issue through multilateral trade negotiations, where if a government is sufficiently powerful, it can place such an issue on the agenda. The specific disciplines will depend on the different interests as accumulated and transformed by the states involved within the multilateral fora. Such an account reflects a functionalist understanding of the expansion of the scope of issues dealt with at the WTO, showing that the expansion is the natural result from pressure

⁷ The literature makes a distinction between technical regulation and a standard, whereas a ‘technical regulation lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory [...] A standard is a document approved by a recognised body that provides for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory’ (Egan and Pelkmans, 2015, p. 63).

⁸ It is important to note early on that excluding private standards. While the definition of NTMs can be extended beyond government policies, we focus exclusively on those. See World Trade Organisation (2012) for a discussion on private standards and their effect on international trade.

⁹ This is skilfully summarised by Andrew Lang in ‘World Trade Law After Neoliberalism’ (Lang, 2011).

from economic interests of major exporters.¹⁰ The functionalist arguments are then combined with structure and state-focused explanations to describe the observed outcome.

Due to the impasse in the multilateral negotiations, governments turned to a range of venues and strategies such as bilateral trade agreements, instruments to target insufficient reciprocity and economic diplomacy, including to discriminatory or partial liberalisation (Manger, 2009; Siles-Brügge, 2014). In the case of the European Union, an additional impetus was the transparency and predictability achieved in the internal market through the Single Market Programme and the comprehensive *Acquis Communautaire*, which rendered the EU market more open than those of its competitors. The breadth and depth of the specific measures and disciplines thus reflect traditional IPE dynamics: domestic societal explanations highlight the role of organised interests and competing demands by exporters and importers (Allee and Elsig, 2017; Pelkmans, 2017; Rigod, 2013); state-oriented explanations focus on a government or agent's ability not only to accumulate those interests via institutional rules but also to transform them (Lester and Manak, 2017); and international-level oriented approaches focus on the market power of specific countries to define the 'rules of the game' (Bach and Newman, 2007; Damro, 2012; Kalyanpur and Newman, 2018; Young, 2018).

While each of these approaches explains different aspects of the dynamics behind non-tariff measures, the dissertation deals with one essential absence in these explanations: what one defines and categorises as a barrier is 'in part an interpretive act, resulting from the application of particular forms and categories of knowledge to the social world' (Lang, 2011, p. 169). While there is a need to tackle the impact that domestic regulatory choices inflict on trade, actors' understanding of what constitutes a barrier and the modes to treat those are socially constructed. As Lang explains:

... we draw distinction between government action which constitute trade 'distortions' on the one hand, and other kinds of government action which correct pre-existing market distortions on the other. Needless to say, the choice of how to characterise a particular government action is not self-evident. (Lang, 2011, p. 170)

Whilst the challenge of indeterminacy is not new and tackled elsewhere as highlighted by the quotes at the beginning of this chapter (Evans, 1971; Goldstein, 1993; Tarullo,

¹⁰ For an example, see Long (1985).

1987)¹¹, we show how ideas about trade and regulation mobilise different discourses and result in the different treatment of non-tariff measures across partners and negotiations.

The argument, which this dissertation advances, is that regulatory issues change policymaking dynamics, resulting in a new political economy of trade. If the world had entirely shifted to negotiating deep integration elements, then the international political economy would be defined by the redistributive consequences of different types of regulations and regulatory competition between states for establishing regulatory superiority and possibly the setup and expansion of fora on specific areas. However, global trade dynamics are defined by a mix of traditional trade policy dynamics, revolving around tariff liberalisation and deep integration, defined by tackling measures behind the border, protection of intellectual property rights, liberalising and protecting investment and dealing with anti-competitive practices (Young, 2018). The interaction between shallow and deep integration, via preferential trade agreements (PTAs) in particular, more than ever highlights the limits of the ideas and concepts used to make sense of the world, and the pervasiveness of uncertainty (Kessler, 2008). Moreover, bringing non-tariff measures to the surface highlights how agents construct and reinterpret ideas about economic issues. Not too distantly from De Ville and Siles-Brügge, we argue that the concept of what is deemed a ‘trade barrier’ in the first place has been stretched in parallel to the understanding of what ‘free trade constitutes’ (De Ville and Siles-Brügge, 2018, pp. 243, 247). However, defining it only as ‘stretching’ masks significant transformations at play about the thinking behind trade integration.

The political economy of non-tariff measures highlights the limits of the dominant rational choice explanations of how agents form their interests and how they behave in the context of uncertainty. While the material factors such as the increase of ‘murkier’ policies, ‘to tilt the playing field in favour of domestic firms, investors and workers’ has accelerated over time, the timing and content of policy initiatives in the

¹¹ For example, in analysing import regulations, Tarullo(1987, p. 550)discusses how market protection statues and protected adjustment statues ‘implicitly or explicitly [...] posit certain norms of economic behaviour by governments, both foreign and domestic (1987, p. 550). The usual, "normal" condition is assumed to be non-intervention. Thus, each of the statutes establishes what is in form an exception to an idealized conception of unrestrained trade’ (Tarullo, 1987, p. 558). Moreover, he showed that the market standard upon which such legislature rests relied on an evaluation of ‘determining whether a particular government intervention distorts or restores “true” costs’, which he deems ‘impossible in practice’ (Tarullo, 1987, p. 558).

European Union raises questions on how these material constraints are interpreted (Evenett, 2013). By combining the micro-foundations of how policymakers define, categorise and understand non-tariff measures with the discourse on the link between trade and regulation in strategies and speeches, we show that non-tariff measures are contingent on the political setting within which they emerge, and are highly discriminatory towards the partner country. Theoretically, the treatment of non-tariff measures within trade policy and trade agreements reflect two points of contention: first, how new issues are embedded in existing ideational pathways and second, how these issues transform ideational development. In essence, it aims to understand how agents view non-tariff measures and regulatory issues, mainly drawing on two persistent conceptualisations: regulatory protectionism and regulatory heterogeneity, elaborated upon in Chapter 2.

1.2.3. What should trade negotiators negotiate about?

The fact that rules evolve due to the complex interactions between different levels of negotiations and rule-making is not a new development in IPE (Woolcock, 2007). Trade-related issues have been particularly crucial for the debate on whether preferential trade agreements have the potential to ‘stumble’ developments at the international level.¹² The title of Krugman’s 1997 reflections on Bhagwati and Hudec summarises this nicely: ‘Fair Trade and Harmonisation: Prerequisites for Free Trade?’ – what do negotiators actually negotiate when regulatory issues are at the forefront (Krugman, 1997). In comparison to tariff liberalisation, negotiations on non-tariff measures often involve a mixture between the establishment of transparency, some form of trade facilitation, agreement of essential principles, and a commitment to the creation of a mutual understanding between regulators in the future. While the exchange of mutual concessions guides negotiations over tariffs in the goods sector, negotiations over non-tariff aspects in some important ways resemble the negotiations over services and the idea of the ‘water in protection’ in services.¹³ The water in protection is the difference between the bound levels of regulatory barriers in services, as stated in the commitment of a country in its schedule to the WTO, and the applied regulatory barriers, which can be below but not above the bound barriers. One of the

¹² For a summary of the ‘building block’ versus ‘stumbling block’ debate, see Bhagwati (1992) and Bhagwati and Panagariya (1996).

¹³ See WTO Secretariat (1999) for a discussion on the common elements between binding in goods and services.

roles of the recent wave of trade agreements¹⁴ is to eliminate the water in protection, where the ‘value of binding’ is perceived as a major source of gain from bilateral and regional agreements since it reduces the scope for discrimination and creates certainty (Messerlin and van der Marel, 2012). As one of the interviewees from the Directorate-General for Trade sums up:

In terms of the dynamics, services are similar to regulatory rules, for goods you have tariffs, when you increase tariffs you penalise the producer; when you punish the services suppliers, you punish the consumers who receive worse services, and it does not make any sense to do this and to negotiate. Same with regulatory rules. It is very counterintuitive, but the FTAs provide legal binding. That is usually what companies want the most since, in case of breach, they can launch a complaint. What we do is that we play with the water between the applied and bound levels of access. (Interview 21, DG Trade Civil Servant, 2017)

In this respect, the negotiability of non-tariff measures can be the binding of existing levels of openness and removal of ‘reservations’, which in the EU’s case are member states’ reservations that are no longer valid. Negotiability over non-tariff measures from this perspective is a decision on the value of binding and decision on to what rules agents want to be bound. Defined in this way negotiability is not about giving up sovereignty but reducing the freedom to revert to higher levels of protectionism.

At the same time, the story of the evolution of non-tariff measures can also be told from the intersection of trade and development, where sovereignty and policy space are the main protagonists. Globally, there has been an increase in the regulations which pertain to protecting human health, safety, consumers and the environment as part of the ‘modern welfare state in much of the industrialised world’ (Trebilcock et al., 2013, p. 288). Hence, economic prosperity and increase in income levels increase the demand for domestic policies on health, safety, the environment, which can be seen as ‘normal economic goods’ (Trebilcock et al., 2013, p. 288). As a final step, these regulatory measures bring about new disciplines on international trade to avoid creating barriers to the flow of goods, services and investment. Some authors take this

¹⁴ The 2011 WTO World Trade Report identifies different historical ‘waves’ of preferential trade agreements in parallel to the multilateral trading system. In ‘modern era’ since the creation of the GATT, the report identifies three waves: late 1950s-1960s with European integration at its core; the second wave of regionalism is seen in the mid-1980s-1990s defined by numerous regional initiatives; a latest wave in the 2000s with the stronger activity in Asia (World Trade Organization, 2011, pp. 50–53). From the perspective of the EU, there is a further distinction to be made where the EU-Korea FTA is deemed ‘the first agreement concluded in the new wave of deep and comprehensive FTAs that the EU launched following the lifting of the its self-imposed moratorium on such agreements in favour of a comprehensive multilateral round in the late 1990s’ (Lakatos and Nilsson, 2015, p. 4).

further by stating that the WTO, in particular, has gone too far or ‘over-reached’ into the domestic sphere thus encroaching on legitimate demands of citizens and consumers (Rodrik, 2018).

Such developments have also increased the number of domestic political actors who participate in the debate over trade policy, particularly social, environmental, and consumer groups attempting to preserve domestic regulatory space from international trade agreements not just in their own countries but also in the partner countries. Moreover, a range of environmental and consumer organisations and human rights activists have the aim to spread ‘national standards to other countries’¹⁵ or campaign against state intrusion and social inequality (Hoekman and Kostecki, 2009).

While fora such as the Organisation for Economic Co-operation and Development (OECD) started in the 1970s to explore this link, subsequent work in the field has not pronounced itself on whether trade rules are the most appropriate way to address such concerns (Trachtman, 2018).¹⁶ Trachtman summarises these issues nicely in the 2018 Robert E. Hudec Lecture:

... as we consider the relationship between trade commitments and diverse commitments in other areas, it is an error to think of trade as somehow prior to other values. This error perhaps is a survival of the fact that historically, trade cooperation seems to precede other types of cooperation, and is promoted by the convenient but misleading term “trade and” (Trachtman, 2018, p. 5)

... the familiar problem of free markets versus regulatory intervention is transposed to the international setting, where states have diverse levels of development, diverse economic systems and diverse values, and have themselves made diverse compromises. (Trachtman, 2018, p. 6)

The negotiability of regulatory issues and their role in the trade-regulation nexus thus lies at the heart of this dissertation. Policymakers, on the one hand, face uncertainty in the expectations of future gains, because benefits from non-tariff measure commitments can only be observed at a later time. On the other hand, with fast-paced

¹⁵ To come back to the Economics literature, Marianna Belloc’s study of the political economy determinants of NTMs in the EU, based on the DG Trade-organised consultations as a proxy for lobbying of various groups, shows ‘significant and positive impact on NTM protection’ (Belloc, 2014).

¹⁶ For example, the OECD recommendations state: ‘Where valid reasons for differences do not exist, Governments should seek harmonisation of environmental policies, for instance with respect to timing and the general scope of regulation for particular industries to avoid the unjustified disruption of international trade patterns and of the international allocation of resources which may arise from diversity of national environmental standards; Measures taken to protect the environment should be framed as far as possible in such a manner as to avoid the creation of non-tariff barriers to trade’ (OECD, 1972).

changes in technology and the need for regulation, some non-tariff measures can be replaced by new ones, and therefore future commitments are as significant as current binding agreements. More importantly, from the discussion above policymakers face uncertainty in the day-to-day processes of defining and categorising what constitutes a non-tariff measure. While uncertainty in itself is a dominant characteristic of IPE studies, the uncertainty of the regulatory choices of other countries provides the new rationale for trade policy (Abdelal et al., 2010; Blyth, 2003; Siles-Brügge, 2014; Woll, 2008). As encapsulated by the Commissioner for Trade:

... we are likely to see an explosion in regulation in the coming decades, because of the success of emerging economies. People start to demand stronger safety and environmental protections when their basic needs are being met. We are already seeing this in China. That is good news, but the more complex and stringent the regulatory regimes of emerging countries become, the more they are likely to affect Europeans economically. (Malmström, 2015a)

These dynamics underline how regulatory issues impact trade policymaking.

Box 1. The puzzle simplified

Non-tariff measures have become a central topic to the debate of how international trade rules and domestic regulatory choices are to co-exist. They are an essential feature of the trade in goods and services, investment, and public procurement regimes. However, different ideas on what is fair and legitimate and how this is justified co-exist. The evolution of the inclusion of non-tariff measures can be explained by rational choice explanations looking at the changed composition and patterns of trade and resulting domestic-international dynamics. However, this explanation is only partial since it does not tell us which factors explain the different understanding of non-tariff measures and how this varies in different periods and contexts. While the constructivist literature and mainly, the literature on the role of ideas in EU trade policy have brought a stronger understanding of the content and influence of ideas, we are still missing an understanding of the content and ideas vis-à-vis non-tariff measures and regulatory issues.

1.2.4. Research question and the argument in brief

In light of the puzzle we set out to understand above, the main question we address is:

What explains the evolution of the treatment of non-tariff measures in the European Union trade policy?

In line with the constructivist approach taken in this dissertation, this question can be broken down in two sub-questions: (i) How do actors perceive being affected by the global economy? (ii) What kind of trade policy results from such understanding? These two components of understanding and treatment are mutually reinforcing in the way that the interactions between different agents and different levels of negotiation alter the understanding of non-tariff measures. While the research question is particularly interested in the evolution of the inclusion of regulatory issues in EU trade policy, the constant interaction between the domestic and international necessitates the inclusion of the broader context.

Through extensive interviews with key stakeholders and the coding of more than 800¹⁷ documents, we analysed how non-tariff measures have changed the political economy of trade. The dissertation is designed as a single case study of the treatment of non-tariff measures in the European Union. Both the EU's economic power and claim to a rule-maker position in the international trading system and the EU as a hard case of the most in-depth progress with the inclusion of regulatory issues in its trade agreements serve as a way to tackle the questions and expand on the implications for political economy in general. Moreover, this dissertation takes a period of twenty-two years to enlighten the different contexts within which these developments happen.

The key finding of this dissertation is that the evolution of treatment of non-tariff measures can be explained by the changing cognitive and normative understanding of the trade-regulation nexus, differentiating between two policy programmes: regulatory protectionism and regulatory heterogeneity. The shifts in the understanding take place within the broader neoliberal zeitgeist but in the process transforms ideational pathways.

¹⁷ This number includes: Strategies of the European Commission on trade, selected speeches across six Commissioners, TBR Regulation Reports, MAAC and TPC Meeting documents, access to documents results, and submissions by business organisations and non-governmental organisations to consultations. A list of documents and the criteria for their inclusion are listed in Appendix 1.

To tackle the research question, we focused on the Directorate-General for Trade (DG Trade) of the European Commission as policy initiator and chief negotiator, where we show that the fact that non-tariff measures became ‘visible’ and had to be tackled does not strip the agency of DG Trade in assessing which non-tariff measures will be addressed. In principle-agent (P-A) models, agent’s discretion can be defined as the ‘leeway conferred to an agent to accomplish a delegation mandate’ (da Conceição-Heldt, 2017, p. 204). In contrast to P-A approaches and in line with the ideational literature in IPE and Public Policy, we define agent’s discretion regarding agent’s leeway to define the problems to be resolved by focusing on ‘negotiability’. The negotiability, in turn, can be defined in terms of the overlap between what agents think is necessary (as evidenced in the coordinative discourse) and what is appropriate (often evoked in the communicative discourse). Negotiability depends on the modes of classification and categorisation, modes of evaluation and assessment, and a normative understanding of legitimacy. Thus we show that how ‘think, talk, and do’ non-tariff measures are closely interrelated (Schmidt, 2011). Constructing the elements of negotiability highlights how different understandings of non-tariff measures result in the different treatment across actors. The negotiations with Japan are defined by a strong understanding of non-tariff measures as regulatory protectionism. Expanding the negotiations in the realm of non-tariff measures and making negotiations conditional on commitment in the area, prompted member states and businesses to demand an ambitious outcome. While the communicative discourse directly reflected this, regarding the coordinative discourse, there was much more uncertainty of how to define the policy problems and appropriate solutions for tackling non-tariff measures. Moreover, during the same period regulatory cooperation emerged as a possible solution, particularly vis-à-vis the negotiations with the United States. While initially, businesses were uncertain of the costs versus the benefits and how to assess those, the European Commission mobilised actors around regulatory heterogeneity as the policy problem with regulatory cooperation instated as the only solution.

The broader argument made in this dissertation is that agents within complex regimes do not start negotiations from scratch and no negotiation is a universe of its own. We aim to show how ideas influence the definition, categorisation and treatment of non-tariff measures and how persistent understandings have mobilised both coordinative and communicative discourse. In this research, the inclusion of NTMs and

Commission agency are seen as mutually dependent from each other, since the inclusion of NTMs is both the result of the international context (the Doha Development Agenda (DDA), WTO rules, power dynamics) as well as a decision from the European Commission to tackle regulatory issues through FTAs.

The question posed here is highly relevant since the increasing role of regulatory issues is still little understood outside the Economic discipline. The analysis combines unilateral action with bilateral and multilateral arrangements to highlight the different modes through which actors address regulatory issues. For example, countries set their level of regulation applicable to third countries unilaterally, where they set specific levels of regulations that they can then promote within bilateral and multilateral fora. In the case of large countries such as the United States and the European Union, they can also export their rules through extraterritoriality, conditioned upon different measurements of power, regulatory capacity, and approach (Bach and Newman, 2007; Damro, 2012; Young, 2015a).¹⁸ Countries can enter into agreements that contain disciplines governing trade beyond the existing multilateral agreements, nowadays predominantly through free trade agreements, mutual recognition agreements (MRAs) and forms of regulatory cooperation (in or outside FTAs). Thirdly, they can create unilateral rules aimed at protecting industries and consumers that are meant to ‘punish’ the wrongdoer or improve the level-playing field for domestic companies, e.g. trade defence instruments in the EU. Therefore, FTAs are not the only game in town.

Further to the regime complexity starting point, each of these venues and the decisions that are taken by policymakers are embedded in a more extensive system of interactions between different stakeholders. Using the case of the European Union’s trade policy, we tackle three sub-case studies of three different periods, which show the interaction between the inclusion of NTMs and agency: The emergence of non-tariff measures in the Market Access and Global Europe Strategies and shaping of policy programmes (1996-2006); The interaction of policy programmes: Global Financial Crisis and the negotiations with Japan (2007-2013); The role of ideas in legitimating regulatory cooperation (2013-2017).

The shift from shallow to deep integration and from negotiating tariffs to rule-making has become an increasing interest for academics. Particularly with the recent efforts to

¹⁸ Rule-makers versus rule-takers debate.

conclude the Trans-Atlantic Trade and Investment Partnership, the works on one of the approaches for dealing with non-tariff measures, namely regulatory cooperation has received much attention. Works, which ‘take the regulatory turn in international trade seriously’ (Laursen and Roederer-Rynning, 2017) cut across multiple disciplines: Economics, International Political Economy and International Relations, EU Trade Policy, Public Policy, and International Economic Law and Regulation. The review of state-of-the-art highlights the possibility to draw on different perspectives to analyse the political economy of non-tariff measures.

1.3. Existing explanations to the ‘regularising’¹⁹ trade landscape

The existing explanations highlight five determinants for cooperation and drivers for the inclusion of non-tariff measures and regulatory issues in the negotiations: (i) economic theories of trade integration and substitutability of tariffs with non-tariff measures; (ii) competing economic and societal interests – firms seeking access to foreign markets and non-traditional actors (domestic societal IPE); (iii) institutional dynamics; (iv) externalisation of policies, and (v) ideational approaches on the strength of neoliberal ideas. We briefly tackle the main insights from these bodies of literature and propose ways for the different bodies of literature to be combined to avoid reductionist²⁰ and monocausal approaches²¹. Table 1 provides a map of the existing explanations we explore in the dissertation and the position of our explanation.

¹⁹ ‘Regularizing’ trade landscape is a phrase coined by Chad Damro (Damro, 2012).

²⁰ For example, reductionist by exclusively looking at the EU without the international context and importance of partner.

²¹ For example, monocausal by looking at only the normative or material underpinnings of policy rather than seeing the linkages between ideas and interests.

Table 1. Summary of existing responses to the question

Approach	Evolution of EU Trade Policy	Inclusion of non-tariff measures and regulatory issues
<i>Economics</i>	Results from binding of tariff levels and general commitments over rules	Main concern is to avoid policy substitution, predominance of tariff equivalence syndrome
<i>Domestic societal explanations</i>	Results from economic interests over liberalisation and protectionism and the ability of groups to organise	Inclusion is the result of economic interests over internationalisation of regulation as well as contestation by broader societal actors
<i>Institutions and P-A models</i>	Entrepreneurship of the European Commission and agency discretion over principles	Entrepreneurship of the European Commission and multiple principles restrict the discretion of the European Commission in highly salient areas
<i>Global regulation</i>	Evolution of trade policy reflects interaction between regulatory capacity, existing stringency of rules / institutional aspects, and context in different sub-fields	Inclusion is the result of the combination of market size, regulatory capacity, and rules stringency conditioned on the context (relational dimension)
<i>Ideas</i>	Shared beliefs in neoclassical economic ideas European Commission can use neoliberal ideas strategically to achieve goals Discourse shapes how agents understand means-ends relationships	Our explanation: inclusion results from ideational change; we locate change at the level of policy programmes, where non-tariff measures have been redefined from regulatory protectionism to regulatory heterogeneity

Source: Own elaboration.

As hinted at the beginning of this chapter, functionalist perspectives draw on an approach to international relations, which assumes that states make demands on other states for the reduction of negative policy externalities and increasing positive policy externalities (Trachtman, 2018). Benchmark studies on NTMs focus on how trade agreements should be designed to prevent policy substitution since with the removal of tariffs and states shift to non-tariff measures and other regulatory tools to level the playing field (Bagwell and Staiger, 2001a; Ederington, 2001; Staiger and Sykes, 2011). Such an approach to seeing tariffs and non-tariff measures as commensurable or as alternative policy tools has led to the development of approaches to quantifying NTMs as tariff equivalents (Melchior, 2018a).

The focus on policy substitution as the primary rationale for international co-operation and regulation of non-tariff measures has also inspired three extensions. Firstly, commitment approaches to NTMs where the inclusion of disciplines on regulatory issue assist a government to set a credible policy both to domestic sectors but also foreign exporters and investors, similarly to the role of free trade agreements overall (Buthe and Milner, 2011). Secondly, enforcement perspectives have explained shallow and deep integration as a result of the channels for enforcement and implementation of commitments (Ederington, 2001, p. 1580). Finally, the negotiations over non-tariff measures act as ‘coordination externalities’, where drawing on Oates (1972), studies have illustrated a trade-off between the severity of coordination externalities and the advantages to respect heterogeneous local preferences (Loeper, 2011).

These perspectives show that the focus on policy substitution has led for many studies to favour shallow integration over regulatory issues. However, empirical evidence shows deepening of such commitments and wide discrimination across partners (Horn et al., 2010). The understanding of non-tariff measures as tariff equivalent cost (TEC) has been widely adopted by policymakers and forms the core of the regulatory protectionism categorisation of regulatory issues. One of the aspects that have been particularly challenging for these studies is to understand which measures have a direct impact on trade flows and how to distinguish between legitimate and illegitimate measures, often outsourcing the decision to the level of international legalisation. While international rules serve as a reference point to understand the degree of judicialization and stringency of existing norms, the evolution of the treatment of non-tariff measures is not sufficiently explained by the cooperation within the WTO. The

reasons for this are twofold: firstly, the rules leave sufficient scope for discretion to define what a legitimate concern is; secondly, with the expansion of the trade agenda, actors deemed that the existing rules are not sufficient to address international integration and global value chain dynamics. We return to how we can build on these models to form an understanding of the negotiability of non-tariff measures in the next chapter. The interaction between domestic and international is however essential. Traditional approaches to NTMs are finding it hard to grapple with the complexity of measures, which necessarily invokes ‘concepts of “fairness”, “self-sufficiency”, or “legitimate cultural interests”, which do not always have measurable counterparts’ (Dee and Ferrantino, 2005).

Similarly driven by the negotiations in trade in goods, much of the literature has turned to domestic-societal explanations. In searching the determinants of trade policy, a key role is played by the interests of economic actors or broader societal interests, resulting in two components. On the one hand, domestic interests will pressure the government for ensuring market access (due to *inter alia* need for first mover advantage, economies of scale, outsourcing), and on the other hand, non-traditional actors will pressure for the inclusion of non-trade issues either to secure existing rules or export rules to other countries. The IPE literature has been very successful in discussing the conditions of trade liberalisation in goods using state-centred and society-centred explanatory factors (Gstöhl and De Bièvre, 2017; Velut, 2015). Multiple studies have shed light on how liberalisation/protection is the result of competing economic and other interests through societal-based perspectives and the role of ‘weak’ and ‘strong’ institutions in insulating and accumulating such interests.²² Societal approaches²³ assess the competition between different interest groups where the ability of certain groups to organise and to bring ‘collective action’ is a condition for impact (Olson, 1971).

However, vis-à-vis liberalisation of trade in services, this picture becomes more complex, which is also the case for non-tariff measures (VanGrasstek, 2011). As recent studies have shown services liberalisation in the EU, have resulted from a ‘reverse

²² Though we still don’t know enough about the causality and often multiple factors interfere at the same time (also taking into consideration theory versus practice in trade), this gives a good starting point for what to expect vis-à-vis demands for liberalisation and protectionism in trade in goods through tariffs.

²³ The literature distinguished broadly between factor versus sector models of domestic interest formation and more recently a turn to firm-level models, deemed more applicable to the study of global value chains.

capture' dynamic, where the European Commission, as chief negotiator, has mobilised the services industry behind market opening (Woll, 2008; Woll and Artigas, 2007). Similarly to the challenges of applying traditional IPE models to trade in services, their extension to explaining the evolution of regulatory issues has been mixed. One reason for this is the contested linkages between trade and regulation and ideas about government-market relations.²⁴

One of the aspects which is not sufficiently recognised, for example, is that the European Commission has convinced companies of the linkages between trade in goods and services to ensure higher support for its bilateral agenda thus methodologically necessitating the treatment of both trade in goods and services. For example, the emergence of the idea of servicification of manufacturing and 'the increase of purchases, production, sale and export of services' (Lodefalk, 2015).²⁵ Hence, the separation of the study of goods or services is no longer possible – even if negotiators have not fully adapted to 'Think GVCs' and servicification, they are now fully part of the trade policy discourse (Hoekman and Jackson, 2013).

On the other hand, the inclusion of regulatory issues in the negotiations has resulted in a focus on the diverse new actors into trade policymaking or what researchers identify as 'contentious market regulation' (De Ville, 2018; Laursen and Roederer-Rynning, 2017; Young, 2018). For example, Laursen and Roederer-Rynning highlight that the 'deep integration entails deep political contestation'²⁶ (Laursen, 2017, p. 17). More

²⁴ For example, when trade in services was put on the agenda of the Uruguay Round with the General Agreement on Trade in Services (GATS), 'trade and services became an issue of intense controversy inside the EU. Not only were foreign service providers seen as a threat to provision of services in the EU, but also EU service companies were criticised by developing countries for seeking to supply water and other environmental services', causing EU-wide demonstrations against the GATS (Baldwin, 2006, p. 396).

²⁵ 2017 has been a defining year for such developments with the inclusion of language on the 'increasing phenomenon of servicification in the field of trade in goods ('mode 5')' in the European Parliament Motion for resolution on multilateral negotiations in view of the 11th WTO Ministerial Conference in Buenos Aires, held 10-13 December 2017. Servicification has also been championed by the Chief Economist of the European Commission, Dr Lucian Cernat, by participants in the WTO Public Forum and most often by the Swedish National Board of Trade with multiple detailed studies on the subject (Kommerskollegium, 2016, 2012a, 2010). The latter in particular has been very clear in its message to negotiators and policymakers in Brussels: 'trade policy has not kept up with developments'; 'Everybody is in services'; 'Servicification also brings new types of trade barriers that the trading system needs to deal with in order to remain relevant to companies in the future' (Kommerskollegium, 2012a).

²⁶ Here contestation is treated as a form of politicisation, which involves both growing resistance against EU policies and institutions and growing engagement of societal groups within existing settings (Wilde and Zürn, 2012, p. 140). To operationalise these dynamics politicisation can be tackled in the analysis through three manifestations: 'increase in polarization of opinions, interests or values and the extent to which they are publicly advanced towards the process of policy formulation within the EU' (Wilde, 2011, p. 572).

importantly, they underline that the shift to rule-making in international trade is not a ‘simple, functional, and irreversible process’ (Idem.). This perspective counteracts existing explanations that assume that due to sufficient consensus in building the internal market, the extension to external liberalisation will also be subject to consensus (Woolcock, 2007). Instead, the inclusion of non-tariff measures has brought about regulatory, redistributive, and legitimacy issues which have increased the number of stakeholders as well as the divisions among them (Laursen and Roederer-Rynning, 2017). One mechanism proposed to trace the ideational is through ‘regulatory frames’, embedded in the ‘regulatory acquis’²⁷ that evoke ‘both the key problems addressed by regulators and the normative justifications for regulatory intervention’ (Laursen and Roederer-Rynning, 2017, p. 17).²⁸ These regulatory frames are used then within a material context defined by organisational capabilities of both the EU and the partner country.

This dissertation differs from this approach in two ways: firstly, the regulatory framing process is analysed through both the coordinative and communicative discourses, where we aim to understand where the content of ideas originates. Secondly, in this dissertation, organisational capacity of the partner country is treated as endogenous, since it formulates the level of trust that policymakers and regulators in the EU have vis-à-vis the partner. In other words, organisational capacity is a matter of perception and iterative cooperation between the EU and the partner country and an essential aspect of assessing the level of ambition of an agreement.

The shift from market access to rule-making and its impact on policymakers can also be explained through the interaction between societal and institutional dynamics (Young and Peterson, 2014, p. 2). In their important study of EU trade policy, Young and Peterson argue that each trade policy area mobilises a different set of societal actors, institutional dynamics and individual preferences of governmental actors to produce ‘trade policy sub-systems’ (Young and Peterson, 2014, p. 2). With regards to rules, they observe that the balance of power with the partner country and the individual subfield dynamics can explain the form and content of trade agreements.

²⁷ ‘... stock of regulatory rights and obligations binding the political and business operators in the negotiating parties’ (Laursen and Roederer-Rynning, 2017, p. 17).

²⁸ ‘Regulatory frames are often observable at the level of sectors, since they relate to specific policy problems, and they may be more or less explicitly articulated by elites. The critical point about regulatory frames, however, is that they are not just elite constructions but discourses potentially shaping social preferences.’ (Laursen and Roederer-Rynning, 2017, pp. 17–18).

Young and Peterson's study on the 'new trade policy' of the European Union provides a benchmark for combining different political economy (Lake, 2009) and negotiation literature (Putnam, 1988) perspectives to explain the shift from market access to rule-making (Young and Peterson, 2014).

Though this dissertation has a similar aim – to look at the 'forest rather than the trees' – we find that the policy silos argued by Young and Peterson do not reflect the development of the treatment of regulatory issues in the broader trade policy context. The compartmentalisation between the different policies makes it impossible to study the issue-linkages created by the use of bilateral trade agreements, the substitutability between different policy instruments, as well as novel ways to deal with non-tariff measures such as regulatory cooperation. The argument that different constellations of societal preferences result from the distributions of anticipated costs and benefits expects in line with a rationalist perspective that redistributive preferences are clear and that non-reciprocal areas have a world of their own (Young, 2015a; Young and Peterson, 2014, p. 24).

The evidence collected in this dissertation points to a big uncertainty about the redistributive and deliberative issues surrounding regulatory barriers. This uncertainty emanates both from traditional actors such as businesses and less traditional societal actors such as civil society organisations and the general public. While modelling societal preferences is often done in binary terms – for or against liberalisation, more recent studies show that veto players may act for specific issues to be included (Allee and Elsig, 2017). More importantly, firms do not always know what they want from trade negotiations, and firms' policy stances are constituted vis-à-vis the regulatory and political environment (Woll, 2016, 2008). There also seems to be a shift towards lobbying for rules and certainty in FTAs (as we show in Chapter 5).

Alternatively, EU Areas Studies have focused exclusively on the role of the institutions in transforming different state and societal preferences. State-centric approaches, generally, emphasise that state interests and domestic institutions condition the impact of pressure groups on the EU and stress why it is sometimes necessary for protectionism to happen. Vis-à-vis, the incidence of NTMs, state-centric approaches, emphasise that larger states have stronger preference towards introducing protectionist measures than smaller states as well as those that have a 'high degree of institutional insulation and autonomy' (Mansfield and Busch, 1995; Rogowski, 1987).

The role of institutions has also attracted interest in how institutions become the context for path dependency, socialisation and learning (Hall and Taylor, 1996). Institutions thus influence the policy-process and are also influenced by agents and ideas (Parsons, 2016). In the area of trade policy, institutions have been associated with ‘positive effects on lowering trade barriers and reinforcing unilateral moves toward freer trade’ where institutions include both those part of the multilateral trading systems and bilateral/regional agreements (Milner, 1999, p. 106). Institutions are recognised for their role in ‘encapsulating norms’, rules of the game and provide a framework for trade in goods and services to take place (Milner, 1999; Ruggie, 1993). Institutions can also act as an independent causal impact of the negotiating process on the negotiating impact (Odell, 2006).

While the institutional approaches in EU Trade Policy are diverse²⁹, we explicitly focus on those studies, which explore the role of the European Commission in both accumulating interests but also defining interests in the first place. In trade policy, the entrepreneurship of the European Commission has been assessed as particularly strong due to its exclusive competence, its role in proposing policy initiatives, and as a negotiator on behalf of member states.

One of the dominant approaches tackling the interaction between agents in the presence of delegation has been the principle-agent model. Vis-à-vis the EU, it has been used both to define the *sui generis* characteristics of the EU policymaking regimes, but also in a comparative perspective through more generalizable frameworks (Poletti and De Bièvre, 2014). The two questions posed by such research are: who shapes trade negotiations in different venues and how the dynamics between the member states and the EU Commission play out? What these accounts tell us is mostly a story about a constant struggle vis-à-vis competence between member states and the Commission, which results in a number of scenarios such as a lowest common denominator policies, which is often associated with a protectionist policy, and even worse relying on inertia or no decision at all (Cline and (U.S.), 1983; Molyneux, 2000). Delegation of trade policymaking in order to ‘insulate the process from protectionist pressures and, as a result, promote trade liberalization’, what has been termed the

²⁹ For a summary see: Gstöhl and De Bièvre (2017) and Siles-Brügge (2014).

‘collusive delegation argument’, has been central to these lines of reasoning (Dür, 2008; Meunier, 2005, p. 8; Woolcock, 2005; Zimmermann, 2007).

In this context, some studies find a high level of Commission autonomy (Conceição-Heldt, 2011; Elsig and Dupont, 2012); while others find support for firm control on behalf of member states (Damro, 2007; Kerremans, 2004; Meunier, 2005). In a recent contribution to the debate, Gastinger (2015) tackles both hypotheses: to what extent the Commission has autonomy and to what extent member states have control. Using the principle agent model, they find extensive evidence that pre-negotiations dynamics, leading to a bilateral trade agreement, have changed from ‘near-complete Commission autonomy to tight Council control’ (Gastinger, 2015, p. 1379). They also argue that member states have extended the modes of interaction existent during the negotiation phase into the pre-negotiations (Gastinger, 2015). Gastinger’s work significantly contributes to our understanding of the links between pre-negotiation, negotiation, and [hints at] links to the implementation as well as the changes in the informational balance between member states and the Commission. However, the latter aspect is still significantly understated.³⁰ This ‘politics of information’ contribution extends our understanding of the knowledge availability and production by member states and EU institutions and points to an earlier argument – that member states and other societal actors hold more information than many of these models preview and from there hold a bigger role in trade policy.³¹ This has also been supported by studies in the dynamics of lobbying in the EU, where issue complexity necessitates the agent to ‘ask’ member states and businesses for information or ‘explain’ certain policy areas (Woll, 2008).

Despite its contribution to the expansion of the conceptions of agency (Elsig, 2007; Pollack, 2007), the principle-agent model still promulgates the dichotomy that preferences are formed outside the negotiating process and thus do not allow for preferences to emerge from interactions. Overall, principle-agent dynamics has two absences when tackling the ‘new trade agenda’.³² Firstly, it overly focuses on the formal stages of one negotiation, rather than tackling the broader discursive context. Secondly, it does not give sufficient attention to how the interactions between

³⁰ On how the information asymmetry assumptions between Brussels and the member states should be relaxed, see Blom and Vanhoonaeker (2014).

³¹ For a detailed analysis, see Gastinger (2015).

³² Similar is the approach of rational choice institutionalists in EU Area Studies.

principles and agent shape interests before the negotiation process. What this dissertation contributes to such approaches is the need to see how Commission ‘creates’ interest in the negotiations rather than looking at salience as a uni-directional and how agents’ discretion is affected by the ideational factors (Gastinger and Adriaensen, 2018).

However, institutions matter also in the way they reflect, mobilise and embed ideas. A key question posed is how ideas and agency shape rule-making. On one hand of the spectrum of sociologically-rooted and constructivist approaches is the role of individuals and networks of individuals in defining the shape of policy programmes and policy ideas. Notably, a role has been given to epistemic communities as ‘network[s] of professionals with recognised expertise and competence in a particular domain, and an authoritative claim to policy-relevant knowledge within that domain or issue-area’ (Haas, 1992, p. 3). The epistemic community’s literature has looked at the causal paths through which policymakers come to understand a policy problem and perceive the relationship between cause and effect. Thus the emphasis is on how a shared understanding drives ideational change, at the roots of which is the expertise of groups of individuals. In the fields of trade and regulation, the modes of treatment of different non-tariff measures and the discursive context have developed in parallel at the international and the European levels. The European Union both contributes to the development of new norms and values in these areas but is also subject to the framing of international organisations such as the WTO, OECD and standard-setting organisations. The second dynamic restricts the possible framings that the EU can use to justify certain actions since norms, coined in the OECD and the WTO, provide a way for understanding specific situations and members draw on the ‘same stock of social knowledge’ based on these norms (Cho, 2014, p. 689). Both the OECD and the WTO Committees have been described elsewhere for their role as fora for rule-making and establishing a shared understanding (Cho, 2014; Kono, 2006; Lang and Scott, 2018; Woolcock, 2007).

The epistemic community argument relies on the assumption that the diffusion of ideas necessitates agreement across actors about modes of categorisation and evaluation. As we will show in the following chapters, while there was an agreement on the definition of non-tariff measure as a cost, there is much more uncertainty about the means-ends

relationship when it comes to regulation and trade as well as the policy solutions (trade-off between harmonisation, mutual recognition, and convergence in particular).

On the other spectrum of ideational approaches is work done on the role of ideas and in particular neoliberal ideas on the shape of trade policy. By introducing the role of neoliberal ideas, they have traced why there has been a shift from the multilateral to the bilateral setting (Siles-Brügge, 2014, 2013a), why there has not been any slip into protectionism during the crisis (De Ville and Orbie, 2014), and why the Commission has pushed for specific policies.

Early ideational literature defined the role of ideas as ‘road maps linking policies to a constellation of interest’ but also establishing the ‘rules of the game’ (Goldstein, 1993, p. xii, 1989). A limited role was given to ideas, mainly in their function as ‘normative justification’ (Goldstein and Keohane, 1993) for taking a specific action or ideas act as ‘principled beliefs’ (Parsons, 2002, p. 139). In these cases, the role of ideas is traced through the way actors invoke them as justification for a particular choice, which in turn is driven by rational interest. Actors can also ‘use’ ideas as ‘causal’ beliefs or roadmaps that guide or ‘navigate’ actors in reaching their aims (Parsons, 2002, p. 139). However, ideas, and in particular economic ideas, can be more than guides, in how they ‘constitute and shape the economic world’ (Morin and Carta, 2014, p. 117). In this sense, constructivist ontology can still accommodate some ‘rationalist insights’ where the central aspect is the causal role of ideas (Siles-Brügge, 2013a, p. 36). Such absences have led to a stronger focus on agency and actor-centred constructivist³³ perspectives (Saurugger, 2013; Siles-Brügge, 2014). While we deep dive into how ideas can explain the evolution of non-tariff measures in Chapter 2, it is important to note here that a constructivist explanation can allow us to understand how actors perceive global economic integration and their regulatory capacity and how does this affect the treatment.

Surprisingly the EU literature on the inclusion of regulatory disciplines in FTAs and the move towards regulatory cooperation has largely disregarded the vast body of studies on global regulation. The global regulation literature tackles the shape of international economic governance from the perspective of power relations and the

³³ Actor-centred constructivists most broadly reject the assumption that material factors are the main independent variable and adopt the view that ideational factors frame the understanding of these material factors and reintroduce the ways, in which actors can use these ideational factors, most often strategically (Saurugger, 2013).

global context of rule-making. The global regulation literature has advanced in differentiating between the forms of interaction between agents and how these forms of interaction are a critical variable to explain rule-making (Newman and Posner, 2015a; Young, 2015a). Fundamentally, the literature differentiates between processes of policy diffusion, regulatory competition, and processes of regulatory cooperation, wherein the latter solution alignment comes through the process of negotiation. Regulatory cooperation interactions, on the other hand, can be further broken down in terms of power-based bargaining with the ability to exclude others from own market; power-based bargaining without the ability to exclude others; and rule-mediated negotiation (Young, 2015a).

These perspectives have found a home in studies on the European Union, analysing how the EU can influence policies beyond its borders using its 'normative power' (Manners, 2006, 2002) and 'market power' (Bradford, 2012; Damro, 2015, 2012) under certain conditions. While Ian Manners' work has been particularly influential on the constructivist approaches to EU policies, its relevance for trade policy has been challenged (De Ville and Siles-Brügge, 2018). Instead, the focus has mostly fallen on 'market power' and conditions through which it can manifest and be strengthened (Damro, 2015, 2012, 2010). These conditions include stringency of rules (Majone, 1994), regulatory capacity (Damro, 2007), interplay between regulatory capacity and market power (Bach and Newman, 2007; Braithwaite and Drahos, 2000; Posner, 2009), relational aspects (Bach and Newman, 2007), as well as the institutions, within which markets are embedded. *Vis-à-vis* the evolution of inclusion of regulatory issues, we need to take particular note of the role of regulatory capacity, defined as the ability to gather and generate information and aggregate preferences (Young, 2015a).

Where we contribute on the understanding of regulatory capacity is that agents can increase regulatory capacity by mobilising societal interests in favour of an agreement. These approaches tie into broader state-centred and structural explanations, which aim to show how powerful states can demand more market access for their exports than those, which are less powerful (Barton et al., 2006). In cases of large power asymmetries, existing regulatory framework of one country can be more easily exported or imposed on a third country (Young, 2015a). In the case of the EU, the stringency of the *Acquis* in certain areas makes standards and regulatory issues harder to negotiate *vis-à-vis* partners and have contributed to the discourse on 'non-

negotiability'. The EU's regulatory influence varies systemically across different forms of regulatory interaction: regulatory competition and different forms of regulatory cooperation, conditioned among other factors by the EU's existing level of ambition. The EU's objectives when it comes to regulatory aspects can vary substantially from attempting to bring third-country rules closer to international disciplines, impose a specific rule, or influence the institutions, within which rules are set.

While acknowledging the variation of the EU's ability to realise its objectives, we can identify a few challenges in these lines of argumentation. In the first instance, the level of ambition is an essential part of the negotiation process and does not precede negotiations when non-tariff measures are concerned. Secondly, these analyses overlook how the EU sets the background conditions, which set out, what is legitimate (Newman and Posner, 2015, p.1320). Finally, and closely related to the ideational literature we discuss below, is how ideas shape both the strategies of agents and the context, so while context impacts the strategies, strategies can also change the context.

While each of these perspectives has successfully tackled issues surrounding EU's trade policy overall, when we introduce the nexus between trade and regulation, an ideational explanation provides a more nuanced understanding of both discourse and process.

1.4. Summary of methodological, empirical and theoretical contributions

Theoretical

In this research, we aim to contribute both to the EU Trade Policy literature and the International Political Economy literature more broadly by analysing the variation in ideas guiding trade policy and studying the factors, which contribute to such variation. Further to Poletti and De Bièvre, this is a process of 'creating typologies of difference, comparing how and why particular value-systems, ideologies and normative frames have developed along different paths' by looking at the variation in discourses (Poletti and De Bièvre, 2014). In this way, the research feeds into the broader problem of how different trade policy arrangements interact in a highly complex international trade and investment environment (Buchanan and Keohane, 2006a; Búrca et al., 2014; Farrell and Newman, 2016; Meunier and Morin, 2015). Such an assumption entails looking

at the strategies devised by negotiators to cope with simultaneous negotiations on market access and regulation; enforcement with a view to the implications they are setting for future negotiations (Meunier and Morin, 2015).

Regarding the theoretical contribution, we also set out a model of how ideas emerge, get transformed and are contested. While building on the work done by other ideational scholars in EU trade policy, we argued that it is misleading to speak of neoliberal ideas since it does not allow us to study the subtle changes and transformation occurring within a regime. Mainly, how different problem definitions co-exist and by prescribing a policy problem, also define the range of possible solutions. The dissertation sits between core debates in International Political Economy and other areas, which try to understand the interaction between global markets and domestic regulation. More notably, it contributes to ways of looking at EU trade policy within this broader context.

Methodological

The dissertation combines three datasets to assess the negotiability of non-tariff measures in EU Trade Policy. Semi-structured interviews are a primary data collection tool because they reflect the understanding of the principal actors (Lodge, 2013a, p. 189). The interviewees were drawn primarily from the European Commission and the Council of Ministers' committee formations. These include current and former bureaucrats and political officers from different levels, departments and periods (Head of Unit, Deputy Head of Unit, responsible for particular policy areas and horizontal development of policies; as well as Full and Deputy Members of the Trade Policy Committee). We also conducted interviews with other EU officials within the European Parliament (especially the Committee on International Trade of the Parliament) and representatives of different civil society groups in Brussels, including labour organisations, consumer representatives and NGOs, as well as trade associations. Interviews with these diverse stakeholders focused on gaining an external perspective, in particular, a broader, longer-term and critical perspective. They were important in validating the information provided by the stakeholders involved directly in the policymaking process and assessing how the discourse by the European Commission has been contested. Further to the research design set up (Chapter 3), the interviews focus on the "perception of change" rather than hard reality.

Interviews (see *Appendix 2 and 3*) are combined with an extensive review of documents from the European institutions and agencies (see *Appendix 1*), which allows us to understand, on the one hand, the broader context to which policymakers operate and on the other hand, the changes in discourse as a result of contestation. Combining fully macro level discourse with a micro-level understanding of policy participants goes beyond the scope of the research, but it illustrates a potential extension of the current work. The dissertation also draws on the European University Institute Archives in Florence for the early period covered by the dissertation.

Methodologically, the contribution is through the horizontal qualitative approach to studying non-tariff measures. While this decision substantially increased the number of documents and speeches to be assessed, it allowed bringing the politics back into a very technical subject and abstract from the specific technicalities of each of the sub-areas of non-tariff measures. Moreover, the dissertation covered a 22-year period to trace changes in the policy programmes guiding the inclusion of non-tariff measures, allowing for a longitudinal study of changes in the discursive context.

Empirical

Regarding the empirical contribution, the research did not go as far as it could have. While it provides substantial evidence to outline how a new political economy looks like, the lack of involvement with regulators within the EU and partner country representatives are two significant drawbacks of painting a full picture of the dynamics. At the same time, the research managed to raise doubts on the technicality of non-tariff measures, on the ‘factuality’ with which they are called barriers and the types of justification that go through the minds of policymakers and which are evoked in discourse, paving the way for further research. The empirical chapters can be seen as an alternative history because they provide a focus on the subtle changes and seemingly technical processes, in which policymakers are engaged. The three chapters also highlight significant evidence that business-government interactions, as often described in IPE, are complemented by new modes of engagement, exchange and collaboration. Particularly, vis-à-vis the European Union the study reveals that supranationalist and inter-governmentalist explanations do not fully grasp an area such as trade policy and the accounts for an all-powerful European Commission are often overstated.

Empirically, the dissertation provides a very detailed breakdown of the exchanges between Directorate-General for Trade officials, businesses, and member states' representatives to show the processes of deliberation and raise doubts on the dynamics of the delegation, portrayed by principle-agent models. The three periods explored also provide rich and detailed interview material of how agents think about categorisation, prioritisation, and evaluation and how they challenge their pre-existing ideas. The empirical observations show the slow but confident emergence of EU regulatory cooperation as a field of study. While much has been written about the Trans-Atlantic Trade and Investment Partnership, the approach of this dissertation has been to position it into the broader context of how ideas about regulatory cooperation emerged. The data presented here also challenges to what extent regulatory cooperation can be applied to other actors since the levels of mobilisation and internal deliberations highlight the need for regulatory capacity on the side of the EU to pursue such initiatives. Finally, the dissertation allows for a more subtle exploration of neoliberal ideas and their components.

1.5. Thesis outline

The following chapters are structured as follows. Chapter 2 elaborates on the main theoretical elements presented in the Introduction and sets out the theoretical framework for studying non-tariff measures. Chapter 3 complements the framework and illustrates the research strategy and provides justification for the combination of different data sources and the differentiation of time periods. Chapter 4 has a dual function: it serves as a first empirical chapter but also background to the rest of the dissertation by providing a sketch of the different institutional elements, within which trade policy is conceived. Chapters 5, 6, and 7 present the central ideas of the empirical analysis, where each of the chapters reflects on what the 'new political economy of trade policy' looks like. Chapter 8 brings the different elements together and provides implications for the future research agenda in IPE and beyond.

We briefly outline the arguments made in the three empirical chapters (5, 6, and 7). The dissertation uses three different time periods to highlight the development of the thinking behind non-tariff measures: The first one looks at the emergence of the understanding of non-tariff measures: non-tariff measures in European and multilateral context (1996-2006). The second tackles the transformation of the understanding of non-tariff measures within the Global Financial Crisis and negotiations with Japan

(2007-2013). The last substantive chapter looks at the challenge to the understanding and treatment of non-tariff measures: negotiations of Trans-Atlantic Trade and Investment Partnership and EU-Canada Economic and Trade Agreement (2013-2017). First, the dissertation shows the emergence of regulatory issues within the EU's external policies and the parallelism between the disciplines discussed on the international and European level (Chapter 5). This first period illustrates the uncertainty in how to deal with non-tariff issues in the first place but also a firm belief that they can be tackled through a Market Access Strategy targeted at specific concerns. Non-tariff measures were conceived as a technical legal matter, which can be resolved through the judicial tools provided by the GATT/WTO rules. The deliberative processes involved predominantly businesses submitting specific obstacles to market access to the European Commission. The relatively little success highlighted that the Commission needed a better way to address regulatory issues. With the return to preferential trade agreements, an ambitious agenda both in scope and in-depth became a key deliverable. The explanation provided in this dissertation shows that the turn to bilateral agreements was as much of a 'fear of missing out' as a conception of FTAs as the fora for resolving non-tariff measures.

The Global and Financial Crisis (GFC) cemented the role of FTAs as a tool to deliver growth and jobs. What became increasingly clear was that 'shallow' FTAs were not able to deliver this. To fulfil the expectations, the Commission turned more forcefully to regulatory issues and different approaches to treating them within trade negotiations. However, as stated earlier their uncertain effects, as well as benefits from their removal, has caused policymakers to refer to existing ways of dealing with trade policy issues. The EU-Japan EPA marked an important moment in defining both the micro-foundations and the macro discourses in trade policy (Chapter 6). Even though the EU-Japan EPA is deemed an ambitious agreement, it still failed to deliver concrete structures for dealing with regulatory issues, which paved the way for the restating of regulatory cooperation as the only way forward. While EU-Korea and EU-Japan were important laboratories for the mix between different rules, there was a consensus within DG Trade that if FTAs are to serve the purpose of 'liberalisation', they have to make use of different combination of strategies. Hence, the need for regulatory cooperation was reinstated – particularly oversold during the negotiations with the US and slightly less so with Canada (Chapter 7). While at the international level,

regulatory cooperation has been studied for its many configurations between depth and stringency of commitments (especially by the OECD), transposed in the EU external relations it has been left vague, undefined, and pointed as the sole solution to tackling non-tariff barriers. Each of these periods highlights how the coordinative and communicative discourse paints a different political economy of trade.

Chapter 2. Theoretical framework

Ideas are an inconvenient issue in empirical political science because they are unobservable. (Larsson, 2015, p. 176)

2.1. Introduction

The research question which we set out to address is what explains the evolution of the treatment of non-tariff measures. The Introduction provided an overview of existing perspectives and outlined the nature of non-tariff measures and the changing nature of trade negotiations. The chapter proposes a constructivist approach and introduces the concepts adopted in the dissertation. The third part of the theoretical argument introduces three levels of ideational theorising: public philosophies, policy programmes and policy ideas. Then the chapter locates regulatory protectionism and regulatory heterogeneity at the level of policy programmes. Finally, the theoretical chapter sets out how different levels of ideational analysis interact and lead to ideational transformation.

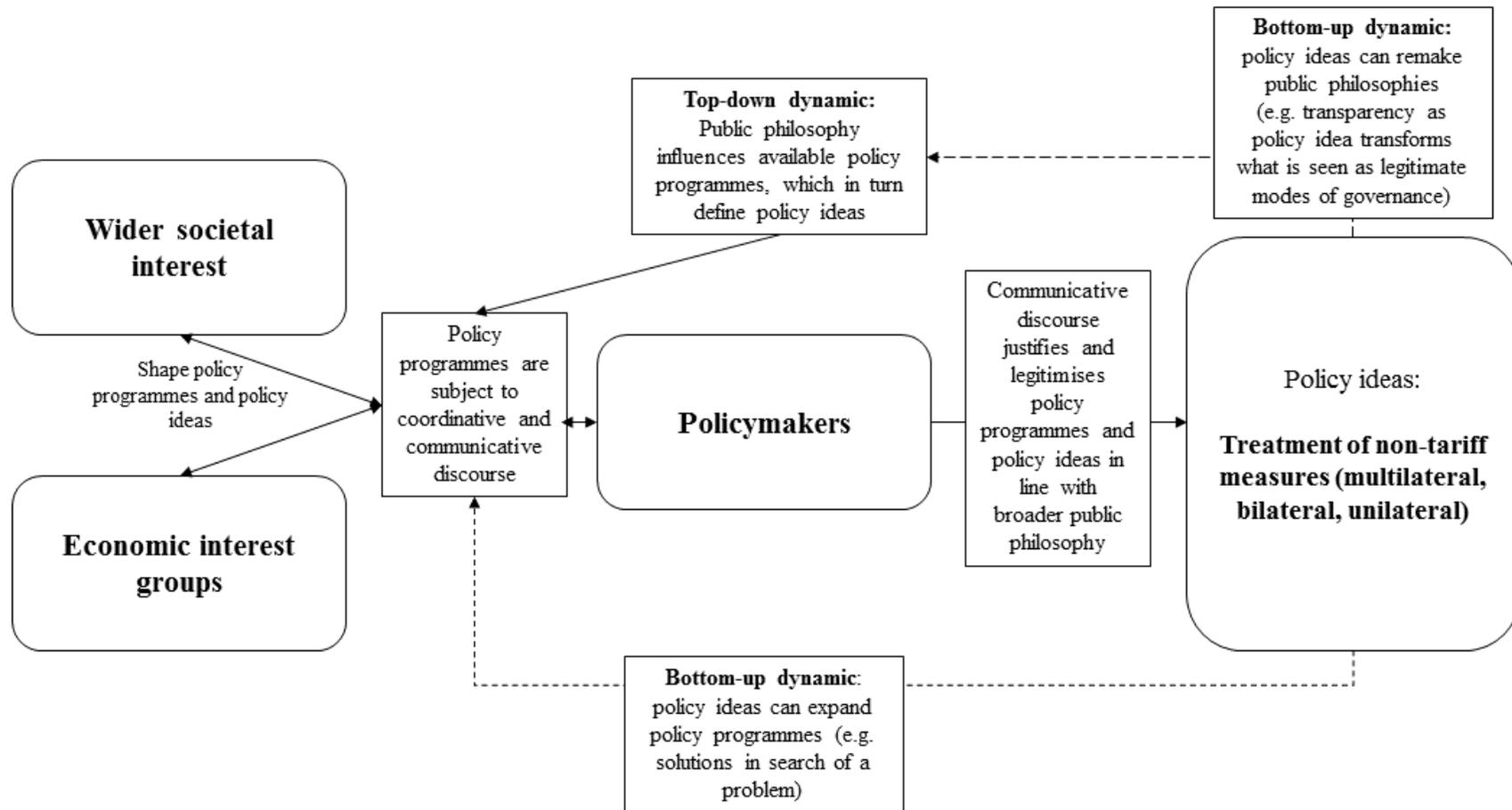
The explanation proposed here shows that ‘ideas are crucial determinants of political, economic outcomes in the face of uncertainty in the social world’ (Siles-Brügge, 2014, p. 14). Ideas are thus not only important to fill in the gap when other explanations fail but they also influence ‘what actors consider to be the ultimate objective of trade policy’ and the instruments to achieve these aims and they can be invoked strategically to define a particular course of action (De Ville and Siles-Brügge, 2018, p. 243). In this chapter, we illustrate how ideas about non-tariff measures are part of the way agents think, talk and treat them at three levels of generality: public philosophies, policy programmes and policy ideas.

The analysis of the treatment of non-tariff measures, as discussed in the previous chapter, cannot be separated from the developments in the European and international trade regimes. We argued that agents within complex regimes do not start negotiations from scratch and no negotiation is a universe of its own. In this sense, the treatment of non-tariff measures needs to be approached from a longitudinal perspective. Such a starting point also has implications for how we theorise ideational development. The theoretical argument we set out has *three building blocks*: (i) public philosophies shape perception of the global economy; (ii) policy programmes shape perception of the link between trade and regulation and the position of non-tariff measures in the liberalisation agenda; (iii) policy ideas, which are deemed successful, lead to

transformation of both policy programmes and public philosophy. Moreover, we integrate these steps into our conceptualisation of negotiability. To provide an overview of the argument, we summarise the approach in Figure 1.

In terms of the ideational progression, the regulatory dimension of trade policy can be seen as newly resurfaced issues since it has always been there (e.g. chapter 1 we quoted Gilpin & other authors on the non-tariff issues with Japan persistent in the middle of the previous century), but it has emerged with different intensity, transforming business-government, government-government and government-state relations. Their new emergence is also in a new context: with highly complex global value chains, new actors domestically (civil society including consumers, social and environmental group), new partners (in particular BRICS) or emboldened old partners (the US), and different institutional arrangements. This chapter brings together these elements to show how the cognitive and normative ideas of agents within the European Commission can explain the changed treatment of NTMs and how we can use communicative and coordinative discourse to see these changes.

Figure 1. Interactions of different levels of ideas



Source: Own elaboration.

2.2. The changing character of trade negotiations

The understanding of the political economy of trade in the academic literature has developed in diverse directions in the past decades through a stronger focus on the role of economic ideas, bounded rationality, and institutionalisation of ideas. While existing interest-based models allow us to derive testable hypothesis, as seen in the last chapter, they are much better suited for trade in goods, than tackling the complex dynamics of regulatory issues (Cowhey and Aronson, 1993; Yoffie, 1993). Moreover, we need to be aware of how actors understand changes in the global economy. The aims of this section are twofold: to show that the turn to deep integration changes how actors perceive the global economy and reinforce the point that we need to be looking at how ideas shape link between trade and regulation.

How actors perceive the effects of the global economy?

While competition from emerging economies has always been present in the IPE of trade, agents are increasingly focusing on the threat of the regulatory choices of other countries. Thus the dynamics surrounding non-tariff measures is often illustrated as regulatory competition, which rather than resulting in a race-to-the-bottom, results in the identification of the ‘excess costs associated with different regulatory regimes that have similar objectives’ (Hoekman, 2016). In this context, competition between regulatory regimes is the ‘default’ characteristic in the international system since different jurisdictions apply their own set of regulations independently (Hoekman, 2016). Therefore, from a theoretical point of view, there is a distinction to be made between competition which is harmful and leads to race-to-the-bottom versus competition which can result in efficient outcomes due to learning, emulation and convergence to approaches and norms. Such a distinction runs across the different stages of the inclusion of regulatory issues in trade agreements.

Similarly to Woll, Yoffie as well as Cowhey and Aronson, we highlight that international political economy is defined less by the debate whether or not to trade (Cowhey and Aronson, 1993; Woll, 2008; Yoffie, 1993). The critical issue is how to make sure that domestic operators can access and maintain foreign markets via internationalisation and harmonisation of domestic policies as well as how global value chains change the calculation of comparative advantages (Woll, 2008, p. 41). Put in the words of Cowhey and Aronson, in this case, domestic regulatory policies

and international economic policies can no longer be treated as independent of each other (Cowhey and Aronson, 1993). Such considerations change both the supply of targeting regulatory protectionism and heterogeneity and the demand for such action. To show why this is important, we draw on Woll's study (2008) on micro-foundations and economic action under uncertainty, which responds to the question how firms determine what goals to pursue in economic policymaking. As illustrated in *Table 2*, she shows that firms do not always know what they want from a trade negotiation and firms' policy stances are constituted vis-à-vis the regulatory and political environment. On the demand-side of trade policy vis-à-vis regulatory aspects, we build on Woll's two ideal types of government-business relations to understand what are firms' interests in regulatory aspects (Woll, 2008; Woll and Artigas, 2007). Even though these two types exist simultaneously, it indicates how non-tariff measures change the roles of agents.

From Woll's analysis we can see that vis-à-vis non-tariff measures in a supply chain world, firms also face different material incentives regarding the level of regulation, the type of regulation and the approaches to achieving mutual understanding with the partner country. Firms are not always in a position to decide whether a more proactive liberalisation in the removal of non-tariff measures will not hurt other parts of their business and how. Particularly when it comes to large firms which have already entered a specific market, the incentives to contributing to the removal of non-tariff measures via an EU FTA or another EU instrument might be very low. Insight from one of the interviews illustrates this. Emerging economies, such as members of the Mercosur bloc, have made use of high behind the border barriers to restrict access. These barriers may be in the form of very complex and lengthy bureaucratic procedures, for example, which are not even discriminatory and applied to domestic producers as well. An EU FTA with Mercosur aims to discuss and do away with such measures, but established firms and particularly large firms are not specifically pushing for such measures to be removed since they have already invested to pay for entry into the foreign market thus resulting in high sunk costs. This reflection, shared in one of the interviews, highlights the different calculations and incentives that firms face (Interview 1, Former DG Trade Official, 2016). Similarly, as we shall see in Chapters 6 and 7, the well-known dynamic of regulatory capture of regulators by large, powerful interests is reversed, in the sense that the European Commission's

Directorate-General for Trade captures business interest to deliver an ambitious agreement.

Table 2. Transformations of trade negotiations

	Pressure lobbying on trade	Regulatory trade lobbying
Goal of multilateral negotiations	Opening/ closing of domestic markets to foreign goods	Internationalisation of regulatory regimes in order to facilitate trade and trans-border operations
Typical means for achieving goal	Tariffs or non-tariff barriers	Regulatory reform or creation of regulatory standards
Stake for economic actors	Making demands for or against market opening	Participating in the elaboration of targeted rules specifying how to liberalise
Lobbying mode	Exerting pressure, consultation	Consultation, cooperation
Principle resource	Political support (financial or electoral)	Technical expertise
Principle constraint	Competition between groups	Dependence on government solicitation; complexity and uncertainty

Source: Woll, 2008.

Indeed, the activities of businesses drive trade policy, but this is not independent of the broader political and regulatory context. Put differently, firms do influence policy outcomes, but they are also influenced by policies and politics (Woll, 2008, p. 4). Respectively governments face even higher uncertainty in terms of non-tariff measures. First regarding which measures can be deemed legitimate; what are the effects of such measures; as well as the effects of their removal and harmonisation. Thus we need to assess how governments' ideas are constituted beyond their role as organisers of existing preferences and in particular how do they understand the balance between trade and regulation and enquire about the changing role of regulation in trade. The European Commission, as we will highlight in Chapters 6, 7, and 8, has a role in categorising and prioritising what is to be addressed and by setting out the

broader trade policy goals, defines the scope of what can be negotiable through its coordinative and communicative discourse. Hence, the Commission can define strategies for targeting regulatory protectionism and regulatory heterogeneity, but its regulatory capacity is dependent on the mobilisation of businesses and regulators.

Market and regulatory failures

One difficulty in assessing how policymakers decide on the approach is the complexity of defining regulation, regulatory outcomes, and processes, which in themselves constitute ideas on different levels, e.g. state-market, elite-public, domestic-international. In defining regulation, we can see those narrow perspectives, which only cover the ‘making, enforcement and monitoring of formal rules by government’ to comprehensive ones comprising all mechanisms of social control’ (Thatcher, 2002, p. 862). The seminal work of Baldwin et al. defines it as an ‘authoritative set of rules, accompanied by some mechanism...for monitoring and promoting compliance with these rules’ (Baldwin et al., 1998, p. 3). However, with regards to the nexus between trade and regulation, the definition we use throughout this dissertation is regulation as the formal and informal rules ‘governing supply of goods and services, the organisations responsible for determining those rules, their powers and features, but also public policies and goals’ (Thatcher, 2002, p. 862). Such a definition allows us to think of regulation under multiple dimensions (policies, goals, formal and informal rules) whereas being useful to understand which norms are associated with neo-liberalism vis-à-vis trade and regulation.

While the rationale for regulation is the presence of a market failure³⁴ or when the market does not result in a socially optimal outcome, the problematisation of regulatory heterogeneity can target government or regulatory failures. This entails ‘mistakes on the part of the enacting legislature; from poor policy analysis leading to the adoption of measures that are not cost-effective; to capture of the regulators by the regulated interests; to the obsolescence of regulatory instruments such as standards: to failures of coordination and implementation’ (Majone, 1994, p. 158). The definition of regulatory failure is socially and politically contingent in the way that it requires a benchmark of what is a good regulation and good regulatory practices, which is often

³⁴ Market failures can result from the ‘failure of competition, public goods, incomplete markets, negative externalities and failures of information’ (Majone, 1994, p. 158).

at the heart of agreements and disagreements in the WTO Committees and the deliberative processes within the EU.

Role of regulatory agencies

Similarly to the P-A dynamics, in the regulatory world, legislatures often empower specific agencies to deliver ‘non-mercantilist regulatory objectives’, which differ not only in their salience but in how their importance changes with time (Aggarwal and Evenett, 2017, p. 554). These agencies would take part in trade negotiations to the extent that they can inform issues to be included or not included, similarly to how DGs besides the Directorate-General for Trade will be involved in the negotiations alongside their DG Trade colleagues. In this process, an agency would make a comparison of the ‘potential outcome of a negotiation with the likely trajectory of the regulatory regime that is expected at the moment of the inclusion decision’ (Aggarwal and Evenett, 2017, p. 555). One of the determinants of how the agency would understand the opportunity cost of such a decision is the venue for cooperation with the counterpart before trade talks have launched. This determinant echoes Griller, Obwexer and Vranes who highlight the ‘legal fragmentation’, which shapes cooperation on trade and regulation and the multiple co-existing venues (Griller et al., 2017). Beyond the perceived opportunity cost, the decision on the inclusion of regulatory issues in the negotiations is also determined by tactical considerations such as issue-linkages and potential for refusal on the side of the partner (Aggarwal and Evenett, 2017). The intersection of the trade and regulation worlds, though not new, shows the uncertainty that agents face and the different factors, which shape their approaches to the negotiations. Thus we show that governments and businesses perceive the global economy given other countries’ regulatory choices.

In the next section, we justify the use of regulatory protectionism and regulatory heterogeneity as distinct policy programmes and explain how a move from the former to the latter changes the objective of cooperation with a stronger focus on regulatory failure rather than market failure.

2.3. Theorising ideational development

The Introduction set out the research question that guides the dissertation: what explains the treatment of regulatory issues in trade negotiations? To respond to this question, we argued for a constructivist approach to understand both the content and

role of ideas. Hence we draw on constructivist approaches in IPE and Public Policy and set out the ways, through which we can convincingly show such influence. Constructivism³⁵ is not simply an approach we can apply here but to a ‘metatheoretical commitment’, composed of three pillars: ‘knowledge is socially constructed (an epistemological claim); social reality is constructed (an ontological claim); knowledge and reality are mutually constitutive (a reflexive claim)’ (Pouliot, 2007, p. 361). Constructivism engages with ‘the social facts of the world, those facts that exist only because they are collectively shared’ (Abdelal, 2009, p. 63). In the field of IPE, these social facts can influence ‘patterns of political economy directly as socially constructed coordination devices’ as well as indirectly through the way agents ‘interpret the material reality around them’ (Abdelal, 2009, p. 63). To complement De Ville and Orbie’s language, agents are important, both ‘in terms of their cognitive beliefs and in relation to their social environment (or ‘intersubjective structure’)’ (De Ville and Siles-Brügge, 2014, p. 154). In this sense ‘intersubjective meaning do not simply provide the context within which agents operate’, but agents are continuously engaged in (re)constructing the discursive environment’ (De Ville and Siles-Brügge, 2014, p. 154).

Such an understanding requires a coherent theoretical framework, which describes where ideas originate, how actors interpret and internalise these ideas and how in turn these shapes their discourse. Similarly to Siles-Brügge, we attempt to provide an explanation where ‘ideas matter all the way’ in the modes through which they shape how policymakers think and moreover, provides modes of justification for further action (Siles-Brügge, 2014). Where we depart from their explanation is in the way ideas through discourse interact with the treatment of regulatory issue rather than the use of discourse as an external economic threat, which opens space for specific policy solutions. Three aspects of ideational theorising need further attention: levels of analysis in ideational explanations; constitutive versus causal ideas; the relationship between ideas and political strategies. Furthermore, we set out the specific ideas, which are traced in the empirical chapters.

³⁵ For a detailed description of the range of approaches that can be termed ‘social constructivist’ see: (Adler, 1997; Checkel, 2004; Christiansen et al., 1999; Finnemore and Sikkink, 1998; Ruggie, 1998).

2.3.1. Levels of ideational analysis

One of the pitfalls of ideational studies has been the lack of differentiation between different levels of analysis. To be able to trace the interaction of different ideas, we draw on Surel's critical review of the role of cognitive and normative frames, defined as:

... coherent systems of normative and cognitive elements which define, in a given field, 'world views', mechanisms of identity formation, principles of action, as well as methodological prescriptions and practices for actors subscribing to the same frame. Generally speaking, these frames constitute conceptual instruments, available for the analysis of changes in public policy and for the explanation of developments between public and private actors which come into play in a given field (Surel, 2000, p. 496).

The operationalisation of cognitive and normative frames involves an understanding of the acts of interpretation or how actors draw on specific systems of meaning: 'concepts, assumptions, techniques of classification, analytical structures as well as processes for producing these elements' (Rasulov et al., 2014, p. 409). We focus on three different levels of analysis, as summarised in Table 3: *public philosophies, policy programmes and policy ideas*. Alternative classification as described by Larsson is to look at the role and function of 'ideas as problem definitions, ideas as policy solutions, and ideas as public philosophies, which together define governmentalities, or how and what type of governance is both possible and desirable' (Larsson, 2015, p. 179). In the dissertation, we adopt the broader term of policy programmes since in addition to how ideas define problem definitions, we also look at modes of categorisation, evaluation and assessment.

This distinction between different levels of analysis highlights the difficulty in distinguishing between the different forms in which ideas 'come' and also in terms of a distinction between the subjective ideas of actors and intersubjective or structural dimension of ideas (Larsson, 2015, p. 180). The distinction has an important link to the way we understand discourse, which we use to refer most broadly to 'the representational practices through which meanings are generated' (Dunn and Neumann, 2016, p. 2). Discourse recognises the central role of language as 'social, a series of collective codes and conventions through which things are given meaning and endowed with particular identities' (Dunn and Neumann, 2016, p. 2). Discourse cannot be meaningfully separated from the cognitive since 'social representations are largely acquired, used and changed, through text and talk' (Van Dijk, 1990, p. 165).

Therefore, the aim here is not to divide subjective and intersubjective ideas but to understand ‘the interactive processes by and through which ideas are generated and communicated’ (Schmidt, 2011, p. 115).

As Table 3 highlights we treat public philosophies as the shared worldviews and common normative commitments; policy programmes, not only as problem but as modes of categorisation and evaluation; and policy ideas as the specific solutions and instruments, which are conceived to address such problem definitions. As Figure 1

Figure 1 summarised, there is both a top-down dynamic of interaction and a bottom-up dynamic. This is revisited in sections 2.6 and 2.7 of this Chapter.

Table 3. Levels of generality of ideas

Levels of generality of ideas	Mechanisms for affecting negotiability	Trade & regulation nexus (examples)
<i>Public philosophies</i>	Shared world-views and common normative commitments	Broader public policy ideas Trade policy goals and objectives e.g. internationalisation of regulatory frameworks Ways of understanding the value of trade e.g. through the reference to market value or broader societal 'values'
<i>Policy programmes</i>	Problem definitions Modes of categorisation and modes of calculation for determining interests Modes of evaluation	Problematizing means-ends relationships and causality Principles for impact assessments, modes of measurement and classification e.g. stakeholders and academics have increasingly challenged the use of Computable general equilibrium (CGE) models for the assessment of the impact of trade agreements Criteria for prioritisation of regulatory issues e.g. the prioritisation used by the European Commission predominantly focuses on size of market versus size of barriers thus not including broader societal considerations
<i>Policy ideas</i>	Policy solutions Selection and specification of policy solutions	Including regulatory issues in FTAs e.g. whether trade agreements are the most appropriate venue to address regulatory issues versus addressing them through multilateral and plurilateral initiatives Modes of dealing with non-tariff measures e.g. through horizontal disciplines, specific chapters, annexes (as well as the depth and scope of annexes) Processes of conducting the negotiations e.g. transparency of the mandates and negotiations, conduct of impact assessments and engagement of wider group of stakeholders

Source: Own elaboration (Rasulov et al., 2014; Schmidt, 2011; Surel, 2000; Woll, 2008).

2.3.2. Constitutive versus causal ideas

To understand the role of ideas, we need to tackle the distinction between constitutive and causal ideas. As the Introduction showed, ideas can be understood in diverse ways: as ‘road maps’(Goldstein, 1993, p. xii, 1989); ‘normative justification’(Goldstein and Keohane, 1993); ‘principled beliefs’(Rosamond, 2014). Ideas, and in particular economic ideas, can be more than guides, in how they ‘constitute and shape the economic world’ (Morin and Carta, 2014, p. 117). Constructivist ontology can still accommodate some ‘rationalist insights’ where the main aspect is the causal role of ideas (Siles-Brügge, 2013a, p. 36). Such ideational accounts, though conditioned by material and institutional factors, can be revealed through four practical roadmaps³⁶ to highlight the influence of ideas ‘on their own’, but ‘not completely by themselves’ (Parsons, 2016). These roadmaps provide a set of questions, which can help us how to understand ideas better: who the advocates of certain ideas are; whether these actors are driven by politically or technical rationale; whether these ideas form particular coalitions, which would be different from the usual bargaining processes; and what the obstacles or enablers are for certain ideas to take precedence (Parsons, 2016). In this dissertation, to trace the role of ideas, we first need to see which actors advocate the inclusion of regulatory issues and how, whether they refer to the technical necessity or wider political rationale and what kind of discourse is mobilised; and what kind of actors ideas mobilise. More specifically, this entails looking at the European Commission’s discourse on the ‘technocratization’ of barriers in the broader context. A second step in analysing how ideas are treated focuses on the constitutive role of ideas or how they shape and influence our understanding of social and political reality (Blyth, 2002; Campbell, 1998; Larsson, 2015).³⁷ The next aspect of an ideational account focuses on the relationship between different levels of analysis and their interaction through discourse.

³⁶ Four strategies include: ‘ideas of the powerful’, ‘ideas as empowering actors’, ‘ideas forming coalitions’ and ‘ideas into institutions’. Within the scope of the study, showing how does that have gained power promote certain ideas, is not too useful, since within the EU institutional framework gaining power can be often described as a series of rounds of intergovernmental bargaining or supranational strategies. It is particularly so in the case of the selection of the European Commissioners and their allocation to specific portfolios. This is often the result of long-term negotiations between member states, where the process has been further complicated by the involvement of the European Parliament. Much more can be said for the other three mechanisms for tracing ideas (Parsons, 2016).

³⁷ Of course, there is also a middle ground where the focus is on ‘which ideas contribute to the selection of the goals actors choose to pursue’ (Woll, 2008, p. 14).

2.3.3. Relationship between different levels of ideas

Building on the definition of discourse presented earlier, we turn to its role in mediating between the subjective and intersubjective or as Schmidt puts it, discourse is ‘not just the representation or embodiment of ideas, but the interactive processes by and through which agents generate and communicate ideas’ (Schmidt, 2017, p. 250). While her framework attaches this to ‘institutionalism’ to reflect the need to look at ideas in discourse in an ‘institutional context’ including that of ‘formal institutions, informal rules, and everyday practices’ (Schmidt, 2017, p. 250), we do not seek to explain endogenous institutional change but the changes in the treatment of non-tariff measures. We do not refer to those as everyday practices but as the process through which policies come about. Very importantly Schmidt provides a differentiation between different types of interactive processes where actors are ‘engaged in “coordinative” discourse of policy construction, and political actors engaged with the public in “communicative” discourse of deliberation, contestation, and legitimisation’ (Schmidt, 2017, 2011).

In terms of the coordinative discourse, there are multiple channels through which agency resurfaces in such processes as Schmidt (2017) outline: as policy ‘entrepreneurs’ (Kingdon, 1984) or ‘norm entrepreneurs’ (Keck and Sikkink, 1998); as a part of ‘epistemic communities’ (Haas, 1992) which share cognitive and normative ideas or ‘advocacy coalitions’ (Sabatier and Jenkins-Smith, 1993) with access to policymaking; also referring to ‘discourse coalitions’ which interact over extended periods of time (Hajer, 2003) or expert networks reproducing expert and technical knowledge (Seabrooke and Tsingou, 2009). On the side of the communicative discourse, coordinative discourse is translated in language adjusted to the general public through a range of strategies (‘political entrepreneurs’ (Zaller, 1992); via ‘policy forums’ (Rein and Schön, 1993); or ‘everyday talk’ (Mansbridge, 1999). As Schmidt points out the coordinative and communicative dimensions are firmly interconnected, where the cognitive justification in the internal policy construction is then legitimised through the addition of normative justification (Schmidt, 2011, 2008).

This interlinkage between different types of discourse in practice means that agents can combine technical and scientific arguments with more broadly recognised narratives and stories that can appeal to the underlying values of society. The

interaction between these two types of discourse is difficult to establish but one proposed route is found in Hay and Smith's empirical study on whether politicians find globalisation as a genuine constraint or only evoke it as an external threat (Hay and Smith, 2010). Such an approach is extended in the field of trade policy by Siles-Brügge (2014) who argued that: 'the beliefs of policymakers in DG Trade led them to pursue certain policies, which they sought to legitimise using a different set of ideas (rhetoric). Ideas have shaped both what policymakers have thought in private and said in public' (Siles-Brügge, 2014, p. 14). More specifically, he shows how actors have internalised 'particular neoliberal ideas derived from neoclassical trade theory' and how actors can deploy discourse of external economic constraints instrumentally legitimising contested policy decisions (Siles-Brügge, 2014, p. 16). Instead, as explained earlier, we see the need to look beyond the discourse of external constraint and also find the need to distinguish between internalised and non-internalised ideas as irrelevant for understanding the evolution. Drawing on Schmidt's definition, the next step in the theoretical model is to outline what kind of communicative and coordinative discourses are associated with regulatory protectionism and heterogeneity.

2.3.4. Ideational transformations

As a final step, we need to understand how ideas transform the three levels of analysis described earlier: underlying public philosophies; policy programmes; policy ideas.³⁸ So how do ideas across these levels develop over time? In this respect three positions can be identified – ideas can be subject to subtle changes (Carstensen and Matthijs, 2017; Matthijs and Blyth, 2017), ideas interact with other ideas; and can be altogether neglected in favour of pragmatism (Mügge, 2011). In this respect, we follow Carstensen and Matthijs (2017)'s understanding of ideational development. We thus argue that ideas in trade policy have not been subject to a complete overhaul but have been subject to ideational 'hybridisation' – namely, agents have adjusted the ideational space to make room for 'new' ideas and recycle 'old' ones, often as a result of the interaction between existing heuristics and economic ideas. This conceptualization is relevant since rather than seeking a paradigmatic shifts à la Hall (1993), we find more relevant the gradual change within a paradigm or using our conceptualisation –

³⁸ For a recent summary of public policy approaches see Beland, Carstensen and Seabrooke (2016); Kornbrobst & Senn (2017).

between different policy programmes (Blyth, 2002; Carstensen and Matthijs, 2017; Carstensen and Schmidt, 2015; Matthijs and Blyth, 2017). In extension, Carstensen and Matthijs (2017) also illustrate how actors can ‘employ their institutional and ideational power to reinterpret and redefine the dominant neoliberal understanding of the economy to match their own specific ideas and policy priorities’ (Carstensen and Matthijs, 2017, p. 1). In this way, they show one of the ways through which actors perceive public philosophies and their problem-solving ability and highlight how ideational power plays a role. Thus we need to see where ideas originate, how they are embedded in the trade preferences of policymakers and interactions with other actors (interest groups and partners), and how they are transformed through legitimation and contestation.

2.4. Neoliberalism and public philosophies

Ideas can be most broadly thought of as public philosophies. Such broader ideas cut across different policy areas and provide ways for understanding ‘the purpose of government or public policy in light of a certain set of assumptions about the society and the market’ (Mehta, 2010, p. 27). *Zeitgeist* has an interrelated meaning in the way that it carries a set of assumptions about the world that are shared and dominant in a particular historical context (Idem.). The difficulty in distinguishing between such philosophical ideas and policy ideas is particularly grave in the use of the term paradigm, which has been used to denote both (Daigneault, 2015, 2014; Schmidt, 2010). In the dissertation, rather than looking at how one public philosophy becomes dominant, we look at how public philosophies shape the available policy programmes and make certain understandings more likely through aligning problem definitions with dominant philosophies. In this way, in contrast to other studies who position neoliberal ideas on the level of paradigm³⁹, we treat them as influencing the broader context.

Since the 1970s⁴⁰ neoliberalism can be seen as a *zeitgeist* shaping state-market and socio-economic relations, which came out as replacement of the principles of

³⁹ Most studies use the language of policy paradigm, which we avoid here due to the multiple interpretations of paradigm, which exist.

⁴⁰ Here we do not discuss the intellectual foundations and origins of neoliberalism, which can be traced to before the 1970s. For extensive review see (Ban, 2011; Harvey, 2005; Jabko, 2006; Plant, 2012). Similarly, we do not focus in depth on Keynesians but on the broader public philosophy within which it was situated.

‘embedded liberalism’ and the accompanying Keynesianism, embedded liberalism most broadly can be defined as a set of ideas about the role of the state in economic life, which inscribed not only a form of state-market relations but also the value of diversity. As encapsulated in the work of John G. Ruggie, it entailed a set of normative commitments within a set of rules, institutions, and modes of functioning (Ruggie, 1982). It was thus conceived to explain ‘a political compromise which generally favoured markets, which assigned to the state a series of important roles in managing economic life, including guaranteeing economic stability, cushioning the domestic economy against international shocks and dislocations, providing extensive social protections particularly for more vulnerable groups and pursuing a degree of economic equality’ (Lang, 2018, p. 11). Vis-à-vis trade liberalisation, the compromise meant that ‘trade liberalisation was embedded within a political commitment, broadly shared among the major players in the trading system of that era, to the progressive, interventionist welfare state’ (Howse, 2002, p. 97). The dynamic of embedding and dis-embedding the market refers to the dynamic of surround markets within ‘a web of social and political constraints and a regulatory environment’ versus permitting it to operate outside this social and political control (Perkins, 2006, p. 10). Disembedded markets in that sense refer to a ‘form of economic life which is governed purely by market logic to the exclusion of “social” values, logic and bonds’ (Lang, 2018, pp. 15–16). The transition between embedded liberalism to neo-liberalism is a critical component of the transformations in the international trade regime and the commitments on regulatory disciplines.

*Defining neoliberalism*⁴¹

Neoliberalism⁴² can be seen as an ‘essentially contested’ concept since ‘the proper use’ of the concept ‘involves endless dispute about [...] proper uses on the part of their users’ (Gallie, 1955, p. 169). The definitions illustrate that on the one hand, neoliberalism does not go as far as being a ‘complete political philosophy or ideology’,

⁴¹ It is important to note that this chapter does not claim to provide a detailed history of economic thought, of European integration (Jabko, 2006), of the conceptions of the market (Jabko, 2006; Watson, 2017), or of the vocabulary of neoliberalism (Eagleton-Pierce, 2016), it merely tries to set the scene for understanding the three components above as well as implications for future research on the ideas in trade and regulation.

⁴² Further reading on neoliberalism includes: (Brenner et al., 2010; Buch-Hansen and Wigger, 2010; Harvey, 2005; Jabko, 2006; Leitner et al., 2007; Overbeek and Apeldoorn, 2012; Peck, 2012)

and on the other hand, does provide for a clear normative turn from a ‘collective purpose’ to the ‘individual pursuit’ (Thorsen, 2009). As David Harvey puts it:

A ‘theory of political economic practices that proposes that human wellbeing can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong property rights, free markets and free trade.’ (Harvey, 2005, p. 2)

This focus on the individual pursuit, translated into the belief that human beings are rational utility-maximisers, forms one of the core aspects of neoliberalism and one way of tracing its influence. At the same time, the definitions above do not tell us about how neoliberalism interacts with other dimensions of social life such as how it is interpreted and internalised by agents and how it interacts with institutions. With the risk of travelling too much in the opposite direction and overstating the role of institutions, it is worth recalling Campbell and Pedersen’s definition:

[A]heterogeneous set of institutions consisting of various ideas, social and economic policies, and ways of organizing political and economic activity. . . . Ideally, it includes formal institutions, such as minimalist welfare-state, taxation, and business regulation programs; flexible labour markets and decentralized capital–labour relations unencumbered by strong unions and collective bargaining; and the absence of barriers to international capital mobility. It includes institutionalized normative principles favouring free-market solutions to economic problems, rather than bargaining or indicative planning, and a dedication to controlling inflation even at the expense of full employment. It includes institutionalized cognitive principles, notably a deep, taken-for-granted belief in neoclassical economics. (Campbell and Pedersen, 2001, p. 5)

Hence, neoliberalism carries a strong cognitive dimension in the form of a strong belief in neoclassical economics and the types of reasoning and justification it invokes. The definition above also illustrates one of the ways through which ideas become powerful: in the way their promulgated by powerful actors and institutionalised within both formal and informal institutions (Carstensen and Schmidt, 2015; Schmidt, 2010).

The foundations in neoclassical economics are most often traced to the nineteenth century and the writings of David Ricardo (Library of Economics and Liberty, 1999; Siles-Brügge, 2013b). The argument, for which he is most quoted, builds on Adam Smith’s writing of ‘absolute advantages’. Ricardo explains that countries could take advantage from specialising in the production of specific goods, even when they are not the most technologically advanced, as long as they have a ‘comparative advantage’, i.e. the opportunity cost of producing a good is lower than the cost for other countries based on its factor endowments (Watson, 2014). Further research

factored in insights from the role of trade for countries with similar factor endowments (intra-industry trade), trade with economies of scale in production, and with technological progress, which became the core of what is now perceived as neoclassical economics. As Siles-Brügge summarises neoclassical economists thinking is defined by a belief that:

... exposing the domestic economy to the forces of international markets culminates in a more efficient allocation of resources through specialisation...; possible processes of economic adjustment resulting from import competition are thus positive and are to be welcomed as they lead to increases in general economic welfare in the form of greater consumer choice, lower production costs and so forth. (Siles-Brügge, 2013b, p. 41)

The talk of comparative advantages, import competition and specialisation, is not limited to academic writing but also finds its way in the statements of Commission officials. One of many examples can be seen in the way Commissioner Pascal Lamy describes globalisation:

But as globalisation means different things to different people, let me start by setting out my understanding of what globalisation is: In my view, it is, in essence, the latest transformation of market capitalism. It is based on comparative advantage, economies of scale and innovation. That is what lies behind the new wave of technological innovation, behind the increasing openness of world markets for goods and services, behind the 1600% increase in trade and the 2500% increase in FDI since 1950, and behind 24 hour world financial markets. (Lamy, 2000a)

While Lamy is one of the few Commissioners who links managing integrating markets to the moral aspect of regulatory choices (as we describe in Chapter 6), he also has not shied away from stating the importance of these neoclassical beliefs. Chapters 6 to 8 highlight the persistence of the neoclassical economic thinking but more importantly, they show that they extended to non-tariff measures and regulatory issues. This expansion is important in that by defining non-tariff measures within the neoclassical economics thinking; they become permanently associated with ‘trade costs’ where their removal would unleash a continuous expansion in trade flows. Surprisingly, early academic studies on the role of non-tariff measures find shallow integration in line with embedded liberalism perfectly capable of resolving such problems (Bagwell and Staiger, 2001a; Copeland, 1990; Staiger, 2012).

The expansion of neoliberal ideas has been one of the main points of criticism, particularly when it starts encompassing other social spaces. For example, both Watson and Davies aim to show the extensive reach of neoliberalism and its different

aspects beyond the economic realm. Particularly, neoliberalism becomes particularly far-reaching in the way that it provides modes of evaluation and justification or in the words of Davies, ‘an attempt to replace political judgment with economic evaluation, including, but not exclusively, the evaluations offered by the markets’ (Davies, 2016, p. 5). As an extension, Davies explains that ‘the state does not necessarily (or at least, not always) cede power to markets, but comes to justify its decisions, policies and rules in terms that are commensurable with the logic of markets’ (Davies, 2016, p. 8). This, in turn, creates an ‘amplification’ of economics and dependency on indicators, and technical fixes (Davies, 2016, 2013).⁴³

The key point here is that neoliberalism as a public philosophy influences, how problems are defined and what solutions are proposed. Moreover, we need to look further in these channels of influence.

Influence of neoliberalism on policy programmes and ideas

What are the implications of neoliberalism for policy programmes and policy ideas?

One of the ways neoliberalism influences policy is through the mode it has become ingrained into the common-sense through which agents interpret and understand the world where discourse is one way to understand the taken-for-granted understandings in everyday processes (Harvey, 2005, pp. 3, 39). The effect of discourse can be traced through the communicative strategies or rhetorical devices, which are invoked as justification for policy action (e.g. the threat of globalisation can be counteracted only with more free markets); in terms of the coordinative power to gather coalitions and supporters behind an idea (e.g. the flexibility of the idea of the market); and in the way they can shape the understanding of a subject (e.g. non-tariff measures as a trade barrier).

Concerning the communicative aspect, neoliberal ideas have been traced by looking at the beliefs of policymakers in the Directorate-General for Trade of European Union, who have constructed the dominant case for trade liberalisation. Such discourse is illustrated with the prioritisation of the interests of exporters at the expense of import-competing groups and convergence of EU’s agenda towards developed and developing countries (Siles-Brügge, 2013b). Alternatively, the neoliberal ideas have been seen as underpinning both the discursive environment and the legitimising discourse of the

⁴³ He further identifies ‘three logics to the limitation and suspension of market principles [...] exemptions to market principles; market externalities; market exceptions’, which create different types of justifications (Davies, 2013, p. 34).

Commission, which creatively operates within this structure (De Ville and Orbie, 2014). In the latter approach, free trade is legitimised through subtle changes in Commission's discourse, engaging 'EU's identity as an open trading power, both through temporal othering (against the mistakes of the 1930s) and geographical othering (against less open economies)' (De Ville and Orbie, 2014, p. 162).

More broadly, Hay's study on the rhetorical devices sets out three tools for invoking neoliberalism: 'non-negotiable character of external imperatives', 'powerlessness of domestic actors', and giving 'responsibility to quasi-independent and supra-democratic authorities' (Hay, 2004, p. 502). Hay also provides an operational definition of seven traits of economic neoliberalism that are helpful for the codification for the discourse analysis, which we define in the next chapter (Hay, 2004, pp. 507–508).⁴⁴ Similarly, De Ville and Orbie (2014a) and Siles-Brügge (2014) trace the 'neoliberal trade policy discourse' through reference to core neoclassical economic aspects: an absolute priority to efficiency gains arising from trade liberalisation both externally and internally and open markets as a tool to stimulate competitiveness across the Union, thus creating justification for structural reforms in member states. However, the focus on the competitiveness dimension has overestimated the continuities in EU trade policy and also overestimated the role of the Directorate-General for Trade in creating an agreement around the gains of imports and exports and further market opening.

Recent work highlights the risk of overly focusing on this line of discourse due to the cohabitation of various streams of market liberalism discourses (Jabko, 2006; Morin and Carta, 2014, p. 119). Such intertwining has illustrated the central role of the reference to a 'European model' of market liberalism in actually creating agreement across different actors (Jabko, 2006; Morin and Carta, 2014, p. 119). Morin and Carta, in particular, argue that multiple discourses intersect in EU trade policymaking:

⁴⁴ These traits include (Hay, 2004, pp. 507–508): '1. A confidence in the market as an efficient mechanism for the allocation of scarce resources; 2. A belief in the desirability of a global regime of free trade and free capital mobility. 3. A belief in the desirability, all things being equal, of a limited and noninterventionist role for the state and of the state as a facilitator and custodian rather than a substitute for market mechanisms. 4. A rejection of Keynesian demand-management techniques in favour of monetarism, neo-monetarism and supply-side economics. 5. A commitment to the removal of those welfare benefits which might be seen to act as disincentives to market participation (in short, a subordination of the principles of social justice to those of perceived economic imperatives). 6. A defence of labour-market flexibility and the promotion and nurturing of cost competitiveness. 7. A confidence in the use of private finance in public projects and, more generally, in the allocative efficiency of market and quasi-market mechanisms in the provision of public goods.'

‘managed globalization’ to a ‘Global Europe’ discourse, from a ‘Ricardian’ to a ‘clash of capitalisms’ phase, from a ‘market-correcting’ to a ‘market-enabling’ approach, from a ‘neo-mercantilist’ to ‘embedded neo-liberal’ hegemony, or from a ‘neoliberalism 2.0’ to a ‘neoliberalism 3.0’ ideology’ (Morin and Carta, 2014, p. 12). Thus the differences between coordinative and communicative discourse are essential as well as the clash between different discourses. As we see in this dissertation, the meeting of trade and regulation has brought less dogmatism and more pragmatism in approaching the negotiations.

Such an observation is close to Mügge’s exploration of “the relative strength that ideas exert over policy at different points in time” (Mügge, 2011, p. 187). He points to existing political institutions as ‘filters of ideas and introduces a distinction between two modes of policymaking – pragmatism and dogmatism’ where the two differ with regards to the value policymakers give to the intellectual coherence of policy and the extent of stakeholders access to policymakers (Mügge, 2011). Thus instances of pragmatic policymaking are characterised by relatively ‘low intellectual coherence, ad hoc bargains, quick fixes and a focus on ultimate policy outcomes’, while dogmatic policymaking is ‘based on deliberation among members of an epistemic community and is theory-based’ (Mügge, 2011, p. 187). Part of the pragmatic approach is a process of ‘ad hocery’. As a term, ‘ad hocery’ has been criticised for referring to ‘those cut and dried rules and stereotyped notions that are often accepted without reflection’ (Finetti et al., 2008, p. 98). Ad hocery, therefore, can be perceived as having ‘as many definitions as there are means and to use them randomly and without reference to the goal for which they are introduced’ (Idem). In the processes of framing discussed here, ad hocery is defined by the use of ‘cut and dried rule and stereotyped notions’ without deeper reflection. While the impact of neoliberal thinking goes beyond what we outline here, it provides us with a foundation for understanding how neoliberal creates a set of assumptions about societal interactions.

2.5. Regulatory protectionism and regulatory heterogeneity as policy programmes

Policy programmes allow us to look at the dynamic aspect of ideas – how at different moments agents highlight different aspects of a given situation thus constructing problem definitions, but also modes of categorisation and evaluation (Mehta, 2010). Agents make use of problem definitions to simplify otherwise complex realities.

Below we start distinguishing between the non-tariff measures as regulatory protectionism and regulatory heterogeneity.

Defining regulatory protectionism and heterogeneity

In terms of distinguishing between different understandings of NTMs, we build upon the recent contribution by Lester and Manak (2017) who set out a framework for ‘three categories of trade issues that arise from regulation: regulatory protectionism, regulatory divergence and regulatory reform’ (Lester and Manak, 2017, p. 339). Regulatory protectionism relates to trade protectionism in that it also has the explicit aim of protecting domestic producers from foreign competition. Protectionist regulatory measures can be put in the place of existing tariffs and quotas (‘substitutability’ thesis), in the form specific restrictions in public procurement, investment, access for goods and services, but also in the shape of a regulation aimed at the protection of the environment and consumers (Lester and Manak, 2017, p. 340). As discussed elsewhere, these can be fairly obvious but not in all cases. An often-cited example comes from one of the key ECJ cases, renowned as the *Cassis de Dijon* case⁴⁵, where a German law applicable to both German and other European economic operators prevented the marketing of alcoholic beverages with alcohol content below 25% under the name of ‘liquor’. While in its formulation the law did not discriminate against different producers, in practice it was more favourable to a domestic industry producing beverages with lower alcohol content, thus in effect being protectionist.

What is more important here, is that understanding of non-tariff measures as regulatory protectionism (with the accompanying justification) leads to the use of specific instruments allowed within the GATT/WTO framework. Andrew Lang has shown how trade barriers are defined in ‘formal-technical’ terms where the elimination of such measures is shown as a neutral and objective process, applying the rule of law (Lang, 2011a). As we will see in Chapter 5, such a discourse surrounding non-tariff measures allows for targeted elimination through legal instruments and cements a technical understanding of non-tariff measures (replacing the term ‘NTBs’).

The second understanding of non-tariff measures, according to Lester and Manak (2017) can be conceptualised as regulatory divergence, focusing on the differences in

⁴⁵ Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (*Cassis de Dijon*) (20 Feb 1979) Case 120/78. This judgement is also seen as the establishment of the ‘mutual recognition’ principle within EU jurisprudence.

the outcomes rather than the process of producing regulations (Lester and Manak, 2017, p. 341). As seen earlier regulatory divergence can reflect different goals, but it can result from the implementation of regulation, resulting from ‘practices, styles, experiences, and institutional assignments’ or from the divergent use of international standards (Lester and Manak, 2017, p. 342). Such divergences are usually the target of international regulatory cooperation initiatives with different scope (see Chapter 7). An example of regulatory divergence is the different understanding of what constitutes an international standard. An inquiry into the causes of regulatory divergence among five OECD members (Canada, EU, Korea, Mexico and the US) reveal difficulties in identifying which international standards are used in which sectors and what are their regulatory objectives (Fliess et al., 2010).

Moreover, an instance when the EU has targeted regulatory heterogeneity with a partner country is the wines and spirits sector in India, where the annual EU report cautioned against ‘unjustifiable regulatory divergences from international standards regarding labelling requirements and by internal taxation measures’ (European Commission, 2017a, p. 16). Similarly, it warned against new requirements on nutritional labelling in Israel, which are ‘not in line with the established international practices and may create discriminations against imported products’ (European Commission, 2018a, p. 21). In both cases, the rules are not directly in breach and are not declared as protectionist from the outset, but the reports highlight the cost of their divergence.

The last category is thinking of non-tariff barriers as regulatory reform and the need to ensure regulatory effectiveness (Lester and Manak, 2017, pp. 346–349). This category, as described by the authors, can encompass a wide range of regulations where their lack of effectiveness can have an impact on trade. Rather than seeing this as a subject involving best practices and good regulatory practices (e.g. Lester and Manak), we argue that this is a response to regulatory divergence rather than a different kind of understanding of regulatory barriers. In this respect, in this dissertation, we deal with two and not three understandings of NTMs – regulatory protectionism and regulatory heterogeneity. Such joining of regulatory divergence and regulatory efficiency is justified due to three reasons. Firstly, the tools used to target regulatory divergences and stimulate regulatory reform can be very similar – mainly, with the shift to regulatory cooperation in FTAs with third countries, it is clear that the two

understandings are conflated. Secondly, the discussion of regulatory divergences itself often carries the normative judgment that the other countries' practices should be amended in the sense that they require reform and move towards efficiency. Finally, using regulatory reform as a third category implies that unless a country reforms it is protectionist, but the direction of the reform can be both towards more or less regulation. More importantly, regulatory heterogeneity in itself carries a definition of what 'normal' or 'optimal' regulation is.

Influence of policy programmes

Hence, we trace the role of policy programmes by looking into three aspects: communicative and coordinative discourse and fit between problem definitions and the other two levels of ideas (philosophies and policy solutions). Such an approach aligns with the existing approaches to understanding how problem definitions emerge and prevail (Beland and Cox, 2010; Larsson, 2015; Mehta, 2010). Firstly, the specific discourse can *inter alia* include (Mehta, 2010, pp. 36–37): establishing causality (means-ends relationships); supporting the problem definition with particular modes of assessment and evaluation, which establish 'numerical indicators'; developing stories and narratives, simplifying complex issues; invoking metaphors, cultural symbols, and values. Secondly, policy programmes are defined within deliberative processes, and thus the formal and informal institutions are essential, for which ideas will prevail. Finally, we also need to look at the actors that are engaged in the construction and contestation of policy programmes. Chapter 3 outlines the step by step methodology for achieving this.

2.6. Regulatory cooperation and other policy ideas

Policy ideas include the specific policy solutions that actors conceive. Ideas as policy solutions, as Mehta explains, are 'both the narrowest conceptualisation of the role that ideas play in politics and the most theoretically developed' (2010, p.28). The relevance of ideas as policy solutions is to understand why certain ideas become policy at the expense of others. Ideas as policy solutions prominently feature in Public Policy work, where the success of an idea depends on its characteristics (policy, political and administrative appeal) in the case of Hall (1989)), on the role of different entrepreneurs (e.g. Kingdon (1984)), or on past policies (Campbell and Pedersen, 2001). The success of a policy idea in the context of EU trade policy will also depend on the appeal of

policy ideas, fit with previous ideas, and the capacity of the Directorate-General for Trade. However, the empirical chapters explore further these constraining factors.

What kind of policy ideas?

In the case of NTMs, the existing IPE literature points to different types of policy solutions, where most of the academic literature reflects the ‘tariff equivalence syndrome’. Such thinking has led to solutions, aiming to commit to specific market access (Bagwell and Staiger, 2001b; Staiger and Sykes, 2011); aiming to improve the type of binding (Horn et al., 2010); and improving the type of information agents hold (Park, 2011). Such a treatment of NTMs links to the definition of regulatory protectionism introduced above, as well as to specific modes of measurement and evaluation. As an extension to this, given the numerous existing and potential future barriers that could be promulgated, no FTA can include all potential NTMs and since there is a universe of potential future changes due to exogenous factors, technological developments etcetera. The focus on the incompleteness of trade agreements most often resulted in imposing a set of exogenous restrictions on the policy instruments and assessing what is possible within these limits (Costinot (2008) calls this the ‘transaction-cost perspective’).

However, in dealing with regulatory issues and particularly, non-tariff measures, governments have different reasons to tackle these through trade agreements. The different solutions to resolving regulatory divergences can vary substantially in scope, depth, intensity and institutional arrangements.⁴⁶ Governments can engage in the least binding forms such as dialogues and informal exchanges, which predominantly focus on transparency and notification requirements, which have been the primary methods used within the GATT/WTO context. This is also more likely in areas where there is more substantial regulatory divergence, and there is less scope for regulatory cooperation (Hoekman, 2016). This mode of cooperation in trade agreements is predominantly associated with the inclusion of chapters on transparency in trade agreements.

More binding types of regulatory cooperation within trade agreements have often been pursued via two modes: harmonisation and mutual recognition. While harmonisation entails the adoption of the same norms across two or more jurisdictions, mutual

⁴⁶ For an overview of the history of IRC and different levels of integration and harmonisation, see Mavroidis (2016) and OECD (2017, 2013, 1994).

recognition requires the acceptance that products legally traded in one jurisdiction can be introduced in another without additional controls (Hoekman, 2015, p.4). Mutual recognition requires trust in each other's regulatory processes and enforcement practices, while regulatory cooperation often entails close alignment of preferences (Rigod, 2013, p. 258). Beyond these two approaches lies the pursuit of 'regulatory equivalence' or 'enhanced mutual recognition'⁴⁷ present in the current EC regulatory regime. The prerequisites for this latter approach are iterative cooperation to build 'trust' or a form of a prior 'mutual assessment' which would establish that the existing regulatory objectives and processes are indeed equivalent (Hoekman, 2015, p. 5; Messerlin, 2011).

At the same time, empirical analysis of pre-Korea FTAs, which was the first agreement to explicitly target NTBs, showed that agreements tend to focus primarily on market access issues and to defer to the WTO negotiating process for any novel advances on unfinished rule-making issues, which contradicted the idea that PTAs can be 'useful rule-making laboratories' (Sauve and Ward, 2008). While theory suggested that PTAs can be a more optimal setting for mutual recognition agreements, practice suggests that outcomes can be heavily dependent on nature and extent of substantive regulatory differences between partners (Sauve and Ward, 2008, p.12).

When do governments resort to regulatory cooperation?

Under what conditions agents turn to regulatory cooperation as a solution to the problem of regulatory heterogeneity? The regulatory turn in the trade policy literature has looked at the 'old' and 'new' forms for dealing with 'regulatory heterogeneity' (Pelkmans, 2017). Some studies have aimed to explain the emergence of regulatory cooperation, the different types that exist as well as the possibilities for future cooperation (Bollyky and Mavroidis, 2016; Hoekman and Mattoo, 2010; Hoekman, 2015; Mavroidis, 2016). While Chapter 7 will explore this in depth, for the moment, it is important to note that regulatory cooperation as used by the Commission is only one form of what the OECD has coined as international regulatory cooperation (IRC). In the context of producing the 2012 Recommendation of the Council on Regulatory Policy and Governance, the OECD Regulatory Policy Committee (RPC) proposed a 'working definition' of international regulatory cooperation (IRC) as:

⁴⁷ Each party agrees to accept the regulatory system of another party, which entails the recognition that both have similar objectives and effective institutional systems to enforce them (Hoekman, 2015).

... any agreement or organisational arrangement, formal or informal, between countries (at the bilateral, regional or multilateral level) to promote some form of co-operation in the design, monitoring, enforcement, or ex post management of regulation' (OECD, 2013, p. 153).

More importantly, while there has not been an epistemic consensus on the inclusion of regulatory cooperation in RTAs, the EC has devised different ad hoc solutions and experimenting with tackling NTMs via regulatory cooperation. In economic terms, trade-related gains of IRC can be assessed through a cost-benefit calculation, juxtaposing a range of costs such as information, specification, conformity assessment and other trade costs with the benefits from keeping the current regulatory system.

From a rationalist legal point of view, the need for regulatory cooperation comes from the thinking of 'incomplete contracting' – the WTO rules as well as the agreed rules at the time of negotiation/ signature of an FTA cannot preview all possible measures to be implemented and their trade-relatedness (Hart and Moore, 1999).⁴⁸ A key feature of this incomplete contract is that the impact on trade costs of specific measures could be 'observable', but they are not 'verifiable' – or simply put they cannot serve in front of dispute settlement / juridical scrutiny (Hart and Moore, 1998, p.7). Similarly, Raustiala looks at regulatory cooperation in terms of compliance, where states commit to cooperation in certain non-reciprocal areas in instrumentalist terms – based on the analysis of costs and benefits of specific commitments (2000, p. 400). His overview of existing perspectives also shows that regulatory cooperation (similarly to trade agreements overall) could be seen as a commitment device on behalf of regulators on both sides to engage in concrete outputs. The source of incompleteness in international trade can be captured through a wide range of regulations, which can be deemed trade related. On the one hand, states aim for comprehensiveness of coverage, but on the other, the cost of cataloguing all existing measures and their impact requires substantial resources (Hudec, 2001).⁴⁹ On the other hand, there is uncertainty about the future economic, political, and technological conditions, which makes the range of issues, which regulation needs to address unforeseeable (Horn et al., 2010; Staiger and Sykes, 2011).

⁴⁸ Also see Williamson, 1975, as cited in Hart and Moore (1999).

⁴⁹ As Hudec (1990) elaborates: 'The standard trade policy rules could deal with the common type of trade policy measure governments usually employ to control trade. But trade can also be affected by other domestic measures, such as product safety standards, having nothing to do with trade policy. It would have been next to impossible to catalogue all such possibilities in advance.'

In this context, EU's regulatory cooperation chapters have mostly aimed to address specific sectors, where regulation has high 'trade costs' and where elimination can be essential for global value chains.⁵⁰ An empirical study of chapters versus sectors shows a focus on sectors where regional and global value chains are important and where technological developments are fast-paced (Pelkmans, 2017). In these cases, regulatory cooperation can reduce the divergence of approaches to future risk, which need to be regulated. Pelkmans poses the question 'what kinds of regulatory heterogeneity are at stake, causing regulatory barriers to be so costly that business urges negotiators to reduce them' (2017, p. 782). In this context, he discerns some differences in how specific issues are treated conditionally on 'specialisation patterns, (common) regulatory ambitions, and local sensitivities' (Pelkmans, 2017, p. 783).

These studies not only highlight what the existing approaches to the puzzle we aim to tackle are but they also show what kind of economic ideas policymakers makers draw on. However, the existing explanations for including regulatory cooperation provisions do not take into account the inter-linkages between different agreements and the broader context, within which these agreements develop thus we need to look beyond the cost-benefit / compliance arguments and respond to the question how regulatory cooperation emerged to dominate other solutions in the trade policy discourse. Defining other countries regulatory choices as protectionist has also provided space for the use of different instruments against third countries. Instead, this dissertation aims to expand on regulatory cooperation as a solution 'to address disparate worldviews⁵¹ among market participants and, once a solution is found, how to deal with conflict in the new order' (Duina, 2015, p. 98). Thus instead approaches to regulatory cooperation can be seen as consolidating different worldviews through sharing normative commitments, principles of categorisation and evaluation, and deliberations on specific policy impacts. Hence, regulatory cooperation in its different forms (and to a different degree across modes) is costly – it requires both the capacity of negotiators to incentivise regulators but also expertise and time involvement for the deliberations on specific issues. While negotiating with a country where the regulatory

⁵⁰ 'Also referred to as trade in intermediate goods and services, global production sharing, trade in tasks, off-shoring, economic fragmentation or vertical specialisation' (Kommerskollegium, 2012b, p. 4).

⁵¹ Other authors speak of the term 'worldmaking', referring to 'the process by which we frame and shape the realities of the worlds in which we live' (Goodman, 1978, cited in (Rein and Schön, 1993, p. 146)).

gap is smaller could be more natural, the gains from regulatory cooperation are higher when the gap is more extensive.

To sum up, studies have shown that differentiating between non-tariff measures with protectionist purposes from those that address legitimate public policy issues is a difficult task methodologically and theoretically. They have also shown that the inclusion of commitments on non-tariff measures could act as a commitment device to avoid policy substitution, as a way to tackle uncertain future regulatory issues, or to reduce the information asymmetry between partners. However, the evidence presented in this dissertation adds a different perspective: the categorisation and treatment of regulatory issues is contingent on the political setting and existing cognitive and normative understanding of what is necessary and appropriate. Thus the next step in the theoretical contribution is to assess to what extent an understanding of non-tariff measures as one or the other categorisation affects treatment when regulatory cooperation is a proposed solution and under what conditions.

Rather than treating regulatory cooperation as a unique mode of interaction, we can break down the different types of regulatory cooperation into ‘policy ideas’, which provide solutions to regulatory protectionism and heterogeneity. Thus the next section looks at where we locate the two categorisations and what kind of policy solutions result from this.

Tracing policy ideas

The interaction of different policy ideas frames the ‘negotiability’ of non-tariff measures. Introducing the concept of negotiability in addition to other dimensions allows us to understand agents’ perception of whether a measure is ‘open to discussion or modification’ (“negotiable,” n.d.) and that can be discussed or changed before an agreement before reaching a decision; versus non negotiable, signifying that which is ‘not open for discussion or modification’ (“non negotiable,” n.d.). The idea of ‘negotiable and non-negotiable trade barriers’ appeared in one of the first studies on the theory of trade agreements (Copeland, 1990). Based on the lack of transparency of behind-the-border measures, Copeland treated contracting costs as exogenous, thus concluding that non-tariff measures are ‘non-negotiable’ (Copeland, 1990). As seen in the Introduction, more recent research tries to identify which domestic trade-related regulations can be negotiated upon (Horn et al., 2010). What we propose instead is that negotiability, regarding the discretion of actors, can also be defined as the overlap

between what agents think is necessary (as evidenced in the coordinative discourse) and what is appropriate (often evoked in the communicative discourse). Thus a narrower view of what is necessary to achieve trade policy objectives narrows the space of what is ‘negotiable’.

Negotiability illustrates the fact that NTMs are subject to agreement and disagreement at different levels of cooperation, but they are not subject to the same modes of negotiations as tariffs. Negotiability reflects a normative view that they cannot be bargained away like tariffs. At the same time, the extension of the trade regime to cover regulation has extended the principle of reciprocity to non-tariff measures. As Pascal Lamy, both former Directorate-General for Trade and Director-General of the WTO, explains:

... the old reciprocity concept in the form of mutual exchanges of market access commitments is difficult to apply to public policies. Bringing public policies to zero is certainly not applicable. And special and differential treatment in the form of exceptions or exclusions from the application of these policies is difficult to imagine. (Lamy, 2012)

The unconditional reciprocity set out by the MFN also related to an understanding of reciprocity, not at the time of exchange in the longer term (Thuderoz, 2017), where ‘the reciprocity of concessions does not refer to equivalence at the time the concession is made. In long-term relationships or repeated negotiations, however, the parties will seek to achieve a rough parity in the exchanges made between them’ (Larson, 1998; Thuderoz, 2017, p. 78).

As constructed here, negotiability shows the interaction between different levels of analysis. First, regarding categorisation, protectionist measures are often dealt with as substitutes of tariffs and commensurable in terms of effect. Regulatory heterogeneity, in comparison, is not ex-ante deemed commensurable with tariffs, but for evaluation purposes, made commensurable to tariffs, resulting in the persistence of the ‘tariff equivalence syndrome’. Secondly, the modes of evaluation and assessment define negotiability, i.e. how the effects of NTMs can be captured and how agents assess whether enough has been negotiated. Finally, negotiability entails a normative dimension, which identifies NTMs in pursuit of legitimate objectives in line with a view of NTMs as regulatory divergence and the presence of value and risk preferences. The normative dimension of negotiability necessitates the safeguarding of ‘values’ and echoes the separation of legitimate measures and reflection of risk preferences and

tastes and the need for communicating such separation. Introducing the concept of negotiability allows us to understand further how it affects the treatment of NTMs.

Thus negotiability and inclusion are conditioned on the partner. When agents perceive non-tariff measures to be ‘regulatory protectionism’, they can highlight the necessity of removal of barriers as well as the normative value of addressing regulatory protectionism. The differences are reflected in the sequencing and prioritisation of measures, where strategically agents can frontload the removal of barriers. It is also reflected in the types of bargaining and reciprocity, where requests can be made for more shallow reciprocity. On the other hand, regulatory heterogeneity shape necessity in terms of the gains and the type of interaction, which would result in those gains. This is most evident in the turn to regulatory cooperation discussed in the next section.

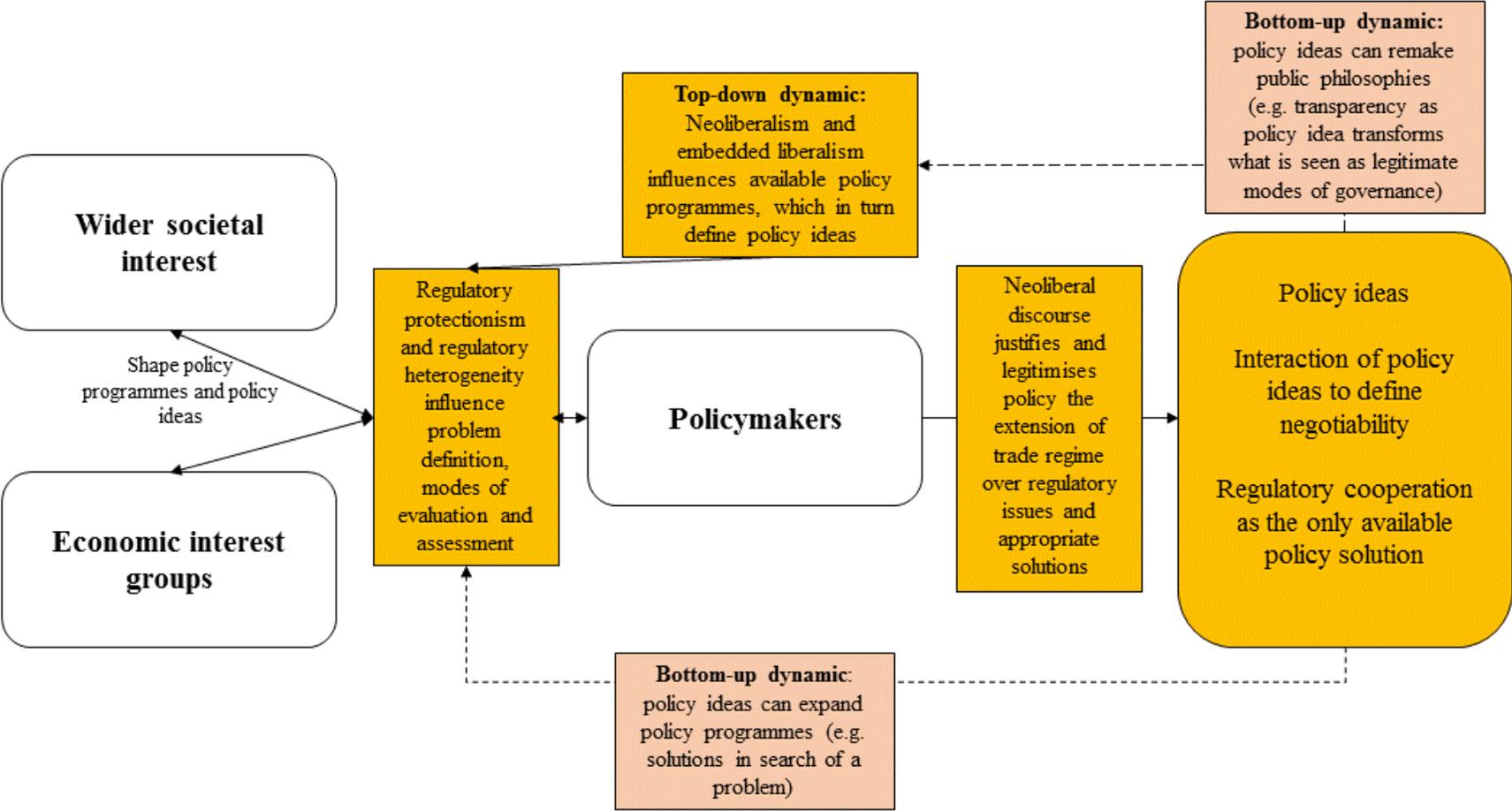
2.7. Summary of theoretical argument: movement from policy solution to problem definition to public philosophy

Due to the combination of these different building blocks, it is worth taking a look at how these elements relate to each other in responding to the research question: What explains the evolution of the treatment of non-tariff measures in European Union trade policy?

The theoretical argument we set out has *three building blocks*: (i) public philosophies shape perception of the global economy; (ii) policy programmes shape perception of the link between trade and regulation and the position of non-tariff measures in the liberalisation agenda; (iii) policy ideas, which are deemed successful, lead to transformation of both policy programmes and public philosophy. Moreover, we integrate these steps into our conceptualisation of negotiability. To return to the figure presented at the beginning of the chapter, we reintroduce it here with the ideas we conceptualised. The dark orange boxes identify where we have made the conceptualisation more precise, while the light pink boxes identify dynamics, which we can only grasp from the empirical observations.

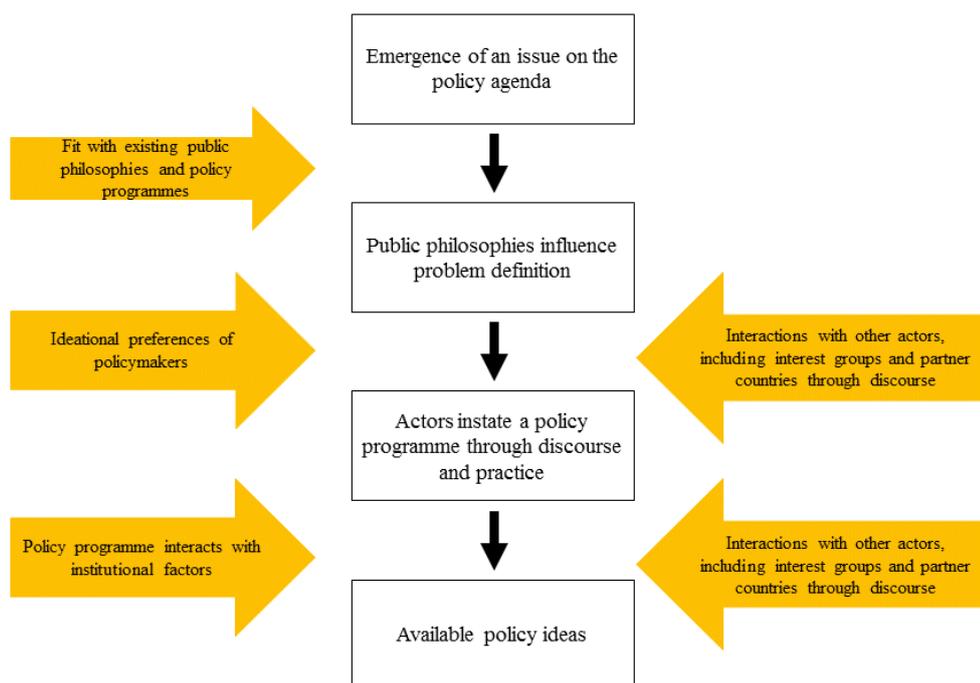
Alternatively, we can also present the theoretical framework from the emergence of an issue to the setting out of available policy solutions in a sequential fashion in Figure 3.

Figure 2. Interaction of different levels of ideas – non-sequential



Source: Own elaboration.

Figure 3. Interaction of different levels of ideas – sequential representation



Source: Own elaboration.

The first component deals with the emergence of a new issue on the agenda. According to the literature, the alignment of the new issue with existing underlying philosophy will determine the treatment. Due to the existence of institutional rules at the international level, when an issue emerges its treatment is conditioned on the existing levels of legalisation and existing modes of treatment. In the case of trade policy, the expansion of the agenda from tariff to non-tariff issues is to be determined by the processes at the international level and on the domestic level. In the European Union, we can expect that the emergence of a new issue will closely follow the processes of European integration and the consensus achieved internally. However, the emergence of non-tariff measures brings in uncertainty about modes of categorisation and evaluation, and fit with existing norms. Since these dynamics do not exist outside agents, it is vital how agents interpret the global economy. Empirically, coordinative discourse shows the fit to existing ideas and what agents deem to be necessary actions. We can observe this empirically by tracing deliberative processes over non-tariff measures. At the same time, agents have discretion on the strategies to address a new area.

The second component of the argument is to understand how policy programmes and a range of problem definitions are developed. Policy programmes reflect the ideational preferences of policymakers but also the interactions with other actors, including interest groups and partner countries. The second step allows us to capture the formulation of new issues within the broader context through the communicative and coordinative discourse. In the case of non-tariff measures, we hypothesise that ideational change does not only occur because there is a crisis (exogenous shock) but when the policy programmes are expanded and adjusted to fit the available policy ideas, in this case, free trade agreements and notably, regulatory cooperation chapters in free trade agreements.

The final component is how policy programmes shape the available policy ideas and transform the underlying public philosophy through processes of legitimation and contestation. The overarching neoliberal public philosophy, through its characteristics, has been invoked in the coordinative and communicative settings and while not replaced, it has changed in the process. We can empirically trace this by looking at the changes in policy programmes and policy ideas.

2.8. Concluding remarks

The framework presented here links closely to the research question, methodology and empirical focus. Drawing on the relevant literature, we constructed a framework which allows us to trace how a change in the understanding of non-tariff measures and the associated ideas, results in a change in their treatment. Due to the massive scope of measures, which fall under the definition of non-tariff measures, this chapter highlighted that from a methodological point of view, keeping them as one group allows us to respond to the first part of the research question – namely what constitutes a barrier to trade and how agents’ understanding influence this definition. We identify two policy programmes: non-tariff measures as regulatory protectionism and regulatory heterogeneity. While the former focuses on the protectionism component of non-tariff barriers, the latter looks at divergence and the regulatory distance and overlap between countries. The next chapter goes deeper into the neoliberal debate, where we also delve into the content of ideas and associated language with each of these categorisations, which will help operationalise the concepts used. The next chapter sets out the research strategy and the empirical expectations for how we can distinguish between regulatory protectionism and heterogeneity.

Chapter 3. Research strategy

This chapter aims to clarify the methodological, empirical and theoretical choices and explain the relevance of the case study and sub-cases selected. The second part delves into the specific methodological steps used to respond to the research question. Finally, we conclude with a reflection on the position of the researcher as interviewer.

3.1. Rationale for the choice of a single case study and justification of the choice of periods

3.1.1. Choice of European Union's trade policy as a single case study

The dissertation is based on a single case study design that involves a temporal analysis of the developments of European Union trade policy vis-à-vis non-tariff measures from 1996 to 2017. Thus the dissertation takes as a case the trade policy of the European Union. In this dissertation, a case study is as ‘an empirical enquiry that investigates a contemporary phenomenon in-depth and within its real-life context, especially when the boundaries between phenomenon and context are not evident’ (Yin, 2009: 14). Particularly relevant here is the last part of Yin’s definition where the inclusion of non-tariff measures and regulatory issues in the negotiations and the agency of actors is both dependent and shapes the existing context within the international trading system. To put this more precisely, while material factors have prompted the move from discussions of tariff only to non-tariff and regulatory issues, agents have both reacted and in the case of the European Union, sped up the process.

Similarly to Cino Pagliarello, who applies this design to a study of the European Union education policy, this dissertation is positioned between an intrinsic and instrumental case study (Cino Pagliarello, 2017). While the first provides an in-depth account of a single event and the explanatory factors associated with it, the latter offers new insight into an event or enable us to revisit an existing generalisation (Cino Pagliarello, 2017; Stake, 2008). Thus looking into EU’s trade policy enables an understanding of non-tariff measures and the transformations in their treatment, as well as from an instrumental point of view – generalizable insights on how ideas function on different levels of analysis and how communicative and coordinative discourses influence policies. The choice of a single case study comes with multiple well-documented reservations, particularly regarding generalizability and robustness of the research design. Concerning the first caveat, the main aim of this dissertation is to show the

hybridisation of ideas, for which we need an extended period (in this case 22 years⁵²) and a careful reconstruction of the international and European context (present in each of the chapters). Beyond the particular case, the insights from the dissertation travel to understanding the interaction between the trade regime with other regimes (foreign policy, security, development, technology) as well as other policy areas. The current dissertation provides insights into how ideas are embedded in the ways policymakers think about trade and regulation and with that carries implications for future trade and investment negotiations at the bilateral and multilateral level. Similarly, regarding the robustness of the research design, it resulted from a trial and error of different designs (see point 3.2.3 below). In this context, an important point that we elaborate on below is the choice of the European Union for in-depth analysis.

Looking at EU's trade policy is warranted due to its high importance to the multilateral trading system as the largest market and trading partner for many of the countries in the world. Its performance and actions matter to the rest of the world and increasingly other countries take an interest in the shape different policies take, also for what has been described as EU's regulatory 'influence', 'capability' and 'power' beyond its borders (Bach and Newman, 2007; Damro, 2012; Young and Peterson, 2006; Young, 2014). The representations of the EU through the 'Brussels Effect' (Bradford, 2015, 2012) and 'regulatory imperialist' (Laidi, 2008) illustrate that the EU is a force foreign companies and in turn foreign governments need to reckon with in order to access EU's 500 million consumers (with a GDP per head of 25,000 euro) and to take part in international trade and access third-country markets.

During its last Trade Policy Review, the EU received 1400 questions by WTO members and 50 delegations intervened in the course of the procedure, seeking clarifications of EU's trade regime. EU trade policy is also interacting with the world trading system through its bilateral agreements and unilateral measures. Also, the EU itself can be seen as a case of 'deepest form of NTM removal among sovereign States' (Carrère and de Melo, 2011, p. 184) while developing a form of 'neo-liberal regulatory model' (Thatcher, 2002, p. 182).

The EU is also an extreme case in the inclusion of regulatory issues in its internal market and its trade agreements (OECD, 1994; Young, 2018). The frozen negotiations

⁵² Moreover, the study of the international dimension starts in the 1970s.

for the Transatlantic Trade and Investment Partnership (TTIP) have been the most notable example, but the Canada Economic Partnership (CETA) and the EU-Japan Economic Partnership Agreement (EPA) also mark significant milestones for the definition, categorisation and negotiability of non-tariff measures. CETA and TTIP, in particular, are mega-regional trade agreements.⁵³ Each of these agreements shows the progression of the thinking of the EU behind the link between trade and regulation and the future of the deep integration agenda and a possible template for other trade agreements. At the same time, the EU is not the only trading partner to be concluding mega-regional and comprehensive agreements with deep elements, and as an extension of the research done here, a comparative analysis of EU's understanding of NTMs needs to be juxtaposed against what has been done by other countries and regions.

The choice of the European Union is also merited because despite the global and European anti-globalisation sentiment, the EU has continued pursuing free trade agreements with deep liberalisation elements and has championed itself (as well as by observers) as the protector of the Liberal International Order. The Economist pointed out that 'As the world sours on trade, the EU sweetens on it' (The Economist, 2017). Similarly, the European Commission announced the modernisation agreement with Mexico stated that '[w]ith this agreement, Mexico joins Canada, Japan and Singapore in the growing list of partners willing to work with the EU in defending open, fair and rules-based trade' (European Commission, 2018b). Even though in such circumstances, it is easy to dismiss discourse as a merely rhetorical and communicative device to tame the fears of critics, this dissertation shows that discourse has a role in shaping what regulatory issues are in the first place and what can be achieved. Once again an avenue for future research is the comparison of the discourse of the EU with that of other developed and developing countries.

Finally, all WTO members are subject to the same disciplines, and by reviewing the interaction of the EU disciplines with the WTO (Chapter 5), one can also draw further reference to how multilateral and national level disciplines on trade and regulation interact. A major pitfall in this strategy is the lack of a comparative element across countries. However, the necessity to conduct a longitudinal study in order to

⁵³ MRAs constitute '... deep integration partnerships between countries and regions with a major share of world trade and foreign direct investment... [going] beyond simply increasing trade links ... aim to improve regulatory compatibility and provide a rules-based framework for ironing out differences in investment and business climates' (Hirst, 2014).

understand the interaction of ideas makes the inclusion of more countries unachievable.

Within the European Union, the dissertation also focuses on the cognitive understandings of the Directorate-General for Trade in the European Commission and the main institutional venues where DG Trade interacts with the Council of Ministers of the EU on non-tariff measures. These are Trade Policy Committee (TPC) and the Market Access Advisory Committees (MAAC) (see Chapter 3 for an overview of the functions of the two). While the in-depth process tracing described below, allows for analysing the interactions between DG Trade and other actors, and analysis this interaction, the focus on DG Trade is justified due to three reasons. Firstly, trade policy is an exclusive competence of the EU. The European Commission has been transferred substantial authority to initiate policy measures and negotiations, to conduct negotiations (under the guidance of the Trade Policy Committee), and implement policies. More importantly, due to its competence in trade policy, DG Trade's communicative and coordinative discourse have 'direct political impact' (Huet and Eliasson, 2018, p. 490). Secondly, the European Commission is also the main actor to interact with direct and indirect lobbying from businesses and civil society, broadly defined, including environmental and social groups, consumer groups, think tanks and academia. They are also producing responses to criticism from civil society and directly engaged in the debate on the shape of EU's trade policy and the intersection between trade and regulation. Finally, the European Commission also interacts with partner countries in trade negotiations and is responsible for assessing the regulatory distance or regulatory overlap. The rationale for the focus on the European Commission is also closely linked to the choice of periodisation of the dissertation, justified in the next section.

3.1.2. Choice of periodisation

While the focus of the dissertation is the European Union, it joins recent moves to step away from treating the EU as *sui generis* and adopt 'conceptual and theoretical tools' from the wider social sciences literature, and in particular International Political Economy (Poletti and De Bièvre, 2014, p. 102). As Poletti and De Bièvre elaborate: 'a number of studies have brought to maturity this process by assuming functional equivalence between trade policymaking system in states and the trade policymaking system of the EU, hence considering the EU just as one case among many to test

generic political science theories' (2014, p. 102). Such an approach is particularly justified in the area of EU trade policy where the EU enjoys power over international trade politics as explained above. Similarly, Siles-Brügge (2014) notes that surprisingly few studies use International Political Economy approaches to look at the developments in EU's trade policy, where often studies tend to overemphasise the role of institutional factors. In order to move away from *sui generis* approaches, Poletti and De Bièvre suggest a useful venue for research to 'come to grips with the role differences in values, norms and culture play in explaining different patterns of trade policymaking and outcomes across political systems' (Poletti and De Bièvre, 2014, p. 103). Thus directly following from their advice is a study of how ideas and discourse have developed across different paths and how EU's trade policy fits within the broader international trading system.

The longitudinal study of EU's trade policy is further divided into three sub-cases. The choice of dividing EU's trade policy into smaller case studies is motivated by the objective to zoom in on the processes, underpinning the evolution of non-tariff measures and the surrounding discourse. The definition of a case study presented earlier allows for a case to divide into smaller cases, where the chain of events is made more precise (Klotz and Prakash, 2008). Further to David Phillips' exploration of the division of time periods in social science research, three features define periodisation:

... that the ordering of history is inevitable to a large extent subjective, though it will often be defended in quasi-objective terms; that the essential purpose of periodisation is to make sense of otherwise unmanageable time spans by identifying unities of some kind; that identifying such coherence in turn depends on the identification of significant events that may be taken to determine change (Phillips, 2002, p. 364).

In line with these suggestions, the time frame of the study covers the period from the Market Access Strategy (MAS) of 1996 to 2017 when CETA entered into force provisionally, a political agreement in principle was reached between EU and Japan on the Economic Partnership Agreement, and negotiations with TTIP were fully frozen.

In line with the theoretical approach defined above and this period is further divided into three different periods: the emergence of the understanding of non-tariff measures (1996-2006); the transformation of the understanding of non-tariff measures within the

Global Financial Crisis and negotiations with Japan (2007-2013); the challenge to the understanding and treatment of non-tariff measures (2013-2017).

It is important to note that the delimitation of the different periods, as stated in the quote above, is subjective and that the boundaries cut across adjacent periods. At the same time the division across periods has been made easier due to the milestones in the developments of the international trading system:

1. GATT/WTO negotiation rounds
2. EU Treaties and associated institutional changes
3. European Commission's Strategies: Market Access Strategy, Global Europe Strategy, Trade, Growth and World Affairs, and Trade for All, where each is associated with a Commissioner
4. Rounds of trade negotiations

We note one caveat. In addition to the significance of the Tokyo Round, the study jumps back to the 1970s since this is pointed out in the literature as for when neoliberal ideas came to be prominent in particular as a result of the crisis of social democracy in the 1970s and 1980s (see the previous chapter). At the same time, archival research points to much earlier points of discussion on the 'negotiability of NTMs'. Therefore, guided by this evidence, we expanded the period to the 1950s through archival research. In the ideational literature, this could be seen as the 'infinite regress' problem or as Béland cites Kingdon (1984, p. 73):

Because of the problem of infinite regress, the ultimate origin of an idea, concern, or proposal cannot be specified. Even if it could be, it would be difficult to determine whether an event at an earlier point in time was more important than an event at a later point. So tracing origins turn out to be futile (Béland, 2016, p. 232).

As Béland notes, however, in ideational research drawing parallels between different historical periods with their respective contexts can be fruitful to understand the content and influence of ideas. Moreover, previous research has shown the usefulness of looking into the development of concepts as well as 'epistemic privilege of certain ideas' within their context (Béland, 2016; Somers and Block, 2005). While events and critical issues as early as the 1950s are included in the research the three periods selected above, represent better the subtle changes in ideational development through a period of 22 years. Distinguishing between the different periods has been difficult,

and there are overlaps in the thinking, but this is what shows us the ideational pathways and the ways through which ideas are important in how we think about the world.

3.1.3. Choice of non-tariff measures and regulatory issues

The field covered by this dissertation is enormous, and multiple approaches can be used to address non-tariff measures. My initial approach focused on a small number of non-tariff measures, using UNCTAD's classification, selected according to the varying degree of European and international legalisation and judicialization and varying degree of European Commission discretion in the selected areas. However, the resulting case studies suffered from three pitfalls: firstly, the existing studies in Economics, impact assessments, and reports often treat NTMs as a group; secondly, the approaches used before, during, and after the negotiations cut across the different non-tariff measures and the same institutional venues tackled these issues; finally, both the communicative and coordinative discourse used by the Commission often does not distinguish between different types of non-tariff measures, where leaving the categorisations vague has provided leeway for a combination of different approaches for their treatment. While the non-division of non-tariff measures and regulatory issues is a pitfall for the methodological robustness of the dissertation, it offers a different view of how actors perceive these concepts. Moreover, the non-division allowed me to trace the commonalities through the two policy programmes: regulatory protectionism and regulatory heterogeneity. We turn to each of the three reasons to keep NTMs as a group below.

From the perspective of existing approaches, the categorisation and measurement of NTMs leave substantial doubts on the spillover effect between different types of measures. Recent CGE models use tariff equivalent to quantify the impact of NTM removal on the impact of an FTA and define the reduction concerning all actionable NTMs (as a proportion of all NTMs), rather than distinguishing across measures. As discussed in Chapter 2, disentangling the effect of one NTM from another is very difficult, which also creates difficulty in negotiating their reduction. For example, the 2009 ECORYS economic analysis of the effects of removal of NTMs between the EU and the US assumes the following:

... we have postulated an ambitious scenario according to which by 2018 around 50 percent of all NTMs and regulatory divergence are addressed. We also examine a limited scenario that assumes a more modest 25 percent of all

NTMs to be addressed by 2018. We analyse (for the two different scenarios) what happens if we remove the NTMs all at the same time (i.e. economy-wide NTM alignment) as well as sector by sector, keeping all other sectors constant (i.e. sector-specific NTM alignment). (Ecorys, 2009, p. xvii)

As we elaborate in Chapter 6 and 7, their concept of actionability, which relies on ‘expert opinions and cross-checks with regulators, legislators and businesses, supported by the business survey’ also looks at the entirety of known barriers for its construction (Ecorys, 2009, p. xviii). Similarly, reports by the European Commission itself sometimes do not distinguish across measures. As stated in the 2011 Trade Barriers Report of the Commission:

The following analysis of such common features may be useful for identifying best ways of addressing the issues, including possibilities for further leverage and for defining an enhanced (and more assertive) removal strategy for the future (European Commission, 2011, p. 11)

Treating non-tariff measures as a continuum of instruments allows us to look at how practice and discourse interact in the face of the uncertainty of their outcome and is informed by the cognitive approaches elaborated earlier.

Secondly, concerning the negotiations dynamics and their treatment on a day-to-day basis, often non-tariff measures and regulatory issues treated together and not divided until the break off into smaller negotiating groups. In the EU’s institutional dynamics, two venues (one within the Council and one within the comitology rules) deal with all non-tariff measures: Trade Policy Committee in full and in its deputy configurations represent the ‘political’ level while the Market Access Advisory Committee represents the ‘technical’ level of discussions on NTMs. Within the texts of agreements, commitments of FTAs versus WTO also vary across the same scale (in different academic studies): FTAs with no provisions on NTMs; FTAs with provisions which do not go much beyond the WTO rules; and FTAs which have provisions, which also go beyond the WTO (“Design of Trade Agreements Database | (DESTA),” n.d.; Melchior, 2018b, 2018c). In discussions with stakeholders, actors see the WTO, preferential trade agreements and unilateral measures as part of the same global trading system and make a decision based on the characteristics of each venue and are often uncertain about the effects of different measures.

Finally, in speeches of different Commissioners, Members of the European Parliament, and the Member States representatives, non-tariff measures are grouped, and only later qualified with specific examples on conformity assessments, labelling,

and food standards etcetera. In line with the theoretical framework, our aim is to show that stakeholders' talk on non-tariff measures, barriers and regulatory measures does not reflect the diversity of issues that negotiations cover, leaving any such divisions within the realm of the 'technical'. Moreover, the contested definition of non-tariff measures was also evident in the interviews. When asked about NTMs, most interviewees readily recognise TBT and SPS measures as the main barriers to feature in this categorisation, in comparison to the other issues tackled in the research, but this does not correspond to existing classifications of NTMs by UNCTAD, discussed in Chapter 2.

Another point can be made here on the distinction between measures affecting trade in goods and services, investment and public procurement, which could be seen as a natural differentiation to simplify the universe of barriers. The review of the existing approaches in Chapters 1 and 2 showed us that separation of goods or services is no longer representative of existing trade dynamics. Even if negotiators have not fully adapted to 'Think GVCs' (Hoekman, 2015) and the concept of Mode 5 services and servicification, these concepts are now fully part of the trade policy discourse. Concerning the scope of the current research, this highlights two existing problems of modes of negotiation: reciprocity and separation of negotiations for manufacturing and services (Lodefalk, 2015). Methodologically, we thus look at non-tariff measures, which impact trade in goods and services.

Furthermore, as Melchior points out 'Trade policy in services is partly trade policy for investment, and so there is a clear overlap between the two areas' (Melchior, 2018b, p. 69). Joint work of OECD in the two areas through the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations are, for example, 'legally binding and promote liberalisation in both areas' (Melchior, 2018b, p. 69). While the dissertation touches upon investment, the absence of a European investment policy puts a natural delimitation of what falls within the competence of the European Commission and thus goes beyond the scope of the dissertation. However, an exciting extension of the work would be to look at the different instruments erected by countries to protect investment as a type of non-tariff measure.

In the case of public procurement, there are an additional set of issues since procurement can be more prone to the inclusion of policy objectives, which can result in non-tariff barriers due to the power exercised by public authorities (Treppe, 2004, p.

236). Moreover, as noted by the OECD: ‘Public procurement is increasingly recognized as a tool for promoting a wide array of socially valuable objectives’ (OECD, 2012). Similarly to TBTs, some of the measures are more easily recognisable as such, but for a lot of them, it is difficult to trace whether they disproportionately affect foreign producers.⁵⁴ At the same time, not too differently to other non-tariff measures, concerning the original categorisations by UNCTAD, measures which impact public procurement can be defined in terms of their market access component and their rule component. The market access has three dimensions: offensive; defensive; and public value based. On the offensive side, the goal is to remove measures, which impede public procurement in foreign markets, thus improving access for exporters. On the defensive side – to make sure that your market is not more open than the partner’s market. However, from an economic point of view opening one’s market to procurement procedures by foreign companies can have a welfare-enhancing effect as well. While initially, the research design planned to look at measures affecting public procurement separately from those affecting goods and services, methodologically the focus on ideas meant that stakeholders often perceive measures in public procurement as part of all existing barriers to access. Such was the case in the negotiations with Japan, which we elaborate on in Chapter 6.

3.1.4. Choice of constructivist approach

Both Chapter 1 and 2 left an important question: why is a constructivist approach best fit to explain the evolution of the treatment of non-tariff measures? Each of the chapters contributes to the response by examining the material conditions and analysing why they are not sufficient to explain the puzzle. However below we outline the ex-ante dimensions of the subject, which make an ideational approach very relevant avenue for further research: reflections on the nature of markets.

Nature of markets

Indeed the central role of the different conceptions of the market for the understanding of neoliberalism across all dimensions is particularly important. Of course, this is not an easy task. As Watson skilfully shows, there are at least three competing concepts of the ‘market’, associated with the market: the market as a descriptive concept

⁵⁴ From the universe of possible non-tariff measures, Trepte identifies those that are likely to appear in governmental purchasing processes and decisions (2014, p.236) such as quantitative restrictions (subject to international rules) and price preferences.

(‘market literally as a marketplace’ in Adam Smith’s *Wealth of Nations*); the market as an analytical concept⁵⁵ (grounded in supply-demand equilibrium where agents make decisions based on cues from price signals); the market as a formalist concept (supply-demand dynamics extended from partial to general equilibrium). As we will see below, these concepts substantially differ from how elites talk about the market.

Studies have emerged to understand the supporting structures, which allow markets to develop and to function. In economic sociology, some name those ‘social structures, social relations, and institutions’ (Fligstein, 2001, p. 4) while others specifically on the subject of regional integration, look at the spaces officials build where regional markets can flourish (Duina, 2007, p. 10). As Duina, in particular, points out Regional Trade Agreements, and this can be well extended to other trade agreements, represent ‘deliberate, explicit attempts to create regional markets in very short periods of time. This amounts to a very different kind of market creation: intentional, faster, programmatic’ (Duina, 2007, p. 11). Hence, the treatment of non-tariff measures through the different venues and in particular via trade agreements reflects the choices of individuals and groups of individuals on how to construct these markets. While neoclassical economics points to an equilibrium position or even a self-equilibrating position, the practice of making trade deals constitutes a series of choices about the scope and content of the market and thus represents existing ideas about the balance between trade and regulation.

For example, in the case of the European Union, the EU itself is the result of deliberate market-building, and often this is used as the template and the achievements in the single market as a benchmark for external action. In 2015, assessing the contribution of its trade agreements to the EU economy, the Commission described its broad agenda ‘of an unprecedented scale’:

To boost the EU’s capacity to benefit from trade and investment, the Commission has developed an ambitious bilateral agenda with significant potential. The trade agenda is indeed of an unprecedented scale. It covers two of the EU’s largest trading partners (the US and Japan) and key emerging country partners alike (including India, several ASEAN countries and Mercosur, notwithstanding the difficulties to take some of these negotiations forward), where there is still untapped potential due to significant remaining barriers to trade and investment. (Directorate-General for Trade, 2015a, p. 6)

⁵⁵ Which we tend to recognise as the core of neoclassical economics.

At the same time, this comes with a clear recognition that the choices for market opening have ‘potentially disruptive impacts’ and characterises structural change as ‘inevitable and part of the process that prepares the EU economy for the future’ (Directorate-General for Trade, 2015a, p. 8). Moreover, the Commission added ‘removing obstacles to adjustment in the internal market and moving resources to sectors where they can be used most effectively is essential to realising the benefits of trade and to creating jobs in Europe’ (Directorate-General for Trade, 2015a, p. 8). The variable geometry of EU’s market building⁵⁶ and the differentiated degrees of integration with neighbourhood countries, other trading blocks, large partners etc. shows a mixture of strategies for creating and sustaining a market.

Another dimension surrounding the nature of the market and market institutions is how we talk about them. In a recent contribution to the debate, Matthew Watson convincingly shows two important things: that the ‘political rhetoric of “the market”’ (here quotation marks are essential) presents “the market” as a ‘thing that thinks and acts for itself’ (Watson, 2017, p. 5); and that this thing is very different from the market concept as present in the theoretical models, where he distinguishing at least three different market concepts as seen above (Watson, 2017, p. 36). What this tells us is highly relevant for the ideational approach presented in this dissertation – agents base decisions on existing models informed by these market concepts (not only) but when they speak about “the market” they are more likely to talk about a thing, which is ‘capable of laying down its own rules of engagement’ (Watson, 2017, p. 5). To quote Watson directly: ‘Market institutions are almost always described in terms of a bodily presence as if market institutions themselves have free will to act upon the broader economic environment, and in turn, to shape everyday experiences in a decisive way’ (Watson, 2017, p. 4). He also argues that such an evocation of “the market” in political speech is a form of justification of a ‘hands-off approach to managing the economy’ (Watson, 2017, p. 36) as well as to ‘externalize responsibility for policy decisions’ (Watson, 2017, p. 13).⁵⁷

⁵⁶ Term used in different contexts, most often to illustrate different levels of ‘opting out’ of EU rules, however, here I use it as the possibility given to some partners to integrate more deeply with the EU (Tassinari, 2006).

⁵⁷ For example, during the Market Access Symposium, the representative of the Confederation of Swedish Enterprises noted that ‘market forces would impose changes to the regulatory environment’ (European Commission, 2005).

Similarly, the definition of value is outsourced to “the market”. Such an observation is not only present in Watson’s work but in much more diverse literature ranging from French convention theory and its followers (Boltanski and Thévenot, 2006; Davies, 2016, 2013) to Economics & studies of capitalism (Mazzucato, 2018). While my work does not delve into the performativity of markets and the narratives agents create, it follows a large group of authors, who see markets and their invocation as social constructions. Since non-tariff measures and their understanding as such depend and are evaluated vis-à-vis the existence of a market, how we understand this concept closely informs the approach taken in the dissertation.

3.2. Research Design

...constructivism is a postfoundationalist style of reasoning which emphasises the mutually constitutive dialectics between the social construction of knowledge and the construction of social reality. By implication, a constructivist methodology should be inductive, interpretive, and historical. ((Pouliot, 2007, p. 359))

The methodology followed in the research is informed by the constructivist-driven theoretical approach sketched previously. The steps, which the research follows, reflect a move away from looking at causality and mechanisms, but at the mutually constitutive character of the agents and structures and the intersubjective context within which these evolve.

In particular, we follow three methodological steps: (i) induction – including interviews with former and current policymakers and stakeholders; (ii) interpretation, namely exploring the discourse and legitimation tactics of policy actors through thematic and discourse analysis; (iii) historicising the context through process tracing (see also Pouliot, 2007). Each of these steps corresponds to a specific analytical task that we outline in the remaining part of this section.

We have argued earlier that to study the hybridisation of trade policy ideas, we need to draw on constructivist perspectives in International Political Economy and to draw on the role of ideas and discourse. Such approach is necessary due to the interplay between domestic decision-making and autonomy and the environment within which policies are developed externally within the context of multilateral, plurilateral and bilateral trade negotiations (Dür, 2008; Kerremans and Orbie, 2013; Sbragia, 2010; Young, 2007). Studying the interaction between trade and regulation requires that the dichotomy between the domestic and international needs to be bridged. The study of

idea development is about processes, and this predetermines that we are more interested in the ‘process rather than outcomes, in context rather than a specific variable, in discovery rather than confirmation’ (Merriam, 1998, p. 19).

The fact that ideas are difficult to study is not new. Ideas are often conditioned by material and institutional factors and difficult to distinguish from those (Beland and Cox, 2010; Saurugger, 2016, 2013). Even more so, decision-makers, élites and the general public rarely think of the idea that drives action at the critical juncture. In preliminary interviews with policymakers, the general comment was that the series of decisions made is set within a broader context, and that is what agents think about, rather than the ideas that have caused them to take certain action. Especially in an area such as trade policy, grand ideas about classical liberalism are not an everyday discussion.⁵⁸

In terms of the research design, looking back to the evolution of NTMs within the WTO and the EU gives us the vantage point of looking back and tracing ideas at the level of public philosophies, policy programmes, and policy ideas. However, it is very likely that stakeholders themselves did not conceive the universe of options or the range of ideas in the way we do. Jacobs frames this differently, highlighting that ‘mechanisms of ideational influence operate within a ‘black box’ of unobservability from the perspective of the historical researcher’ (Jacobs, 2014, p. 41). What we see as a beneficial aspect, he conceives as a broader challenge (Jacobs, 2014, p. 41).

In addressing the challenge of tracing discourse and justification, we combine three interlinked analytical tasks:

⁵⁸ Interview 1, former DG Trade official.

Table 4. Analytical tasks

Analytical task	Aim	Methodology
Use of discourse on non-tariff measures/barriers and regulatory issues.	Trace the use of coordinative and communicative discourse in the understanding of non-tariff measures.	<ul style="list-style-type: none"> • Interviews used to study what things are taken for granted and why things are historically the way they are. • Process tracing through the use of policy documents, minutes of meetings, and speeches to provide context for the existing ideas.
Role of agents in treatment of issues	Define who is involved in different aspect of policy-making.	<ul style="list-style-type: none"> • Interviews used to study the interactions between the Commission and Member States as well as assessing the counterfactual arguments through interviews with external stakeholders. • Process tracing of the role of different actors.
Justification and legitimisation of ideas	Assess how are these ideas legitimised through what justification is given.	<ul style="list-style-type: none"> • Broad level of analysis – within period and beyond the specific period. • Analysis of key strategies, Commissioners’ speeches (from the 1970s to 2015); and other key actors.

Source: Own elaboration.

3.3. Induction, Interpretation and Historicising

3.3.1. Interviews

As outlined in the table on the analytical tasks, to address the role of agents, the empirical work included interviews with EU civil servants, members of the Trade Policy and Trade Defence Instrument Committees and other actors involved in the policymaking process.

The interview method has been described as ‘timeless’ since, despite the new technology, it has essentially remained the same. Semi-structured and open-ended interviews bring ‘sufficient flexibility to accommodate the individual circumstances of each interview, while also providing a basic structure of questions that allow for comparison’ as well as ‘space to update and learn from different interviews’ (Lodge, 2013b, pp. 187–188). The semi-structured format of the interview also provides more

robustness in the responses in that it allows for crosschecking across different interviewees (Lodge, 2013b).

Interviews are essential to reveal the ideas of actors, which ideas are considered and how do they justify specific actions. The interviews are a primary data collection tool since they reflect the understanding of the principal actors (Lodge, 2013b, p. 189). Interviews were carried out in person, whenever possible, or via phone interviews. In reference to Rubin and Rubin, Pouliot cites that the importance of interviews is in that they allow us to ‘find out what others think and know, and avoid dominating your interviewees by imposing your world on theirs’ (Pouliot, 2007, p. 370). Induction or the generation of situated, insider knowledge is the fundamental principle behind interviews.

The interviewees were drawn primarily from the European Commission and the Council of Ministers’ committee formations. These include current and former bureaucrats and political officers from different levels, departments and periods (Head of Unit, Deputy Head of Unit, responsible for particular policy areas and horizontal development of policies; as well as Full and Deputy Members of the Trade Policy Committee). The interviewees include a list of civil servants we have already spoken to or have been introduced and rely on the ‘snowball principle’ through suggestions by other civil servants, administrators as well as other academics (Bruter and Lodge, 2013). Due to the historical coverage of the study, we complete the existing gap by using the database of existing interviews with policy officials and Commissioners, part of the Historical Archives of the European Union, which keeps original recordings and written transcripts, among which the series on the European Commission 1958-1973 and the European Commission 1973-1986.⁵⁹

Moreover, many observers and participants in trade policymaking first in the European Communities and then the European Union acknowledge and discuss the persistent differences in Member States ideas about trade policy (Baldwin, 2006; Bollen et al., 2016; Hine, 1985; Johnson, 1998; Reiter, 2012). Traditionally the division in Community trade policy reflected in the Trade Policy Committee has been described as divided into two ‘camps’ or positioned on a continuum between liberalisation and

⁵⁹ More information on the database is available here: http://archives.eui.eu/en/oral_history/. The oral history database holds 595 interviews across: Voices on Europe, the European Commission 1958-1973, the European Commission 1973-1986, Europe in Space, EUI Interviews, and Jean Monnet – Statesman of Interdependence.

protectionism.⁶⁰ A more detailed look, however, shows a wide range of ideas within these countries conditioned on the range of socio-cultural and economic context. More importantly, non-tariff measures and regulatory issues challenge what Bollen calls the ‘usual heuristics (North versus South, unitary state preferences, the dominance of material interests and instrumental rationality)’ and allow us to look into how member states interact and how does this matter for EU trade policy (Bollen, 2018). To reveal the possibility for MS agency, we undertake a series of interviews with representatives in the different Council formations.

We also conducted interviews with other EU officials within the European Parliament and representatives of different business associations and civil society groups in Brussels, including consumer representatives and NGOs. Interviews with these diverse stakeholders focused on gaining an external perspective, in particular, a broader, longer-term and critical perspective. They were important in validating the information provided by the stakeholders involved directly in the policymaking process and assessing whether the discourse by the European Commission has been contested.

Combining the interviews with the extensive review of documents by the European institutions and agencies allows for further triangulation and for avoiding overreliance on personal stories, as well as understanding the intersubjective context. Lodge usefully puts this as ‘recall bias’ where the ‘past will be glorified, damned, downplayed, or not recalled’ (Bruter and Lodge, 2013). He also points out that for the research design, which focuses on the ‘perception of change’ rather than hard reality, such recall bias is less problematic. Thus interviews combine two components: they are tailored to reflect the particular interviewee and the context, and they also serve to ‘update, strengthen, or check information’ from the literature reviewed and from other interviews. *Appendix 2* and *3* show the interview guides used and the summary of anonymised interviews.

⁶⁰ In a European Union of six countries, the Treaty of Rome represented the balance between the two dominant Member States: Germany and its progress towards open markets and France and its preservation of agricultural support. The stories goes that in a Community of nine, ‘Germany, the Netherlands and Denmark are inclined to take a more liberal stance on Community trade issues than France, Italy and the UK, who have more frequently tended to adopt a protectionist approach’. Famously, Matthew Baldwin has summed this up as ‘what do the Germans think is often the key question in the 133 Committee or Council’. The division of the Council along two groups with a ‘number of swing states’ has also recently been seen as shifting towards the liberal position with a change in the Spanish position. (Baldwin, 2006, p. 93; Bollen et al., 2016, p. 290; Hine, 1985, p. 54; Johnson, 1998).

3.3.2. Thematic analysis

The thematic analysis used in this research can be described as the ‘hybrid process’ (Fereday and Muir-Cochrane, 2006) since it combines both a data-driven bottom-up approach (coding of the interviews) and the initial development of coding categories or template of codes, based on the existing academic literature and the initial theoretical framework.

Using the existing research reviewed earlier, we identify four global themes, which would allow me to trace the influence of ideas: actors’ interactions, the parallelism between internal and external context, formulation of justification, and process. Each of these large themes was further divided to capture both the constructivist perspective, adopted in the research but also alternative explanations in the literature:

- a. Actors’ interaction: Commission entrepreneurship /activism; Member State control; lobbying by powerful business actors; relevance of the partner country; autonomy; delegation
- b. International-domestic: WTO rules as ‘straitjackets’, including key GATT/WTO principles: ‘necessity’; ‘reciprocity’; ‘fairness’; not compromising the internal market (‘openness’); macroeconomic environment (‘growth’ and type of growth (faster / slower); ‘financial crisis’; ‘economic crisis’; ‘effects of crisis’; exogenous factors;
- c. Justification: justification based on public value; justifications based on economic value; justifications based on legalistic principles; modes of evaluation; assessment.
- d. Process: processes referring to categorisation; systematisation; definition; negotiation; contestation.

Additionally, we were aware to be looking for mentions of motives/rationale for taking on specific actions, mentions of ideal types, those things that are taken for granted and can seem like common sense.

Using existing theories or prior research, we identified some of the main concepts, which link to non-tariff measures and regulatory issues as described above. Then we proceeded with a two-step coding of the interviews with a unit of analysis linked to sentences and where relevant extended to passages. All units that did not fit in the existing categories were coded as a new separate code, further to the process proposed

by Hsieh & Shannon (2005). The interviews were transcribed and entered into the QSR NVivo data management software which put the beginning of the process of data coding. Before coding, the interview scripts were entered into a second software, AntConc, freeware corpus analysis toolkit for concordance and text analysis. It was predominantly used to assess the total words in the interview corpus, to identify most commonly used words and to see the concordance of the use of some of the key terms. However, it is not suitable for coding, so the process was continued in NVivo.

3.3.3. Discourse analysis

Why is the study of discourse necessary? To quote Pouliot's citation of Ricoeur, 'to interpret the meaning of a proverb, one has to put it in the wider context of a culture, a language, and a set of related practices'. Discourse analysis provides a way to understand the justification and legitimation of the ideas promoted by the key agents in social interactions. The in-depth analysis of text also allows researchers to 'unfold resilient patterns' of discourse and to 'unmask the exclusion of any possible alternative' (Carta, 2014). In my research, the text itself is not the object of study but a 'vehicle for understanding social, political, and cultural phenomena' (Dunn and Neumann, 2016, p.2). Expanding further, according to Bartleson (1995, p.71):

Discourses are 'systems of statements for the organization of practice.'... 'but discourse cannot determine action completely. There will always be more than one possible outcome. Importantly, discourse analysis aims at specifying the bandwidth of possible outcomes' (Dunn and Neumann, 2016, p.4).

In an ideal world, in addition to the discourse on an EU level, we would also be exploring discourse on the level of individual member states – whether ideas justified and legitimised in different ways and how member states shape the overall discourse vis-à-vis non-tariff measures and regulatory issues. These 28 studies in 24 languages would involve resources going beyond this project. To partially capture member states' understanding, we undertake the interviews outlined above. Without focusing on particular measures, we trace the changes/ continuities / subtle alterations in the discourse of EU Commissioners and key trade policy actors.

To assess how actors justify certain ideas, we look at two questions: how are trade policies and trade policy actions legitimised; what is defined as legitimate and illegitimate and who is the one to say what is legitimate. Based on the debate surrounding neoliberalism outlined in Chapter 3, the starting proposition was that policy papers, strategies and speeches invoke discourse associated with 'neoliberal'

ideas as justification and legitimation. We extended this to regulation where the ‘neoliberal’ state has been active in the development of new markets and at the same time changing the conception of the trade-regulation nexus from regulatory protectionism to regulatory heterogeneity.

In entering the field of discourse analysis, as referred before my aim was to grasp how certain discourses make it possible for conceptions to exist. Three steps to discourse analysis were followed (Dunn and Neumann, 2016):

1. Find the limits of certain discourse, e.g. competitiveness; regulatory liberalisation; managing integrating markets; legitimacy – approximate the limits of the discourse from the inside; where the actors think it is? How do actors speak about neoliberal ideas and manifestations of such ideas?
2. Find different representations and markers of discourse;
3. Find how these representations change/ continue; map the terrain on which political conditions happen.

In practical terms, steps of discourse analysis employed closely resembles previous such efforts by De Ville and Orbie (2014), Siles-Brügge (2014, 2013) and Morin and Carta (2014), representing a variant of Fairclough’s Critical Discourse Analysis (Fairclough, 2013) in order to allow for a broader set of speeches and documentation. We first look at the discourse of former and current Commissioners, DG Trade officials and EU Chief Negotiations, European Parliament and European Council. *Appendix 1* provides a list for all documents used for the thematic and discourse analysis.

3.3.4. Process tracing from a constructivist perspective

Even though process tracing has been sometimes seen as challenging to unite with a constructivist perspective (Checkel and Bennett, 2012), it could be instrumental in providing the longer term historical context of the meaning created through agents and interactions. For process tracing to ‘work’ with a constructivist perspective, one has to look at the process less in terms of the causality, rather than as ‘constitutive mechanism’; and that mechanisms are ‘heuristic devices’ (Pouliot, 2007). An amended interpretive approach to process tracing will focus less on the mechanisms per se and more on the ‘intersubjective context makes such a social fact possible’ (Pouliot, 2007, p. 373).

As Pouliot describes when talking about a possible constructivist methodology, ‘the dialectical constitution of knowledge and reality calls for a process-centred approach’ (Pouliot, 2007, p. 364) and ‘process and sequence matter because social life is fundamentally temporal’ (Pouliot, 2007, p. 367). This is also reiterated by Vennesson, who highlights that the process one traces, does not have to be necessarily causal but ‘it can be constitutive as well – that is, accounting for the property of the phenomenon by reference to its structures and allowing the researcher to explain its conditions of possibility’ (Vennesson, 2008, p. 234). Previous studies of norms use the reasons agents give for their action as a central aspect of empirical investigation (Vennesson, 2008).

To return to the different steps presented above, process tracing in a constructivist-driven framework can tell us how agents conceive different solutions and how they explain why certain actions are appropriate and legitimate in a temporal setting. We provide a sort of narrative of the evolution of trade-related aspects, where we cast the net broadly in terms of temporal and actor focus to avoid the ‘story-telling’ of one perspective. To address this, we draw on the interviews and the broader discourse (Flyvbjerg, 2006). Such type of process tracing to an extent links to ‘anticipated’ processes since it focuses on the ‘considerations that actors make before coming to a decision and committing a specific action’ (Rohlfing, 2013, p. 34).

Within the periods selected, we use process tracing to follow the strategy applied by the Commission to position itself given the divergence of ideas and to prioritise between these ideas. Looking at the prioritisation of ideas makes a direct link to the work done by Orbie and De Ville on the neoliberal ideas and their persistence at the time of crisis and surprising non-return of protectionism. As seen earlier, the literature on EU trade policy essentially takes the ideas as given and does not trace how they have come into existence. The methodological approach here directly links to the conceptual framework defined. We look at how actors construct specific ideas and then act on them in practice as well as how they speak about them to constitute them in a specific way.

3.4. Operationalisation and observable implications

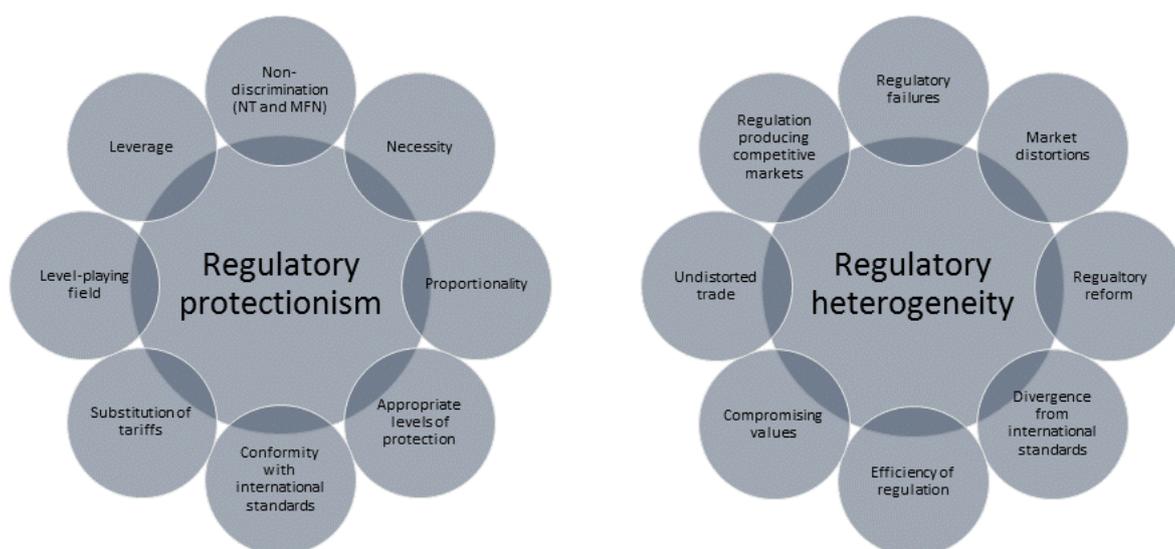
Since non-tariff measures can be used for different purposes and with different justification, the way that they feature in the communicative and coordinative

discourse provides a way to understand how actors perceive them. Below we set out how we expect to see the differences between the two policy programmes identified.

While regulatory protectionism, emerged within the ‘embedded liberalism’ public philosophy it has also been made consistent with free trade in the perception that ‘responding to protectionism is not protectionism’ (Interview 14, TPC Member, 2016). The coordinative and communicative discourse is predominated by a legal/legalistic framing. The normative component is that measures are not fair in line with international rules and principles. With the move to regulatory heterogeneity, treatment of non-tariff measures is subordinated to the conception of markets and their efficiency. It also encompasses discourse surrounding measures, which obstruct markets particularly due to the failure of regulators. The latter has a different normative component, which is associated with regulatory reform and regulating in a way, which does not have unintended consequences for trade.

To operationalise the two categories, the content of ideas, and the influence of these ideas, we provide a summary of key terms associated with each in *Figure 4*. We follow with a discussion of how the partner dimension is reflected in each of these understandings.

Figure 4. Key terms: regulatory protectionism and heterogeneity



Source: Own elaboration.

Regulatory protectionism & the partner dimension

The lack of transparency of non-tariff measures and their understanding as regulatory protectionism has brought a focus on a legal/legalistic discourse. The notion of legalism, defined by Burley & Mattli (1993, p.45) and echoed in Mortensen's study of the framing activities of the WTO, conveys the importance of process over the outcome (Mortensen, 2012, p. 81). A legalistic framing places importance on the legal discourse justifying what is valid and legitimate within the scope of the WTO agreements, but also what types of justifications could be used. As Mortensen reminds us the GATT/WTO structures do not allow member states to use framings as 'levelling the playing field' and 'promoting commercial interests' as legitimate justifications for action but rather they urge governments to justify their action based on technical and legal principles. Regardless of this, an understanding of regulatory protectionism often brings about targeting the partner country for 'lack of level-playing field', lack of reciprocity, and being unfair.

The disciplines of the WTO law, which pertain to domestic regulation and domestic regulatory autonomy can be found in the SPS, TBT, GATT, GATS, and TRIPs Agreements. These disciplines can be divided into a number of categories such as:

... non-discrimination (national treatment and most-favoured-nation); necessity and proportionality tests; appropriate level of protection/scientific basis; harmonization or conformity with international standards; (mutual) recognition and equivalence; internal consistency; permission for precautionary action; balancing; product/process issues and the territorial-extraterritorial divide (Marceau and Trachtman, 2014, p. 357)

As Gilpin puts it 'the Most-Favored-Nation principle, non-discrimination, and unconditional reciprocity provide as close to an objective basis of judging the legitimacy of economic behaviour as may be possible; they place a constraint on arbitrary actions' (Gilpin and Gilpin, 1987, p. 405).

Concerning how this influences the treatment of non-tariff measures within the EU, we expect to see this through two channels: firstly the degree of international legalisation sets constraints to policy actors, depending on the agreement within which the measure falls (e.g. SPS, TBT, GATT, GATS, TRIPs rules). Secondly, the progress made within the WTO in creating a shared understanding of what legitimate has implications on the design of policies by member states. The European Commission can evoke such discourse to highlight the illegitimacy of those barriers that do not

conform to GATT/WTO rules and to reinstate the importance of international standards as a common reference framework.

Regulatory heterogeneity

Regulatory heterogeneity or divergence focuses on the differences in the outcomes rather than the process of producing regulations, and it carries a reflection on the regulatory gap between countries. Discourse associated with regulatory heterogeneity mobilises a discourse involving the efficiency of markets and regulators and has a normative component in the way it can target regulatory reform in countries that do things differently.

The efficiency and market discourse has found its way in the literature on trade policy and also the resilience of neoliberal modes of interaction in policymaking within states and international organisations (Davies, 2016, 2013; Lang, 2011a). This is what Lang calls ‘formal-technical governance’ associated with a process where:

... the trade regime began to turn more rigorously to technical bodies of knowledge – mainly, though not exclusively, economic styles of policy analysis – to determine whether a particular regulatory measure was legitimate, for example, because it was necessary for the efficient functioning of markets, or an optimal solution to a market failure. (Lang, 2011a, p. 7)

Similarly to Lang (2011) and De Ville and Siles-Brügge (2018), one should be cautious not to overstate the centrality of classical liberal thought in the trade regime due to the ‘the multiple and often conflicting ideological traditions that shape the trade regime over its history’, particularly diluted when we look at trade and regulation together (Lang, 2011a, p. 4). At the same time, the free trade discourse has stretched to target much beyond tariffs, quotas and subsidies to targeting ‘undistorted trade’; ‘optimal regulation’; ‘regulation producing competitive markets’.

The treatment of regulatory issues in trade agreements and the discretion of policy agents will depend on the degree, to which certain measures are perceived as trade-obstructing, market-segmenting and market-distorting. Regarding the existing approaches to their treatment, we expect measures that are perceived to have a direct impact on trade flows often find their way in horizontal chapters in PTAs to enforce disciplines across the board. The extent, to which an area is trade-related, has been a subject of contestation in the WTO at the first instance and then in numerous trade agreements. The continuous expansion of trade ‘ands’ and trade+ disciplines has led to the widening of trade agreements to include language from human rights clauses to

corruption and regulatory cooperation in specific sectors. The widening and deepening of FTAs, particularly in the EU has been the result of contestation from different societal actors, including non-governmental organisations, consumers, and the European Parliament, among others. It has also led to a crisis about the scope of trade agreements and what trade policy should be about in the first place. While many academics and observers say that regulatory issues necessitate a different kind of understanding of the context, problems, and solutions (Laursen and Roederer-Rynning, 2017), the treatment and negotiation of regulatory issues have been firmly attached to the understanding of the possibility for tariff concessions. The inherent inseparability of tariff and non-tariff negotiations has become an essential part of the EU trade policy discourse. However, in this context, the framing of issues with reference to economic value allows the use of specific instruments including the use of protectionism against those that do not allow access to more significant economic benefits. This form of framing lets agents talk about the magnitude of harm done and build quantitative evidence to support their claims.

Regulatory protectionism and heterogeneity conditioned on the partner country?

One pitfall of the distinction provided above is that it does not specify how the partner country conditions the differences in discourse. The treatment of NTMs is conditioned upon the perceived importance of the partner country and the specific characteristics of the country (not too distantly this links to the relational dimension of market power). Given the Global Europe Communication and the strategy set by the European Commission, simply put, is that partners with large markets and many barriers to EU exports should be targeted for an FTA and a coherent approach towards the removal of barriers. From first look, the Global Europe Strategy and its commitment to free trade are consistent with both regulatory protectionism and regulatory heterogeneity.

From the discussion of non-tariff measures above, regulatory issues (except TDI) are supposed to be applied in a non-discriminatory manner to everyone. At the same time the approach of dealing with non-tariff measures has substantially differed across partner countries (in terms depth of coverage, breadth of the issues tackled, specific sectors included, annexes provided). It seems that the move to negotiating non-tariff measures has created a space for negotiators to use more rather than less discretion, despite a limited policy space.

But the partner country also features in a different way than the one described by these approaches, namely through the country characteristics that have been revealed in dealing with the partner. Hence, the partner country dimension is endogenous to the treatment of NTMs. Thus historical relations with countries heavily weight on judging the importance of regulatory issues, the problem of regulatory divergence, and the option of considering regulatory cooperation. Regulatory cooperation, in particular, is the most-sought prize and not given as an option to all partner countries. The framing that is invoked to make sure that benefits are extended only to some countries and not to others are those of ‘trust’ and ‘fair/ not fair’. The Commission is likely to speak about a trusted partner versus those that play ‘unfairly’ and do not follow the ‘rules’.

Fairness and trust are derived from previous rounds of negotiations with the specific partner as well as how they act during the process of pre-negotiation and negotiation. Finally, dynamics across partners also carries weight in agency discretion and mode of treatment of NTMs (Meunier and Morin, 2015). Previous negotiations with one partner can provide both practical templates and practice, which can both speed up the process of negotiations with another partner or stifle ‘creativity and out-of-the-box’ thinking (Meunier and Morin, 2015). Thus past practices create both ‘negotiating habits’ and frame ‘negotiators’ mindsets’ (Meunier and Morin, 2015). In practice, the same experts follow multiple files and negotiations at the same time, and the EU chief negotiators can be involved in several agreements simultaneously. Some linkages between the negotiations can be more explicit – in the case of South Korea and Japan, for example, pressure from the Japanese governments contributed to the decision of the European Commission to open negotiations.

While level-playing field, fairness and leverage most often feature about regulatory protectionism, regulatory heterogeneity is associated with trust and values. For example, the Commission often refers to public value and more vaguely ‘values’ as a reference point for justified action. The recent Communications of the European Commission speak about not ‘compromising our values’, but they are rarely defined (see Trade for All (2015)). Often these values are put in opposition to what ‘interests’ as clear in this part of the Communication: ‘The third pillar of the strategy is about ensuring EU trade policy is not just about interests but also values (ibid at p.5). Reference to values includes regard to EU’s social model, sustainable development, human rights, tax evasion, consumer protection, and responsible and fair trade.

Invoking values means that the EU is not supposed to ‘negotiate’ or horse-trade commitments, which in turn moves to focus on establishing linkages, balances priorities, and finds the most appropriate ways for cooperation in the regulatory agenda. The invocation of public value brings Commission officials to promote an image of ‘regulatory superiority’ (Buonnano, 2017). The redefinition of the trade regime to trade and regulation thus pushed the ideational consensus on regulatory heterogeneity as the main reason for lack of a level-playing, conflating aspects of regulatory protectionism and heterogeneity.

3.5. Robustness of the research design

This chapter already addressed some of the pitfalls of the research: focusing on the European Union’s trade policy, non-division of non-tariff measures and regulatory issues, and periodisation. It also proposed areas of further research, such as going on the sub-European level and engaging more with third country actors and regulators. At the same time, the research design allows us to tackle the puzzle and provides scope for testable hypothesis and further research (see Conclusions).

The seminal study by Lincoln and Guba (1985) provides us with a set of criteria for ensuring robust results with interpretative research work: credibility, transferability, dependability and confirmability. We provide some thoughts on each of the criteria and expand on the achievement of these goals in the Conclusions. *Vis-à-vis* the criteria of credibility – referring to the ‘adequate representation of the construction of the social world under study’ – my approach to improving the credibility of the research results is to first, not limit myself to the specific studies in EU Area Studies, but address the broader literature on international political dynamics and regimes. Secondly, we undertake external interviews to the main groups of study (DG Trade and the member states in the TPC and MAAC) to complement the discussions and understand the rationale for action as understood from outside. Finally, we also undertook triangulation through the use of documents, where we followed up on statements about facts from the interviews in the texts of other organisations such as OECD and WTO. Moreover, as much as possible, and at the price of succinctness, we have provided the interviewees’ direct reflections, conveyed in their words, to improve the credibility of the statements made (Fereday and Muir-Cochrane, 2006; Patton, 2002).

The second criterion of transferability does not go as far as generalisability but refers to the degree to which the working hypothesis and expectations can be applied to another context. The interaction between the trade and other regimes (in my case regulation more broadly) can be extended to other regimes such as trade and foreign policy, development, human rights, labour, digital. These are all areas with which the trade regime interacts and especially in the sphere of digital rules where it will interact more. As we explore further in Chapter 8, the process of global economic integration has not led to homogeneity across countries, but the interaction of different understandings of the interaction between trade and regulation. While this dissertation focuses on the European Union, it is important to extend the approach to other countries and assess the ‘regulatory distance’ regarding the balance between trade and regulation in different areas. An extension is the comparison of different institutional structures, within which ideas are embedded. What is more, the ‘boundaries of acceptable domestic’ regulation is relevant in many other areas of study, including international trade law and the approach can travel beyond International Political Economy. Finally, the methodological approach outlined is important for studying the processes that agents in international organisations undertake (similarly to Jens Mortensen’s study of Seeing like the WTO (2012)) as well as in studying other areas of policymaking.

The third criteria, which Lincoln and Guba, but also other authors suggest, is that of internal coherence or dependability or the coherence in setting out the coding framework and implementing it. As discussed earlier, the distinction between regulatory protectionism and regulatory heterogeneity is not always easy to grasp, so this necessitated looking into the broader context within which terms about each of these understanding can be grouped. Dependability derives from the combination of bottom-up collection and coding of data and top-down identification of themes through the literature review. It is also done through a double-coding process and constant reference back to the existing literature.

Finally, confirmability of qualitative research denotes the extent to which the characteristics of my data can be confirmed by others, reviewing my results. There are two aspects to ensuring this: firstly, we have carefully recorded all sources of speeches, archival locations, and access to documents entries used. Secondly, this would be further ensured post-viva when we will upload a database and copies of all the

documents collected and my coding scheme to an online blog to be used by other researchers. We expand on some of these elements in the final chapter.

3.6. Self-reflection on interviewee-interviewer dynamic

A final caveat is based self-reflection – as someone who has worked at the Directorate-General for Trade as a trainee (2010-2011) and has acted as an external consultant through LSE Consulting I have had the chance to see some of the processes I describe in practice. I have been a researcher and managed four assessments for the European Commission: the Sustainability Impact Assessment of the EU-Japan Economic Partnership Agreement, Ex-ante assessment in support of the negotiations between the EU and Australia and EU and New Zealand, Sustainability Impact Assessment of the modernisation of the EU-Mexico Global Agreement, and Sustainability Impact Assessment of the trade pillar of the EU-Mercosur Association Agreement. The issues reported here focus on the data collected from interviews, document analysis and archival work done after my work at DG Trade but the time spent at the Commission during the negotiations with Korea and after the entry into force of the Lisbon Treaty were very instructive of the everyday dynamics within the institutions.

At the EUJA JEI Annual Lecture Natalie Tocci reflected on the essence of the link between academia and practice. While she described the two as different worlds with its different logics – one which aims to understand and one to resolve issues – she also offered a number of paths, through which academia can build on policymaking practice and observation of everyday processes. Similarly, the interaction with policymakers has highlighted that norms and values do matter and that constructivist ontology can definitely help reflect on some of the existing dynamics. My work at the Directorate has affected by research in two ways – firstly, a clear observation that DG Trade officials are not some ‘crazy free traders’ and that none of them would understand themselves as ‘neoliberal’; secondly, it has affected the data collection in the interviews since the discussions with policymakers were done with someone from the ‘Brussels bubble’, perceived as one who understands how trade policy works. I reflect further on these benefits and challenges in the Conclusions, and offer ways forward for bridging academia and policymaking.

Chapter 4. Trade and regulation in an institutional and historical context

4.1. From theory to practice

Trade policy is like a tank, you cannot completely change its direction, but you can nudge it to slightly shuffle, no major movements possible. (Interview 2, DG Trade Civil Servant, 2016)

The depiction of trade policy as a tank, albeit mostly entertaining, reflects a broad agreement in the academic literature that EU trade policy, in general, is characterised by ‘a liberal aspiration’, which traces the EU integration process (Gstöhl and De Bièvre, 2017, p. 24). The way that trade policy moves or stalls can also be perceived as the result of inertia – it will rest or continue in uniform motion unless challenged by an external force. However, this tendency to look at the continuity in EU’s trade policy hides the subtle changes, which occur within policy programmes and policy ideas, and which in turn can influence public philosophies.

Since ideas do not exist in a vacuum but continuously interact with institutional and material factors, there is a constant adjustment and hybridisation of ideas, where new ideas can be gradually incorporated into the goals and objectives guiding trade policy. This is the result of the effective incorporation of these new policy ideas and policy programmes by the European Commission, but also due to the way the institutional framework balances between the interests of different actors. Understanding what role regulatory issues play in the liberalisation agenda would also allow us to understand how the political economy of trade has changed.

This chapter aims to set out the institutional embeddedness of the ideas guiding trade policy. Institutional factors inform both the level of ambition that the European Commission strives to achieve in relations with third countries but also the regulatory capacity and discretion of the Directorate-General for Trade. The level of ambition, in turn, will pre-set what is negotiable while regulatory capacity, highlights the ability of the Commission to mobilise different actors around policy programmes and policy ideas. This chapter includes what usually is the focus of lawyers: the legal framework within which EU’s Common Commercial Policy (CCP) operates and the competence battles between the Commission and the member states; and that of political scientists:

competition of interests groups and institutional processes, which define the Commission's scope for discretion.⁶¹

On the one hand, the evolution of thinking about NTMs has been a constant process of defining the competence of the European institutions vis-à-vis member states, as well as the specification of new instruments to tackle the challenge of regulatory issues. From this perspective, the Single European Market Programme, the Treaty of Lisbon and Court of Justice of the European Union (CJEU) decisions define the link between the internal market and external liberalisation and the powers of DG Trade and the possibilities for action within this context. Internal liberalisation saw the parallelism between regulatory protectionism and regulatory heterogeneity with the joint solution to manage diversity.

Similarly, the Treaty of Lisbon defines the instruments that DG Trade has, together with member states in the Trade Policy Committee, to pursue trade policy objectives. In addition, a series of strategy documents, which put into practice the overall direction of the Union's Common Commercial Policy, which we trace closely in the following chapters. What is important is that trade policy has to be read against the broader context, within which certain developments have taken place.

On the other hand, the chapter sets out the principal actors, who are involved in EU trade policy, and how they interact within the existing institutional framework (or outside it, when it comes to informal institutional processes). Do agents have the power to mobilise discourse? The main actors in EU trade policy are the EU institutions, business organisations, a variety of societal stakeholders, and third country actors. As outlined in the previous chapter, concerning the EU institutions, we focus on the European Commission's Directorate-General for Trade, the Council committees with responsibility for trade policy, and committees under the Comitology rules. When it comes to businesses and societal actors, their role is explored in how the understanding of 'negotiability' before, during, and after an agreement with a third country is reached, while third country governments are factored in the way EU officials perceive them.

⁶¹ As Gstöhl and De Bièvre aptly summarise 'In the study of EU trade policy, lawyers tend to focus on the competence allocation between the EU and its member states; economists on the economic benefits of trade and their distribution; political scientists on the competition of interest groups and their access to policymakers; and international relations specialists on the role of the EU as a global player. Each of these perspectives has a contribution to make to understanding EU trade policy' (Gstöhl and De Bièvre, 2017, p. 10).

The recent Opinion 2/15 adopted by the Full Court of the European Court of Justice highlighted the importance of the issue of competence and how it changes the thinking about trade policy (Court of Justice of the European Union, 2017). The conclusions stirred a lot of debate within the European Commission and the Brussels bubble on what are the implications for trade policy overall. While some hailed this as a major success due to the clarity on substance, e.g. transport services (Interview 29, European Business Association, 2017), other highlight worries vis-à-vis the procedural and institutional implications, where the European Parliament and national parliaments can hold FTAs hostage with the parallel negotiations on investment agreements. But actors did not have to wait long, since on the 22 May 2018 the Foreign Affairs Council gave the green light to the EU Commission's plans to split investment and free trade agreements in the future, formulating what has been deemed the 'new approach' (Council of the European Union, 2018a). This most recent playoff highlights how the formal competence as set out in the Treaties and various CJEU decisions shape the thinking of trade policy actors and particularly of the European Commission. And while the battle of competences should not be overstated, they provide an essential aspect of the relations between the Commission and member states and the European Parliament.

The Council conclusions also illustrate two aspects, which are the subject of this chapter. Firstly, vis-à-vis instruments, the Council reiterated the EU's commitment to the 'negotiation of ambitious, balanced and mutually beneficial free-trade agreements (FTAs), ensuring a level playing field' thus even at a time of challenge reinstating trade agreements as the key tool (Council of the European Union, 2018b). EU Commission discourse has been instrumental in achieving broad support for free trade agreements even at a time of backlash. This is further complemented by strong language on both the need to 'strengthen the enforcement of commitments undertaken by third countries' and the application of the agreements by EU member states (Council of the European Union, 2018b). The return to the focus on implementation and enforcement is one of the subtle changes in how the Commission perceives trade policy, which though present in the *Market Access Strategy* was given a central place after *Trade for All*. As Chapters 5 to 7 illustrate regulatory issues are about implementation and enforcement, and thus these two components need to be reinforced.

Secondly, vis-à-vis the interaction between actors, the Council restated both its involvement during ‘all the stages of the negotiating process’ as well as ‘the importance of striving to reach consensual decisions’, where this can be seen as a commitment for member states to stand behind whatever is decided in the Council (Council of the European Union, 2018c). As we will see in Chapter 7, such language can be seen as a direct response to criticism towards the Council for backtracking on decisions it has taken under populist pressures or what has been called the “European disease”, or the tendency of Member State representatives to say one thing in Brussels and another to their home country publics’ (European Commission, 2015a, p. 2).

The relevance of this chapter is to highlight that the strategies pursued by the Directorate-General for Trade have been brought about by the limited regulatory capacity of the DG within the institutional-set up, prompting its reliance on a mixture of evolutionary-centred discourse and expansion of the conceptions of trade policy. Whilst the legal framework of the EU has been described as an ‘erratic mixture of decisions of principle, responses to practical necessity and development of case law’ (Johnson, 1998, p. 14), the responses of the Directorate-General for Trade have an important implications for how businesses, government, and stakeholders understand the role of trade policy. While this chapter describes some characteristics, which define the EU as a *sui generis* entity, it highlights how the institutional and legal features define the cognitive and normative frames, which can be applied to other entities regarding the methodology and ideational development.

4.2. Policy programmes and EU trade policy

The Treaties and the development of EU integration highlight two aspects, which shape the world-views of policymakers. Firstly, EU’s trade policy is one of the oldest and most developed areas, creating an imperative to trade and constant evocation of a historical lineage with the goal to continue with the liberalisation of trade in goods, service and investment. The original conception of the CCP was enshrined in Article 113 of the Treaty of Rome, which stated that the CCP:

... shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies. (Article 113(1) Treaty of Rome)

Article 113 did not provide an ‘exhaustive definition’ of the CCP which often brought about discussions on competence, giving a role to the Court of Justice of the EU, which shaped much of the thinking on trade-related issues (Reiter, 2012, p. 445). Article 113 also encompassed two aspects surviving to this day: the process through which the Commission submits proposals to the Council for implementing the CCP and through which the Commission conducts negotiations ‘in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it’ (Article 113(203) and Article 115 Treaty of Rome). Therefore, the formerly known Article 113 Committee, now the Trade Policy Committee (TPC), ‘spans the entire existence of the Community’ and has evolved as the key venue for ‘processes of debate and policy compromise’ in EU trade policy (Johnson, 1998, p. vi). Thus the need for consensus evoked by the Council above with regards to trade confirm the existing practices and modes of cooperation within the Trade Policy Committee.

Initially, the role of trade policy was to promote trade between member states, taking into consideration developments in conditions of competition within the Union and the need to eschew disturbances in the economies of member states (ex Article 27 TEC; para. a & b.). Thus from the Treaty of Rome trade policy was conceived as an instrument to support the internal market and the competitiveness of member states in the world economy. The establishing of the common market, which necessitated the common external tariff, came with a recognition that higher productivity is ‘contradictory’ to ‘maintaining the previous protective measures’ in member states, which in turn go against the rules of the GATT (Spaak, 1956, p. 3). No explicit reference was made to issues that go beyond trade in goods and negotiation of the liberalisation of trade.

At the same time, Council regulations and procedures were in place to ensure that the Commission can act promptly in cases where the expeditious action was necessary to protect member states.⁶² As detailed elsewhere (Hayes, 1993; Hine, 1985), the end of the 1970s were defined by intensive use of quantitative restrictions and voluntary export restraints (VERs) in particular. In this setting, states could request national trade

⁶² For example, Council Regulation (EEC) 1439/74, Official Journal, L159, Brussels, European Commission, 15 June 1974. Council Regulation (EEC) 288/82, Official Journal L35 Brussels, European Commission, 9 February 1982.

barriers against non-EC countries (Article 115 of the Rome Treaty), while the Commission gave final approval, which was mostly a formality. Industries could request protection from their national governments that would, in turn, bring these claims to the EC (Hanson, 1998). National protectionism could also be backed by Article 115 or the ‘escape clause’, where both discretions of governments and the Commission was quite wide, only having to show the ‘existence or threat of economic difficulties’ (Schuknecht, 1991, p. 39). Earlier cases of the CJEU were occupied with assessing the balance between intra-EU liberalisation and external liberalisation.⁶³ Member states also had leeway in maintaining bilateral trade relations with ‘a degree of coordination and some common policies, such as anti-dumping’ (Young and Peterson, 2014, p. 53).

In trade discourse, the historical evolution of the Common Commercial Policy is often evoked to highlight the danger of reversing such a long history. Often the reference to the long history of openness serves as a justification for the critical importance and centrality of liberalisation to the EU project. In the words of Karel De Gucht:

It is fair to say that Europe is at the vanguard in trade liberalisation that goes much beyond what is possible in the WTO framework. (De Gucht, 2010a)

Trade policy was always a core competence of the European Union. Already the Treaty of Rome dedicated an entire chapter to the liberalisation of the international exchange of goods. (De Gucht, 2010b)

After all, what is the Single Market, if not the world's most advanced, most revolutionary experiment in regulatory cooperation? (De Gucht, 2013a)

Furthermore, often this openness is highlighted as a virtue of the European Union and a testament to its uniqueness and championship of free trade in comparison to other countries. The last quote by De Gucht also highlights the association of openness with EU’s achievement in tackling regulatory heterogeneity and a ‘revolutionary’ trial of achieving regulatory cooperation to which we return in Chapter 7.

Part of this guiding principle is to act consistently with both the internal market and WTO rules. Present in the speeches of all Commissioners and all strategies is a commitment to multilateralism where the Commission has taken the role of being ‘Guardian of the Treaties’, part of which mandate is to justify to the outside world EU’s goals and objectives. Similarly, the Commissioner’s statements also underline

⁶³ See Case C-51/75; Case 270/80 and Case 112/80 and the discussion on their importance for EU trade policy in Araujo, *The EU Deep Trade Agenda*.

the objective to reduce barriers at the core of both defending Europe's economic and political interests and EU's overall external policy: 'To make the most of trade, we are working hard to reduce the barriers that hinder it. In fact, the "progressive abolition of restrictions to international trade" is a constitutional objective of the European Union under the Treaty of Lisbon' (De Gucht, 2014).⁶⁴ While trade negotiations and market access are only one aspect of EU's trade policy (for detailed review see (Gstöhl and De Bièvre, 2017)), the trade policy documents since the Market Access Strategy focus predominantly on the 'progressive abolition of restrictions'. The co-existence of regulatory protectionism and regulatory heterogeneity has allowed for multiple instruments to be used to pursue these objectives.

Formal competence is, of course, necessary for the interaction with member states and, since Lisbon, the European Parliament and defines the role of trade policy. The EU's external trade policy as it is defined in the EU's Treaties belongs to the EU's exclusive competences. However, as highlighted earlier, the precise delimitation of competences has been subject to long-lasting debate, reflected in a series of legal and political discussions. The boundaries of the CCP became important on many occasions, one of them being export credit arrangements. The Court's Opinion 1/75 did not leave space for doubt on whether these are community competence or member state prerogative declaring that 'the Community has exclusive power to participate in the understanding on a local cost standard' (Court of Justice of the European Union, 1975). Arguably, more importantly, it maintained that the Council has 'expressly recognized the important role played by export credits in international trade, as a factor of commercial policy' (Court of Justice of the European Union, 1975). Thus it made some early steps in defining what trade policy is by taking a pro-integration stance (Leal-Arcas, 2009).

Issues of competence were also pointed out by the interviewees, as we will see below particularly vis-à-vis the Treaty of Lisbon. One of the interviewees recalled a major

⁶⁴ In the same speech he also adds: 'We have pursued this objective bilaterally with our individual trading partners as well as in wider group negotiations and multilaterally through the World Trade Organisation. Our bilateral agreements go much further than trade agreements have in the past. These treaties no longer just focus on pure tariff elimination. Instead, they cover regulatory areas and extend to topics such as procurement, intellectual property rights, competition and investment. From a legal perspective, one could also say that FTAs enter the realm of "law-making treaties" in a specialised area of international law.'

milestone contributing to issues of competence (France v Japan tape recorders and Poitier), to deal with divergent regulatory aspects.⁶⁵

I worked on negotiations with Japan vis-à-vis their surge in imports in the EU. Japanese were not inclined to move; the biggest problem came with the video tape recorders imports to France – they put a measure that those can be imported only from the Poitier port. Behind the case were different industrial standards by producers but the impact was important. The Commission took over the case from France since the French had no idea how to deal with the consequences. They had not thought about this before imposing the measure, and there was no plan. Also if we wanted to keep the internal market, there was no other way to deal with this.

Our goal was to give EC industry some breathing space and some time to adjust. The Japanese definitely dominated the market. It took about five years to resolve the issues following Poitier. It was more about market penetration and safeguarding European industry. Poitier definitely triggered a process. (Interview 11, Former negotiator, 2016)

The process the interviewee refers to above was aimed at consolidating some of the fragmented policies of the EU, culminating in the Single Market Programme⁶⁶ but it also highlights the reluctance initially of some member states to transfer powers over regulatory issues (Hanson, 1998, pp. 68–71). The Single European Act (1986) provided a ‘leap in the scope of EU trade policymaking’ where the dynamics in the internal market were paralleled with the expansion of the CCP (Holmes, 2006; Reiter, 2012, p. 444). The Single European Market initiative has been seen as a ‘paradigm shift’ both in the external and internal evolution of trade-related issues (Woolcock, 2011, p. 2). As seen in the previous chapter, the SEM has also been deemed as the breakthrough between different member states ideas, namely ‘French dirigisme and rigorous reciprocity in trade negotiations and Anglo-Saxon liberalism’, resulting in ‘a form of EC “Ordnungspolitik”’ (Woolcock, 2011, p. 2). The SEM is often pointed to as the cause for a more united front of member states during the negotiations of the Uruguay Round (Woolcock, 2011; Young and Peterson, 2006).

As has been often acknowledged, the Single European Market was a culmination of efforts the Commission of the European Communities started in the 1980s, assessing how to deal with both regulatory protectionism and regulatory heterogeneity and with specific non-tariff measures between its member states in the internal market

⁶⁵ Since the case is widely known, here we only present the interviewees recollection and assessment of the importance of this issue. See: <https://www.nytimes.com/1983/04/29/business/french-lifting-curb-on-japanese-video-recorders.html>.

⁶⁶ Commission of the European Communities, Completing the Internal Market.

(Commission of the European Communities, 1980)⁶⁷. Important linkages between the internal and external dimensions of EU policies emerged in the thinking of the Commission behind technical barriers to trade in particular. Here we note that of course some of these issues have not been continuously discussed since then, but the thinking of the internal market and external liberalisation shows a lot of parallels. What we want to highlight here is that the process provides both lessons learned and reservations on extending such an approach with negotiations with third countries.

The 1980 programme maintained the broad and diverse character of ‘obstacles to freedom of trade’ and the possibility for the Commission to use the vague legal framework (Article 30) to ‘proceed more efficiently against new non-tariff barriers which hinder free trade within the Community often hidden in or disguised as a variety of rules and regulations’ (Commission of the European Communities, 1980, p. 4). Similarly, one of the main tasks the Commission sets itself is to try to avoid barriers created by provisions of law, regulation or administrative action from arising in the first place dedicating equal time and resources to both. The framework for regulatory issue removal recognised the effect that this has on the evolution of industrial structures where the Commission explained that: ‘[it] has never attempted to stand in the way of a natural process which is the outcome of free competition between the Community companies and will enable them to face their non-community competitors on the most favourable terms’ (Commission of the European Communities, 1980, p. 10). Finally, at the time it made both the elimination of technical barriers and the protection of consumers it's connected aims’. The initiative resulted in a mix of mutual recognition, harmonisation, and equivalence of regulatory outcomes through legal decisions and institutional tools, thus in the internal approach tackling regulatory protectionism and regulatory heterogeneity was done simultaneously. Linking this back to the theoretical framework, this approach within the framework of European integration was focused on the joint aim to eliminate and manage diversity.

At the same time, neither the SEM nor an expanded legal basis thoroughly covered the range of issues that are included in comprehensive trade agreements as well as what others call the ‘external regulatory policy of the EU’ (Vooren et al., 2013). The

⁶⁷ As the Commission explains: this is ‘a general descriptive document which would give the Parliament an overall view of the Commission’s aims in this field, the reasons for the action it has taken, the priorities which it intends to adopt and the instruments which it hopes to use’ (Commission of the European Communities, 1980, p. 1).

European Court of Justice stepped in this debate with its Opinion 1/94 where the Court dismissed the premise that TBT and SPS agreements are outside the scope of Article 113 EC (Court of Justice of the European Union, 1994). ECJ's ruling meant that 'in so far as regulatory measures are directly concerned with trade, in the sense of promoting, facilitating or governing trade, they may be adopted on the basis of the CCP' (Cremona, 2013, p. 163). The conclusions also signified that those agreements, which could lead to substantive harmonisation of standards, cannot be concluded only by now Article 207 and need an additional internal market legal basis.⁶⁸ Notably, the Opinion concluded that GATS and TRIPs Agreements should be jointly concluded by the EC together with member states. Vis-à-vis intellectual property rights, famously the Court declares that if the EC is to be given exclusive competence to:

*... harmonise the protection of intellectual property and, at the same time, to achieve harmonisation at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.*⁶⁹ (Court of Justice of the European Union, 1994, para. 60)

The ECJ thus confirmed that the EC could not attempt to impose certain internationally agreed rules on member states through the back door, but it also referred to the ability of the EC to 'harmonise rules of enforcement within and by the legal order of the member states' (Court of Justice of the European Union, 1994, para. 104; Hilf, 1995, p. 254). This Opinion resonated widely across member states and had long repercussions for the boundaries of trade policy issues since it essentially took the view that the Commission cannot use external negotiations to discipline member states. The Opinion also led to questioning and defining, which measures can be deemed 'directly concerned with trade'.

Thus the Opinion could not preclude from further issues on the delineation of competence since the CCP is 'of an evolutionary nature and always go hand in hand with respective progress relating to the internal market' (Court of Justice of the European Union, 1994, p. 41; Hilf, 1995, p. 250).⁷⁰ This division of competences was also essentially enshrined in the Commission's efforts to extend the coverage of the CCP in the period both before the Maastricht and the Amsterdam Treaties (Leal-Arcas,

⁶⁸ Cremona (2013) provides an example for this with EU-Korea FTA, where alongside CCP, there are legal bases for transport and culture, resulting in a mixed agreement.

⁶⁹ See also para. 57-59.

⁷⁰ Also mentioning the 'open nature of the common commercial policy'.

2009, pp. 173–174; Young and Peterson, 2014, p. 55). It was largely unsuccessful due to persistent opposition first by most member states and then by larger ones (Young and Peterson, 2014, p. 55). These tensions have been described in detail elsewhere, but most importantly the balance of support has shifted in favour of the Commission and ‘communitarization’, culminating in the compromise of the Nice Treaty (Meunier and Nicolaidis, 2006; Young and Peterson, 2014).

In sum, the principal causes for the difficulty in establishing the scope of the CCP include: vague & incomplete formulation of coverage in the Treaty provisions; resistance by member states to yield power to the Commission; failure of consecutive ECJ decisions to clarify scope of the CCP⁷¹; as well as challenge by national and regional parliaments to the process of signature and ratification (Devuyst, 2014). The formal competence of the Commission guides its goals and objectives as well as the thinking about the role of trade policy in the European integration process and how to adjust this towards third countries.

The Treaty of Lisbon⁷² broadened the scope of the CCP, reflecting both the external dynamics and also internal drive for more comprehensive bilateral agreements. The expanded scope is reflected in Art 207:

*... particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.*⁷³

The Article also provides for the use of qualified majority voting (QMV) in the conclusion of agreements, where unanimity in the Council continues to apply for agreements on trade in services, commercial aspects of intellectual property rights, and foreign direct investment that include provisions for the adoption of internal rules. Unanimity is also the rule for the negotiation and conclusion of agreements on trade in cultural and audio-visual services and in the field of social, education and health services.⁷⁴ Finally, the legal base confirms the role of ‘a special committee appointed

⁷¹ E.g. Opinion 1/75; Opinion 1/94;

⁷² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) Official Journal, C 115, 9 May 2008, 2008/C 115/01.

⁷³ Article 207(1), TFEU.

⁷⁴ Article 207(4) a and b, TFEU.

by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it' (Article 207(4), TFEU).

The existing framework allows the Commission to negotiate trade agreements on matters that are not subject to internal regulations as long as this does not 'harmonisation in areas where the Treaty excludes such harmonisation' (Idem). In this context, the earlier-mentioned Opinion 2/15 raised important issues with regards to EU's competence and the powers of the European Union with important implications for future trade agreements.

Since the entry into force of the Treaty of Lisbon, the ordinary legislative procedure (OLP), formerly known as 'co-decision procedure', is the decision-making process also in the area of trade. International negotiations and in particular balance of competences between member states and the Commission are subject to Art 218(5). This Article highlights the difference between EP and Council's involvement in the process of negotiations. Mixed agreements are subject to a slightly different procedure, due to the competence of member states. In these cases, member states are to act according to Common Accord, where no abstentions are possible. The additional difference in case of mixed agreements is the need for ratification by member states' parliaments, in which case the part of the agreement, which falls under EU's exclusive competence, can be provisionally applied.

The modalities of the OLP are set out in Article 294, and it places the Council and the EP on an equal footing. The legislation is proposed by the Commission and then agreed on by the two institutions in an iterative process. The institutions can adopt the legislative acts at first reading, second reading or if no decision is reached through setting up a Conciliation Committee, in which case the Commission acts as a mediator (Article 294(10)). The TFEU also brought about a reform in the 'comitology'⁷⁵ system for the implementation of trade policy.⁷⁶ The EU's trade and investment policy is designed and implemented using two types of legislation: primary legislation (e.g. treaties and other agreements of similar status), and secondary legislation, including

⁷⁵ 'Comitology refers to the set of procedures through which the European Commission exercises the implementing powers conferred on it by the EU legislator, with the assistance of committees of representatives from EU countries.' See <http://eur-lex.europa.eu/summary/glossary/comitology.html>.

⁷⁶See: Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers.

regulations, directives, decisions and recommendations and opinions. Regulations are the only legal act, which is binding and directly applicable to all EU member states and the Common Commercial Policy is primarily implemented through regulations, to ensure the uniformity in application. On the other hand, trade-related regulatory aspects could also be implemented through directives, which first needs MS to transpose them in their local legislative framework.

In the field of trade policy, these changes took place through the Trade Omnibus I⁷⁷ and II⁷⁸ proposals, where ‘the former sought to bring all regulations that previously fell outside the comitology system within the new structure of delegating and implementing acts whereas the latter sought to realign existing legislation under comitology with the new system’ (Adriaensen, 2016, p. 64). In 2012, the Commission adopted a proposal for a Regulation ‘concerning the exercise of the Union's rights for the application and enforcement of international trade rules’, which sets out framework through which the EC can take executive action when the trade interests of the EU are at stake and ensure compliance and fairness in the international trade system, which has become one of the main dimensions of the ‘Trade, Growth, and World Affairs’ (European Commission, 2012a).

While Lisbon has been hailed as an enhancement of EU’s ability to implement comprehensive trade policy, its legal implications, leading to Opinion 2/15 and its practical implications on the Commission-Council relations have been costly. One of the interviewees put it very forcefully when discussing the challenges trade policy is facing:

It's the situation created by the Lisbon Treaty and the thousands of euros that are spent on meetings and discussions that revolve only around procedure and competence – this did not use to be the case before Lisbon. The argumentation of the Commission has led to the last unfortunate treaty – chaos created by Article 207, which the Commission pushed for, so that they are able to negotiate. The Commission uses a legal argument - ‘this is what Lisbon says’

⁷⁷ Applies to 24 regulations, and includes: all trade defence instruments, EU's Generalised System of Preferences, the Economic Partnership Agreement Market Access Regulation, the Trade Barriers Regulation, the Blocking statute responding to legislation with extra-territorial effect, and, regulations implementing safeguard clauses and managing the implementation of bilateral agreements.

⁷⁸ Applies to 10 regulations, and includes: instruments governing textile and steel trade, the Regulation establishing the EU's Generalised System of Preferences, the Economic Partnership Agreement Market Access Regulation, the regulation preventing trade diversion of certain key medicines, some of the regulations managing bilateral agreements and, regulation managing trade sanctions imposed against the United States.

but no one buys this. Lisbon is the 'epitaph' of Europe. (Interview 13, TPC Member, 2016)

While the tensions and imperfections described by interviewees pertain to the definition of the scope of investment provisions (Interview 13, TPC Member, 2016; Interview 14, TPC Member, 2016), it created a stumbling block to the progression of the trade agenda and prompted a hardened language both on the side of the Commission and member states representatives on their counterparts thus the institutional framework allows for one issue of contention to slow consensus in decision-making.

The overarching goal of internationalising regulatory regimes to facilitate trade and trans-border operations, first within the EU and then externally and the matters of competence provide the foundations of the background framework, which guides trade policy actors. These, in turn, shape the available instruments to achieve the objectives tackled in the following section.

4.3. Policy ideas and discretion of the European Commission

The European Commission is most recognised for its executive role in tabling proposals for legislation to be adopted by the co-legislators and proposals for mandates for negotiations. The Commission, following the overall political direction and priorities defined by the European Council, sets the annual objectives and priorities for action and is responsible for the implementation of the EU policies and budget. Since the implementation of the common external tariff. The Commission is also the external representative of the EU in trade negotiations and now has a formal seat as one of the founding members of the World Trade Organisation.⁷⁹

In trade, its role is to help 'develop and implement EU trade and investment policy'.⁸⁰ It is responsible for the implementation of policy with the aim of securing 'prosperity, solidarity and security in Europe and around the globe' in line with the fact that CCP falls under the umbrella of EU's external action (Directorate-General for Trade, 2016a, p. 3). Its stated mission is also to support European citizens and businesses by creating a supportive trade environment. As a component of EU's external relations, the

⁷⁹ For a discussion on the dynamics between MS in setting the external tariff see (Hayes, 1993; Johnson, 1998; Young and Peterson, 2014, p. 52).

⁸⁰ DG Trade website, <http://ec.europa.eu/trade/policy/>, visited 19 January 2016.

Directorate-General for Trade⁸¹ states that policies are also aimed at promoting European principles and values, though the priority is ‘boosting growth and jobs in the EU’ by linking it to ‘new centres of global growth’ (European Commission, 2015b, pp. 13–16).

Box 2 provides a summary of the organisational chart for the Directorate-General for Trade, showing the thematic and geographical divisions, according to which their work is organised. While deliberations with other DGs are done through the Inter-Service Consultation (ISC) process, deliberations within DG Trade and coherence across the actions by different directorates is ensured by Directorates A and G. Directorate G in particular deals with supporting the Directors and Secretary General in delivering the overall trade policy strategy and also ensures coherence with other Union policies through ISCs, with other services, but also within trade policies. As has been described elsewhere different parts of the Directorate-General for Trade can have diverse interests and beliefs based on the issues they focus on (De Bièvre, 2015; Gstöhl and De Bièvre, 2017). While Directorate A also has functions pertaining to internal coordination, a large amount of their work is for communicating with other EU institutions (particularly Council and Parliament) and with external stakeholders. With the expansion of the use of impact assessments, one of the roles of Directorate A is to ensure coherence between the tools and methodologies used across different negotiations.

⁸¹ Prior to the existence of DG Trade in its current shape and form, the responsibility for both bilateral and multilateral trade negotiations was handled by the Directorate-General I for External Relations (RELEX). Throughout the 90s up to 1999 Prodi Commission, RELEX was divided into those sections dealing with trade and those with the broader foreign policy agenda. The internal dynamics also reflected the extension of policy areas, for which DG Trade started developing its competence.

Box 2. Directorates of DG Trade of the European Commission (Oct 2018), led by Director General, Jean-Luc Demarty⁸²

<p style="text-align: center;">Deputy Director General, Helena Konig</p> <p>Dir. A. Resources, information and Policy Coordination</p> <p>Dir. B. Services and investment, Intellectual Property and Public Procurement</p> <p>Dir. C. Asia and Latin America</p> <p>Dir. D. Sustainable Development; Economic Partnership Agreements, Africa-Caribbean and Pacific, Agri-food and fisheries</p> <p style="text-align: center;">Deputy Director General, Sandra Gallina</p> <p>Dir. E. Neighbouring countries, USA & Canada</p> <p>Dir. F. WTO Affairs, Legal affairs and Trade in Goods</p> <p>Dir. G. Trade Strategy and Market Access</p> <p>Dir. H. Trade defence</p>

Source: DG Trade, Organisation chart.

The instruments, which DG Trade has at its disposal outside the multilateral track, include: negotiating bilateral agreements; monitoring, assessment and enforcement of these agreements; market access instruments (e.g. Market Access Database (MADB))⁸³; anti-dumping⁸⁴ and trade defence instruments (TDI)⁸⁵, which it implements through implementing and delegating acts.

Since Global Europe, the European Commission has established a strategy, where bilateral trade agreements form the core of EU's common commercial policy. Whilst Chapter 5 reviews the position of regulatory barriers in-depth, here it is important to note that DG Trade's role became to assess, with which of the countries with most considerable market access potential it could launch negotiations and what depth and breadth of the coverage of the agreements will result in sufficient market opening.

Enhanced cooperation with top trading partners, though undefined regarding scope, also became a vital instrument of the Commission. Regulatory issues became an

⁸² Two Deputy Director Generals support him, each responsible for four Directorates, which can have either a thematic or a geographical focus, covering in total of twenty-nine units.

⁸³ As early as unused 1984, the Commission created the 'New Commercial Policy Instrument' (NCPI) which was to interact with industry in light of market opening measures, however this did not take off as planned.

⁸⁴ Article 115, 1968 Anti-dumping regulation

⁸⁵ DG Trade states that the idea behind TDI is not to 'challenge the comparative advantages of partner countries, but will combat unfair trade practises and contribute to European sustainable growth' (2015, p.29).

important element of delivering an ‘ambitious’ trade agreement, among other things due to the lack of progress on the multilateral level. Thus behind-the-border issues gained prominence in the external EU Strategy with the 2007 Global Europe Communication and follow-up communication.⁸⁶ In line with the Market Access Strategy and the build of a database, the Commission put together a list with the main barriers faced by EU exporters and the ways to address them. The main conclusions at the time were that:

The EU has different instruments at its disposal to overcome trade barriers and promote regulatory convergence. It needs to use all its instruments strategically and to ensure that there is a more integrated external policy agenda, which allows for trade-offs and win-win solutions. The Commission will ensure full exploitation of the potential of regulatory co-operation to anticipate trade challenges and ensure mutually beneficial cooperation at early stages of the legislative process. Beyond market access, regulatory cooperation offers further benefits in areas such as consumer protection, improving environmental standards, improving the evidence base for drawing up legislation and reducing the cost of doing business proposed. (European Commission, 2008a)

An often cited refrain nowadays is that the EU will use its entire toolbox to achieve the removal of barriers. This toolbox goes beyond these instruments since the reference is always made to the broader EU external policies and the use of different venues for addressing key issues, thus highlighting the position of trade policy within the overall framework. On the one hand, as seen in Chapter 1 this has been triggered by process of ‘legal fragmentation’ where countries now are more often than not signatories and parties to different bilateral, plurilateral and multilateral agreements and fora, which have different rules, procedures and purposes. On the other hand, the insistence on the range of tools that the EU can put forward is a reference to the difficulty to deal with regulatory issues, which are not in direct contradiction to WTO rules.

What is more, the assessment that EU’s has not been able to fight barriers in third countries has prompted not only the use of multiple tools and the emergence of regulatory cooperation but also the introduction and reinvigoration of initiatives to enable the Commission to seek better reciprocity and level-playing field and leverage. While my focus is not on public procurement and investment, it is important to note two initiatives outside bilateral trade agreements, which complement market

⁸⁶ ‘Reporting on market access and setting the framework for more effective international regulatory cooperation’ (COM (2008)874).

opening.⁸⁷ These newly proposed instruments are meant to highlight that the EU, while a free-trader, is not naïve and also that the Commission is responding to concerns of member states. As noted above, these instruments highlight the discourses on EU's openness and sometimes even superiority with regards to the rules achieved in the Single Market.

The use and specification of these instruments, however, is not decided solely by the European Commission. Despite some accounts telling the story of the European Commission as the sole negotiator that has gained substantial independence in EU trade policy, member states, MEPs and interest groups remain main actors in defining the scope and substance of policymaking.

4.4. Actors involved in EU's trade policy

Three phases delineate the relationship between the Commission and member states and the other institutions in setting EU's trade policy consensus: agreeing on a mandate and negotiating directives; negotiating externally and internally; as well as the adoption of the agreement (Reiter, 2012). With the move from tariff negotiations to non-tariff issues, there has also been a shift in the discursive and practical focus of trade policymakers on two additional stages: pre-mandate and implementation. It has also meant that member states are more closely involved in the definition and specifications of instruments. The following sub-sections briefly outline the interactions of the Commission with the Council of Ministers, the European Parliament and external stakeholders.

The Council of Ministers formations and deliberations

The Council of the European Union as we know it today is the successor of the Special Council of the European Coal and Steel Community, the Council of the European Economic Community and the Council of the European Atomic Energy Community, created by the Merger Treaty in 1967 (General Secretariat of the Council, 2014).⁸⁸ While the Special Council was set up to exercise control over the High Authority's activities by issuing opinions, the latter two Councils had similar decision-making role to the one the Council holds today. Presently the Council combines these dimensions

⁸⁷ These include the International Procurement Instrument and Regulation establishing a framework to screen foreign direct investment coming into the EU.

⁸⁸ Though formally renamed with the Maastricht Treaty (1993). For a full history of the Council, see: The Council of the European Union – 1952–2012: Sixty years of law- and decision-making.

where its function is fivefold: i. Negotiates and adopts EU laws jointly with the EP via the OLP procedure described earlier; ii. Coordinates policies in the areas where MS retain competence; iii. Advances EU's foreign & security policy; iv. Formally concluding agreements between the EU and third countries, and v. adopting the EU budget.

The Council is supported by the Committee of Permanent Representatives of the Governments of the member states to the European Union (Coreper I and II) and about 150 Council preparatory bodies or working groups.⁸⁹ Coreper II⁹⁰ is the relevant body responsible for the preparation of the Foreign Affairs Council (FAC), formerly the General Affairs Council, meetings. The FAC is 'responsible for the EU's external action, which includes foreign policy, defence and security, trade, development cooperation and humanitarian aid'.⁹¹ When the FAC discusses issues about the CCP, it is not presided as usual by the High Representative of the Union for Foreign Affairs and Security Policy, but by the representative of the member state holding the six-monthly rotating presidency of the Council. The Council formation with Trade ministers has been meetings more regularly since 2010 (Gstöhl and De Bièvre, 2017, p. 50). Before a decision is reached in the Council, most of the preparatory work takes place in the different Council Working Groups, which also means that most of the work can be traced to lower levels in the organisation of the Council, such as the Trade Policy Committee (TPC) and the Working Parties on Trade⁹².

The TPC, formerly Article 113 Committee, often called the 'black box' of trade policymaking, is 'important link in trade policymaking' where the Committee serves two tasks: consult with the Commission on trade policy issues and support the Commission during negotiations with external partners (Hayes, 1993, p. 39; Murphy, 1989). The work of the TPC is organised in a series of regular meetings of the 'Titulaires' or Full members (monthly) and 'Suppléants' or Deputies (almost every week) and more specific sub-groups had been set up in the 1980s-1990s to discuss negotiations in sectors such as textiles and steel, and GSP issues and later still during

⁸⁹ The preparatory bodies can either be permanent such as those set up by the treaties or other legislative acts or created by Coreper on specific relevant issues.

⁹⁰ Coreper is composed of the permanent representatives of member states and chaired by the respective representative of the country holding the presidency.

⁹¹ Foreign Affairs Council configuration (FAC).

⁹² Responsible for implementing legislation as well as the application of trade policy instruments (Gstöhl and De Bièvre, 2017, p. 49).

the Uruguay Round on Services trade and TRIPs matters (Interview 1, Former DG Trade Official, 2016).⁹³ The work of the TPC is characterised by informal contacts by member states and DG Trade as well as other parts of the Commission. Whilst the full members are senior officials often coming directly from member states, deputy members are Brussels-based and often sit across multiple committees. This is illustrated in Table 5, where out of ten interviews with member state representatives in a total of twenty different roles are held, where one of the interviews declared following the discussions in all formations.

Table 5. The multiplicity of roles held by trade officials

Configuration / committee	Roles held by interviews
TPC Full Member	2
TPC Deputy Member	7
TPC Services and Investment	2
TPC STIS (steel, textiles, industrial sectors)	1
Working Party on Trade Questions	2
Market Access Advisory Committee	5
All configurations followed	1
Total number of roles	20
Total number of representatives interviewed	10

Source: Interviews.

In terms of decision-making, the general practice of consensus from the times of six members both at the committee and council level still exists, but there are no records of this since the TPC does not formally vote. Similarly, in the FAC, most trade matters are decided through consensus but under the ‘shadow of qualified majority’ (Gstöhl and De Bièvre, 2017, p. 49). The way in which member states can influence the agenda is mainly through the close cooperation and informal contacts with the Commission, which can be divided into further paths. For example, the Commission uses member states to float ideas about proposals in the making; member states can bring practical problems and in-depth knowledge about country-context; Through the Presidency of

⁹³ Adriaensen (2015) observes that the topics addressed in the two formations of the TPC – political versus specialised issues – also reflects in the duration of the meetings, where meeting of the Full members last half a day and deputies full day. In terms of the current research, this is reflected in the methodology where target interviewees are the deputies in the TPC, who have broader overview on the discussion of both technical and high level issues.

the Committee; Introducing issues during discussions and ‘*tour de table*’; or more indirectly lobbying through industrial groups (Johnson, 1998).

The TPC is further supported by a number of specific committees attached to the TPC/113 Committee - TPC STIS (Steel, Textiles and other Industrial Supplies), TPC Mutual Recognition and TPC Services and Investment (S&I). Their functioning, accountability and role in trade policymaking have remained unclear and more recent evidence points to the phasing out of the former two (Adriaensen, 2016). At the same time, the TPC spin-off on services and investment has increased the number of issues it reviews (Johnson, 1998).

The critical role that both the TPC and the TPC S&I address has been elaborated on in discussions with representatives and observers. While multiple different venues for discussions co-exist, the TPC has remained as the central space for deliberations predominantly on the political but also technical discussions as the following quotes illustrate the TPC as a place for reaching mutual understanding has been essential for the conduct of trade policy:

TPC is still a key forum, where all member states express their positions and where consensus is reached. It does not go in-depth in discussing NTBs. (Interview 16, TPC Member, 2017)

TPC remains very important; since their involvement in the negotiations and responsibilities given to them by COM are very broad. (Interview 17, European Business Association, 2017)

TPC can actually overturn an approach or proposal by the Commission. In the case of the TTIP, Commission did not want to exclude audio-visual sectors a priori but there was unanimity against the Commission. (Interview 5, DG Trade Civil Servant, 2016)

Similarly, the TPC S&I has been hailed as a major platform of discussions on cross-cutting issues and specific negotiations:

TPC S&I very active. Still 28 MS – I especially don’t understand what the Brexiteers are so happy about with the ECJ decision. Even if most of the issues are exclusive competence, you still have all the MS involved and they have to be on the same page. (Interview 29, European Business Association, 2017)

Very lengthy discussions can take part in the TPC and when you talk about technical matters that is the place to go e.g. TPC Services and Investment. As a forum, it works quite well, certain family spirit – rotating presidency, plus MS know that their time will come to ask something from the Commission ... (Interview 4, Former DG Trade Official, 2016)

An important point raised by one of the interviewees also has methodological implications in differentiating the positions of different actors:

... also when you mentioned earlier MS and business separately, most often MS and businesses will be the same thing. Also Permanent Representations and the Capital will be the same thing since it is the official line ... (Interview 18, European Business Association, 2017)

These parts of the discussion with policymakers provide evidence to the importance of the interaction between Commission, Council and businesses to set out the direction of trade policy. While this is studied widely, including with the use of the P-A models, with the move to the inclusion of regulatory issues in trade negotiations, MS and business groups have been shaping policymakers' cognitive and normative understanding through five different channels. Firstly, as seen above this takes place by providing technical expertise on specific barriers and issues through the systemic involvement of MS via Trade Policy Committee of the Council and MS and businesses via the Market Access Advisory Committee (MAAC), emerging with the 1996 Market Access Strategy.⁹⁴ Secondly, with the inclusion of regulatory issues, the burden has been placed on businesses and MS for providing information on the existence of specific barriers and issues which can provide concrete examples to be addressed via Free Trade Agreement negotiations, regulatory dialogues, and other venues. Thirdly, the Commission formulates its strategy through the consultations and deliberation on trade policy issues both the institutional venues (incl. Working Groups on priority issues/countries) but also informally through regular contact between the Commission, MS and business actors. Finally, this also entails deliberations: on categorisation, prioritisation and tackling of non-tariff measures and specific trade concerns; and on strategy, negotiations, and implementation.

Anecdotal evidence also points to strengthening the involvement of businesses in shaping instruments and specification due to the move from tariff negotiations to non-tariff issues. As one of the interviewees describes:

But actually at DG Trade, we cannot track all of the regulations and measures by third countries – with the vast geographical coverage we have, we just cannot track what is happening in all these places, so we receive a lot of the information and notifications from industry. Therefore, I will describe our

⁹⁴The role of MAAC is further discussed in the following chapter.

approach as very reactive, since we don't identify them but only respond to industry demands. (Interview 32, DG Trade Civil Servant, 2017)

Another interviewee also reiterates this: 'We focus on consultations with industry; the industry in the country is our only interest' (Interview 12, DG Trade Civil Servant, 2016). While business-government relations are much more complex than described here, these observations point to the institutional practices that pre-set what instruments are available and what kind of choices among those instruments are possible.

These dynamics are explored further in the following chapters, while below we briefly turn to the role of the European Parliament in this institutional setup.

The European Parliament: more assertive actor

The second co-legislator is the European Parliament (EP). EP's role in external economic relations has substantially evolved since its creation, and arguably it is the institution that has gained the most in subsequent Treaty revisions and particularly with the entry into force of the Treaty of Lisbon. Even though many of the revisions in the Treaty reflected already existing informal procedures, the European Parliament was given co-legislator powers vis-à-vis trade policy issues, replacing the non-binding consultation procedure.

Before the Lisbon Treaty, the consultation procedure assured that the Commission has to update regularly the European Parliament of the trade policy agenda and many informal channels existed, especially vis-à-vis the Committee on International Trade (INTA), established in 2004. Even before Lisbon, the EP was involved in commenting on the general direction of trade issues through a series of resolutions and own-initiative reports. They treated trade as interrelated with trade-related areas and in particular 'trade ands' such as social, human rights and environmental dimensions (European Parliament, 2009).⁹⁵ The EP further expanded the list of policy areas that trade policy should cater to with a second resolution on the 'New trade policy for Europe under the Europe 2020 Strategy' (European Parliament, 2011). The scope of trade-related issues presented by the EP, identified in a total of seventeen policy areas

⁹⁵ The European Parliament's resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements set the level of expectations of the EP vis-à-vis trade negotiations and both the substantive and procedural aspects of international agreements. Despite the fact that the resolution itself did not bring any immediate consequences, it was a clear sign from the EP that its approval of agreements with third countries will depend on the conduct of detailed impact assessments, regular and comprehensive information to INTA and the EP as well as the inclusion of a list of minimum standards in trade agreements.

that ‘modern trade policy is required to take into account’ (EP, 2011, Article 5). Beyond the more common aspects as agricultural, development and foreign policy, the EP also included industrial policy, corporate social responsibility, protection of consumer interests and rights, and protection of property rights, including intellectual property rights, expanding substantially the scope of what is deemed trade-related (VanGrasstek, 2013).

The resolution goes also in much detail when outlining more specific ways for tackling barriers, calling for ‘standardisation policies, mutual recognition, licences, services and access to public procurement’ in the ‘heart of FTA negotiations’ as well as for including ‘the aspect of international competitiveness in all impact assessments related to new legislative proposals’ (EP, 2011, Articles 30-34). Thus ‘non-tariff barriers’ and regulatory barriers enter firmly the EP’s agenda creating the need for intensified interaction within the EP, where a specific FTA now needs the opinion of numerous Committees.⁹⁶ In particular, Art.34 states that the EP:

Reminds the Commission to pay particular attention to the ‘non-tariff barriers’ and regulatory barriers used by many countries, including WTO members, vis-à-vis EU exports, not least with a view to future trade partnership agreements; points out that, during negotiations, provision should be made for intervention instruments aimed at restoring reciprocity and conditions of equilibrium between the parties in the event of unilateral measures (“non-tariff barriers”) being taken, including merely administrative measures (certification, inspection), which may place EU businesses at a competitive disadvantage and give rise to asymmetrical operating conditions; calls on the EU to take steps at international level in favour of regulatory cooperation with a view to promoting equivalence and convergence of international standards and thereby limiting disputes and the associated trade costs.

The committee, this research takes the most interest in, is the Committee on International Trade (INTA). According to Annex VI to the Rules of Procedure of the EP, the Committee on International Trade is ‘responsible for matters relating to the establishment, implementation and monitoring of the Union’s common commercial policy and its external economic relations’ also including measures of technical

⁹⁶ The objectives of different committees as well as their membership at the time also define the balance between support for free trade and for protectionism. The process of negotiating and signing the EU-South Korea agreement is an example to the levels of protectionism sentiments voiced by MEPs on behalf of their constituencies.

harmonisation or standardisation in fields covered by instruments of international law.⁹⁷

Prior to the formation of the committee, responsibility for trade policy was included within a broader agenda including industry, energy, and research. Its creation signalled the stronger role of the Parliament and the intensified informal coordination with the Commission on trade policy issues. In comparing the role of INTA with that of the TPC, it is evident that the latter is more closely involved in decision-making *among other things* due to its long-standing relationship with the Commission and in-depth expertise, developed since its creation (Kleimann, 2011). At the same time, INTA has substantial power on trade policy issues since the legislative proposals made from the committee to the Plenary are adopted by simple majority. These dynamics are not the focus of study, but the role of the EP is highlighted throughout the different stages, mainly where it changes the consensus achieved between the Council and the Commission.

The differences in the role of the EP and the Council are clearly stated by one of the interviewees: ‘In the TPC, member states are experts. They follow these issues every week and get into the details of the files, while in the EP the focus is mostly on the politics’ (Interview 5, DG Trade Civil Servant, 2016). While the EP has contributed to the EU’s focus on values, trade and, and broader legitimacy and transparency issues, its role in assessing the negotiability of regulatory issues has remained limited to asking for justifications.

*External stakeholders*⁹⁸

The map of societal actors in EU’s trade policy is characterised by a wide range of organisations that differ in the scope and intensity of their work, as well as the channels

⁹⁷ In the 2014-2018 Parliament, INTA is composed of eighty members (41 full members and 39 substitutes), coming from seven political groups as indicated in the table in Annex 4. The Lisbon Treaty strengthened this by establishing that INTA (and the EP overall) share powers with the Council in adopting trade legislation on the instruments of the EU, inter alia ‘anti-dumping, safeguards and the Trade Barriers Regulation (TBR) as well as autonomous trade measures such as the EU’s Generalised System of Preferences (GSP) scheme. Also the previous inter-institutional coordination has been codified in Article 207, where similarly to the TPC, INTA is to be regularly informed of the process of negotiations. The Treaty has not put the two committees on an equal footing, since the TPC remains the only body to ‘support’ the work of the Commission, throughout the entire duration of external negotiations.

⁹⁸ Here we define stakeholder as any individual or group, which has an interest in trade policy. This broad definition has emerged from the conduct of impact and sustainability impact assessments for the European Commission. At the same time this does not entail equivalence to interest groups who lobby the EU institutions for specific outcomes.

through which they aim to access the European institutions. Eagleton-Pierce criticises the use of the term stakeholder due to the fact that it creates the perception that all stakeholders have equal ‘voice, credibility, and influence’ (Eagleton-Pierce, 2016, chap. “stakeholder”). It also smooths the inequality between different types of stakeholders. Table 6 and 7 give a snapshot of the perceived difference in the interaction between the EU institutions and respectively, non-governmental organisations and businesses.

In the conduct of trade negotiations, the Commission consults with a wide range of stakeholders, where it delineates between non-governmental organisations, businesses, social partners (such as trade unions and cooperatives), academia, as well as highlighting specifically consumer organisations, small and medium enterprises, and vulnerable groups (e.g. low income, children, people with disabilities, ethnic minorities, indigenous peoples and unskilled workers). From the perspective of businesses, interest groups include: ‘comprehensive business and employer associations (e.g. BusinessEurope), sector-wide peak associations (e.g. the European Chemical industry council, CEFIC), and branch-specific trade associations (e.g. the European Association of Metals, Eurometaux)’ (Gstöhl and De Bièvre, 2017, p. 52).⁹⁹ Non-governmental organisations also differ substantially with regards to their mandate – either focusing on a specific group in society or a specific policy area (environment, social issues, human rights, animal welfare).

Societal actors can mobilise on both national and European level, where they use a combination of strategies to do this. On the one hand, they can approach take part in the formal Civil Society Dialogues, or informally approach DG Trade officials and the cabinet of the Commissioner. On the other hand, they can also approach MEPs or members of the Trade Policy Committee. These differences are touched upon in the rest of the chapters.

⁹⁹ On the role of the European Economic and Social Committee (EESC) see Gstöhl and De Bièvre (2017, p. 53).

Table 6. Interaction with business

Description	Source
Input of businesses – they are constantly asked and participate at every stage’	Interview 22, External Stakeholder - Social, 2017
But we know that businesses have more information than us. We get the information after the mandate and even negotiating position, while businesses get them as early as the proposal for mandate and can influence the decisions much earlier.	Interview 24, External Stakeholder - Horizontal, 2017
In the MAAC, under comitology, first of all we have businesses participating, we definitely discuss specific issues.	Interview 27, TPC Member, 2017
We participate in all consultations but also between negotiations it will be in constant communication with national ministries – Ministry of Economics, Ministry of Foreign Affairs; businesses; MEPs; the Commission and also other Member States. They are constantly asked for input and sometimes it is difficult to cope with all the information that	Interview 28, National Business Association, 2017

Source: Interviews.

Table 7. Interaction with NGOs

We are not asked, as simple as that.	Interview 22, External Stakeholder - Social, 2017
[only] through the official channel of the Civil Society Dialogue	Interview 22, External Stakeholder - Social, 2017 Interview 24, External Stakeholder – Horizontal, 2017
Even when there are questionnaires circulated on different FTAs, most of the questions apply to businesses while very few to sustainability issues.	Interview 22, External Stakeholder - Social, 2017
Most of the information comes from leaks	Interview 22, External Stakeholder - Social, 2017
We also request meetings with the Chief Negotiators; sometimes we will also speak directly with Member States at the TPC and INTA representatives – either those that share the same ideas as us, or we speak to those that do not fully agree with our positions in order to explain and see where they come from.	Interview 24, External Stakeholder – Horizontal, 2017

Source: Interviews.

4.5. Implications for the rest of the chapters

The objective of this chapter was to sketch out what guides the ideas of trade policy actors and what are the boundaries within which the European Commission and Council operate. It highlighted the emergence of trade agreements as the principal trade policy instrument and the acceptance of trade policy actors, also outside the policymaking elites, that this is the case. The chapter also underlined that the inclusion of regulatory issues and regulatory cooperation in trade agreements expanded the available instruments of the Directorate-General for Trade and the discretion of the use of these instruments.

The relevance of the institutional design in terms of competence, rules and procedures and formal institutional structures lies not only in their existence but how actors understand them and use them as justifications for action/non-action. The progression of European integration has created a historical imperative to adhere to its guiding principles among which the progressive abolition of barriers to trade. The continuity in this guiding objective has empowered actors to tweak and add instruments for the achievement of this goal. And while we perceive this as a lack of definitive shift to neoliberal ideas (but co-existence of different ideas), the strengthening of language on liberalisation, efficiency, technicalization and marketisation of regulatory issues has served a strategic purpose to unify different stakeholders behind FTAs. Each of the following chapters highlights this tension between discourse and practice and the increasing uncertainty about how these objectives to be reached.

The relevance of the institutional framework can be seen through three dimensions. Firstly, while we have to be careful not to overstate the importance of competence and the legal framework, the division of competence does provide a guide to the balance between the internal and the external dimensions of EU trade policy. While it can be the ‘shadow’ of legal battles rather than the actual rules, the Commission aims to ensure there is a consensus with the Council with its proposed actions and actions are continuously deliberated with the Trade Policy Committee. Member states through the TPC and its sub-groups can define and prioritise among issues, which is particularly relevant for regulatory issues in third countries. This dimension is apparent both in Chapter 6 and 7, where zooming in on the TPC and MAAC we see continuous exchange on what constitutes a barrier and how this is to be justified.

Secondly, since both Council and Parliament ratify the negotiated agreement, this entails that the Commission has to ensure the support of the Parliament early on as well. Even before Lisbon, the EP had started to influence the actions of the Commission in the field of trade by adopting resolutions early in the negotiation process as well as issuing opinions on critical issues and with a tendency to focus on issues beyond trade, it has reaffirmed a need for a multidimensional approach to non-tariff measures and regulatory issues. The threat of a veto from the European Parliament has also prompted more active inter-institutional coordination as well as a change of the communicative discourse of the European Commission to engage the broad range of stakeholders. This theme is picked up in Chapter 8, where we look at the ways through which societal actors have contested EU trade policy.

Finally, concerning the constellation of interests, which underpin EU trade policy, lobbying policymakers at different stages of negotiations has been subject to multiple studies both in EU Area Studies and IPE. What is important to note is that the delegation of trade competences has not led to the insulation of DG Trade from lobbying interests (De Bievre, 2005; Gstöhl and De Bièvre, 2017, p. 11), but this is not to say that there is no autonomy for policymakers. As we will see in the next three chapters, the deliberative processes between the Directorate-General for Trade and the Market Access Advisory Committee and the Trade Policy Committee reflect two understandings of regulatory issues as regulatory protectionism and regulatory heterogeneity. The institutional dimension provides signs which problem definition and solutions will take over given the institutional constraints.

Chapter 5. Emergence of non-tariff measures in the Market Access and Global Europe Strategies and shaping of policy programmes

This chapter focus on the first of the three periods we tackle in this dissertation. It traces the evolution of the treatment of non-tariff measures from 1996 when the Market Access Strategy (MAS) came into force to the 2006 Global Europe Strategy (GES)¹⁰⁰. It identifies both aspects of the research question: how actors perceive being affected by the global economy and what the trade policy outcomes are. From an empirical point of view, it feeds into two aspects: provides evidence of how ideas emerge with regards to an issue area through deliberations on the interest-based logic and necessity (coordinative discourse) and how these ideas are then justified in terms of their appropriateness (communicative discourse). The chapter uses a historical overview of the developments surrounding regulatory issues on the international level and traces the impact on the European level. It also uses thematic analysis to identify understanding non-tariff measures as regulatory protectionism and regulatory heterogeneity and what the effect of such understanding is.

This period combines very different economic context and dynamics: to provide a comprehensive picture of the origins of the GATT/WTO approach, it briefly jumps back to the 1970s and the ‘embedded liberalism’ consensus, coinciding with the economic difficulties in the 1970s. These milestones at the international level concurred with the creation of the European Monetary System of 1979, the Single European Act of 1986, as well as multiple rounds of enlargement, but while these in different ways shaped the story here, the focus of this chapter falls on the conception of regulatory issues.

The first period shows the parallelism of the treatment of non-tariff measures in the European Union and at the international level and the ‘jump’ in the thinking behind regulatory issues with the Single Market Programme. It also highlights the difficulties in the definition and classification of non-tariff measures. How certain measures became understood as barriers are closely related to the evolution of the GATT/WTO system itself, the place of the European Union within it and the interaction of different

¹⁰⁰ Hereafter also Global Europe.

public philosophies, particularly embedded liberalism and neoliberalism.¹⁰¹ In line with the former, the inclusion of disciplines on domestic regulation in the GATT/WTO did not try to delineate the boundaries of what is ‘protectionist’ in terms of the effect of a measure (Hudec, 1998). Instead, it focused on the processes through which regulatory measures are enacted and are made transparent and through which new measures are developed in light of existing international standards.

While cooperation at the international level has been instructive on what can be deemed protectionist and what processes are legitimate, the understanding of how to deal with NTBs within the EU has been closely informed by the process of building and completing the Single Market. The process of dealing with regulatory issues revolved around two policy ideas, minimum harmonisation¹⁰² and mutual recognition (Pelkmans and Sun, 1994, p. 192).¹⁰³ While these solutions were not readily available at the start of the 1992 programme, they developed through the process of the outright removal of regulatory protectionism and addressing regulatory heterogeneity. Most importantly for the extension of the approach externally is that the resulting policy was defined by ‘great flexibility’, which allowed for regulatory cooperation vertically and horizontally and other built-in ‘regulatory flexibilities’ (Pelkmans and Sun, 1994, p. 192). In addition to these regulatory flexibilities, the approach also entailed a degree of regulatory competition which was ‘carefully circumscribed’ by the fact that regulatory competition was pursued in parallel with prior harmonisation (Pelkmans and Sun, 1994). Thus the race-to-the-bottom extreme, which is one of the dominant perspectives in discussing the ‘negotiability’ of regulatory issues, is prevented by the fact that before mutual recognition takes place in practice, member states have to be confident that these essential requirements and public policy objectives are assured. In this line of reasoning, even though one of the solutions was regulatory competition,

¹⁰¹ The history of the evolution of the GATT/WTO system has been told numerous times elsewhere (Araujo, 2016; VanGrasstek, 2013; Young and Peterson, 2014). It has often been described as a story of shallow integration followed by attempts of deeper integration (Hoekman and Kostecki, 2009); of a conflict between developing and developed countries (Wade, 2003); a story of loss and reclaim of policy space (Araujo, 2016); as well as a story of how it was reconceived as a ‘global marketplace’ (Heiskanen, 2004; Lang, 2011). Most relevantly to the scope of this work is the view that post-war GATT/WTO can be understood through three periods ‘the period of “embedded liberalism” from its inception to the early 1970s, the period of “neo-liberalism” from the 1970s to the turn of the millennium and the current period “after neo-liberalism” since that time.’ (Lang, 2011; Rasulov et al., 2014, p. 412).

¹⁰² Minimum harmonisation was introduced to signify harmonisation only of the ‘essential requirement’ of regulations, meaning those safeguarding interests such as ‘public morality, public policy, or public security’ (Pelkmans and Sun, 1994).

¹⁰³ Pelkmans and Sun (1994) identify five guiding principles, including also free movement, subsidiarity, and no internal frontiers.

this meant regulatory competition only after the essential requirements are secured, which in turn can be seen as a form of ‘managed mutual recognition’ (Nicolaidis and Schmidt, 2007).

The interactions between domestic-international factors also interacted with the domestic dynamics within the EU through the channels the EU set up to assess and target non-tariff measures. In the first period we look at, the work took three different streams, which primarily reflected the nature of regulatory issues as either ‘protectionist’ in intent or protectionist in effect but even more so reflected what the EU could legitimately justify through the GATT and WTO rules. These three streams included: the Trade Barrier Regulation to target ‘obstacles to trade’, which are WTO incompatible and thus can result in a complaint, which DG Trade still distils in annual reports; the Market Access Strategy and Partnership to target a more comprehensive set of measures, where business and government can discuss what can be deemed as protectionist in the first place; and a broader strategic focus, on which markets make the most use of regulatory protectionism. As the theoretical framework set out counter-intuitively for regulation, non-tariff measures and their negotiability is highly conditioned on the partner country and thus also provides scope for discrimination across partners. While this is not a new fact, this chapter shows how the relationship and trust among partners are endogenous to the process of negotiations and tackling barriers. What is more, the partner dimension interacts with all the other aspects of negotiability.

The chapter is structured as follows: first, we take a quick tour of the key norms enshrined in the GATT/WTO, since this is essential for understanding their role in liberalisation at the multilateral level and the first steps in making sense of them. Then, we turn to the three streams identified above where essentially these represent EU’s approach to regulatory protectionism by looking at both the content of policy documents (Market Access Strategy, Global Europe Strategy), meetings of the Market Access Advisory Committee and speeches of three Commissioner (Sir Leon Brittan (1993–1995 and 1995–1999), Pascal Lamy (1999–2004), and Peter Mandelson (2004–2008))¹⁰⁴ and senior DG Trade officials (e.g. M.P. Carl). During this first period, both

¹⁰⁴ Under the Prodi Commission, Dr Danuta Hübner, the first Polish Commissioner, was Commissioner for Trade from 1 May to 31 October 2004, together with Pascal Lamy. This was part of the process, where Commissioners from ten new member states were paired with existing Commissioners. They had full voting rights but no individual portfolios thus she her speeches were not part of the analysis.

the coordinative and communicative discourse reflect an understanding of NTBs as highly ‘technical’ protectionist tools, which reflect what individual companies and industries deemed unnecessary. During this period, very much reflecting the academic literature consensus, the main concern was with shallow integration, resting on two features of the classical model of trade: terms-of-trade approach¹⁰⁵ and the ‘pecuniary world price externality’ (Ederington and Ruta, Staiger) and addressing the goal of international cooperation over NTMs to prevent policy substitution, through an enforcement approach. Moreover, the lack of regulatory capacity to address the entire universe of measures prompted the EU towards experimentation and new ways to think about non-tariff measures. The departure from a regulatory protectionism discourse were the interventions of Commissioner for Trade Pascal Lamy, who both within the EU and externally, argued that regulatory issues are embedded within broader moral and institutional choices of a society and thus necessitate a different approach. While the chapter emphasizes the Market Access Strategy and the Global Europe Strategy (the period from 1996 to 2006) in the development of the understanding of NTMs, as outlined in the previous chapter, this requires some reference to the broader architecture of the international regime and the internal market.

5.1. Impact of treatment of non-tariff measures at the international level on their understanding

5.1.1. Problematising non-tariff issues on the international level

In the early years of the GATT, the norm of non-discrimination and its extensions, national treatment (NT) and most-favoured-nation (MFN), allowed large differences between countries and did not affect their right to regulate as they see fit (Heiskanen, 2004, pp. 3–4). One of the aims of the system was to avoid a race-to-the-bottom and spillovers seen as the biggest problem of the inter-war period (Howse, 2002, p. 95). This is a reflection of the broader public philosophy:

... that assumes and assimilates the classic insights about the gains to wealth and welfare from free trade but is fundamentally concerned with the interdependency of different states’ trade and other economic policies—i.e., managing or constraining the external costs that states impose on other states by virtue of their policies. (Howse, 2002, p. 94)

¹⁰⁵ Terms of trade approach and the idea that ‘when setting policy unilaterally, countries will have an incentive to place restrictions on trade since the resulting change in the world price shifts some of the cost of the policy to the country’s trading partners’ (Josh Ederington and Ruta, 2016, p. 37).

Abstracting even further from the international trading system, the co-existence of the norms of non-discrimination and divergence of multiple national approaches was perceived as part of the broader embedded liberalism agreement (Howse, 2002; Lang, 2006; Ruggie, 1992). As seen in Chapter 2, such an agreement entailed the separation of domestic policy space from the matters of international cooperation, as long as the norm of non-discrimination was fulfilled.

The problematisation of non-tariff measures emerged on the agenda of the GATT as early as 1969-70. The initial work was analytical in nature concerning setting up a typology with notifications being submitted by countries against each other, followed by responses, all carefully sorted into categories and noted down by the Secretariat (Interview 1, Former DG Trade Official, 2016). The second phase included discussions with the ‘defendant country’ looking into what measures actually exist and their effect on trade. The current WTO notification system works similarly since notifications are voluntary with no sanctions for non-compliance and countries decide whether or not to expose themselves to the resulting criticism (Cadot et al., 2012). During this period, EU member states still spoke for themselves both within the ‘GATT as well as the OECD on non-tariff trade barriers (which, unlike tariffs, were not explicitly covered by Article 113)’ (Johnson, 1998, p. 22). During this first phase, there was also no attempt to decide on a specific solution to dealing with beyond the border issues – the aim was to catalogue and categorise.

After the Kennedy Round¹⁰⁶ trade practitioners increasingly thought about other challenges to multilateral trade and decided to set up a Committee on Trade in Industrial Products, in addition to the already existing Agriculture Committee (World Trade Organisation, 2015). The Committee was immediately tasked to prepare ‘an inventory of non-tariff and para-tariff barriers affecting international trade’ as well as ‘appropriate machinery’ to respond to the challenges identified (GATT Committee on Trade and Development, 1968, p. 2). The GATT Contracting parties had put high importance on the work done by the Committee highlighting the ‘need to resist domestic pressures for the introduction of new barriers to trade’ and even declaring that ‘It was impossible to stand still’ (GATT Committee on Industrial Products, 1968,

¹⁰⁶ Formally, the Kennedy Round, sixth session of GATT held between 1964 and 1967, introduced the GATT Anti-Dumping Agreement and a section on development as first steps towards a broader agenda. Part IV of GATT 1947 (Articles XXXVI – XXXVIII).

p. 1). The work of the Committee resulted in an extensive list in six categories ranging from customs matters to standards, and from quotas and bans to state trading and government monopoly situations, which paved the way for the current classification (*Appendix 5*) and set out a broad framework of what regulatory protectionism can entail (Interview 1, Former DG Trade Official, 2016).¹⁰⁷ At the time, this seemed like a breakthrough. However, it already became evident that non-tariff barriers can encompass everything and that only a ‘commonly shared understanding among negotiators’ could pave the way for establishing a limit (Evans, 1971).

In the margins of the round, the Commission made attempts to start a discussion on non-tariff barriers and common industrial policy measures in view of taking the Common Commercial Policy further, but without success and work on non-tariff barriers did not progress during the Kennedy Round. Apart from that, the Commission was already seen as having sufficient ‘technical expertise and innovative thinking for generating the ideas needed to reach a compromise’ (Coppolaro, 2014, p. 39). The Kennedy Round was the start, despite a slow one, of a deeper transformation of the purpose of the GATT and the space it created for deliberations on regulatory protectionism.¹⁰⁸

Thus the Tokyo Round, from 1973 to 1979, brought the ‘the first major attempt’ to address trade barriers that go beyond tariffs (“WTO | Pre-WTO legal texts,” n.d.). This round of negotiations marked an essential moment in the treatment of non-tariff measures, where the diversity in ‘national regulatory regimes came to be seen as impediments to trade’ thus regulatory heterogeneity took centre stage (Heiskanen, 2004, p. 5). Differences in approaches started to be seen themselves as a problem regardless of the intent of policymakers, prompting discussing on how these are to be put into order (Heiskanen, 2004, p. 5). The Tokyo Round negotiations developed agreements on anti-dumping measures, government procurement, technical barriers to trade¹⁰⁹ and other non-tariff measures, known as ‘Tokyo Round Codes’.¹¹⁰ One

¹⁰⁷ This is explored in detail in L/3083 and COM.IND/6 and Addenda 1 – 6 listing notifications by Contracting Parties, which are discussed further in the research [On File].

¹⁰⁸ Lang provides an extensive overview of the dynamics of such transformation that we tackle in Chapter 3. (Lang, 2011, p. Chapter 7)

¹⁰⁹ ‘The Standards Code’

¹¹⁰ The Codes were essentially ‘Gentlemen’s agreements’ since they were voluntary and represented a commitment only by those that signed them (Interview 1, Former DG Trade Official, 2016; Interview 2, DG Trade Civil Servant, 2016). Of GATT’s 128 contracting parties, the number that signed on to the

example, the Standards Code included the main principles of non-discrimination, but also included a rationale for harmonisation, which then became part of the TBT Agreement during the Uruguay Round.¹¹¹ It introduced the policy idea that ‘international standards’ should be the basis for measures introduced by Members and thus a possible solution to address non-tariff measures. More precisely:

Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems. (Article 2.2 of the GATT Standards Code)

The legal text itself was, however, not sufficient to put hard commitments on the parties and the decision on what constitutes an international standard remains with the Members. The ambiguity of obligations and the need for lawyers to continuously engage in interpretation became another aspect with high relevance to domestic regulation disciplines (Lang, 2011, p. 164). It was up to the party enforcing certain standards to prove the appropriateness of the measure and that it pursues a ‘legitimate objective’ (Article 2.5 TBT Agreement). This was an early signpost of an important shift in the direction of the international trade system – from negative to positive harmonisation aiming at a ‘uniform regulatory framework for trade’ (Heiskanen, 2004, p. 6).

Non-tariff measures largely remained the focus of the Uruguay Round to an extent addressing the gaps from the Tokyo Round. The Punta del Este Declaration setting out the mandate for the negotiations reflected the persisting focus on these issues (European Commission, 1986). The Uruguay Round, first differentiated between existing standards, dividing the Standards Code into separate TBT and SPS Agreements. Similarly to the TBT Agreement, vis-à-vis SPS, WTO Members were required to ‘base their measures on international standards and thus are not required to

Codes were far less ‘ranging from 13 signatories to the Agreement on Government Procurement to 47 for the Agreement on Technical Barriers to Trade’ (VanGrasstek, 2013, p. 49).

¹¹¹ Preamble, Standards Code: ‘Recognizing the important contribution that international standards and certification systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade.’

adopt any international standards as such [...] they are encouraged to do so' (Appellate Body, 1998; Heiskanen, 2004, p. 10). It was the Appellate Body that had the role to establish a reading of the Basic Rights and Obligations eventually confirming that a measure can be deemed inconsistent with the requirements of the agreement for harmonisation even if it is non-discriminatory (Appellate Body, 1998). During the round, the European Economic Communities had also proposed a more serious consideration of opening up trade in services and rules to govern intellectual property protection.

Whilst in principle the embedded liberal compromise put clear boundaries between trade and domestic regulation, the processes of categorisation and classification highlighted three aspects: there was a lack of a common understanding of what is protectionist and therefore, a need to establish an agreement, and a need to establish the setting, within which protectionist measures will be addressed. Within the GATT the first two were addressed by the general norm of non-discrimination and through both legal and technical expertise. The third aspect resulted in the inclusion of non-tariff measures and regulatory issues in the main negotiation package. The mushrooming of measures was seen as a replacement for tariffs, and as a result, it was treated similarly to tariffs. Trying to negotiate removal within the GATT context became a common trend thus bringing non-tariff measures within the reciprocity package and normative aspects of reciprocity. The cognitive and normative shift in the purpose of the regime extended both the reach of the legal framework and the reach of technical expertise, particularly in reference to what a market distortion constitutes.

The never-completed Doha Development Round¹¹² built on the work done in the Uruguay round and while it has been studied widely, particularly due to its utter failure, it is important to note that it raised doubts on how non-tariff measures and classified and categorised (Das, 2006; Evenett, 2007; Hay, 2007; Heydon, 2006; Hoekman, 2011; Martin and Messerlin, 2007). More precisely, the agenda called for:

We agree to negotiations, which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-

¹¹² While the DDA was never concluded, it resulted in the signature of the Agreement on Trade Facilitation, which by targeting information asymmetries impacts both directly non-tariff measures by eliminating issues at the border as well as indirectly by serving as a template for improving information exchanges among members. Annex to the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization.

tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions. (World Trade Organisation, 2001, para. 16)

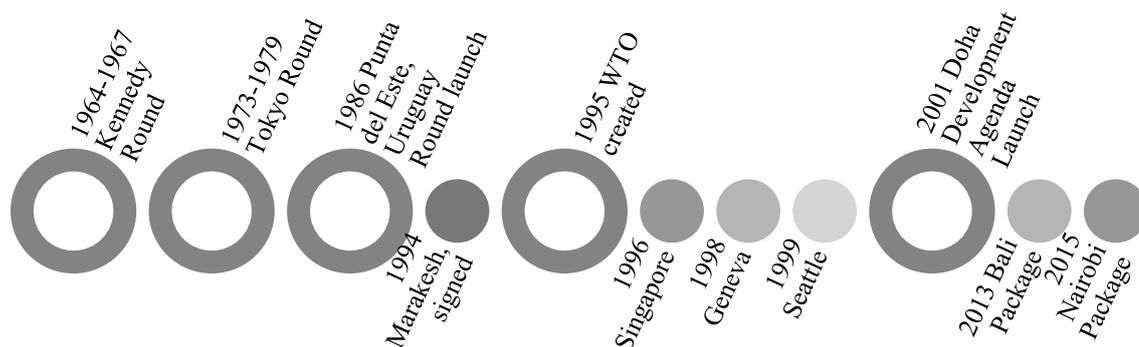
At the time this broad agenda was supported by key stakeholders in the technical work on non-tariff measures, where the International Chamber of Commerce called for ‘WTO members to agree that no subset of non-tariff barriers will be excluded from the DDA negotiations by virtue of their arbitrary classification or categorisation on an issues specific or sector-specific basis’ (2003, p. 4). The idea of the general understanding that nothing is to be ex-ante excluded is that better modalities can be deliberated for the reduction and elimination of non-tariff barriers. While the DDA was not concluded, this ambition to tackle the universe of regulatory protectionism and regulatory heterogeneity has guided the work of its different committees.

Though the Tokyo Round only attempted to reach into regulatory areas, the Uruguay Round increased the breath of international trade regulation, which in turn demanded greater specialisation on the side of GATT/WTO, including the European Commission to be able to justify its own and others regulatory choices within the existing framework. The WTO Agreements ‘imported’ almost all of the Tokyo Round codes into the ‘Single Undertaking’¹¹³, except the Government Procurement and the Civil Aircraft Agreement, which remained optional plurilateral agreements (Sarfati, 1998).¹¹⁴ This shows fragmentation in the treatment of non-tariff barriers into those that could be subject to some form of harmonisation (such as SPS and TBT) via international standards and those that were to be subject to a further mutual agreement such as government procurement restrictions (Chapter M of the UNCTAD classification).

¹¹³ One of the principles provided for in the 2001 mandate for the Fourth Ministerial Conference in Doha: ‘Single undertaking: Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. ‘Nothing is agreed until everything is agreed’. ‘How the negotiations are organized’.

¹¹⁴ Thus the WTO Agreements include: Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (antidumping), Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (customs valuation), Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, and Agreement on Safeguards (WTO).

Figure 5. Overview of negotiating milestones



5.1.2. Policy programmes and policy ideas

Thus the disciplines of the WTO law, which pertain to domestic regulation and domestic regulatory autonomy, can be found in the SPS, TBT and GATT/GATS Agreements. The different agreements identified as a problem costly regulatory issues, which impeded trade and the resulting policy ideas, combined a range of solutions. These broadly embrace: non-discrimination, necessity and proportionality tests; the level of protection and scientific basis; harmonisation or conformity with international standards; recognition and equivalence; consistency; precautionary action; balancing; product/process issues and the territorial-extraterritorial divide (Marceau and Trachtman, 2014, p. 357).

The evolution of the treatment of non-tariff measures at the international level resulted in some signposts on deciding whether a measure is legitimate. Firstly, from a GATT/WTO perspective, the intent of the regulators cannot be used for such an assessment. For example in the Japan Alcoholic Beverages Case, the Appellate Body pronounced that:

... [I]t does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure...This is an issue of how the measure in question is applied. (Appellate Body, 1996, para. 28)

Similarly, with a series of judgements, the Appellate Body confirmed that it does not consider the ‘regulatory purpose of the technical regulation’ as a criterion to be applied under the TBT Agreement (Appellate Body, 2005, para. 104). Secondly, the Appellate Body set out that it’s the role of the complaining Member to suggest that were ‘reasonably available alternatives’ (Appellate Body, 2005, paras. 306–311; Marceau

and Trachtman, 2014, p. 371). The Body afterwards clearly highlighted the need to define necessity in terms of ‘material contribution’.

To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. (Appellate Body, 2007, para. 210)

In Korea – Various Measures on Beef, the ruling outlined a ‘balancing test between the challenged measure’s degree of contribution to the end pursued, the weight of the interests of values pursued, and the measure’s trade restrictiveness: ‘The greater the contribution, the more easily a measure might be considered to be “necessary”’ (Appellate Body, 2000, paras. 162–3).’ With this, the WTO adjudicating bodies gave themselves a stronger role in weighing regulatory values against trade values.

Three reflections emerge from this historical account of the developments in the GATT/WTO. Firstly, the GATT/WTO through both technical and legal expertise set out criteria to assess the balance between legitimate measures and measures, which unnecessarily restrict trade within the broader embedded liberalism compromise. The problematisation of non-tariff measures as a form of trade protectionism brought them early on the negotiation agenda, requiring an approach to evaluating their relationship to tariffs and the approach to be taken. The large number of submissions and diversity of measures prompted Members to agree only on the broad principle on non-discrimination, leaving discussions on necessity and legitimacy to the legal-technical realm. However, a series of judgements, rather than pointing to a circumscribed area of measures that are outright protectionist, focused on the types of justification provided by Members. Moreover, the recognised modes of justification in terms of the monetary value of measures (judged by their effect on market segmentation) demoted other forms of value judgement to second place.

Secondly, the WTO already made the first steps towards harmonisation by referring to the use of international standards. While it defined what a standard constitutes, it does not delineate the meaning of an ‘international standard’, leaving a lot of scope for discretion and for deliberations, of which standards should be used as a reference point. As we will see in Chapter 6, international standards are one possible solution for

addressing non-tariff measures, but the meaning of an international standard is subject to negotiation.

Lastly, the criteria of non-discrimination, necessity and proportionality have had limited success in facilitating trade¹¹⁵, thus prompting the European Union to go further both in terms of the internal market and the ways it tackles third country trade-restricting measures. However, we will see that the EU faced similar challenges in its approach as deliberations on the international level: the complexity of the range of measures; their categorisation and classification; and evaluation of their effects. In this regard, the next sections present the emerging unilateral approach of the side of the EU and the internal deliberations on the scale of the problem to be addressed.

5.2. Negotiability of regulatory issues

As discussed in Chapter 2, the negotiability of non-tariff measures entails the ability for them to be ‘traded’ or ‘exchanged’ and reflects an understanding of both necessity and appropriateness. The term itself does not often appear in policy documents, but surprisingly, it appears in one of the earliest documents of the EEC. In 1959, the Directorate-General for External Relations¹¹⁶ presented an introductory note to the special committee under Article 111 of the Treaty establishing the EEC (predecessor to the TPC) discussing ‘*La négociabilité des mesures restrictives de caractère non tarifaire*’. The discussion was brought up in light of the demands made by agriculture-exporting countries before the Dillon Round (1961) of the GATT for the inclusion of non-tariff issues in order to address the possibility that tariff concessions are not ‘emptied of their substance’.¹¹⁷ DG External Relations assured member states that agreement on the principle of ‘negotiability’ of non-tariff measures does not involve a ‘particular danger’, an ‘insurmountable difficulty’ and if it results in an agreement, ‘by definition will include a balance of mutual benefits.’¹¹⁸ However, the Commission also points to ‘very serious disadvantages’ of including non-tariff measures in the negotiations and a danger of ‘departing from the fundamental principle of tariff negotiations, namely *reciprocity* and the mutual benefit of concessions, which by their

¹¹⁵ For summary of this perspective, see Trachtman (2018).

¹¹⁶ Directorate-General for Trade was split into a separate DG during Sir Leon Brittan, Vice-President, External economic affairs and trade policy.

¹¹⁷ Archives, European University Institute, CM2/1959.

¹¹⁸ Archives, European University Institute, CM2/1959, p. 6.

nature can be approximately quantified'.¹¹⁹ Of course, the context matters and as seen above, the main concern was the replacement of one form of protectionism with another. In the context of the 1950s, NTMs were seen as a way to ensure constant protection as seen earlier, referring to the fact that you either remove all NTMs or create a broader framework, otherwise new NTMs will appear in the place of the old ones. These early discussions finished with the recognition that there cannot be a general approach to address all types of measures and these need to be addressed on a case-by-case basis.

While these very early discussions should not be traced directly to the work of the Commission in the 90s, it highlights two main components of the treatment of NTMs surviving until today – regulatory protectionism and the fear of substitutability between tariffs and NTMs, and among different NTMs; as well as the conceptualisation of reciprocity vis-à-vis NTMs. The latter aspect has been challenging to pin down and even in Chapters 6 and 7 as the approach of the Commission progressed reciprocity remained difficult to assess. Each of the next sections delves more precisely in the practice and discourse surrounding NTMs between 1996 and 2006, based on the three aspects of negotiability defined in the theoretical chapter: defining non-tariff measures, modes of categorisation and prioritisation, and modes of evaluation.

5.2.1. Defining non-tariff measures and the legalistic dimension of non-tariff measures

The mushrooming of protectionist measures and the developments on the international level required a clearer set of interactions within the European Union. One of the channels through which the EU adjusted to the need to monitor the implementation of GATT disciplines in third countries was the Trade Barrier Regulation (TBR), which came into effect on 1 January 1995. Its stated aim was to 'maintain third country markets open for European Union exporters ... in the context of progressive liberalisation of world trade in goods and services', thus becoming EU's offensive instrument (European Commission, 2008b). In practice, it's important to note that since 1996 only 24 TBR examination procedures have been initiated ("Investigations (Trade barriers) - Trade - European Commission," 2018). What the Commission

¹¹⁹ Archives, European University Institute, CM2/1959, p. 6.

clarifies vis-à-vis this ‘track-record’ is that ‘[I]n some of those cases, a solution has been reached through negotiation or action by the third country and in others by means of WTO dispute settlement procedures’ (“Investigations (Trade barriers) - Trade - European Commission,” 2018). At the same time, the review of the first five years showed more activism by national and European industry associations and individual companies. As the symposium on the TBR summarised between the second half of 1996 and November 2000, sixteen TBR examination procedures had been initiated (Lamy, 2000b, p. 2).

Two quick examples highlight the linkages between the TBR and other channels for addressing trade barriers such as WTO DSM and bilateral agreements. EU’s TBR case ‘Korea-Pharmaceuticals’ concerned the reform in the Korean health insurance system (29 December 2006), which the EU claimed does not provide ‘transparent, objective and verifiable criteria nor does it provide due process guarantees in decision-making on reimbursement and pricing of pharmaceutical products’ (European Commission, 2016a, p. 52). The Commission raised its concerns through different bilateral fora, but more importantly, the TBR investigation contributed to the scope and content of the sectoral annexe on pharmaceuticals, which became part of the EU- Korea Free Trade Agreement. While the TBR investigation on Korea provided input for the negotiations, in the TBR case ‘India – Spirits and Wines’, the investigation by the Commission led to the initialling of DSU consultations (WTO Secretariat, 2008). In the case of India, the TBR investigation led to a DSU case as well as discussions within the scope of the EU-India Free Trade Agreement negotiations (European Commission, 2016a, p. 19).

Thus while the number of cases formally under TBR investigation is limited, the TBR mechanism serves as an interface between EU businesses and the international dispute settlement system. It also provided a way to problematize non-tariff measures as regulatory protectionism. The TBR regulation defines obstacle to trade broadly as ‘any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action’ (Council Regulation N°3286/94). One of the interviewees explained that as a legal instrument TBR is essential for making use of the GATT/WTO channels: ‘As I mentioned not all NTMs are barriers. The TBR regulation defines what constitutes a barrier. Also, member states define this through their constituents, particularly businesses, in terms of which barriers to address in 3rd countries’ (Interview 27, TPC Member, 2017).

Hence, on the one hand, the TBR provides the scope of what can be targeted as a barrier, and on the other hand, government-business interactions are vital for identifying those practices in third countries which create barriers to entry, both within the specific scope of the TBR but also in EU's broader trade policy. Regarding the process under the TBR, companies can lodge a complaint against third-country barriers, where the Commission must open an investigation in case of sufficient evidence (European Commission, 2008b). Two elements of the TBR process are essential here: first, the scope of TBR in defining what is 'legitimate' in relation to other instruments and second, the progression of TBR. The introduction of the Market Access Strategy (1996), made the TBR part of its instruments, therefore, integrating TBR within the broader set of tools. However, both organisationally and in terms of process, it was kept separate from Market Access Strategy and the Market Access Unit. This was brought about by the clear recognition that TBR is a legal instrument, aimed at providing a bridge between EU businesses and the Dispute Settlement Mechanism. It was also brought about by the fact that the measures falling under TBR are easier to delineate as 'obstacles to trade', due to the principles of non-discrimination and consistency with GATT rules, in comparison to the range of measures that are "unfair", "protectionist", "highly damaging to business" or "prohibitive for trade" but still legal if measured by reference to existing international trade rules' (Crowell & Moring, 2005). This separation meant different channels for legal and illegal vis-à-vis international standards measures. While the TBR and the Market Access Strategy share much in terms of goals and ambition, TBR remains a legal solution, targeting those measures, which can be shown not to be compliant with GATT/WTO rules, explicit regulatory protectionism, and as revealed earlier it often feeds into other channels for tackling non-tariff measures. Moreover, the discussion surrounding TBR also highlights the complementarity between different venues with regards to the negotiations over non-tariff measures (one of the elements of negotiability identified in the theoretical framework).

5.2.2. Categorising and prioritising NTMs through the Market Access Strategy

The developments on the international level outlined earlier, and the achievement of Single Market Programme set out a specific context, in which Sir Leon Brittan revealed the Market Access Strategy in February 1996. The first part of the MAS reflects this, where 'the need' for such a strategy was outlined, as well as the

interventions preceding the strategy (Agence Europe, 1996). Firstly, Sir Leon Brittan set out the predominant view of free trade as something, which requires defending against, rather than as an opportunity for companies and positioned the MAS as a more 'offensive strategy' (Agence Europe, 1996). Thus he strongly tied the openness of the European economy to EU's prosperity and what has since become one of the common refrains in EU trade: open markets as 'one of the keys to securing faster growth and more rapid job creation' (European Commission, 1996, p. 2). Secondly, and closely linked to this, is the understanding that the Single Market has created an open European market, which needs to be matched by openness in third countries. Finally, as an extension to this, there is a clear indication of the 'multitude of obstacles to trade', which EU business operators face. While the Market Access Strategy does not constitute a specific trade policy instruments, it sets out the thinking behind a more offensive approach to addressing 'less obvious obstacles' to trade and provides two common objectives for a wide variety of measures (European Commission, 1996, p. 4).

More importantly, the Strategy made the first attempt to communicate, albeit in a footnote, what are the different measures, which obstacles to trade constitute and it is worth listing the full breakdown here to highlight the distinctions made:

Customs duties which in some instances may be considerable, and which in any case involve significant administrative (costs caused by compliance with custom formalities; outright violations of negotiated agreements; "unregulated" practices even in areas where trade rules have existed for a long time (e.g. the use of high export taxes to get round the prohibition of export restrictions in Article XI GATT or the use of differential export taxation to avoid subsidies disciplines); "abuses" of legitimate practices (e.g. use of a differentiated tariff structure between different stages of a product cycle, not to protect the domestic market, but to affect the supply of inputs and favour domestic processing /export of the finished product; various other forms of obstacles to access to raw materials); obstacles in the "new" areas of trade rules (barriers concerning intellectual property rights obviously affect trade in goods; barriers concerning trade in services have a relevance of their own, but also affect trade in many products, where deals include a very high services component: aircraft, shipbuilding, etc.); "invisible" obstacles, and in particular insufficient or non-existent enforcement of national laws and regulations which, on the face of it, purport to implement third countries' international obligations, as well as insufficient (even non-existent) or inadequately enforced domestic rules on private anti-competitive behaviour which acts as barriers to market access. (European Commission, 1996, p. 3)

While the academic literature divides non-tariff obstacles with regards to their impact on exports or imports; product, process or consumer aspects, the European Commission differentiated between barriers in terms of the levels of misuse and mis-implementation of different administrative aspects as well as the absence and insufficiency of control over anti-competitive behaviour. The definition of ‘unregulated’, ‘abuses’ and ‘invisible’ obstacles highlight the perception that barriers to trade may result from legitimate practices, which have been mismanaged by the governments that erect them. Such a definition makes an implicit reference to government and regulatory failures as the reason for non-tariff measures. An implicit reference is also made to how other countries use these type of measures to restrict access thus problematising non-tariff measures as regulatory protectionism. While the distinction may seem trivial, the MAS did not aim to tackle different approaches to regulation and diversity but the intentional or unintentional failure of governments to secure the application of rules.

As the theoretical chapter described, establishing the problem definition of regulatory protectionism allowed for multiple instruments to be mobilised. The Market Access Strategy established the approach to tackling the diversity of issues, highlighting the ‘toolbox’ that the Commission has at its disposal. The measures necessary to achieve these objectives also highlight the multi-dimensional approach undertaken by the Commission across different venues. These include at the multilateral level, the use of the TBR and the DSM, negotiations concerning WTO accession, and future rounds of negotiations; on the bilateral level, the implementation and negotiation on bilateral agreements on a given product/sector or horizontal barrier, bilateral economic diplomacy, and EU enlargement negotiations; and flanking policies such as the negotiation of mutual recognition agreements and business and industrial cooperation. The combination of venues and policy ideas for eliminating regulatory protectionism illustrate the interaction between the political and economic rationale for targeting non-tariff measures and the interlinkages between different elements.

In terms of the process for elimination of these barriers, the Commission set out the steps of the ‘crucial phase’:

... establishing priorities amongst these problems, on the basis of their relative importance, the likelihood of their elimination and the resulting economic benefits; comparing such priorities with the available means and instruments of action; choosing the approach to be taken and of instruments and

opportunities to be used; setting a timetable for its execution (where appropriate against the background of already scheduled bi- and multilateral events). (European Commission, 1996, p. 10)

Shortly after, as part of these efforts to prioritise problems, the Commission envisaged a ‘barrier removal programme’, which was strongly endorsed by the General Affairs Council in 1999 (General Affairs Council, 1999). It was meant to take the information gathering by the Market Access Database to the next phase by very focused removal of existing barriers (European Commission, 1999). The programme was based on three aspects: ‘(i) identifying the most injurious foreign trade practices and distinguishing high priority barriers from less important ones; (ii) selecting the most appropriate procedure to achieve the removal of the most damaging trade barriers; and (iii) follow up action to ensure that the eradication action is completed successfully’ (Maclean, 2006, p. 20). The Commission and the Article 133 Committee were tasked to implement the programme, where the Council also stressed the need to include the needs of small and medium-sized enterprises and the ‘interests of specific regions affected by particular trade barriers’ in the criteria for identifying priority measures. The Council also ‘called upon the Commission to make full use of the possibilities offered under the Europe Agreements and under the Accession Partnerships’ (General Affairs Council, 1999).

Policy ideas and regulatory capacity

However, this first attempt to identify priority problems did not succeed. The barrier removal programme was not implemented for what appeared to be ‘both political and technical reasons’ affecting the viability of the policy (Maclean, 2006, p. 20). From a political perspective, attention has been shifted to the WTO Doha Development Round and development-related initiatives such as Everything But Arms (EBA), while from a technical perspective, the breadth of the measures covered seems to have required more resources than available (Maclean, 2006, p. 21). Moreover, this enforced a perception of MAS as an information gathering and to a lesser extent barrier analysis initiative. The importance of this goes beyond a failed initiative due to lack of capacity, but an understanding that such a policy solution does not use the resources and instruments effectively to target barriers. While the objectives and specific goals of the MAS show continuity in the Global Europe Strategy, this attempt marks a shift to a stronger focus on the bilateral track via the use of trade negotiations for the removal of existing barriers and pre-empting new ones. The lack of regulatory capacity to

mobilise other actors in support to aggregate and analyse is one milestone in the shift to the use of bilateral agreements to tackle non-tariff measures and regulatory issues.

Policy programmes in an institutional context

On the front of business-state interactions, with the Market Access Strategy, the Market Access Advisory Committee (MAAC) emerged as the institutional loci for discussions on prioritisation and tackling of non-tariff measures. It has been deemed ‘the “central nervous system” under which specific working groups have been set up to discuss particular market access barriers (e.g. vaccines in Japan, medical devices in China, India, etcetera) and to stimulate discussion and exchange of information among partners’.¹²⁰ It provides for the ‘systematic involvement of Member States’ and ‘enhanced coordination between all the Commission’s services together with Member States’ (Idem.). The MAAC is complemented by the work of civil servants on the ground, as part of the external dimension of the Market Access Strategy, through the Market Access Teams (MATs) set up with the Global Europe Strategy¹²¹. Another dimension of the Market Access Strategy is the stronger focus on the partnership between EU economic operators, member states, and Commission services for addressing specific barriers.

The problem definition of regulatory protectionism allowed for a smaller number of markets and sectors to be targeted to avoid the overstretching of negotiators. The focus was on measures that operators wanted to see removed, providing less discretion for the European Commission in defining what a barrier is. This bottom-up process of identifying barriers required that the Commission, member states and business work jointly through different available channels. As the interim evaluation of the TBR highlights:

The view from EU industry and enterprises, and interestingly from EU trade practitioners as well, was that there was a definite need for some form of centralised point of contact inside DG-Trade for EU industry and enterprises to voice their views on measures or actions necessary to alleviate the impact of market access barriers. In this context, it was repeatedly mentioned that foreign obstacles to trade may not necessarily be illegal under international

¹²⁰ Jens Schaps, acting Director, Directorate-General for External Trade during Ad Hoc meeting – The Renewed Market Access Strategy: A Strong Partnership to Deliver Market Access for European Partners.

¹²¹ Based in third countries and include European Commission delegations, Member State embassies as well as European companies.

trade rules and, in such cases, the TBR Team was not the right place to air these views. (Crowell & Moring, 2005)

In contrast to Chapter 6, where post-Global Europe, MAAC becomes a key venue for prioritisation, the early efforts cited here point to a slowly developing approach to how to deal with measures that do not infringe international trade rules outright. These early attempts also highlight the emerging role of the European Commission, which encourages the exchange between different actors in the EU and the MAT on the ground, coordinating efforts by different stakeholders and providing resources in line with the existing instruments, as well as improving transparency through the sharing of information.¹²² While the early criteria for prioritisation did not result in a substantial reduction¹²³, the approach of the Commission also allowed scope for discretion and flexibility (Hoekman et al., 2017). The functioning of the system is conditioned upon the active participation of member states, businesses, and EU wide-sectoral organisations. They not only share information about specific barriers but also take part in identifying and analysing what kinds of instruments are suitable for targeting of measures. The MAAC is thus not only the central nervous system but also a principal place for deliberations, where agreement and disagreement on policy programmes and policy ideas are created.

5.2.3. Economic assessment of non-tariff barriers and Global Europe Strategy

While the Global Europe Strategy has been studied elsewhere for the way it cemented the current turn to bilateral trade agreements and the economic rationale for FTAs (Abdelal and Meunier, 2010; Siles-Brügge, 2014), it indicates a more decisive shift: the turn to negotiations with partners, such as Korea, Japan, and the United States, with which the regulatory gaps are wide. Given the limited regulatory capacity, identified in the MAS follow-up, the Global Europe Strategy aimed to set out a new rationale and mode for tackling protectionism. While some observers see the turn to bilateralism as a new development, many others perceive it to be a return to the olden days when the Commission was negotiating agreements with the European Free Trade Association (EFTA) countries, with the newly transitioning Eastern European Countries and with the neighbourhood (Interview 10, Former DG Trade Official, 2016).

¹²² See also Hoekman et al. (2017).

¹²³ According to MacLean (2003), 670 out of more than 1000 were identified for focused action.

The difference in the trade negotiations kick-started with Global Europe was the explicit economic rationale, which it outlined. The newly launched agreements were based on a matrix juxtaposing the scale of the potential market with the existing barriers (Interview 8, DG Trade Civil Servant, 2016). DG Trade's role then became to assess, with which of the countries with most substantial market access potential it could launch negotiations and what depth and breadth of the coverage of the agreements will result in sufficient market opening. Thus the discretion of the Directorate General for Trade was in setting out the level of ambition. As interviewees described, this economic rationale for the Global Europe FTAs was quickly watered down by political factors brought in by the member states. Moreover, it was further watered down by the Commission itself, which needed to ensure consistency across different partners.¹²⁴

The Global Europe Strategy cemented a closer link between the problems to be addressed and the broader public philosophy. The process of deciding the value of trade agreements resulted from a Commission-prepared matrix of those countries that have both the largest markets and the highest level of barriers, inclusive of non-tariff barriers. As one of the interviewees perceives:

For years DG Trade had been led by proper trade negotiators, who viewed trade in a very mercantilist way. This has held DG Trade back. Now, much more economic foundations. Global Europe, for example, was the first one where this was witnessed. (Interview 3, Council of Ministers Representative, 2016)

This is complemented by another interviewee:

Global Europe is very much based on the economic rationale which is valid to this day on the bilateral negotiations – matrix country growth versus level of barriers and you want to start with those that are fastest growing and have the highest barriers since they can provide the biggest markets. (Interview 2, DG Trade Civil Servant, 2016)

Language in the Global Europe Strategy firmly put the importance of NTBs in the calculation of the advantages of agreements. While not stated the economic rationale did not entail the absence of bargaining and reciprocity, but rather the efficiency in addressing regulatory gaps. This shift was most explicit in the variety of policy ideas proposed such as mutual recognition agreements, international standardisation and

¹²⁴ A notable example in the latest negotiations launched by the Commission, which were not part of the economic or political rationale, is the opening of negotiations with Australia and New Zealand.

regulatory dialogues, as well as technical assistance to third countries, in both ‘promoting trade and preventing distorting rules and standards’ (European Commission, 2006, pp. 6–7). The Strategy frames non-tariff measures in terms of their ‘visibility’ and sets out that the effectiveness of FTAs is conditioned upon tackling those:

But as tariffs fall, non-tariff barriers, such as unnecessarily trade-restricting regulations and procedures become the main obstacles. These are often less visible, more complex and can be more sensitive because they touch directly on domestic regulation.

The effectiveness of competitiveness-driven FTAs will depend in part on their capacity to tackle non-tariff barriers. (Idem.)

The way Global Europe sets out the issue of non-tariff measures flows from existing experience within the WTO and also the internal market. As the Communication sets out: NTBs are not adequately covered in the WTO and ‘the expansion of WTO rules has not fully kept pace with the expanding range of barriers in the global economy’ and addressing NTBs is resource-intensive and ‘requires new ways of working within the Commission and with others, including member states and industry in order to identify and tackle barriers’ (European Commission, 2006, pp. 4, 6–7). In this way, the Strategy hints to both the problems of regulatory protectionism and regulatory heterogeneity and the new ways through which the EU can strengthen its regulatory capacity to address these.

Global Europe also reinstated the desire to prioritise key barriers, following the MAS and the failed ‘barrier removal programme’. It sets out three criteria, which are to be used as guidance rather than ‘straightjacket’: the previewed economic benefits for EU operators ‘as a whole’ both in the short and medium term, the barrier’s outright infringement of bilateral or multilateral disciplines, and the chances of the solution of the barrier ‘within a reasonable timeframe’ (European Commission, 2007, p. 8). Finally, regarding substance, the Strategy establishes regulatory issues as a key component of the turn to bilateralism. As Agence Europe reported on the Communication: ‘Commission seeks to fight non-tariff barriers’ (Agence Europe, 2008; European Commission, 2008a).

Concerning the process, the Commission set out an expanded mandate for the Market Access Advisory Committee where it ‘should become more technically focused on market access issues, including consideration of particular cases and exchange of best

practices' (European Commission, 2007, p. 7). The Commission also added that MAAC should also be the loci for coordination with the Market Access Teams, thus reiterating the partnership dimension of dealing with non-tariff barriers to trade. Interestingly while the discussion in the Global Europe Strategy and the accompanying communication predominantly targets those barriers that are not directly in breach of international obligations, there is an absence of a reflection on which barriers are deemed legitimate and justifiable. The Communication sets out the difference between 'unnecessary barriers to trade' and justified and legally defensible measures to fulfil legitimate policy objectives' in passing, defining that any measures to regulate trade should be put in place in 'a transparent and non-discriminatory manner, which is not more trade-restrictive than necessary in pursuing other legitimate policy objectives' (European Commission, 2006).

While it uses a persuasive language to clarify that such a distinction is needed, there is little on the processes through which this distinction is made. Such absence in one of the critical Communications by the Commission highlights the need for deliberations to establish what are legitimate objectives and legitimate level of trade regulation. Finally, the problem definition pre-sets the range of policy ideas, deemed the 'new ways of addressing non-tariff barriers', acknowledging that the 'ability' to tackle those will depend on the partner (European Commission, 2006, pp. 17–18). As the Communication sets out:

Our ability to tackle NTBs will differ depending on our trade partners. Regulatory convergence, for example, is more likely to be achieved with neighbourhood partners than others. But these issues must be on the agenda with all our prospective partners. Mutual recognition agreements should be concluded where necessary and useful. The lack of regulatory transparency is often cited by industry as a major problem in almost all the countries with which the EU would have an interest in negotiating FTAs and is at the root of many non-tariff barriers. The problem relates both to the way new regulations are introduced without sufficient consultation and the way in which regulations are implemented on the basis of very broad discretion. [...] We will need to consider also how to extend the possibilities of cooperation instruments aimed at regulatory convergence within new agreements, notably those involving direct contacts/private agreements between standardisation and conformity assessment bodies with support by the Commission. We should also request and support relevant partner countries to participate in specific international mechanisms of standard-setting/regulatory convergence (e.g. ISO, UN-ECE).' (European Commission, 2006, pp. 17–18)

The coordinative discourse and processes surrounding the negotiability of non-tariff measures highlight two components: internally there is a limited regulatory capacity to go beyond a simple inventory of existing protectionism, and there is a stronger recognition that the EU should take into account the international context as well as be more sensitised to other countries' regulatory choices. While the theoretical framework underlined that the coordinative discourse allows us to understand what is negotiable, the vagueness of the Global Europe Strategy illustrates that while the understanding of regulatory heterogeneity was starting to take shape, this was not made precise with specific policy solutions, leaving both a scope for discretion but also different levels of ambition across partners. The range of policy ideas leaves substantial discretion to the Commission, member states, and businesses to decide what is appropriate regarding the levels of ambition. In hindsight, we can ask – how did regulatory cooperation come out as the only policy solution to regulatory heterogeneity? We continue tracing this through chapters 6 and 7.

The coordinative discourse is juxtaposed to the communicative discourse in the following section, where we see three specific constructions surrounding non-tariff measures: regulation as a result of a moral and collective choice, the existence of a perfect regulatory process; and structural difficulty in addressing barriers. While internally the Directorate-General for Trade and the Market Access Advisory Committee promptly took on the task to look at a broader set of regulatory barriers, the communicative discourse also reveals doubts on how to consolidate trade with regulation.

5.3. Legitimising free trade and regulatory choices

Collective preferences and reciprocity between tariff and non-tariff negotiations

The perception that trade and regulation may need to be subject to different norms was experienced post the failed Seattle conference in 1999. The EU Trade Commissioner at the time, Pascal Lamy, challenged the natural extension of the rules governing trade to regulation and urged for stronger recognition of the worldviews, which shape regulatory choices. Talking about the contestation surrounding the Seattle Ministerial Conference, Pascal Lamy pointed to an explanation in the changing substance of trade policy, which later became the foundation of two points he continuously made on

‘collective preferences’ (Lamy, 2004, 2000a, 2000c, 2000d) and ‘administration of protection’ versus ‘administration of precaution’ (*The New World of Trade*, 2015):

As traditional trade barriers such as tariffs and quotas have been gradually dismantled through successive trade rounds, regulatory barriers (in the form of technical standards, environmental or consumer protection) have hit the radar screen of trade policymakers. These, however, are deeply embedded not only in the institutional infrastructure of an economy, but also reflect the collective preferences and moral choices of a society. Trade policy today impinges on every area of public concern – and it, therefore, deserves the attention it now receives from people in all walks of life. (Lamy, 2000a)

Lamy’s understanding of ‘managed globalisation’ was thus described as the ‘ideological cornerstone’ of his tenure (*Hearing of Mr Lamy*, 1999) and often traced for its long-lasting influence on EU trade policy (Abdelal and Meunier, 2010; Meunier, 2007). However, less attention has been paid to the moral aspect of regulatory choices, and institutional embeddedness of choices. Lamy’s interventions within the WTO but also the EU, highlighted an understanding of non-tariff measures not for their protectionist component or even heterogeneity but for the underlying values, which they are based on. His view departed from existing approaches in the way he reflected on the legitimacy aspect of trade and regulation and also in the way he argued about one key aspect of the negotiability of regulatory issues – the different type of reciprocity that they necessitate. On reciprocity, he particularly highlighted the balance that needs to be achieved between developed and developing countries and the legitimacy of the different values, which underpin regulatory choices. He highlighted the need for ‘a new type of reciprocity: market access vs. rules’ and consideration for the cost of domestic regulation in developed economies on developing countries: ‘If we want to impose respect of our strict environmental, sanitary or phytosanitary rules on developing countries (and I think we have every right and obligation to do so), we have to offer in turn better effective access for their products to our market’ (Lamy, 2000a, p. 3). At the same time, he also highlighted what the ‘old style’ evident up to the Uruguay Round entailed: ‘the mercantilist GATT model of reciprocity worked well, based on the premise that protectionist lobbies could be balanced by export interests – or import interests, such as they are represented by the FTA’ (Lamy, 2002). The ‘old’ versus ‘new’ style, which he aimed to contrast, meant that there is not only a shift in the stakeholders of trade policy from lobbying companies to wider societal actors but also a shift in how non-tariff measures and regulatory aspects are negotiated

upon. More importantly, his interventions appeared to invoke that both policy programmes and policy ideas are a question of legitimacy and one needs to change the way that these issues are perceived. Thus in addition to seeing regulatory issues as the crossing between trade and domestic regulatory choices, Lamy also saw it as the nexus of economic and social security, which is to be balanced through the ‘dialogue with these countries, overcoming our own points of rivalry and managing our different collective preferences – for example our respective perceptions of genetically modified organisms or hormone beef across the Atlantic Ocean differ sensibly – in order to work out the economic and social dimensions of global security’ (Lamy, 2000d).

Finally, Lamy’s concerns were related to the effectiveness and legitimacy of governance and rule-making and particularly at which level of governance ‘to express collective preferences on trade’. For him, the solution was to be found on the transnational level through horizontal organisations and vertical groupings of states (Lamy, 2000c). The communicative discourse moves away from looking at non-tariff measures in terms of economic value but in terms of the broader societal value. Thus highlighting that another approach to the evolution of the treatment of non-tariff measures was also possible, but did not become dominant in the wider European trade policy context.

Perfect regulatory process

In contrast to the recognition of the norms and values behind regulatory choices, the dominant discourse during the period 1996 to 2006 was that of identifying the effective modes of regulation or even an optimal regulatory process. In the years between the Market Access Strategy and the Global Europe Strategy there was constant attention on the developments in the DDA but also stronger language by the Commission on its desire to continue with rule setting, as well as to continue developing the strategy for more effective elimination of barriers. While most statements during this period dedicate the full support and effort to the multilateral negotiations, below are some indications by M.P. Carl, the Director-General for Trade at the time that the alternatives were already in the works. Because the link between national law-making and international rules became a main issue of contention in the WTO, the European Commission warned of a growing camp of protectionists, which insist on the separation between trade and regulation. As M.P. Carl rebukes listeners during the WTO General Council:

We have, for example, successfully outlawed unilateral action, but we have left aside many unjustified obstacles to market access, in services, agriculture, and manufacturing. We also see that in many WTO Members, the very notion that national law-making is subject to international constraints is under attack, from both old-fashioned as well as newly minted protectionist forces. (Carl, 2001)

Similar issues resurfaced in the discussion on services disciplines, where the DG clearly reprimands the concerns that ‘more and freer trade undermines governments’ abilities to address, through regulation, policy objectives such as protection of the poor or disadvantaged, consumers, or the environment’ (Carl, 2003a). He goes on to explain that he does not understand ‘why closed markets would allow us to achieve these objectives in a better way’, and clearly outlining the one appropriate response: ‘The appropriate response to many such problems is not to keep markets closed, but rather to design domestic policies directly targeted at the problems ...’ (Carl, 2003a).

The communicative discourse emerging from the Commission evokes the broader free trade philosophy and positioning domestic legislation as its antipode. What constitutes an ambitious FTA started to be defined hand in hand with the economic case for NTM removal. Again best highlighted in the words of M.P. Carl:

... empirical evidence has clearly demonstrated that only regional or bilateral trade agreements that go substantially beyond classical tariff-only FTAs are worth considering ... Such FTAs must, therefore, include non-tariff barriers to trade, some of which were also rejected for further WTO negotiations at Cancun, at least by some Members. It is difficult to see why it should be possible, therefore, to pursue such a wide, anti-NTB agenda, except of course with those countries, which, like the EU, also wish to further reduce all non-tariff barriers to trade. (Carl, 2003b)

M.P. Carl’s statements illustrate a different rationale to the turn to bilateral agreements rather than impasse at the WTO per se, it shapes to be the disagreement on how trade and regulation are to be married with the aim of liberalisation. The persistent problem of how to deal with regulatory issues and the failed attempts to prioritise barriers prompted some reflections internally within DG Trade but also with stakeholders on how best to address barriers beyond tariffs. During the Market Access Symposium workshop, chaired by Matthew Baldwin, the Acting Director of DG Trade, some of the key impediments were tackled, and participants discussed the necessary actions to ‘resolve the underlying question of “trade” versus “regulation”’ (European Commission, 2005). One of the takeaways of the exchange was put simply as:

Trade agreements addressing regulatory barriers in third countries were described as the agreements of the future. But this would imply also being ready to address any deficiencies in our own internal market before we could proselytise to the outside world. (European Commission, 2005)

This double shift – extending the understanding regulation as a trade barrier and extending trade agreements over regulation – are thus in line with looking internally at how EU’s regulatory choices impact trade. The workshop exchange highlights the following: highly competitive sectors in the EU wanted the Commission to deal with ‘excessive or at least inappropriate regulatory environment’ in third countries and the EU itself; and what constitutes the ‘perfect’ regulatory process – one which would at the same time ensure transparency and encourage input from industry and acknowledge that regulators operate within a broader international context (European Commission, 2005). During the Market Access Symposium, the President of the United Nations Economic Commission for Europe (UNECE) captured the spirit of the context under the first part of his intervention on ‘Trade Policy and Domestic Regulation’, where he called for those responsible for EU trade policy must ensure that internal policies do not harm EU’s global competitiveness (Seillière, 2005). He also highlighted that EU regulations should be ‘compatible with EU’s trade obligations’, thus calling for the detailed assessment of EU legislation’s impact on international trade.

The build-up from the Market Access Strategy, which as described above can be seen as a bottom-up effort to address barriers, led to a more strategic top-down approach, enshrined in the Global Europe Strategy. The Global Europe Strategy was a move away from targeting specific unlawful concerns through the TBR and a focus on overall results with the partner country and a realisation that the removal of barriers needs political clout or for the problem definition to be accepted, political factors had to be in place. In speeches before presenting the Strategy, Peter Mandelson, Trade Commissioner at the time, defined the new approach as ‘strategic’ with references to fears for race-to-the-bottom in line with the regulatory competition argument. As he argued in May 2006:

We need to ensure we have the tools available to respond to unfair barriers – be they local standards, restrictions on competition or discrimination in public procurement ... this cannot be a mad rush towards open markets at all costs. It doesn’t have to be a race to the bottom either. But we should not forget entirely that it is a race. (Mandelson, 2006)

In this way rather than stripping the politics of non-tariff measures, he mobilises political and business support to target regulatory heterogeneity.

Similarly to what we saw in Chapter 2, invoking neoclassical economists on comparative advantages is often associated with a belief in neoliberal ideas. Albeit implicitly, the Commission has also called for a rethinking of comparative advantages. During an intervention the Work Foundation conference in London, for example, Mandelson contrasted the world before and after the ‘openness boom [...] since about 1990’ and made sure to highlight that ‘[W]e are not trading Spanish port wine for English cloth anymore. We are not trading just finished goods – in fact, most of what we trade are not finished – it is intermediate goods’ (Mandelson, 2008).

The construction of a free trade competitiveness discourse in the Global Europe Strategy can be seen as launching EU’s trade policy on the ideational path we witness now. The elements of the discourse revolve around the benefits of internal and external openness, ensuring competitiveness, with the aim of delivering jobs and growth.

While these elements were present from the Market Access Strategy, the 2006 Strategy extended the competitiveness discourse over regulatory issues by making them an essential component of market access for businesses. For example, the strategy insists that:

Ensuring that positive changes induced by openness are not jeopardised by abuses of fair competition. (European Commission, 2006, p. 9)

We face structural difficulties in addressing non-tariff barriers either at multilateral or bilateral levels. (European Commission, 2006, p. 10)

In addition, we can note the shape of the problematisation of regulatory heterogeneity through different stages – rejection of protectionism (versus ‘activism abroad’), EU as a more open economy than its partners, deeper interaction between external and internal environment in a changing environment, and cost of diversity and fragmentation (European Commission, 2006, p. 8).

5.4. Discussion and conclusion

The process of collection and categorisation of barriers during the GATT years has highlighted the immensity of the task to understand the restrictiveness and impact of different domestic measures, putting the burden of proof on governments to use measures that are least restrictive to international trade. Within the conceptual toolbox, regulatory protectionism has remained the primary mode of explaining and targeting

such barriers due to the fact that it is subject to rules and to the dispute settlement mechanism – providing certainty both to business operators and policymakers in terms of the process. Equating foreign regulatory choices to regulatory protectionism has also allowed policymakers to use a wide range of tools to address such lack of openness and to use discourse surrounding free trade versus protectionism as the justification for market access. As early as the Market Access Strategy, a vast number of policy ideas within different venues (multilateral, bilateral and unilateral) were put at the service of tackling barriers elsewhere.

In contrast, when talking about the multilateral level, the Commissioner at the time, Pascal Lamy, and the Director-General, M.P. Carl used the language of diversity in national regulatory regimes as the rationale for negotiations at the WTO to continue. The EU was much slower to adopt the language and understanding of regulatory heterogeneity in its internal documentation on trade issues. Lamy's elaboration in particular on managing diversity as a policy solution did not get traction within the institutional context due to limited regulatory capacity as well as political appeal, given the alternative problems, associated with the WTO.

In this first period, non-tariff measures were mostly perceived as technical barriers, for which legal solutions in combination with direct company lobbying is used for their solution. Increasingly with the stalemate at the Doha Round, there was increasing recognition across actors within the EU that the approach to non-tariff measures needs to change and needs to be embedded more firmly in the broader strategic direction of EU's trade policy as well as rooted within more coherent effort across different stakeholders. The failure of the barrier removal programme due to both shift of political will to multilateral negotiation and the lack of regulatory capacity to deal with the number of barriers was a crucial moment for a change in the understanding of non-tariff measures and regulatory issues. This marked a shift from the treatment of non-tariff measures as a 'technical-legal' matter requiring information gathering and analysis as well as identification of which measures to be targeted to using economic rationale and evidence to establish, which measures to be targeted and how. Possibly even more importantly it became a political matter. Hinting to what Baldwin points as the difficulty or impossibility 'to get unbiased advice', the definition and conception of what is unnecessarily restrictive legislation became a matter of deliberation between the Commission, member states, and businesses, operating abroad. While they

remained within the remit of ‘technical’ issues, on which the Commission should lead, the modes of defining them, categorising them and evaluating their impact became further politicised within the institutional framework.

The different documents and speeches highlight two crucial absences: a definition of what the Union considers to be the balance between external liberalisation and internal regulation and a specification of the policy ideas, particularly concerning regulatory cooperation. These absences allowed for more discretion on the side of the European Commission, but this discretion could not necessarily be used in the same way as in the construction of the internal market, due to the immensity of the task.

The developments in the internal market have informed the conception of what are possible approaches to the removal of non-tariff barriers and the combination of different tools. As Pelkmans and Sun (1994) highlight *vis-à-vis* the internal market at the start of the implementation of the programme the combination of principles, which defined it was not readily available to policymakers. In the case of the extension of these principles to the external markets, there were a combination of existing conceptual tools, in the form of heuristics, as well as potential instruments. In the face of uncertainty of multilateral liberalisation and competitiveness concerns, agents made use of such shortcuts available via the WTO, or the internal market and non-tariff measures were slowly embedded in the existing trade regimes. Such a process allowed for the mobilisation of instruments and the creation of new institutional settings to deal with non-tariff measures.

The notion of barriers beyond tariffs also started entering the discourse of Commissioners’ speeches. While this was still limited to specific instances surrounding MAS, the Global Europe strategy shifted the discussion to modes of lowering trade costs in third countries and the necessary tools for achieving that. This was part of reinstating the use of bilateral negotiations and shift away from uniquely multilateral efforts. It created a consensus across member states and businesses on the shift to free trade agreements as a better tool to target this ‘less visible’ costs.

Why would this emerge as the new political economy of trade policymaking? The reasons for this surround three questions, which are widely studied in IPE: how do preferences of operators form (sectoral v class based v mixed explanations; epistemic communities); how are these preferences accumulated (through institutional tools,

individual agents, structures, principle-agent dynamics); how are these transformed and negotiated bilaterally and multilaterally (two and three level games, cooperation dynamics)? While this is a very simplified set up of the critical problems, it provides a starting point of what can be called the new political economy of trade and what is the essence of its newness. This first empirical chapter gives us three possible ways in which the inclusion of regulatory issues in the trade agenda alters the responses to the three questions. We briefly outline each of these below, but these are taken further in each of the other chapters.

Starting from a constructivist approach, we have so far shown that the treatment of regulatory issues has created a puzzle with regards to their categorisation, analysis, and mode of treatment. The reference to such measures as protectionism is a shortcut used to define them in a way similar to tariffs and to be able to apply a similar treatment, but in their essence, they result from different regulatory models, their implementation, and the capacity for their monitoring and evaluation. The preferences of economic operators are not for or against liberalisation but concern the specific sectoral or horizontal barrier removal and establishment of rules. During this first period, there is an absence of clear processes of accumulation and prioritisation. Instead, there is a strategic commitment to their targeting. By positioning them in the heart of the Global Europe Strategy, Commission officials created space for multiple policy ideas to be made conceivable.

To conclude, the early development of the approach towards non-tariff measures shows a focus on their understanding as ‘invisible’ obstacles to trade, which are made ‘visible’ through different instruments at the multilateral and European levels. The distinction between those that are legitimate but unnecessarily burdensome, and those that are illegitimate developed in reference to the progress on the multilateral level but the discussions at the GATT/WTO left substantial gap in assessing the balance between international trade and domestic regulation and did not attempt to put limits to the institutional diversity among members. The impasse in the WTO around the Doha Round, beyond other factors, was also the result of a different understanding of where the limits are between the two and even more so trying to avoid that international disciplines encroach on the domestic regulatory space, which became more and more the focus of discussion. Global Europe was not only a reflection of economic ideas about trade liberalisation and competitiveness but about the link between trade and

regulation. The next chapters continue to look at both how actors understand the impact of the global economy and what kind of legitimate responses could be devised.

Chapter 6. Interaction of policy programmes: Global Financial Crisis and the negotiations with Japan

The previous chapter looked at the first of three periods, namely the emergence of non-tariff measures in the international trade agenda in the 1970s, mainly focusing on the period from the Market Access Strategy to the Global Europe Strategy in 2006, which paved the way for an approach towards non-tariff measures, in principle reflecting their economic weight. It showed how an understanding of non-tariff measures as regulatory protectionism found its way in the coordinative and communicative discourse and early on shaped the institutional structures for dealing with NTMs. The chapter also showed that while there was an impasse at tackling regulatory issues at the international level and that business operators wanted such issues addressed through alternative instruments, the main reason for the treatment of non-tariff measures was the understanding that they are negotiable through the right policy mix. Chapter 6 looks at the second period of interest – from 2007 to 2013, encompassing the reaction to the Global Financial Crisis and the developments surrounding the negotiations of the EU-Japan Economic Partnership Agreement (EU-Japan EPA).

In December 2017 the EU and Japan finalised the EPA negotiations, officially launched in 2013. The agreement has been hailed as a landmark deal which sends ‘a clear message internationally that the EU and Japan, highly-developed democracies, remain committed to a liberal, free-trading, rules-based world, and they will seek to shape it even if the US won't’ (“EU and Japan reach free trade deal,” 2017). Whether the EU and Japan will be able to fulfil such high expectations of the agreement is still to be seen, but the importance of the deal lies elsewhere – it put into the focus of attention the negotiability of non-tariff measures and the factors which shape the evolution of NTMs. As many of the interviewees noted, the negotiations with Japan put pressure on the EU to define a method for calculating NTMs, for understanding the restrictiveness and the inter-linkages between different non-tariff measures and also their relationship to tariffs, and also for defining the justification for addressing NTMs (Interview 8, DG Trade Civil Servant, 2016; Interview 12, DG Trade Civil Servant, 2016; Interview 32, DG Trade Civil Servant, 2017).

The importance of the EU-Japan negotiations is also set against the broader context of the post-Global Financial Crisis and the imperative to seek ambitious agreements and

fight protectionism. The European Commissioner for Trade's communicative discourse at the time of the launch of negotiations clearly reflect this, pointing out all the 'very good reasons' for the deal to be launched due to the growth in Asia, a promising opening of the Japanese market, and the need to create jobs in the current economic climate (De Gucht, 2012a).

The communicative discourse surrounding the agreement with Japan shows that for the first time the benefits of a free trade agreement were inextricably tied to addressing non-tariff barriers and tied to two discursive formulations: one focusing on protecting the status quo and not being left behind and second – positive benefits for two core aspects of the overall EU rhetoric - jobs and growth. The imperative to seek negotiations with Japan against this backdrop, however, faced reservations from member states and was not the result of intensive lobbying from industry, among other things due to the parallel negotiations on TTIP, which took precedence for many actors. Regarding the coordinative discourse, there was much more hesitation on how a 'good' agreement with Japan could be achieved. Both policy documents and interviews show a difficulty to categorise and evaluate, which barriers need to be addressed and how. In the internal dynamics among EU actors, Japanese non-tariff measures were seen as regulatory protectionism. This understanding then paved the way for a specific approach to the negotiations.

Beyond this empirical focus, which shows the expansion of the concept of free trade in the communicative discourse and the uncertainty about the role of non-tariff measures in the coordinative discourse, the chapter coincides with the second part of the theoretical argument. It focuses on the transformation of existing ideas and how ideas are transformed in the process of negotiations. It highlights how regulatory protectionism and heterogeneity are highly dependent on the partner country and identifies three factors, which are particularly relevant during this period: sequencing and prioritisation, modes of evaluation and assessment, and the types of bargaining and reciprocity.

The chapter combines process tracing of policy documents and meetings during the period, with semi-structured interviews on the EU-Japan negotiations to illustrate the influence of ideas. It uses data collected in September 2016 and March/April 2017 to show the changes in the cognitive and normative frames. After this introduction, each section does the following: the first part briefly turns to the global dynamics and the

understanding of the causes and effects of the crisis. The second part traces the legitimising communicative discourse around regulatory issues and how the debate was structured within the public sphere, where inescapably some of the speeches focus on the transatlantic market. It then goes into the coordinative discourse, which shapes the negotiability of non-tariff measures and the different dimensions of negotiability as presented in Chapter 2. In the last section, we provide further discussion and conclusions from this chapter.

6.1. Impact of Global Financial Crisis on policy programmes

While the next section looks at the communicative and coordinative discourse of the European Commission, this section explores the broader discursive context within which trade policy and regulatory issues interact. Two processes have become clearer at the international level as a result of the financial crisis. On the one hand, the financial crisis and the ensuing slow growth have provided the space for countries to put different forms of non-tariff measures in support of the domestic companies and particular sectors, cementing the perception of regulatory measures as regulatory protectionism. The Global Trade Alert's 16th report summarises that there was 'a surge in 2008 and 2009, a fall in the rate of new measures imposed as the prospects for the global economy brightened in 2010 and 2011, and then an acceleration once the slowdown in global growth became apparent in 2012 and beyond' (Evenett, 2014, p. 1). For example, the Canadian province of Ontario introduced sales targets for various wines, which meant that wines sold in the stores of the Liquor Control Board of Ontario below these thresholds could be de-listed (Global Trade Alert, 2009). However, thresholds for Ontario wines are set at a substantially lower level than imported wines, which as the Commission states 'can be considered a possible barrier to trade' (European Commission, 2010a, p. 46). In its 2011 report on barriers to trade and investment the Commission cemented the perspective that the post-crisis trade landscape is characterised by both pre-crisis barriers and crisis-induced ones noting that '[E]xperience of 2010 confirms yet again that the cost of trade is no longer primarily linked to tariffs (with certain exceptions), but lies mostly behind the border' (European Commission, 2011, p. 2).

On the other hand, the financial crisis was also presented as an opportunity to tackle the full range of measures, which can affect trade, and a broadening of the definition of a barrier towards different manifestations of regulatory heterogeneity. Another

example from the same report lists some ‘other measures’, which need to be monitored, including a range of what can be seen as domestic policies with only potential indirect effect on trade. One of the regulations named includes a moratorium on any rise in prices and tariffs for medicines during the financial crisis in Ukraine ‘until the level of minimum wages and pensions is set at the level of the living wage and all debts on wages and scholarships are repaid’ (European Commission, 2010a, p. 73). According to the Law, domestically produced medicines should be sold at prices regulated by the state, while foreign medicines should be sold at the prices set as of July 1, 2008. The Commission noted that such measures should be monitored in order to ensure that the regulation does not affect EU exporters. We briefly expand on these two dynamics below and then show how both feature in the communicative discourse of the European Commission.

Interaction between regulatory protectionism and regulatory heterogeneity

The causes of the Global Financial Crisis have been multiple, but trade was not directly one (Helleiner, 2011). Global trade, however, was affected both on the supply and demand side. With regards to the former, trade collapsed due to drying up of trade finance; the collapse of vertical integration; disruption in international capital markets; while on the demand side, it was driven by a collapse in demand in advanced economies (WTO, 2008). Likening the Great Depression of the 1930s and the 2008 crisis, analysts observe that between 2008 and 2010 trade declined faster than during the first two years of the Great Depression (Eichengreen and O’Rourke, 2012). Drawing comparisons between the two – both in academic and the policy circles – led to substantial uncertainty of the measures countries might take and fear of a slip to protectionism. Both the WTO and G20 used the opportunity to call for resisting protectionism with the former closely monitoring development in global trade, which resulted in a two-fold commitment – standstill not to introduce new measures, which either reduce market access for foreign suppliers or increase discrimination or remove those already taken. In their 2010 declaration including ‘Commitment to an Open Global Economy’, the leaders reiterated the need for free-market principles and limiting the effect of the crisis by avoiding measures (G20 Leaders’ Declaration, 2010, p. 8).

While the fears for a worst-case beggar-thy-neighbour policies and trade collapse have been exaggerated, the centrality of regulatory issues – how quickly they can be

introduced, while challenging to dismantle – was brought at the forefront of discussions (Bown, 2011; Gawande et al., 2015; Kee et al., 2013). Moreover, the crisis highlighted that the appeal of non-tariff measures is in their opaqueness, both vis-à-vis objective and impact, since while often less economically efficient, they can overcome institutional and political constraints (WTO, 2012, p.38). In essence, highlighting the protectionist dimension of regulation as a reaction to the crisis or the first channel described above.

However, the second dynamic described focused on a ‘new reality’ which the WTO is not necessarily prepared to tackle, namely: ‘rapidly evolving economic realities, where international trade runs through much more intricate webs, involving a greater number of countries, firms, and products, as well as being associated with a greater range of non-trade concerns such as environmental protection, than was at the time of the establishment of the WTO’ (UNCTAD, 2010, p. xi).

Thus at the international level, there was also a rethinking of what the trade policy agenda encompasses and what should be subject of negotiations and how. This was spearheaded by Pascal Lamy who as we saw in Chapter 5, early on recognised that market-opening meets different ‘collective preference’ through trade and while collective preferences are not synonymous to the regulatory choices they result in, his speeches recognised that collective preferences are a challenge to the multilateral trading system (Lamy, 2004). In the introduction to the 2012 World Trade Report (by which point he had abandoned talking about collective preferences) he explains:

... expansion of the public policy agenda means that NTMs will not follow a path of diminishing relevance like tariffs have done ... one way of thinking about the challenges of economic integration is less as a quest for free trade and more as progress towards a global market ... The aim is not to reduce public policy interventions to zero; it is to render them compatible with the gains from trade. We can no longer think about reduction formulae, becoming immersed – and sometimes lost – in endless debates about the size of reduction coefficients or exceptions to the coefficients. Reciprocity in negotiations does not have the same meaning. The policy tool box is quite different. (World Trade Organisation, 2012)

His introduction to the WTO report highlights two aspects. Firstly, that trade rules should be more concerned with a broader definition of non-tariff measures than just regulatory protectionism and secondly, that the type of negotiations over regulatory issues is different to that of tariff negotiations, thus requiring different policy ideas. While Lamy’s interventions served the purpose of raising awareness of the fact that

different regulatory choices reflect different values without normatively assessing what is the right way ahead, the work done within the Organisation for Economic Co-operation and Development (OECD) after the crisis tied together need for regulatory reform with trade openness. In one of their report on ‘Regulatory Reform for Recovery’, the OECD talks about the ‘domestic regulatory measures that operate behind the border can also act as a form of protectionism’, including implementation of such measures (OECD, 2010, p. 19). They see a role for regulatory reform to tackle behind-the-border regulatory measures and thus promote openness (OECD, 2010, p. 19). Set against the broader neoliberal public philosophy, regulatory reform, prompted by the cost of regulatory heterogeneity, became instated as a potential benefit of cooperation over regulatory issues.

The next sub-section shows how these dynamics feature in DG Trade’s communicative discourse surrounding the crisis and the EU-Japan agreement and then in the coordinative discourse. As the introduction to this chapter pointed out, the negotiations with Japan are a milestone for how NTMs are dealt with internally, and they shed light on how agents’ define the negotiability of measures.

6.2. Legitimising free trade and inclusion of regulatory issues

While regulatory heterogeneity started entering both the international and European discourse during this period, the communicative discourse from the European Commission after the crisis showed an expansion over regulatory issues of the neoliberal public philosophy, particularly free trade dimension, as well as the need for regulatory choices to better consider the trade environment. While regulatory heterogeneity was present in interventions by both Baroness Catherine Ashton and Karel De Gucht, vis-à-vis the specific partner – Japan – the coordinative discourse and practical considerations behind negotiability reflect a much stronger understanding of non-tariff measures as regulatory protectionism. The legitimisation of free trade is thus done by addressing both regulatory protectionism and heterogeneity.

Tracing the common themes across two Commissioners – Baroness Ashton and Karel De Gucht – this period illustrates how that the Global Financial Crisis created a space for deep free trade agreements to be asserted as the leading policy solution for achieving jobs and growth. While this in itself seems more as a continuity from Global Europe, what has shifted is the focus on regulatory issues as the means to deliver the

necessary ambition in the agreements, and thus we witness the stretching of the understanding of free trade.

Even though Baroness Ashton was Trade Commissioner for just over a year, her time in office coincides with in-depth assessments and discussions of the FTAs launched by her predecessor, Peter Mandelson, as well as the toughest year in terms of the impact of the Global Financial Crisis. At the Seventh WTO Ministerial Conference, which marked Ashton's last speech¹²⁵, Pascal Lamy highlighted: 'The year 2009 will go down in history as a moment of great global insecurity' (Lamy, 2009). During her time as Trade Commissioner, she focused on three persistent points, which were set out in her first speech during BusinessEurope Conference 'Going Global' (Ashton, 2008a), which defined the framing of trade policy issue on a general level. Firstly, insistence to 'protect openness not unravel it' and a plan to 'fight de-globalisation' (Ashton, 2009a). This has been defined as the 'no more urgent priority', where the need for an agreement at the multilateral level as insurance policy is deemed to have a greater market value than ever (Ashton, 2008a). Secondly, the need for a global trade deal to 'lock in openness' (first speech) to being one of the 'best insurance policy' (later speeches); and finally, to 're-examine measures in place' in third-countries. All three elements connect to the idea of 'low-intensity protectionism', particularly in the form of different regulatory barriers, which are very tempting to use in the short term but may have long-term implications for economic growth. Looking back at the two channels through which the GFC crisis entered European discourse, the focus initially was on 'regulatory protectionism' – how to remove the 'low-intensity protectionism'. She also focuses on the self-evidence of the harm of protectionism: 'We all know that protectionism makes recovery harder. But sometimes in the face of crisis, we risk throwing away what we know'(Ashton, 2008a). The language around non-tariff measures from the Global Europe Strategy finds its way to the framing of what barriers represent during her time as well. Her interventions revolved around three connected understandings of regulatory issues: as 'new barriers to trade' which need to be addressed to address the 'total business environment' and 'the whole operating environment for business'; part of the ambition of an agreement (for those partners

¹²⁵ Last day as Trade Commissioner, statement at the plenary session of the Seventh WTO Ministerial Conference, 30 November 2009.

that are ready to move ahead); and as a ‘myriad of trade problems and irritants’ (Ashton, 2008b). We elaborate on this below.

Much more than just a free trade agreement

The narrative surrounding the inclusion of non-tariff measures reinstates the market access opportunities as well as the fact that such commitments go beyond an FTA. Commissioner Ashton highlighted on numerous occasions during her speeches that FTAs aim to remove remaining tariff barriers and behind the border non-tariff barriers, and particularly for the major emerging economies the EU is engaging with (Ashton, 2008b). These new FTAs are also related to the EU’s internal approach in terms of its Market Access Partnership, whose role is ‘to tackle the myriad of trade problems and irritant that too often tie up our exports in unnecessary red-tape or deny them a fair chance to enter foreign markets’ (Ashton, 2008b). In one of her latest speeches, she adds that the EU’s ambition should be to achieve ‘much more than just a free trade agreement’ (Ashton, 2009b).

Her statements highlight that tariff barriers are only part of the picture of ‘21st-century market conditions’ and that the ambition of an agreement depends on how much of those new barriers are tackled. The understanding of ambition has been left vague in all communicative discourse since this allows for different interpretation of an ambitious agreement, depending on the partner country. As we saw in the chapter on research design, the expectation here is that depending on the understanding of non-tariff measures as regulatory protectionism or heterogeneity, we will witness differences across countries.

On the other hand, there is a dissonance between internal and external communicative discourse – internally agreements are ‘new’, ‘unique’, and ‘ambitious’, while externally they are just like the FTAs signed by other partners. While in a domestic context, the ambition of these deals is praised, within the WTO context there is a much more defensive stance. The bilateral and regional trade agreements are championed as a part of EU’s multilateralism policy (Ashton, 2009c). What is more, the allegations made that EU’s FTAs do not meet the requirements of Article XXIV of GATT, of Article V. of GATS and differ from FTAs of other members are met with even stronger language: ‘it seems that using the term ‘discriminatory’ just to the EU’s FTAs is not just unjustified, but is also a discrimination itself’ (Ashton, 2009c). De Gucht makes

repeated reference to an ambitious EU-Japan Free Trade Agreement and in one of his interventions (which also includes ‘ambitious’ in its title) he describes that ambitious is that which tackles regulatory protectionism or ‘the non-tariff barriers – the ‘red tape’ - that currently hinders access to both markets’ (De Gucht, 2012b).

The stretching of what an ambitious trade agreement entails, as we outline later in this chapter, has two implications: forms coalition around the removal of regulatory protectionism, and allows for a broader set of demands in negotiations over regulatory protectionism.

Market for regulation

Echoing what Lamy called the challenges of economic integration as ‘less as a quest for free trade and more as progress towards a global market’ (World Trade Organisation, 2012), Catherine Ashton introduced the understanding of negotiations over regulatory issues as a potential towards a ‘transatlantic market’ (Ashton, 2009d). In her early speeches, particularly on relations with the US, Ashton defined non-tariff measures and regulatory issues as ‘glass ceiling’ and set out the ways to achieve a breakthrough in the relationship (Ashton, 2009d). The growing discussion on regulatory cooperation was still limited to future obligations and in particular regulatory cooperation as a form of ‘effective early warning system’ or a weak form of exchanges (Ashton, 2009d). This system is associated with what Ashton calls a ‘double dividend: smarter regulation and more trade’ (Ashton, 2009d). This can be seen as one of the key moments of defining a vision for dealing with regulatory issues and their position in the broader EU trade policy, despite the lack of a clear definition of what ‘regulatory cooperation’ entails.

Even though this idea of the double dividend was also present in the academic field and highlighted that regulation comes first, further in the same speech Ashton moved away from this thinking. Instead, she introduces the long-term goal of ‘market for regulation’:

Let me explain what I mean by smarter regulation. Because of the dialogue, we're engaged in, we are forced to look again at our own regulation, to challenge the way we look at it and to evaluate whether there isn't a smarter way of achieving the same public policy results. Just as we have a transatlantic market for goods we should have a transatlantic 'market for regulation'. A solid and critical exchange about our respective approaches, and indeed some degree of competition for best practice in this area can actually help us spot

the most efficient regulatory tools, which we can then share with each other
(Ashton, 2009d)

While her intervention focused explicitly on the ‘transatlantic market’, it had feedback effects on the treatment of regulatory issues in general. Two points become clear – the learning through competition and the aim to each ‘the most efficient regulatory tools’ thus signing up to a view that there is an optimal regulatory form. The emergence of ‘market for regulation’ can be paralleled to the developments in EU’s internal market (Kerber, 2000; Muir Watt, 2004). The ways to manage the diversity, which emerge as a result of free movement of goods, services, and factors of production (capital and work-force), are unification (‘diversity as impediment to integration’) and ‘market for regulation’ (Muir Watt, 2004, p.439). The argument developed is that mobility of capital creates competition for regulation among member states as well as competition among the national regulations under which trade in goods and services takes place. Vis-à-vis internal market regulation, the solution has been a movement across three alternatives: ‘deregulation (private market solution), national regulations with ‘home country control’ and EC regulations, i.e., centralisation/ harmonisation’ (Kerber, 2000, p. S243).

At the same time a market for regulation also echoes studies in the theory of economic regulation, which trace a move from ‘regulation is instituted primarily for the protection and the benefit of the public at large [...]’ to ‘what benefits a state can provide to an industry’ (Posner, 1974; Stigler, 1971). Accordingly, a ‘market for regulation’ is constructed where ‘regulation and regulators are instrumentalised by the market incumbents to erect entry barriers and undermine competition’ (Kerber, 2000, p. S243). The idea of a market for regulation did not reappear in the same form, possibly because of what it entailed for negotiability and that all regulatory issues are negotiable. This communicative discourse wanted to legitimatise the market as the locus where good regulation is selected over bad regulation. Moreover, the evoked degree of competition to reach good practices echoed the core of the application of neoliberal ideas. This discourse was essentially abandoned for other agreements, except for the Trans-Atlantic Partnership Agreement, where it reappeared in a much softer form in terms of the potential for learning.

At the same time, the possibility that the EU may explore regulatory change on the European level was also hinted by De Gucht in his Keynote speech at the Conference

hosted by the Commission on: ‘Working Together for Growth: Making the most of the internal market and external trade’ (De Gucht, 2012c). He raised the question whether there is the possibility for a two-way approach, notably ‘Could we consider adapting our own regulations in a spirit of give and take while recognizing that our own regulations are often the fruit of legislation?’ (De Gucht, 2012c).

This idea that there could be ‘give and take’ in regulation is closely linked to the imperative to continue with trade liberalisation against protectionism and to ensure growth, part of the broader neoliberal direction. De Gucht’s intervention makes use rhetorical tools to highlight both the necessity and appropriateness to take action (De Ville and Orbie, 2014; Huet and Eliasson, 2018; Siles-Brügge, 2014). He combines the threat of the crisis of 2008 and its consequences in 2012; the imperative to seek growth and take advantage of the growth in emerging economies (‘Over the next two years, 90% of supplementary world demand will be generated outside the EU’) and the ‘golden opportunity’ to ‘leverage the necessary domestic regulatory changes to improve access to external markets’ (De Gucht, 2012c, p. 2). In this context, his Keynote speech sets out the thinking behind regulatory cooperation and tackling regulatory obstacles for trade. The full page is worth noting, but the most important elements concern the commonplace position of regulatory heterogeneity in the debate as a widely discussed topic:

On regulatory cooperation, I hear almost every day that unnecessary incompatibilities between different regulatory regimes represent the thorniest obstacles to trade. // Increasing the compatibility between regulatory regimes with a view to reducing trade costs is a very important element of our trade policy as I see it, in particular with our main trade partners. // It should be more at the core of our regulatory agenda. ... The strategic question before us is, therefore: how can we do better on the interface between EU regulation and regulatory approximation or mutual recognition with third countries? (De Gucht, 2012c, pp. 4–6)

By this stage there had been very few speeches on regulatory cooperation and different regulatory regimes as ‘the thorniest obstacles to trade’, and De Gucht’s reference to these questions as something tackled every day, makes it seem mundane. His statements also frame regulatory heterogeneity as the core of the regulatory agenda and an important element of the ‘external competitiveness proofing’ of EU’s regulation, where new initiatives are assessed for their impact on trade and investment (De Gucht, 2012c, p. 6).

The dominance of free trade in this instance reinstates the overall public philosophy and not only stretches to include regulatory heterogeneity but also all regulatory choices. This marked the extension of what can be negotiated and a move towards the possibility that regulatory choices can be subject to discussion.

However, this phrasing, mentioned in the High-level exchange with industry and academics was quickly abandoned with the backlash against the TTIP negotiations with its spillover effects on the negotiations with Canada but surprisingly did not concern Japan. The reason for this is that the Commission managed to shape the EU-Japan EPA as the removal of unjustified regulatory barriers with the discursive focus on Japan's process of removal of these barriers. It is important to note, however, in 2012 the public backlash against the TTIP had not started yet – declarations and initiatives to stop TTIP did not launch until March 2013 while the self-organised Stop TTIP initiative is launching in March the following year.¹²⁶ This becomes evident in the shift in the European Commission's discourse on regulatory issues afterwards, insisting on the non-negotiability of regulatory issues.

No other choice but bilaterals

Similarly, the documents emanating from the European Commission instated not only a turn to bilaterals, but FTAs as the only choice if regulatory barriers are to be tackled. Despite the perception by some in the Commission that 'Trade, Growth, and World Affairs' was not a 'memorable' strategy (Interview 8, DG Trade Civil Servant, 2016), it intensified the language on regulatory barriers and particularly their use 'in our major trade partners, given the intensity of our trade and investment relationship with them' (European Commission, 2010b, p. 7). The concerns outlined are: 'lack of acceptance and/or use of international standards, and often-burdensome certification or inspection requirements' (European Commission, 2010b, p. 7). Similarly to Global Europe, the Strategy uses the same phrasing technique 'but while [differences in laws and regulations, or the absence of common standards or mutual recognition, may be legitimate in some cases], they too often constitute an important source of business costs for our companies abroad' (European Commission, 2010b, p. 7). Here it is not clear who the savings are for – is it companies or the EU as a whole. In its phrasing

¹²⁶ See <https://stop-ttip.org/about-stop-ttip/>; European Citizens' Initiative (ECI) Stop TTIP collected signatures against TTIP and CETA from 7 October 2014 to 6 October 2015. During this one year, 3,284,289 European citizens signed the ECI.

the Commission confirms the definition of regulatory issues as ‘trading costs’ and outlines the clear problem ‘differences...constitute an important source of business costs’, it also points out as straightforward the solution: ‘... enhanced regulatory cooperation – both in order to promote equivalence or convergence (of rules, standards, testing and certification practices) internationally and to minimize unnecessary costs in regulation worldwide’ (Idem). In this circumstance what enhanced forms of cooperation entail is not defined by the Strategy. It is presented as the natural solution but leaves scope for its definition at a later stage and leaves further discretion vis-à-vis the partner.

The Strategy also reiterates the ‘attractiveness’ of EU’s system of regulation – ‘quite a few third countries recognise the advantages of the EU’s system of regulation for the Single Market and have adapted their own rules accordingly’ (Idem.). This attractiveness of the EU system allows the Commission to further the point that EU’s internal rulemaking ‘must be increasingly sensitive’ to the global environment, adding the ‘need to help our businesses remain competitive’ (Idem). Internal market reform is linked fully to the dynamics of external trade openness and enhancing Europe’s competitiveness. Such framing provides the Commission with a new task: improving the coordination between internal and external regulatory action through both government regulation and international standards, ‘with a particular focus on future legislation’ (Idem.).

Interestingly this period was also defined by the turn to the idea that the European Union has no other choice but to turn to bilaterals. This is echoed by some of the interviewees:

Karel De Gucht made a change from the multilateral to the bilateral track, but really it was because we had no other choice but bilateral. He made a last push to meet with G5 to assess possible progress within the WTO and he saw that it was not feasible. And suddenly he opened negotiations with countries we have not negotiated with before – game changers – Japan, US, India. (Interview 9, DG Trade Civil Servant, 2016)

The same interviewee added: ‘The crisis definitely helped - it confirmed that we are desperate and we have to be courageous. It was really stick to the crisis or move forward.’ (Idem) The Strategy, presented by Karel De Gucht was branded as a ‘renewed’ trade strategy echoing an idea of resuming after interruption and bringing fresh life and strength to trade policy (De Gucht, 2010c). In his speeches, the

Commission often evoked the importance of history and the advantages of having a long history as an open trading partner thus in his opening statement to the Strategy, De Gucht stated: ‘History has taught us that trade works. Europe has been a trading hub for many centuries. Over time, this has helped to bring us the prosperity that we know today’ (De Gucht, 2010c). Within this communicative context, the place of an EU-Japan trade agreement was evident – it had to support jobs and growth, and it had to deal with regulatory barriers.

No agreement without non-tariff measures

The calculation of the benefits of non-tariff measure removal became central for the negotiations in order to convince member states and businesses of the benefits of an agreement and became an essential element of an ambitious agreement. Vis-à-vis Japan, in particular, the Commission found it very difficult to convince member states to launch the negotiations in the first place (Interview 8, DG Trade Civil Servant, 2016; Interview 12, DG Trade Civil Servant, 2016; Interview 17, Industry Association, 2017; Interview 18, Industry Association, 2017). Member states perceived that there is more downside than upside in the negotiations and the presentation of the FTA as the tool to address long-standing regulatory challenges provided a way for the Commission to push forward with the agreement. Because Japan already had sufficiently low tariffs on industrial products, compared to the EU, the process of negotiation between tariffs and non-tariff measures had to be done in parallel. This was clear both in the demands from the less-keen industry as well as the Commission itself. As the memo on the first round of negotiations stated the Council authorised the suspension of the negotiations if Japan ‘does not live up to its commitments on non-tariff barriers (European Commission, 2013a). One of the interviewees puts it in stronger words: ‘Japan was seen as a stagnant market, and it was already recognised as a country with no or low tariffs. Therefore, more downside than upside to starting the negotiations. So we highlighted the opportunity with NTBs’ (Interview 12, DG Trade Civil Servant, 2016). The positioning of NTBs in the heart of the agreement mobilised both companies and member states around the problem of ‘regulatory protectionism’.

The parallelism between tariff removal and reduction of non-tariff measures, therefore, became a key component of EU’s approach, but since there was little precedent (EU-Korea FTA as precedent), the approach faced difficulties. The dynamics, which ensued resembled the bargaining type of negotiations, based on the reciprocal exchange of

concessions in mercantilist terms, and provoked a discussion on the commensurability of tariffs and NTMs, which has long been subject to the policy and academic debate. At the same time, this goes contrary to the idea that vis-à-vis non-tariff measures, reciprocity takes on a different meaning. While the communicative discourse preceding the negotiations started identifying regulatory heterogeneity, the market for regulation, discussions over regulatory choices, the negotiations with Japan highlighted a more conservative view of non-tariff measures as regulatory protectionism. The next section focuses on three aspects: understanding of NTMs, factors, which shape it, and the effects.

6.3. Negotiability of regulatory issues: EU-Japan Economic Partnership Agreement

This part of Chapter 6 focuses on the themes, which emerged in the interviews and internal communications on which factors are essential in defining ‘negotiability’ and how does the partner country feature in this calculation. Figure 6 on the following page sketches out key milestones of the negotiation since the launch of formal negotiations in May 2011. Cooperation over different non-tariff measures and regulatory aspects have been ongoing for decades, but particularly since 1991 when the EU and Japan agreed on an Action Plan for EU-Japan Cooperation, which included reinforcing efforts in relation to the ‘regulatory reform dialogue, removing obstacles and barriers to trade and investment with the aim to develop an appropriate regulatory framework’ (European Union - Japan Summit, 2001). Some of the progress achieved before the EPA negotiations were launched was in the field of medical devices, vaccines, as well as cooperation with Japan on barriers in third countries (European Commission, 2009). For example, vis-à-vis medical devices, the Japanese Ministry of Health, Labour and Welfare clarified ‘pre-market’ approval processes for medical devices and simplified conformity assessment processes for some categories of medical devices (European Commission, 2012b, p. 6). Other achievements included the modification of the cross-border mergers regulation and more transparency on pharmaceuticals (European Commission, 2009). The milestones in the negotiations between the EU and Japan are summarised in Figure 6. The structure of the resulting agreement is enclosed in *Appendix 4* and reflects the different modes of tackling barriers through FTAs: disciplines on non-tariff measure within horizontal chapters (e.g. in Japan: Chapter 6 Sanitary and phytosanitary measures, Chapter 7 Technical barriers to trade), sector-

specific chapters (EU-Japan Chapter 19 Cooperation in the field of agriculture) or annexes (EU-Japan Annex 8-A Regulatory cooperation on financial regulation), as well as chapters addressing regulatory heterogeneity more explicitly (EU-Japan Chapter 17 Transparency).

Figure 6. Milestones of EU-Japan EPA negotiations

May 2011	EU-Japan Summit agreement to launch negotiations; 2012 scoping study
29 November 2012	Negotiating Directives adopted
19 April 2013	First Round of Negotiations
7 April 2017	Eighteenth Round of Negotiation
6 July 2017	EU and Japan reached an agreement in principle on the main elements of EPA
8 December 2017	The Agreement was finalised
18 April 2018	EC proposed signature and conclusion of Japan

Source: Own elaboration.

Negotiability and the partner dimension

In line with the combination of theory and data-driven approach to identifying the key factors which define negotiability, one of the expectations of the research was that the partner country would be necessary for both regulatory protectionism and regulatory heterogeneity, but their importance will be of different degree. Concerning the former, the partner country will be more critical in terms of its relative economic weight while in the latter it will be more important in terms of the regulatory distance. While the thematic analysis of the interviews conducted in September 2016 and March/April 2017 point to the partner dimension, they highlight trust towards the partners as a critical component of negotiability. This is evident both for the understanding of non-tariff measures as regulatory protectionism and regulatory heterogeneity. As seen above, vis-à-vis Japan, one of the criteria for launching the negotiations was to ensure that Japan could be ‘trusted’ vis-à-vis non-tariff issues in goods, services, investment and public procurement (Council of the European Union, 2012). The dimension of ‘trust’ has been highlighted by a number of interviews from the Trade Policy

Committee (Interview 13, TPC Member, 2016; Interview 14, TPC Member, 2016; Interview 26, TPC Member, 2017; Interview 27, TPC Member, 2017). Since enforceability of NTMs is more difficult than with tariffs, prior elimination of some of the so defined barriers had to be undertaken from Japan. This approval was formalised by the Council of Ministers, which required a one-year review to make sure that Japan has made sufficient progress. Rather as a commitment device, the FTA became the venue for discussions on regulatory issues to take place, shifting the focus on pre-implementation. Such an approach faced difficulties with the Japanese side, which did not want to lose all bargaining power by giving up on all existing restrictions outright.

As one of the interviewees highlighted pointing out: ‘First and foremost depends on the goodwill and trust with the partner’, the examples given were Japan and Turkey but also ‘a lot of other partners’ (Interview 25, TPC Member, 2017). What does showing ‘goodwill’ and creating ‘trust’ means in this context? The interviewee explains that ‘we need them to show that they are committed to liberalising and removing barriers before and during the negotiations. We need to see that sufficient progress is made and this is judged by the regulatory changes the other country has taken’ (Interview 25, TPC Member, 2017). In the cases where Council representatives find it difficult to judge the effects, they consult with the national ministries responsible for the portfolio and rely on the specific area expertise back home. During the interview, the representative repeated twice the importance of ‘goodwill’ of the partner country, where goodwill can be understood as the ‘friendly, helpful, or cooperative feelings or attitude’ (“goodwill | Definition of goodwill in English by Oxford Dictionaries,” n.d.). Goodwill thus underlines the need to show cooperative behaviour and as the interviewee explained this has to be shown before the formal negotiations start. At the same time, it also highlights that goodwill is particularly important for the cases, where the EU actors perceive the partner country as protectionist.

Slightly before the first formal round of negotiations, Karel De Gucht outlined his perspective at an EU-Japan Business Summit in Tokyo, and while the speech is accessible by the general public, the message is predominantly directed to convince member states (and sectoral interests) who were sceptical of the agreement initially. He particularly underlined Japan’s commitment to agree on the roadmaps on non-tariff

barriers was a way to build trust, which created the foundations of the negotiations (De Gucht, 2013b).

In his speech, he also reiterated the principal role of the business community, as those who would ‘reap the benefits’: identifying what are the problems on the ground but also explaining to constituencies the relevance of a good outcome of the agreement (De Gucht, 2013b, p. 3). In contrast to expectations of societal IPE dynamics, businesses were not very vocal on the EU-Japan agreement. While in 2012 at the launch of the negotiations, De Gucht named a number of European industry associations (such as agri-food and drink, pharmaceuticals, chemicals, ICT, express deliveries and services industry) who have expressed their support for the initiative, interviewees reveal a less proactive role before the launch of negotiations with a time-lag in involvement of business associations. One of the interviewees from a business association in support of the agreement highlighted that members of the association, member states and MEPs had to be convinced of the importance of the agreement and non-tariff barriers became a crucial tool (Interview 36, National Business Association, 2017).

While the Commission tried to equate the importance of negotiations of Japan to the TTIP negotiations, with Jean-Luc Demarty calling it ‘almost equivalent’ (Directorate-General for Trade, 2015b), it took numerous calls from the Commission to invite organisations to submit input to the lists of barriers (Directorate-General for Trade, 2014a). The services sector, in particular, had moments of high and low interests in the negotiations. Meeting records with the European Services Forum illustrate regular engagement but predominantly from the ESF leadership. Whilst barriers to services in Japan have been seen as important; often companies do not recognise to what extent services matter to their business processes (Interview 29, European Business Association, 2017). Since issues around trade in goods are easier to grasp, trade in services has been more difficult to explain including how liberalisation impacts the services sector. What one of the interviewees pointed out: ‘There is a general lack of understanding of how much services contribute to the EU economy also via manufacturing. This has always existed, but in some sense, we are only starting to realise this now’ (Interview 29, European Business Association, 2017).

At the time of the negotiations with Japan, partially as a way to counteract the concentrated interests of the auto industry, the European Commission’s DG Trade

Chief Economist (Cernat and Kutlina-Dimitrova, 2014) started highlighting the centrality of services for manufacturing with the push for an introduction of a fifth mode of supply¹²⁷. As summarised in a later report from the same series, Mode 5 services are a vital dimension of manufacturing exports with high relevance in the future due to the way in which services content is embodied in goods exports (Antimiani and Cernat, 2017).

As introduced in Chapter 1, the approach behind Mode 5 reflects an understanding that manufacturers are actively ‘buying, producing, and selling more and more services in recent years in a trend referred to as “servicification”’ (Cernat and Kutlina-Dimitrova, 2014, p. 2; Kommerskollegium, 2012a). Thus the existing four modes of supply, enshrined in Article I:2 of the GATS, do not account for the ‘share of services is being embodied in products and traded around the globe’ and does not represent the linkages between trade in goods and services (Cernat and Kutlina-Dimitrova, 2014, p. 6). While the attention on ‘servicification’ originated with the Swedish National Board of Trade (Kommerskollegium), it quickly found its way in the thinking behind regulating for both trade in goods and services. One of the main aspects of the approach championed by the Chief Economist was to prompt for trade rules which reflect these new dynamics. While not explicitly targeted to the negotiations with Japan, the discussion surrounding mode 5 was aimed at highlighting that ‘everybody is in services’ and to convince companies, focusing on the limited gains from an EU-Japan agreement, that this is more to be gained. The need to convince the sceptics and gather support for the EU-Japan negotiations was also reflected in the insistence that first, a lot of regulatory barriers exist in Japan, and second, that both the EU and Japan are ready to tackle them.

The Commission continuously prompted the ESF and its members to continue providing input to the development of EU policy on trade in services, particularly on the modes of assessment of the ‘value of services liberalization’ (Directorate-General for Trade, 2016b). Going back to the considerations of the services sectors, ESF while

¹²⁷ Mode 5 refers to the existing legal framework in the WTO GATS (Article I:2), where four modes of supply are distinguished: from the territory of one Member into the territory of any other Member (Mode 1 — Cross border trade); in the territory of one Member to the service consumer of any other Member (Mode 2 — Consumption abroad); by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 — Commercial presence); and by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4 — Presence of natural persons).

‘very strongly’ supporting the FTA with Japan, insisted on the fact that ‘the real value will come from strong regulatory provisions’ (Directorate-General for Trade, 2014b). ESF also flagged concerns about the stalling of the negotiations vis-à-vis the one-year review process as a result of pressure from the car industry and member states. ESF committed to sending a joint letter to the Commission to express support for the negotiations. At the same time, with the progression of the negotiations, it was clear that Japan is not a priority – as summed up in the notes of a meeting between the Cabinet and ESF on 30 September 2014: ‘Japan: no major priority for ESF, but interested in Japan Post and GP railway’ (Directorate-General for Trade, 2014c).

However, we witness a backlash to the reverse capture dynamic – while the Commission wanted to convince member states and businesses of the benefits of non-tariff measures, they used it to reduce the discretion of the Commission in the level of ambition. More precisely, they requested an agreement, which tackled a huge universe of different regulatory choices.

The negotiations with Japan highlight two dimensions of the process of negotiability: an internal and an external dimension (Agence Europe, 2014). Japanese policies and regulations that create barriers have long been discussed within the EU; and which barriers to be addressed and the process of categorisation internally has substantially developed during the negotiations. Essentially, necessity was defined within the negotiations. Also internally in the presence of strong concentrated interests, the Commission built support for the agreement around the positive contribution of regulatory issues – what is necessary and appropriate. While this in line with traditional societal dynamics, the discussion reveals that the focus on regulatory issues also reflected an understanding of regulatory protectionism.

Externally, the process highlights the interplay between the EU and the partner country, signified by a strong relational dimension – the building of trust between partner countries; as well as the perception that negotiability is defined during the process of negotiations. The partner dimension and in particular trust is also critical in relation to one of the modes of dealing with non-tariff measures, regulatory cooperation, discussed in the next chapter.

As outlined in the theoretical framework, the factors which shape the cognitive and normative understanding of NTMs on the level of policy programmes require

agreement on the principles of relevance and modes of calculation for determining interests and the criteria for evaluation (see Chapter 2). The EU-Japan negotiations touch upon three aspects relevant for negotiability: commensurability of tariffs and non-tariff measures, the role of impact assessments, and modes of inclusion of non-tariff issues in the negotiations.

Commensurability

The initial expectations as set out in Chapter 2 was that regulatory protectionism aligns closely with the ‘substitutability’ thesis and the ‘tariff-equivalence syndrome’ which are dominant in the academic and policy research on non-tariff measures. Particularly in the quantitative studies reviewed non-tariff measures are assessed in terms of their incidence and price and quantity effects. The calculation of Trade Cost Equivalents (TCE), where the impact of the NTM is converted into a tariff equivalent showing how many percent the price abroad increases as a result of the NTM, is also the methodology also used in the impact assessment commissioned by DG Trade (Sunesen et al., 2009, p. 51). Due to the importance of the modes of evaluation, we return to them separately below, but it is important to note the persistence of the ‘tariff-equivalence syndrome’ and how it has shaped the approach to the treatment of NTMs in the negotiations.

From the analysis of the interviews, it becomes evident that commensurability of tariff and non-tariff barriers is essential for understanding how much an agreement is ‘worth’ in terms of its economic value. More importantly, policymakers recognise that it is a matter of a subjective decision to assess, which non-tariff measures are to be entered into the evaluation and recognise that deciding what should be deemed a barrier constitutes a choice. One of the interviewees presents this point: ‘What I find as most difficult is to assess whether what we give up / sacrifice on tariffs, works to reduce NTBs and to what extent. So far we have no good way to compare tariffs to NTBs’ (Interview 8, DG Trade Civil Servant, 2016). Such consideration echoes the long-standing debate in the academic and policy literature on the substitutability of tariff and non-tariff measures (World Trade Organisation, 2012). While empirical evidence has not been definitive, the thinking of the Commission in the negotiations with Japan highlight the dynamics between the two. It is highlighted mainly in the coordinative discourse whilst the communicative discourse illustrated earlier focuses on the gains that can be reaped when non-tariff measures are included in the agreements.

With the negotiations with Korea, first and then with Japan, it became clear that policymakers could not look only at tariffs to assess the value of an agreement. The same interviewee adds:

... with the existence of NTBs it is different...how you compare the two becomes very important and problematic as well because it requires a decision on which NTBs you take into consideration and also if you remove eight out of ten barriers would this be enough. (Interview 8, DG Trade Civil Servant, 2016)

While the starting point is that non-tariff measures in the partner country are regulatory protectionism, the strategies of the Commission also recognise that the purpose of addressing non-tariff measures is to address or eliminate unnecessary restrictions in regulatory differences or regulatory divergence. However, interviewees themselves posed the rhetorical question ‘What is necessary?’ (Interview 12, DG Trade Civil Servant, 2016). There is strong recognition that sometimes measures are in place for technical or historical reasons and that they cannot always be eliminated. The interviewees showed a strong understanding that in the case of Japan many of the NTBs are based on consumer preferences. Echoing Gilpin’s story from the 1970s, one of the interviews repeated the notorious phrase that ‘Every Japanese is an NTB’ (Interview 8, DG Trade Civil Servant, 2016).

One of the signposts of what is ‘unnecessary’ is through assessing whether they are applied in a ‘discriminatory or unjustified way’ further to the normative understanding at the international level (Interview 27, TPC Member, 2017). As one of the interviewees explains through an example:

Both US and the EU import a product into a third country and the third country allows the US but not the EU import. The second and more severe is that the third country does not allow the import of certain groups of products, but gives priority to domestic production; at the same time exports to the EU. (Interview 27, TPC Member, 2017)

In the first scenario, another country receives a different treatment; while in the second scenario, there is a lack of level playing field, since the partner country can export to the EU but not vice-versa. In our theoretical approach, these examples are firmly within the regulatory protectionism realm.

The second signpost for what is ‘unnecessary’ is assessed through the costs and the segmentation of the market a measure creates, i.e. the value in terms of the market (Interview 12, DG Trade Civil Servant, 2016). Once again this echoes the thinking of NTMs as the trading costs for exporters. This is also reflected in the methodology used

to assess what is a barrier. Some interviewees describe the process as ‘empirical’ rather than ‘theoretical’ – it is based on concerns expressed by the industry similarly to the regular processes of the Market Access Advisory Committee, described in Chapter 5.

The interviews point to the idea that industry plays a crucial role in defining the necessity. As one of the interviewee's highlights:

In terms of comparing tariffs and NTBs, I would say that the normal procedure is to compare to the status quo, and given that an agreement is generally better than the status quo we are content. Of course, we can also contribute during the legal scrubbing stage – that’s what happened with CETA. There was a high-level political agreement, but then during the legal scrubbing we clarified some issues, we think that the same could happen with Japan, given that there is a commitment to reach a political decision in July [2017]. (Interview 28, National Business Association, 2017)

For businesses and business associations the baseline level is multilateral negotiations. Preference is given to the multilateral level, and a lot of businesses were active to stimulate the discussion around the Doha Development Round. As the same interviewee explained: ‘but since then, we try to set priorities for other issues. Since all the other countries were going for FTAs, we needed to do something. In general, our work is very intense: constant production of letters, brief, information for all stakeholders.’ (Interview 28, National Business Association, 2017).

Vis-a-vis the commensurability of tariffs and NTMs as well as the outcome of negotiations, one of the interviewees asks rhetorically: ‘What is a fair outcome? I would say an acceptable one. Now the way to approve agreements is very complex, so it is harder for us to get it to be acceptable’ (Interview 8, DG Trade Civil Servant, 2016). What becomes evident is that commensurability becomes clear during the negotiations and it is difficult to assess ex-ante. This changes the dynamics both within the EU decision-making system but also in relations with the partner country. What does this entail for the role of the Commission and particularly DG Trade? The reflections above show a very distinct role for the Directorate-General for Trade to define what is necessary and what is acceptable within the institutional framework. Choices of what is negotiable engage not only a cost-benefit calculation but also a cognitive understanding of what is a barrier and a normative understanding of what unrestricted trade should look like. As we will see below, the role of agents to categorise, interpret and evaluate regulatory choices provides scope for discretion, which again is defined within the institutional context.

From the discussion so far with regards to Japan, the initial perception was of existing regulatory protectionism, but during the negotiations, there was a move towards understanding better the rationale for which measures exist and targeting regulatory heterogeneity.

Categorisation and Prioritisation

The second key factor, defining the negotiability of measures, is their categorisation and prioritisation. The coordinative discourse by the Commission illustrates that the process of establishing, which NTMs to address was not only technical, but it also involved deliberations within the European Commission and deliberations with businesses and member states. This entails an interaction between assessment of economic value and balance between different values (across interests), as well as a reference to existing modes of assessment and evaluation, where different DGs and businesses were a part of the categorisation.

As two interviewees summarised: ‘we dumped a lot of lists on Japan’ (Interview 8, DG Trade Civil Servant, 2016; Interview 12, DG Trade Civil Servant, 2016). Industry submissions were the main source together with member states, but the latter, according to them, ‘did not really add anything really new’ (Interview 12, DG Trade Civil Servant, 2016). The role of the Commission in this instance was not necessarily of prioritisation but of categorisation and identification of what is founded and what is not, which are assessed in reference to WTO rules, existing EU rules but also practice by the EU and its member states.

The first of those lists consisted of more than a hundred barriers that were reduced to thirty and included issues the Commission was already aware of (Interview 8, DG Trade Civil Servant, 2016). The filtering that they had to do included identifying those that have either been changed already or do not exist. A second list was prepared, which was ‘based on refinement’, ‘more accurate and targeted’ (Interview 12, DG Trade Civil Servant, 2016). More importantly, it already included the ways, in which the Commission thought that they should be addressed in terms of the range of possible approaches – international standards, building on existing mutual recognition, conformity assessment, and transparency thus reflecting a focus on regulatory divergence. Meeting notes from exchanges between DG Trade and representatives of Cosmetics Europe on concerns relating to the Japanese market and the second list of

NTBs underlines some of the difficulties to balance between specific concerns and the broader approach of the negotiations (Directorate-General for Trade, 2014d). The exchange highlights both the need for justifying the issues raised (more detailed data on the regulatory approaches and alternative methods) and modes of substantiating them in front of the partner country (Directorate-General for Trade, 2014d).

While the Commission had received a commitment on the Japanese side for the elimination of the first list of barriers, the process with the second was more cumbersome, and no specific commitment existed. Even supporters of the agreement such as the Confederation of Danish Industry (CDI) worried about what are the appropriate ways for NTMs to be addressed in the FTA, highlighting the uncertainty on the side of businesses:

Confederation of Danish Industry: What type of mechanism will the FTA include to address new NTMs? The first list of NTMs was agreed upfront with Japan the second is not, does it mean that there is no commitment of Japan to deliver on the second list? How can do plan to learn from the Korea example on NTMs? How can one improve the utilisation rate of FTAs? (Directorate-General for Trade, 2014e)

Industry associations which follow the negotiations explain that the increased scope of the negotiations has increased the pressure on businesses to provide information (Interview 28, National Business Association, 2017). In particular, associations that are regular partners of the European Commission participate in all consultations, not only during negotiations but also before. The industry representative explains:

We are constantly asked for input and sometimes it is difficult to cope with all the information that needs to be collected and processed. For example, in the case of Japan we were asked on two occasions to reach out to businesses to assess barriers; also for positions on the different negotiations and non-tariff barrier issues. The Commission reaches out to them [businesses] just as much (Interview 28, National Business Association, 2017).

Those associations that have a wide membership coverage are involved via a continuous process where they follow all issues – general strategy, ongoing negotiations, sector-specific issues and national legislation and regulations. One of the industry representatives explains that businesses were very supportive of the high growth and large market strategy ‘but it is not only about the opening of markets, we also aim to seek clarifications on rules’ (Interview 28, National Business Association, 2017). What is more, apart from a few disagreements, ‘export-oriented and import-using industries on the same line usually’ since both are supportive of the rule-oriented

scope of agreements. With regards to Japan, in particular, industry associations were one of the vocal supporters of the better link between tariff and non-tariff negotiations and commitments in the agreement, but they also see ‘serious difficulties’ in achieving that.

Related to this is the idea that once the European Commission focused its discourse on the removal of regulatory barriers as a core aspect of the agreement, businesses put stronger demands for commitments in the area. To an extent, this then backfired since DG Trade had to make sure that any commitments requested from Japan and the scope of cooperation over regulatory issues, could in some way be matched by the EU side. This is illustrated in a briefing for DG GROW on the Future work on Regulatory Cooperation in the framework of the Industrial Policy Dialogue EU industry is also facing a challenge vis-à-vis the level of the commitments. The briefing highlights the joint work of DG GROW and DG Trade on the drafting of an FTA chapter dedicated to regulatory cooperation. In particular, it describes that the challenge with regulatory cooperation is that it covers all areas of an FTA (including services, technical regulations etc.) and that it requires agreement on overarching commitments. The briefing notes that ‘the EU industry is pushing for binding commitments as far as the treatment of non-tariff measures is concerned, but as such commitments would work both ways, we need to find the right balance’ (Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 2015). This is also supported by the previous discussion on the involvement of industry that once the discourse on the gains from regulatory barriers flourished, it also became the focus of many of the statements about the negotiations.

At the same time, discussions with both industry representatives and the Commission illustrate the difficulty in agreeing on binding commitments as far as the treatment of non-tariff measures is concerned and mainly since this involves multiple actors on both sides. BusinessEurope’s reading of the engagement on the Japanese side underlines this: on the one hand Japan looking to conclude negotiations in 2015, but highlighting that the commitment has been less strong outside the Ministry of Economy, Trade and Industry (METI) (Directorate-General for Trade, 2015c). Vis-à-vis regulatory cooperation in particular: ‘the message they [BusinessEurope] pass to the business community is that we should not overload the FTA and that this should be mostly done via a parallel track’ (Directorate-General for Trade, 2015c). Also, the briefing reports

on BE's support for 'an ambitious FTA with Japan' (Directorate-General for Trade, 2015c). Similarly in November 2016 in a discussion between Business Europe and DG Trade's civil servants, covering Asia and Latin America, on the broader topic of the implementation of FTAs, DG Trade shared a plan on how to focus more on the preparatory phase of negotiations in the future as well as the engagement of stakeholders (Directorate-General for Trade, 2016c). This is relevant since it links the approach during the negotiations of EU-Japan to the stronger focus of DG Trade on monitoring and strengthening the implementation of agreements, identified in its 2014-2020 Strategic Plan and reflecting the priorities of the Juncker Commission (Directorate-General for Trade, 2016a).

In the discussion, BE has shared doubts about how DG Trade can take over the work on implementation given stretched resources and as the note mentions wondered whether the negotiation phase could play a more significant role:

There is already now a shortage in addressing MA barriers, and focusing work on FTA implementation risks making the situation even worse. Would a solution be to try to include and solve as many MA barriers as possible already in the FTA negotiations, include them in the negotiations, so that they will automatically be part of the FTA implementation? (Directorate-General for Trade, 2015c)

The meeting also touched upon the central role of the Market Access Advisory Committee (MAAC). In this context, apart from the 266 meetings and exchanges between 1 January 2014 and 17 January 2017, documented in the Access to Documents request¹²⁸ the formalised engagement of business in the process of discussing regulatory issues before after and during the negotiations, takes place both via the Trade Policy Committee (TPC) on the strategic dimension and via the MAAC on the specific trade-related issues. The MAAC deals with the Market Access Strategy, Market Access Database and the 'prioritisation' of issues (Interview 25, TPC Member, 2017). As one of the interviewee's highlights:

... this prioritisation is not spelt out but it also not secret. The Commission makes the priority list from what member states and industry have submitted, and it balances based of course on: short term versus long term issues; market value as well; but also effect on the EU as a whole. (Interview 25, TPC Member, 2017)

¹²⁸ Reference GestDem No 2017/0311.

Regarding the thinking of which ‘barriers’ are important: ‘biggest ones’ first, which can infer both biggest ones in terms of economic value but also in terms of political salience vis-a-vis legitimate policymaking. When asked about the methodology used to define, which NTMs are legitimate, one policy official states: ‘In terms of justification, we need to see what kind of benefits the existing measures bring. Quantifying NTMs has been a difficult task, but we made a first attempt with the study if the negotiated outcome of Korea’s negotiated results, but you can always adjust the modelling’ (Interview 8, DG Trade Civil Servant, 2016).

Thus the first route for looking for justification is through economic value: ability to present quantifiable evidence for the effect of a measure. This is the go-to option in the case of impact assessments and evaluations (discussed below). At the same time, the description of the process also echoes the fact that policymakers look at what kind of benefits these measures bring in the partner country – while these benefits can be to economic operators, they can also extend to consumers and society more generally. Finally, there is an element of reverse engineering: once DG Trade has seen what has been agreed on, it can see whether it is sufficient.

The methodology to address NTMs also triggers a reflection on the measures, which exist within the European Union and inward-looking into the restrictiveness of EU barriers. Despite the discourse on EU’s regulatory superiority, policymakers recognise that EU’s lead in terms of openness is not always based on substantive evidence: ‘Also problematic is that we always assume that we are the most open because of the single market, but Canada and the US also have unified legislation at the state level’ (Interview 8, DG Trade Civil Servant, 2016). One of the interviewees from the Council of Ministers also challenges equalising single market to openness and even challenges the idea of single market superiority: ‘What single market? Do we have a single market in procurement? In services?’ (Interview 30, TPC Member, 2017). Self-reflection is also evident in the tweaking of methods of assessment and evaluation to illustrate the value of an agreement and the importance of regulatory issues.

This section attempted to show how despite the presence of typical societal IPE dynamics – concentrated interests and gathering coalitions to counteract them – the Directorate-General for Trade has been engaged in defining what is negotiable within the process of negotiations.

Methods of assessment and evaluation

The third factor, which shapes the thinking behind non-tariff measures are the modes of assessment and evaluation. Actors are continuously involved in questions of justification both in terms of the internal audience and external audience. Even though actors acknowledge the need for ‘evidence’, the role of economic analysis in their day-to-day work (and especially vis-à-vis impact assessments (IAs)) has been assessed as limited (Interview 2, DG Trade Civil Servant, 2016). From a mode of using IAs in support of multilateral trade negotiations in Seattle (1999), the Better Regulation initiative (2015) led to a more formalized and bureaucratized process where the Directorate-General for Trade now had to perform ex-ante impact assessment (IA), Sustainability Impact Assessments (SIA) during the negotiations, economic assessment of the negotiated outcome, and an ex-post assessment. DG Trade undertakes four different types of assessment: impact assessment before the start of the negotiations (Better Regulation tool); sustainability impact assessments (DG Trade tool); assessment of the negotiated outcome (DG Trade tool); and ex-post assessments conducted after a certain period of the entry into force of an agreement (Better Regulation tool).

The first appraisal of the methodology for impact assessments for trade negotiations recognised the limits of how far economic analysis can travel:

... for some components of the policy agenda, such as tariff changes, the causal relationships are fairly well understood and may have been incorporated into economic and other models. For others, the relationships are less well understood, and empirical evidence of past effects is limited. In such cases, much of the analysis consists of evaluating the validity of the various claims made by negotiating parties for and against the proposed measure, alongside stakeholder concerns and further logical analysis of likely causes and effects. (Kirkpatrick and George, 2006, p. 328)

This shows that the methodology for impact assessments in principle does not assess the trade-offs between economic and non-economic issues. Within national policymaking, such balance is drawn within the political process, via ‘the “horizontal” dimension, through interdepartmental conflicts that must be settled in the Cabinet or Parliament’ (Schampf, 1996, p. 36). Within the EU policymaking, DG Trade has attempted to use IAs as a way to legitimise policy-options through the use of formal evidence and further to the Better Regulation Guidelines provide a way for assessing the likelihood of certain impacts. During a discussion on the methodology, the German

Federal Government pointed out that the Handbook DG Trade provides does not provide ‘guidelines on how to cope with conflicting results (e.g. economic vs. social / qualitative vs. quantitative data) e.g. by mentioning conflicting messages (similar to a cost-benefit analysis as in the EU Impact Assessment Guidelines) without weighing, for example, economic interests greater than environmental interests’ (European Commission, 2015c, p. 4).

But despite their use across all initiatives, all respondents challenged their usefulness and what do they contribute to policymaking when this concerns regulatory issues (Interview 8, DG Trade Civil Servant, 2016; Interview 10, Former DG Trade Official, 2016; Interview 11, Former negotiator, 2016). Some see them as a bureaucratic tool, some as a ‘guidance’ document, while other challenge the underlying rationale of the indicators used (Idem.). Across the board, in their coordinative discourse, actors do not express a belief in the power of Computable General Equilibrium (CGE) models and the resulting impact assessment. Thus:

IAs to be triggered automatically is a very bureaucratic thing. It used to be a political choice in DG Trade to conduct a study, and it always relied on evidence to do so. Currently, we have a 2-year period for any legislation, so we are always late in addressing the problems. (Interview 4, Former DG Trade Official, 2016)

Impact assessments and Sustainability Impact Assessments became very important since the negotiations with Japan since it is no longer an internal Impact Assessment Board but also external Regulatory Scrutiny Board, which assesses the analysis of the impact. DG Trade was not obliged to do the Commission-wide impact assessments, but due to internal squabbles with other DGs it had to start as well (Interview 7, DG Trade Civil Servant, 2016).

As discussed in Chapter 2, the quantification of NTBs is still being developed since the economic impact of NTM removal is tough to estimate. The impact assessments performed by the Commission provide only a broad idea of the level of barriers, which need to be removed to improve market access. The Chief Economist Unit has a role to play by checking for consistency across different models and results, but as one of the interviewee explains ‘but as you know models can produce very different results based on the assumptions, so how do you then compare how much will be gained with Japan EPA or TTIP’ (Interview 8, DG Trade Civil Servant, 2016). Thus again the process of DG Trade is based on experience, both with the country concerned and previous

negotiations, but also negotiations with other countries. Finally, this is summed up nicely by one of the interviewees: ‘the process is ‘bottom-up: once we know what we have negotiated, we can see whether we have asked for enough’ (Interview 7, DG Trade Civil Servant, 2016).

Recent external analysis has introduced the concept of ‘actionability’ signifying ‘the degree to which an NTM or regulatory divergence can realistically be reduced (via various means and techniques)’ (ECORYS, 2009). As the authors of the report on Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis state ‘actionability estimates are based on expert opinions and cross-checks with regulators, legislators and businesses, supported by the business survey, and they should be interpreted with caution’ (Ecorys, 2009, p. xviii). Actionability further depends on the timeframe taken as well as ‘political will’ (Ecorys, 2009, p. xviii). The actionability assumptions are also used for the assessment of barriers to trade and investment between the EU and Japan (Sunesen et al., 2009), which guide how much of the produced estimates can be decreased in each policy scenario. The TTIP barrier report and methodology, which is now used widely for the assessment of how many barriers can be removed, provides a first attempt to define in qualitative terms the situations, which are actionable. For example, they put forward many reasons why eliminating regulatory divergence might not be feasible:

... because this would require constitutional changes, unrealistic legal work, or unrealistic technical change; because there is a lack of sufficient economic benefit to support the effort; because the set of regulations is too broad; because of consumer preferences, language and geography; or because of political sensitivities.’ (Ecorys, 2009, p. xxxvi)¹²⁹

Actionability allows for a distinction between issues that can be realistically addressed if the political will to do so exists, and those that, while perhaps functioning as NTMs and regulatory differences, most likely cannot be changed through a joint process of negotiation and realignment. Actionability and what can be constituted as actionable thus is closely tied to the partner. Regarding regulatory protectionism, what is included will depend on the tools that exist to address these barriers and the partner’s capacity to tackle them. Given that the measurement of how much NTM reduction is feasible

¹²⁹ In the case of EU-US trade and investment flows, the study concludes that approximately half of the NTMs and regulatory differences that impinge flows “could realistically be reduced through joint efforts (ECORYS, 2009, p.xxxvi). In their case, reduction covers all possible instruments, including recognition of equivalence, mutual recognition agreements, harmonisation of rules, or common international standard developments.

is also to a large extent based on survey data and expert opinions, how DG Trade officials interpret and decide possible choices and what can be actioned is conditioned upon their perception of negotiability and the dynamics with the partner country.

Implementation and enforcement

The shift towards the inclusion of non-tariff measures in FTAs has highlighted two additional dimensions along which they differ from tariffs, which factor in their understanding and negotiability: implementation and enforcement. The theme of implementation and enforcement also resurfaces in MAAC and TPC meetings, as well as broader policy documents. These two have become a central pillar of trade policy, partially because until now not that many comprehensive agreements were implemented. The Trade for All Strategy reinstated its commitment to eradicate non-tariff barriers through the enforcement of agreements and regulatory cooperation (European Commission, 2015b, p. 13). The theme has four dimensions: enforceability of rules and commitments within FTAs, enforceability outside an FTA, implementation of FTAs and particularly non-tariff measure commitments, as well as implementation and fluidity¹³⁰. Implementation and enforcement issues create the need for revision of existing structures or the creation of new structures. These can be seen as ‘regulatory structures’ since they aim to set the relationship between different regulatory bodies and societal actors, subject to regulation, and aim to ‘regulate’ the balance between the provisions aimed at opening and provisions aimed at protection. These regulatory structures are informed by existing regulatory frames but also define new ones, which set the context for the societal understanding of the aims to be achieved through the agreement.

Regulatory structures at the same time create discrimination. The EU is ‘not going to decrease its standards’ has been added to ‘free trade’ as one of the guiding framings as one of the interviews said “the general norm”; but the idea of a norm is that it is applied equally to all partners, while the strongest aspect of bilateralism seems to be differentiation. The inclusion of regulatory issues thus creates a paradox – on the one hand, the main aim of the rules set out by the WTO is to avoid discrimination between national and foreign suppliers and among national suppliers but at the same time they provide a space for more discretion across different partners based on the levels of

¹³⁰ Fluidity is defined as the ‘ability of a substance to flow easily’ (“fluidity | Definition of fluidity in English by Oxford Dictionaries,” n.d.)

trust and potential economic gains. In this sense, the inclusion of regulatory issues in EU FTAs has taken the EU further away from the WTO and its principles of non-discrimination and national treatment. Similarly, evidence points to a turn to narrow reciprocity and moving away from a traditional understanding of reciprocity as unconditional reciprocity. Due to the focus on non-tariff measures as protectionism, agents are less willing to wait for parity in the longer term. Concerning the difficulties of implementation post-signature and enforcement, the move towards non-tariff measures shows signs for a move to conditional reciprocity where pre-emptive investment was required by the Japanese, reinstating a narrower version of *réciprocité à la Française* (Woolcock et al., 2012). This creates an understanding where something has value if you can get something in return for it. The negotiators become involved in a process where the goal of identifying a problem as a barrier and calling it such is to address it before the negotiations have formally started or during the negotiations. Such thinking also reinstates earlier observations that there is an interlinkage between different measures and it is a matter of judgement and justification for which measures to target.

One quarter of interviews underlined the need for monitoring and assessment of implementation and enforcement structure (Interview 3, Council of Ministers Representative, 2016; Interview 5, DG Trade Civil Servant, 2016; Interview 6, DG Trade Civil Servant, 2016; Interview 25, TPC Member, 2017; Interview 26, TPC Member, 2017; Interview 28, National Business Association, 2017). As one of the member state representatives highlighted ‘multilateralism will be better but [for FTAs] it is really about implementation and implementation is about trade barriers’ (Interview 25, TPC Member, 2017).

Both the negotiations with Korea and Japan were important milestones in the process of refocusing efforts on implementation and EU trade policy participants and observers underline the difficulty to create mechanisms for monitoring and evaluation. Different interviewees express the frustration with NTBs:

The Korea agreement particularly problematic is the enforcement issue on some NTBs since we cannot remove them and we get informed from businesses that these are problematic. There was not too much on regulatory cooperation in Korea so that also makes us think that more monitoring/surveillance needed on NTBs. (Interview 28, National Business Association, 2017)

Commission representatives also illustrate the change in perspective: ‘NTBs also feature in relation to the new focus on the implementation of trade agreements and whether the results are good enough. This is now a problem with Korea and making sure that 5 years on progress has been made.’ (Interview 5, DG Trade Civil Servant, 2016; Interview 6, DG Trade Civil Servant, 2016).

The experience with Korea also created a feedback effect on other FTA negotiations since its implementation vis-à-vis NTBs did not launch smoothly. As the notes of different MAAC meetings illustrate, this created tensions with businesses and the member states. The process shows that once the FTA with South Korea was in place more specific barriers to EU exporters started being tackled. In April 2012 the EU raised for the first time the possibility to draw a key barriers list for Korea. In June 2012 the draft was presented to the MAAC for discussion with ‘10 issues of various sectors (automotive, cosmetics, electronics, renewable energy, SPS/food/alcohol and pharmaceuticals)’ (“MAAC Draft Minutes, September,” 2013, p. 1). One of the attending business organisations raised the question of criteria for the selection of key issues, which has resurfaced after previous discussions (e.g. during the evaluation of the Market Access Partnership). The Commission ‘clarified’ that ‘key barriers are selected on the basis of a combination of factors, including number of MS affected, economic importance as well as a legal/political hook which would allow to address the issue appropriately’ (“MAAC Draft Minutes, September,” 2013, p. 2). The final list was presented in September 2012 without changes.

6.4. Discussion and conclusions

While the previous section looked at the factors, which shape the understanding of NTMs, here we focus on how this understanding affects the evolution of treatment of barriers. Firstly, based on the evidence above, the first question to tackle is what the role of the European Commission in deciding the approach is. The theoretical framework outlined that we can see the relative strength that ideas exert over policy at different moments of time by looking at instances where policymaking is characterised by either ‘low intellectual coherence, ad hoc bargains, quick fixes and a focus on ultimate policy outcomes’ or ‘based on deliberation among members of an epistemic community and is theory-based’ (Mügge, 2011, p. 187). The continuum between the two can show us when actors suspend either the underlying public philosophy and policy programmes and for what reasons. Part of the pragmatic instances of

policymaking are moments of ad hocery, as the passive ‘cut and dried rule and stereotyped notions’ without deeper reflection, but also experimentation, involving new modes of engaging with partner countries and internally. What we see here is that there is recognition of the need for changed modes of understanding and more profound reflection on how the categorisation and treatment of barriers are interrelated.

Within the institutional setting for negotiations with third countries, the role of the civil servants in DG Trade can be seen both as constrained – due to deliberations with member states, difficulty to reach consensus, protecting the internal market; but also as subject to discretion – due to DG Trade’s ideational leadership and entrepreneurship, its role in categorisation and prioritisation, and ability to form consensus around its policy programmes. The role of civil servants in DG Trade is constrained by the negotiating directives for trade negotiations, but the directives are characterised both in terms of their vagueness and their similarity across partners. However, the first part of this chapter illustrated that during the actual process of negotiation, the treatment across partners is very different. For DG Trade the negotiating mandates are ideal-case guidelines and ‘they don’t provide straitjackets’, but as interviews highlighted civil servants would attempt to address all issues (Interview 8, DG Trade Civil Servant, 2016). Regarding the control of the member states, one of the interviewees explains that member states would also discuss the approach on how to include non-tariff measures ‘but mostly those that have industrial interests’ (Interview 25, TPC Member, 2017). Those that do not have specific-industry interests would not take an explicit position on the mode of inclusion in the agreement with the partner country and how the issue is to be treated in the agreement.

Similarly to the understanding of non-tariff measures, regarding the specific approach the interviewees rank ‘partner dynamics’ as important, which is not to be perceived necessarily as power. It links to the dynamics in terms of cooperation on regulatory issues, which both sides are prepared to agree on and that has already been achieved (Interview 25, TPC Member, 2017; Interview 26, TPC Member, 2017). In terms of the fourth mode described earlier – regulatory cooperation provisions, member state representatives within the TPC format do not seem to discuss whether regulatory cooperation is appropriate but ‘how to do it in terms of the scope, sectors and focus (Interview 25, TPC Member, 2017). Similarly, some business associations also

identify two components of the approach – ‘partner country and sensitive issues’ (Interview 28, National Business Association, 2017).

The thematic analysis reveals that the inclusion of NTBs in the negotiations is framed in practical terms – particularly evident in the area of Technical Barriers to Trade. As one of the interviewees compared approaches:

For Korea, we had three annexes: cars/automotive, pharma, electronics (avoidance of double testing), which was a very technical annexe. Too complicated, so we even had to issue guidance on how to understand and read the annex...no scoping exercise was done, we based it on KORUS as the minimum that we need to achieve, and we also had bilateral contacts beyond the negotiations to sort it out. (Interview 8, DG Trade Civil Servant, 2016)

This is compared to the Japan case where the scoping to the agreement included an annexe on NTBs, and as described earlier, Japan was presented with the two lists with barriers (Interview 8, DG Trade Civil Servant, 2016). The first ‘indicative’ list has been based on information from local associations in Japan as well as the High-Level Economic Dialogue (Idem). A participant in the negotiations explains that once those were in full speed, a second list was prepared - first member states in the Trade Policy Committee have sent their contributions and as a second step, meeting with Trade Policy Committee members and with industry to merge the issues and ‘to see what we can address - what works and what is feasible’ (Idem). The discussion on the mode of inclusion highlights the difficulty in deciding what the subject of discussion is in the first place. What the same interviewee added ‘Of course, a problem is what we think a barrier is, how we can address it, and to look, whether at the EU we actually do the same’ (Idem).

We always start with international standards first. The EU is active and influential in international government-backed fora, and that is why we prefer international standards since we think we can make use of that. Lately, we also work on regulatory cooperation (Japan, US, Canada) in areas where we come close with our partners. (Interview 12, DG Trade Civil Servant, 2016)

Even though these standards are often voluntary, the reference to them in free trade agreements brings about a legal effect.¹³¹ At the same time, there is a time lag until

¹³¹ As Egan and Pelkmans elaborate: ‘An international standard (or guide or recommendation, as the World Trade Organization specifies) is widely understood as a standard issued by world bodies such as the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU), except in ICT where other consortia often play a role. The WTO TBT Committee has defined a set of six principles for determining whether a standard is ‘international’: openness, transparency, impartiality and consensus, relevance and

international standards become implemented and dominant in a marketplace.¹³² Thus the second list already included proposals of what actions had to be taken, which reflected the DG Trade's understanding of negotiability and highlights their scope for discretion. While the TPC and MAAC, as we saw in the previous chapters, are intimately involved in the deliberation and create a space for discussions over NTMs, DG Trade's power of the categorisation and prioritisation of measures creates the scope for an agreement to be reached.

The discussion on negotiability and the different factors, which shape it highlights the importance of the partner country, on one side, and the transformation in the understanding of NTMs, on the other. The broader underlying philosophies of embedded liberalism, which we associated with regulatory protectionism in the previous chapter has made way to the free trade philosophy, which involves both the need to respond to protectionism and to address regulatory heterogeneity. In this way, the overall background ideas about what free trade entails have been preserved but have been transformed through uncertainty at the level of policy programmes and in particular, the principles for measurement, classification and evaluation and criteria for prioritisation. The case of Japan can be seen as the core of the transformation since it aimed at eliminating both regulatory protectionism and regulatory heterogeneity before a full turn to the latter.

The move towards discussing and including regulatory issues in FTAs is embedded within existing ideas about the benefits of free trade, market openness, undistorted trade, but it also challenges agents' understanding who have to come to grips with the new reality. In Mugge's terminology, agents' move from dogmatism to pragmatism to adhocery to assess how much is enough in negotiating NTMs and how this is to be done. Rather than witnessing a transformation of FTAs, new disciplines are added on top of old ones, accommodating existing understandings.

Regulatory heterogeneity as a trade problem and regulatory protectionism with Japan

The theoretical chapter set out that in the face of uncertainty of cause-effect relations in the case of non-tariff measures and the difficulty of assessing their impact, ideas about what constitutes a barrier will drive agents' to take certain actions. While the

effectiveness, coherence and the development dimension (see, e.g. USTR (2014), 2014 Report on TBTs, pp. 25-26).' (Egan and Pelkmans, 2015, pp. 64–65)

¹³² See Egan and Pelkmans (2015).

interests of societal actors and the Directorate-General for Trade are informed by material and structural factors, these interests are constituted by cognitive ideas, which form the guidelines for action and justification for policies in terms of their interest-based logic and necessity and normative ideas in terms of the value attached to policies and the legitimisation of those with regards to the underlying philosophies. Regarding the cognitive ideas, they are illustrated through DG Trade's coordinative and communicative discourse about the contribution of tackling regulatory issues for jobs and growth and their importance for an ambitious trade agreement. Cognitive ideas about the commensurability of tariff and non-tariff barriers, about the modes of categorisation, assessment and evaluation inform the process of negotiations and what is negotiable. Within the institutional set-up for market access barriers (MAAC) and trade overall (TPC), there is evidence for deliberations, involving the Commission, member states, and businesses on how to define necessity in the negotiations and how to justify the issues raised. At the same time normative ideas about the balance between free trade and regulation, and underlying philosophies such as embedded liberalism and free trade, find their way predominantly in the communicative discourse of the Commission.

This interplay between the communicative and coordinative discourse highlights several cleavages. On one hand, the Global Financial Crisis and the imperative to avoid protectionism created space for the reinforcement of the Global Europe Strategy and emboldened the European Commission, led by efforts by Karel De Gucht, to position regulation as a trade issues and open negotiations with unlikely partners, strongly evoking regulatory heterogeneity as a trade problem. On the other hand, the framing of the negotiations Japan in terms of the high obstacles faced in terms of regulatory issues, however, reflects a much stronger focus on regulatory protectionism and highlights the discriminatory aspect of negotiability and the discretion for agents to define what is negotiable. As many of the interviewees highlighted, the negotiations with Japan were crucial for formulating an approach to dealing with non-tariff measures, but they fell short of defining an approach to regulatory heterogeneity since they targeted regulatory protectionism.

Factors shaping the understanding

Existing ideas about what constitutes undeterred trade informed process overall, the modes of categorisation and prioritisation, and the modes of evaluation. In particular,

the interplay between tariff and non-tariff measures brought about a strong focus on commensurability and parallelism between the two. Commensurability itself was defined in the process of negotiations. While other empirical studies do not find definitive evidence on the relationship between the two, in the minds of negotiators they are still very much interconnected. The practice of evaluating the relationship between the removal of tariffs and NTMs also highlighted a turn to narrower reciprocity – where rather than looking at the long-term gains, DG Trade wanted to make sure that what is given up corresponds to the gains of NTM removal. This was primarily prompted by ‘sceptics’ to the agreement who did not ‘trust’ that Japan would make substantial changes to its domestic policies. The dimension of trust allowed the Commission to be more assertive on the NTM dimension and to prompt Japan to remove multiple ‘barriers’ before the negotiations have yet started. Finally, this process reveals how certain measures become ‘barriers’ – on the side of the *demandeur*, in this case, the Commission, it requires the collection of evidence from companies, associations and member states, prioritisation and categorisation, and an assessment of what is justifiable. These steps are taken against the backdrop of what has already been done in the internal market as seen in the previous chapter.

Impact of this understanding

At the same time, the communicative discourse surrounding regulatory issues evokes much more certainty on the cause-effect relations and the contribution of regulatory issues to the jobs and growth agenda. The broader discourse highlights the approach to NTMs as evolutionary and as the next natural step for the EU to take in its external policies. Early on regulatory issues gained the definition of ‘red-tape’, distortions, barriers and trading costs for exporters, which also allowed the call for reflection on EU’s measures internally.

The macro discourses and micro processes illustrate two aspects of the theoretical framework: on one hand, defining NTMs as ‘new issues’ has allowed for stronger languages on their contribution to the EU and their role in ambitious FTAs; at the same time, making them part of the trade agenda has embedded them in existing ideational pathways. However, their inclusion has brought about ideational hybridity, since they cannot be fully integrated in existing discourses, processes, and practice. This period shows a transition where both regulatory protectionism and regulatory heterogeneity co-exist. This can be seen as slow ideational adjustments where the interplay between

tariff negotiations and non-tariff barriers, which leaves a lot of uncertainty for businesses and the Commission on what the outcome will be.

The second aspect of the ideational framework is the contingency of regulatory issues. While in theory, the move towards regulatory issues should prompt a different approach to negotiations and policymaking overall, in practice, they have created a space for more discretion and flexibility on the side of agents. In this case, particularly the European Commission and the Directorate-General for Trade. The partner dimension has been reinstated as the most crucial aspect of the negotiations providing scope for DG Trade to decide both on what is justifiably addressed as a barrier and how it should be included in an agreement. This aspect of the inclusion of regulatory issues highlights a possible tension with further progression on rule-making on the international level. While discursively, EU FTA's are a part of a broader multilateralist strategy, the practice of comprehensive FTAs moves away from non-discrimination with scope for discretion.

To conclude, this chapter has also reinstated a new important dimension of trade policy, concerning the importance of implementation and enforcement of regulatory disciplines. The political economy of regulatory issues highlights a diverse range of stakeholder interests and preferences, which are conditioned upon the political context in the EU in the face of uncertainty of the effect of measures. These more extensive preferences are more challenging to balance within and across negotiations, creating further societal cleavages.

Chapter 7. Policy programmes, policy ideas and legitimating regulatory cooperation

Chapters 5 and 6 illustrated the evolution of the treatment of non-tariff measures in two different contexts – from the Market Access Strategy to the Global Europe Strategy and from Global Financial Crisis to the launch of the negotiations with Japan. This chapter covers the last of the three periods tackled from 2013 with the preparatory phase of the TTIP negotiations to September 2017, when the EU-Canada Comprehensive Economic and Trade Agreement was provisionally applied, but it also travels back to see the progression in the thinking behind regulatory cooperation. The evidence in the previous two chapters portrayed the evolution of the treatment of non-tariff measures from the use of legalistic tools to their technical treatment to the inclusion of non-tariff measures under core trade policy objectives. During these two periods the challenges of the global economy were increasingly associated with the concentration of growth outside of Europe, in Malmström (2015b)'s words '90% of world growth', and an increasing concern for other countries' regulatory choices and their impact on the EU. During the period since 2008, regulatory cooperation emerged as an answer to the need to reduce and eliminate non-tariff measures within the framework of the Lisbon Strategy as reflected in strategies, agreements, and reflection by interviewees (European Commission, 2008c). It was closely linked to the evaluation of the Single Market developments and ways to make the internal market work for external liberalisation. In Chapter 7, we focus on how regulatory cooperation is not only one answer, but the only answer provided to the need to address the intersection between trade and regulation.

The objective of this chapter is to show how the changed understanding of non-tariff measures from regulatory protectionism to regulatory heterogeneity explains the change in treatment. While specific interests play a role, we focus on how ideas constitute those interests through discourse. The experience from the success / failure of tackling barriers through MAS (Chapter 5), the negotiations with Japan (Chapter 6), and the implementation and evaluation with Korea created the scope for the Directorate-General for Trade of the European Commission to expand the public philosophy, associated with free trade, to the approach over non-tariff measures. The Commission used the available instruments – free trade agreements – to address a new problem definition.

The transformation towards regulatory heterogeneity provoked a backlash by different non-traditional actors, but it did not challenge free trade agreements as a tool but how FTAs include regulatory issues, challenging individual policy ideas. Taking out non-tariff measures from their technical realm to include them into the politics of FTA – i.e. positioning them front and centre into the communicative discourse – resulted into stronger opposition in how they are treated and in particular, how they are treated via regulatory cooperation. This shows us what happens with the dominant ideational argumentation when it is challenged. It aims to contribute to the understanding of non-tariff measures and their negotiability when they are brought out of the technical realm and become politicised (as Chapter 6 showed), but more so they become contested (this chapter). Thus the empirical focus is on the legitimisation and contestation of free trade.

The EU has not been the only partner to try to negotiate regional or mega-regional trade agreements with commitments on regulatory issues (Bull et al., 2015; Lester and Manak, 2017; Mitchell and Sheargold, 2016). While more and more FTAs refer to behind-the-border measures, it is still unclear what kind of role regulatory issues play within the broader liberalisation agenda. As an alternative explanation to the one provided here, the bilateral negotiations over regulatory cooperation can be seen as a rational response to the difficulty to agree regulatory cooperation rules on the international level and as a reduction of the cost of targeting future measures, from which follows that the inclusion in FTAs is also a way to incentivise regulators to achieve measurable results. However, such an explanation does not tell us what is considered regulatory cooperation in the first place, how did it come to be perceived as a trade instrument. Moreover, there seems to be a disagreement within different expert communities on the benefits of linking regulatory cooperation to trade thus there has not been an agreement within the epistemic community on how to understand it. There is also substantial divergence between how regulatory cooperation is treated in different academic fields such as international economic law, global regulatory politics, IR and EU area studies (Bull et al., 2015; Newman and Posner, 2015b; Wiener and Alemanno, 2015; Young, 2015b).

This chapter draws on extensive elite interviews, EU document analysis, and triangulation with external sources to show the evolution of the legitimising and coordinating discourse, as well as the effect on the treatment of non-tariff measures.

Methodologically, it is important to note that this period coincides with increased uncertainty on the global level on trade policy commitments as well as anti-trade sentiments. A document outlining the challenges in front of the G20 at the 2017 WTO Public Forum sums up the tensions: ‘Trade policy has emerged as one of the most contested policy fields during Germany’s G20 presidency’¹³³ (T20 Trade and Investment Task Force, 2017).

The international context within which trade developments in this chapter take place can be defined by three aspects. Firstly, the period highlighted a failure of ‘old narratives’ about the opportunities of free trade to convince the wider public, which resulted not only in anti-trade rhetoric but a deeper challenge to the global trading system. This was not a challenge exclusively to the European Union but across the group of G20 to varying degrees. Secondly, it illustrated deeper deficiencies in the global trading system to discipline mercantilist and protectionist talk and policies, as often evidenced by the reluctance of President Donald Trump to support the international trading system. Finally, as the T20 Trade and Investment Task Force argued the level of consensus on trade in 2017 had shown very little agreement and desire for commitments to an open global trading system (T20 Trade and Investment Task Force, 2017). Not surprisingly, the process of data collection through interviews, taking place in 2016 and 2017, inevitably reflects the understanding of these different challenges. It reflects how traditional core trade policy actors such as civil servants in the Directorate-General for Trade and member states’ representatives in TPC and MAAC, perceive contestation and the impact of the global economy on Europe. At the same time, interviews with less traditional actors in trade such as the European Parliament, NGOs and consumer organisations, show the limits of the Commission’s communicative discourse.

The chapter is structured as follows. The first part turns to an existing consensus on the relationship between regulatory cooperation and international trade and investment. It shows that while agreement on the international level on the benefits of regulatory cooperation through RTAs is lacking, the European Commission integrated it into its existing FTA approach. The second sub-section moves to the coordinating discourse and interactions over regulatory cooperation, which briefly sketches the

¹³³ On 1 December 2016, Germany assumed the G20 presidency for a period of one year.

internal deliberations among DG Trade, member states, and businesses. The third part illustrates the legitimising free trade discourse surrounding regulatory cooperation, highlighting the vagueness of the use of regulatory cooperation in public discourse, rather than becoming a nodal point, it has been attached to trade. We conclude with a turn to the effects on treatment of non-tariff measures and the ensuing backlash and conclusions. Thus this chapter particularises the uncertainty on the role of trade agreements, the inclusion of regulatory issues as a crucial reason for the increased contestation, and regulatory cooperation as a tool to enforce liberalisation commitments.

7.1. Impact of thinking at the international level: regulatory cooperation and relationship to international trade and investment

In the field of regulatory cooperation as in other areas, modes of treatment and discourse surrounding non-tariff measures have often developed in parallel at the international and the European levels. The European Union both contributes to the development of new norms and values in these areas but is also subject to the framing of international organisations such as the WTO, Organization for Economic Co-operation and Development (OECD) and standard-setting organisations. The second dynamic provides a way for understanding specific situations, and members draw on the ‘same stock of social knowledge’ based on these norms (Cho, 2014, p. 689). Discourses thus have to be viewed within this broader context to meaningfully represent the emergence of different kinds of understanding – in this period, the cementing of non-tariff measures as regulatory heterogeneity. Thus how regulatory cooperation came to be seen as the primary solution to regulatory issues is embedded within the definition of international regulatory cooperation (IRC) at the international level. More importantly, the conception of regulatory coherence and regulatory cooperation should be seen in the context of the ‘regulatory reform’ turn in the OECD (Mitchell and Sheargold, 2016), where regulatory reform is defined as the ‘changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities’ (OECD, 2005, p. 4). With regards to trade and investment, the OECD promotes the application of the disciplines of ‘regulatory policy (good regulatory practices)’ as the means to ‘reduce unnecessary and unintentional trade frictions’ (OECD, 2017, p. 61).

Countries have been involved in different forms of regulatory cooperation for a long time and through different venues – bilateral, multilateral, international organisations, private IOs (Chase and Pelkmans, 2015, pp. 18–19). Such initiatives fall under the broader understanding of international regulatory cooperation, as it is usually discussed in the OECD, other regional organisations (e.g. Asia-Pacific Economic Cooperation (APEC)) and the WTO. Efforts specifically in the OECD, starting as early as 1994, revolve around identifying the cost and benefits of different approaches for addressing non-tariff measures, developing a conceptual framework for identifying trade-offs in the link between trade and regulation, as well using these ideas to prepare recommendations. The analytical efforts of the OECD are grounded in the conception of ‘good regulation’ on the domestic level, as reflected in the 2012 Recommendation on Regulatory Policy and Governance. In turn, these domestic regulatory efforts are increasingly defined in terms of the ‘webs of regulatory cooperation’, within which they are embedded beyond the domestic (OECD, 2013). As others point out the work of international organisations such as the OECD and APEC, have been to encourage regulatory reform, and part of their work has been to show how changes in the domestic regulatory processes can support international trade and investment (Mitchell and Sheargold, 2016, p. 589).

Particularly since 2013, the efforts surrounding regulatory reform became intertwined with the work stream promoting international cooperation over trade and investment. The joint work of the Regulatory Policy Committee and the Trade Committee was aimed at mapping and assessing different IRC options in terms of breadth (binding versus no binding) and depth (shallow versus deep), for example from non-binding regulatory dialogues and information exchanges to harmonisation and economic integration (Basedow and Kauffmann, 2016; Chase and Pelkmans, 2015; OECD, 2017). The stocktaking ’s objective was to provide guidance on ‘how to promote successful cooperation at the global level at a time when businesses and citizens require more than ever the elimination of unnecessary regulatory divergences across countries’ (OECD, 2013, p. 4). Thus the OECD identified ‘international regulatory cooperation’ as ‘one of the best practice regulatory principles ... to achieve better and more efficient regulation and thereby remove unnecessary obstacles to trade and increase economic welfare’ (OECD, 2018).

Two aspects of the analysis by OECD provides an understanding of what regulatory

cooperation is about and how actors understand it – one is the definition of regulatory heterogeneity as a trade cost and linking that to the ‘regulatory reform’ movement; the other is a turn away from harmonisation and towards flexibility. Firstly, the OECD explicitly focuses on the ‘trade costs of regulatory heterogeneity’, which is defined as the ‘costs accruing to traders of goods and services from differences in regulations across jurisdictions’ (OECD, 2017, p. 14). The OECD decomposed the cost of regulatory heterogeneity in a ‘fixed’ and ‘variable’ cost, where the former can be seen as market entry barriers irrespective of trade volumes, while the latter as increasing the marginal costs of the products traded and thus equivalent to tariffs in their effect (OECD, 2017, p. 15). Also rather than defining regulatory heterogeneity in terms of the regulatory purposes it serves, the analytical exercise focuses on three types of cost¹³⁴ that it incurs, placing the focus on regulators to be aware and consider such costs in their policymaking process.

While initially, OECD’s work concerned IRC across all areas, with the Global Financial Crisis it increasingly turned to the area of trade policy and identifying the modes of cooperation with the aim of reducing trade barriers. As the OECD stated in its 2013 paper:

Regulatory co-operation is not a new topic (OECD, 1994). However, renewed attention has been paid to its importance since the economic crisis began in 2008. Perceived regulatory failures related to the poor articulation of regulation across borders, limited enforcement of rules and regulatory capture have raised questions regarding the role of the state as a regulator and, specifically, how and where it should intervene to achieve key policy objectives in an increasingly globalised world. (OECD, 2013, p. 15)

The work surrounding the recommendations on domestic regulation also intensively promoted a conception of regulatory choices as a potential trade cost via regulatory heterogeneity and the framing of trade costs as the result of regulatory failure.

Similarly, while regulatory cooperation as such is not explicitly mentioned in the GATT/WTO agreements, the Committee on Technical Barriers to Trade agreed that in order to enhance information on RC, it will provide the forum for the exchange of information ‘on the different approaches to regulatory cooperation between Members that aim at, inter alia, enhancing mutual understanding of regulatory systems and

¹³⁴ These include: information costs (resulting from opaqueness and divergence in the regulatory regimes); specification costs (from divergence in product rules across countries); and conformity assessment costs (from verifications and assessment of production processes).

identifying, where possible, avenues for greater regulatory convergence’ (WTO, 2009).¹³⁵ The TBT Agreement itself implicitly discusses RC by discussing: standards, equivalence, harmonisation, mutual recognition, its mandate, as well as technical assistance (Wijkström, 2011). While both the SPS and TBT Agreements require that Members base their measures on international standards, the requirement for regulatory convergence is less stringent in the way that it allows for departure from these standards, where Members justify such departures (Lang and Scott, 2006, p. 5). Similarly, the interpretation of provisions by WTO dispute settlement bodies has been less categorical for the need for regulatory convergence via harmonisation (Cohen and Sabel, 2005; Lang and Scott, 2006).

Secondly, while research and expertise at the international level have been very relevant for establishing regulatory cooperation as an option, it did not prescribe regulatory cooperation in RTAs as a way to resolve regulatory heterogeneity. Guidance at the international level increasingly re-focused cooperation efforts away from harmonisation to flexibility and experimentation in devising ways to tackle regulatory heterogeneity. Particularly relevant in this regard is the use of Regional Trade Agreements (RTAs) as a vehicle for IRC. The organisation identified the following modes of developing IRC through RTAs:

‘i) broad provisions promoting convergence to international standards, mutual recognition or transparency, ii) sector-specific provisions and iii) horizontal chapters encouraging countries to adopt GRPs and information exchange’ (OECD, 2017, p. 11).

As section 3 explores, this guidance reflects the experience of the EU and other bilateral agreements. However, the agreement on whether RTAs are the most appropriate channel for addressing regulatory aspects is less evident. The OECD, for example, cautions against both issues with implementation as well as the risk of regional fragmentation (OECD, 2017, p. 11). Also whilst acknowledging the ease of achieving regulatory coherence on a regional level, it raises doubts on how this can be levelled to the international level. The guidance primarily advocated for regional approaches in support of ‘international approaches’ and RTAs as a pilot project or experimentation (OECD, 2017, p. 61, 2013b, 2013c).

Disagreement on the benefits of linking regulatory cooperation to trade and the

¹³⁵ G/TBT/26, dated 13 November 2009. Fifth Triennial Review.

inclusion of regulatory cooperation in RTAs is also contested in the academic literature. In relation to the scope of regulatory cooperation, Chase and Pelkmans observe that it should focus only on those regulatory instruments that ‘directly’ apply to the goods and services traded rather than domestic matters which may have ‘indirect’ effect, such as laws and regulations related to social and environmental issues (Chase and Pelkmans, 2015, p. 32). Similarly, Hoekman sees the inclusion of regulatory matters in FTAs as a ‘second-best solution’ in light of the high integration across international value chains and the fact that PTA-enshrined rules can generate trade and investment diversion (Hoekman, 2016, p. 70).

These international developments paint a more nuanced picture both of the modes of regulatory cooperation, their benefits and drawbacks. Whilst they reinstate a dominant narrative that regulatory choices impact international trade, mainly, the OECD is much more cautious of the effects of different modes of cooperation. At the international level, regulatory heterogeneity is defined as a cost both in terms of its market entry effect and then as a cost, which is transferred to consumers via the channel of increased marginal costs of the products traded. Furthermore, discussions surrounding regulatory heterogeneity pictured it as equivalent to tariffs in its effect on product price and quantity, limiting the space for alternative positions. Illustrations of the ways to tackle regulatory heterogeneity through regulatory cooperation are much more balanced, leaving scope for the different options governments can pursue. Surprisingly, the European Commission focused on regulatory cooperation via RTAs as the way to tackle regulatory heterogeneity.

One of the interviews explains the seeming lack of alternatives to address non-tariff measures:

I really don't remember the thinking behind how regulatory cooperation came to be seen as important and a possible solution forward – I only remember that it was initiated by DG Trade and the Commissioner at the time, it was very supported by other DGs, member states and even by industry. We were thinking about how to resolve NTBs, and regulatory cooperation came out as the only response in the absence of international commitment. (Interview 32, DG Trade Civil Servant, 2017)

This obvious solution is not applied to all partners equally and still does not have strong regulatory structures within the Directorate-General for Trade. A member of the TPC Deputies voices similar concerns, also illustrating the lack of discussion around regulatory cooperation as a tool:

It also depends on the partner dynamics in terms of regulatory cooperation and the extent of the cooperation that has already been achieved. We actually don't discuss that much whether regulatory cooperation is appropriate or not but how to do it scope, sectors, focus. (Interview 25, TPC Member, 2017)

However, once regulatory issues were positioned as a deliverable in FTAs, the Commission faced a fundamental question of how to address regulatory choices of third countries. The following two sections first, illustrate the emergence of the legitimising discourse surrounding regulatory cooperation and its links to regulatory heterogeneity, and second, move to deliberative processes and policy documents, which define the shape and scope of regulatory cooperation regarding internal processes and interactions.

7.2. Negotiability of regulatory cooperation in EU trade

Part one of this chapter showed that a consensus is being shaped on the international level that regulatory heterogeneity is costly. It also showed less of a consensus on the extent to which RTAs are the most appropriate venue for including regulatory cooperation. More so, it illustrated the scepticism towards harmonisation. The theoretical framework also outlined the benefits and drawbacks of harmonisation and mainly the doubt that an optimal technical solution is 'knowable'. This part of this chapter aims to show what a turn to regulatory heterogeneity entails for trade policy and the kind of evolution for non-tariff measures it prescribes. It illustrates that the approaches to regulatory heterogeneity in the EU context shift policy strategies towards experimentation and flexibility in dealing with regulatory issues. Vis-à-vis interactions, this leaves an increased scope for the Commission and member states through the MAAC and TPC to define what is acceptable and justifiable. The deliberative processes internally define what is acceptable in terms of the specific trading partner and the broader communicative discourse. In recent agreements, very different approaches to regulatory cooperation are being shaped. The EU-Korea Free Trade Agreement includes only a brief chapter on transparency (following the KORUS FTA approach); the EU-Canada Comprehensive Economic and Trade Agreement and the EU-Japan Economic Partnership Agreement¹³⁶ contain specific chapters, but they are entirely voluntary, while Trans-Atlantic Trade and Investment Partnership draft text, before abandoned, had the highest ambition in terms of the level of alignment to

¹³⁶ The texts of both agreements are provisionally finalised but not signed and not yet binding on the Parties.

be achieved (in line with the communicative discourse).¹³⁷ How much is regulatory cooperation then conditioned on the partner and how does regulatory protectionism versus regulatory heterogeneity matter for this distinction?

7.1.1. Objectives of regulatory cooperation and forms

In the EU, the objectives of regulatory cooperation in trade have been defined as follows: improve market access, promote a common interest, shape future legislation, and improve existing legislation (Lopian, 2015)¹³⁸. As further described in an internal document in support of the EU-Japan EPA:

The current FTA/EPA negotiations aim at solving existing non-tariff barriers. In addition, we would like the FTA/EPA to allow for the prevention and resolution of new non-tariff barriers. Moreover, the regulatory cooperation should allow us to work together before a new regulation is issued in order to make our regulations if not the same, at least convergent in order to facilitate trade flows and alleviate the burden for our producers/ exporters (EC, 2015a).

Within EU's trade agreements, the different approaches used reflect both a level of agreement internally on what different measures are for but also what kind of rules can ensure implementation. The inclusion of provisions within chapters, pertaining to the trade in goods (such as Chapters on the Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT)) refer to the relevant international standard and thus provide a definition of which standards can be considered international (see example with Japan in Chapter 6). It creates a reference point to the existing levels of legalisation and stringency within the WTO and can be seen as the continuation of the approach in earlier FTAs. Other horizontal chapters reflect the treatment of Singapore issues (Competition policy; State enterprises, monopolies, and enterprises granted special rights or privileges; Government procurement; Intellectual property). The chapters on disciplines for trade in goods, services, and Singapore issues benefit from the previous negotiations conducted, where a number of templates have been made in a compilation (Interview 34, DG Trade Civil Servant, 2017). As an interviewee explained:

We could not come up with one template, but we brought together a few that we found most relevant. They will diverge depending on the partner and on what we want to achieve ... you can't take the TTIP template alone, but we have achieved a good collection of items. (Interview 34, DG Trade Civil Servant, 2017)

¹³⁷ For a detailed discussion see Pelkmans (2017); Egan & Pelkmans (2015).

¹³⁸ Deputy Head of Unit dealing with Industrial Tariff and Non-tariff Negotiations and Rules of Origin.

The purpose of this task, driven at the level of Directorates, is to set out ‘clearer provisions in FTAs’, ‘achieve strategic coherence’ but also brief negotiators and management level on ‘some binding disciplines and templates’ (Interview 34, DG Trade Civil Servant, 2017). While the use of templates is to be expected with the multiple ongoing negotiations, what the interviews highlighted is a high level of discretion of the approach to be taken in the case of different partners.

The second mode is within sector-specific commitments, predominantly in annexes. The technical question of the scope and coverage of annexes is often defined by the level of agreement achieved between the parties during the negotiations (Interview 34, DG Trade Civil Servant, 2017). The negotiations between Korea and the EU, for example, were very reliant on addressing technical barriers to trade, but the annexes added to the agreement had a very different level of ambition and resulted in targeted sectoral regulatory cooperation provisions. Interviewees see the role of annexes both as a practical and a legal issue, and highly dependent on the negotiations (Interview 7, DG Trade Civil Servant, 2016; Interview 20, DG Trade Civil Servant, 2017; Interview 34, DG Trade Civil Servant, 2017). In practical terms, agreements need to be kept sufficiently short and broad thus predominantly addressing general and horizontal issues. The annexes, on the other hand, address the specific problems and the specific solutions that partners have found in the process of negotiations when the ambition is established (Interview 34, DG Trade Civil Servant, 2017). Annexes are also described to include reference to legislation, which is more dynamic since modifications of the main text are more difficult to make (Interview 32, DG Trade Civil Servant, 2017). In this sense, the annex part of the agreement can be seen as problem-oriented and aiming at experimentation vis-à-vis the specific commitments.

What is not explicitly pointed out here is that often disciplines contained in annexes include disciplines that are important for global or transnational value chains such as speciality chemicals, engineering /machinery, automotive, consumer electronics and some individual cases such as aircraft and optical equipment (Pelkmans, 2017, p. 784). The dynamism of these areas is thus matched by more straightforward institutional procedures. If these disciplines were part of the main text, this would entail ‘signing another international agreement again, while if it is in an annexe, it can also be agreed by the joint committee and the process could be simplified’ (Interview 34, DG Trade Civil Servant, 2017). The economic rationale for such annexes is thus complemented

with active involvement of different stakeholders to establish the accepted level of ambition.

The final mode of including regulatory cooperation provisions in EU FTAs is via horizontal Chapters on Regulatory Cooperation / Coherence, where these can also be supplemented by a chapter on Transparency; on Bilateral Dialogues and Cooperation; and on Administrative and Institutional Provisions. In the CETA and TTIP proposals, this includes: reaffirmation of regulatory practices (GRP); a mechanism to promote regulatory compatibility (regulatory cooperation); and creation of Regulatory Cooperation Body/Forum (Lopian, 2015).

In the case of the Trans-Atlantic Trade and Investment Partnership, these different components were summed up as standard market access issues, agreeing on mutually agreed international standards, and regulatory cooperation, as a separate component (ESF Policy Committee meeting, 2013). With regards to regulatory cooperation, the experience of the EU in the internal market is referenced as guiding:

General basis should be recognition of equivalence rather than seeking to harmonise and agree on common standards. The FTA should establish a framework setting out the basic principles of co-operation, the political momentum and visibility of the trade negotiations should be used to push regulators to agree to a work plan, which identified clear goals, objectives, and timelines to guide the work of regulators. Industry must play an important role here as well, in suggesting areas where regulators should focus their efforts in order to bring greatest benefit to industry. (ESF Policy Committee meeting, 2013)

What becomes clear is that in the coordinative discourse there is much more uncertainty on how ambitious regulatory cooperation can be and in principle activities resemble trade facilitation than actual agreement on future regulatory stringency.

7.1.2. Deliberative processes behind regulatory cooperation

The discussions within the Market Access Advisory Committee highlight a minimal success of tackling non-tariff measures in general and in particular via the route of regulatory cooperation. Discussions on the latter in particular were not very focused pre-2012, when the dialogue intensified, as a result of more intense initiatives of DG Growth and DG Trade. For example, in June 2012 the Commission provided an update on ongoing regulatory dialogues with the US, Russia and the Mediterranean countries under the point of ‘Regulatory Cooperation in Third Countries’ (“MAAC Draft Minutes, June,” 2012, p. 5). Among the overview provided, the Commission also

explained about the ‘instrument of regulatory cooperation’ championed by Commissioner Tajani under the agenda for “‘Missions for Growth” for important third countries’ such as the US and Latin America, where the objective is to ‘promote industrial cooperation and growth on both sides’ (“MAAC Draft Minutes, June,” 2012, p. 5). On this occasion, a business organisation enquired whether ‘there are plans to develop a more comprehensive regulatory dialogue with FTA countries in Asia, as some of the issues do not fit in the FTA agenda’ (“MAAC Draft Minutes, June,” 2012, p. 5). The Commission on its side highlighted the difficulty in engaging with multiple countries and multiple issues at the same time (particularly asked about Vietnam and agricultural dialogue with the US):

COM said that EU has institutionalized regulatory discussions with China and Japan, but it is rather difficult to have such discussions with more Asian countries because of the resource constraints. Regarding agriculture with the US, the agenda consists of topics with positive prospects of resolving and tries to avoid long-standing conflict issues. (“MAAC Draft Minutes, June,” 2012, p. 5).

As seen in Chapter 5, the Market Access Strategy and Global Europe Strategy identified some channels and venues, through which specific regulatory issues can be targeted, relying on a mix between technical-legal instruments, trade negotiations, and economic diplomacy. The mixture of different strategies to target non-tariff barriers hand in hand with EU’s regulatory capacity has prioritised high market value and high obstacles agenda, which has also spilt over onto the regulatory cooperation agenda. This is further reiterated in the draft minutes of March 2013, where the Commission provided a summary and an overview of regulatory cooperation efforts, including on the sectoral level where it becomes further evident that regulatory cooperation is limited to introducing international standards and mutual recognition of conformity assessment and limited to specific countries:

COM recalled that over the past years, it has developed several regulatory dialogue with third countries with the aim to reduce costs for businesses acting on several markets by reducing differences in regulations either by using common international standards where possible or mutual recognition of conformity assessment. Experience has shown that this way of cooperation can be highly effective in problem-solving, thus leading to the enhanced market opening. Whereas it is sometimes difficult to change long-established standards, better results can be achieved on innovative markets where upstream communication can prevent barriers from arising. The principle partner for regulatory and industrial policy dialogues are US, Russia, China,

Japan, India, China, Canada and Brazil. (“MAAC, Draft Minutes, March,” 2013, p. 5)

This marks an increase in the regularity of updates to the Committee with DG Growth presenting progress on key issues. Under the point of ‘Regulatory and Industrial Policy Dialogues’, following DG Growth’s update during the session of 21 April 2016, the Chair (DG Trade), ‘stressed the importance of linking trade policy with these dialogues in the framework of Economic Diplomacy and the Enhanced Partnership’ (“MAAC, Draft Minutes, April,” 2016, p. 2). In contrast to the communicative discourse, the coordinative discourse and internal processes point to much narrower thinking about regulatory cooperation and what it can achieve.

At the same time, discussions on key barrier lists reinstate the growing inter-linkages between different areas of policymaking as well as a multi-pronged approach to regulatory issues. For example, in a recent discussion on list preparation for Mexico, the Chair asked MS and BU to actively share information about the country’s trade barriers but also to make an assessment of their difficulty to be addressed. In particular, the Commission asked MS and BU to:

inform the Commission about any cooperation projects they may have with Mexico, which could have an incidence on a given key barrier; notify their upcoming visits to Mexico where these issues will be raised; report on the perceived difficulty of achieving progress in these key barriers, evaluating the difficulties on a scale 1-3:

- 1. issue difficult to solve due, for instance, to the political context*
- 2. difficult to tackle, but doable*
- 3. issue represents a low hanging fruit (“MAAC, Draft Minutes, April,” 2016).*

This approach actively engages MS and BU not only in the information gathering but also in the classification and assessment of different barriers. What is more, the Commission at these instances does not distinguish between regulatory protectionism and heterogeneity but across the difficulty to target a measure about the political context.

Interviews with business associations also show a different Commission – member state – businesses dynamic to the principle-agent delegation. Business associations have taken on board the idea of a ‘living agreement’. One of the interviewees explains that a ‘real’ living agreement is one which ‘builds a regulatory environment’ (Interview 28, National Business Association, 2017). The negotiation of multiple agreements allows for spillovers between regulatory clauses in the agreements. In

internal discussion before the negotiations with the US were officially launched, the US Chamber of Commerce representative sum up the agreement as a combination between ‘early harvest’ and the ‘gift that keeps on giving’. As the meeting summary states:

US chamber stated that “if you deliver on SPS and TBT, then we will deliver on regulatory cooperation”; nobody was opposed to regulatory cooperation but people were sceptical whether Europe would be able to deliver on TBT and SPS. There was some concern re TBT and SPS, an EU-US Agreement could end up with a lower standard than TPP. Regarding regulatory cooperation, while some concrete results should be achieved by the end of negotiations (“early harvest”), it would be difficult to have regulators agree up front across the board; the most important part of an agreement would be to set a process in place which allows for a harmonized approach to future regulation (the “gift that keeps on giving”).¹³⁹

As the previous chapter explored, the Commission has expressed the goal to use all possible instruments to address issues of market access, transparency, and rules thus mixing across horizontal, sector-specific provisions and annexes. One of the business associations shows the change in the cognitive thinking of businesses: ‘an annex can be helpful if we have an idea of the specific commitments. If you have a really good clause or an agreement with the third-party why not put it in already’ (Interview 28, National Business Association, 2017).

The debate on the most appropriate instruments and ways to tackle regulatory issues and investment provisions in free trade agreements has left some businesses in an uncertain position. They face a challenge in formulating a position and thus involvement is mostly to urge the debate by presenting the different issues which need resolving and possible scenarios (Interview 28, National Business Association, 2017). One of the reasons for this is that even though they have solid legal opinions about the scope of FTAs, their ‘decision just as much as the general decision will also be as much political as it is legal so we are waiting to see the political debate’ (Interview 28, National Business Association, 2017). One of the interviewees highlights three challenges. On the one hand, the developments vis-à-vis regulatory cooperation are seen as ‘unhelpful’ – ‘it was very exaggerated’ (Interview 28, National Business Association, 2017). Secondly, they are ‘wondering a lot what is going to happen’ vis-à-vis the separation of trade agreements. Thirdly, they do not want to take action before there is more clear consolidation of different positions due to the fact that, in the words

¹³⁹ Meeting with US Chamber of Commerce. Report of visit to DC (Access to Documents, 2013a).

of the representative, ‘we definitely don’t want to sit in the middle between the EP, member states and the Commission, so we will wait and decide how it is best to proceed’ (Interview 28, National Business Association, 2017). The next section looks at how the European Parliament, non-governmental organisations and consumer organisations (the latter two often defined as the non-traditional actors in trade policy) understand the inclusion of regulatory cooperation in FTAs.

The dynamics of Commission – business interaction reflect both the need to shape the policy ideas but also to legitimise them. Data from Access to Documents requests show that in the preparation of the TTIP negotiations, the European Commission’s DG Trade, often accompanied by other DG representatives, met more than 290 different organisations in the period 2012 – 2013, predominantly from the private sector.¹⁴⁰ These set of consultations was pre-empted by letter jointly sent by Commissioner De Gucht together with Tajani and Dalli encouraging business to identify possible divergences in regulatory matters and the ‘practical’ ways to solve them, highlighting a solution-oriented approach. The major question was what can be solved with regulatory cooperation. Moreover, the message from De Gucht and the other Commissioners was clear that harmonisation will not be for its own sake but only in those areas where it was productive, particularly identifying regulatory issues based on ‘solvability’. While consultations between the Commission and different business representatives are part of the day-to-day interactions within the institutions, the meetings in preparation for TTIP show three dynamics relevant for ideational development: firstly, once the Commission decided on regulatory cooperation in FTAs and in particular in TTIP as the appropriate policy tool, it aimed to mobilise businesses around the problematisation of the cost of heterogeneity and to convince business of the need for industry to drive regulatory cooperation. In 2013, most of the industry representatives did not express a specific preference towards a chapter on regulatory cooperation and even less on its content. In what was called the ‘brainstorming mode’ of meetings the Commission discussed with different industry representatives how regulatory cooperation could be justified and delivered. Secondly, the need for regulatory cooperation was justified not only in terms of the direct benefits from the reduction of costs but in them of the impact the agreement will have on trade relations

¹⁴⁰ Full data published by Corporate Europe Observatory, available here: <https://corporateeurope.org/sites/default/files/attachments/methodological-annex.pdf>.

with third countries in reducing their protectionist initiatives.¹⁴¹ One of the strongest rationales for the agreement was the expected effect on third countries, resulting from US-EU convergence.

Secondly, the solutions-oriented approaches face difficulty due to the overstretching of the problem definition. For example, in meetings with business associations, the Commission – DG Trade and DG Enterprise at the time – highlighted that the need for input for businesses is not only in providing information of economic benefits but also ‘on how to assess the differences between the two systems, their real impact and also to what extent these could be overcome’ (Access to Documents, 2013b). Thirdly, the Commission prompted EU industry associations to contact US counterparts to send joint submissions for regulatory cooperation. This can be seen as an effort to align the policy programmes as well as specific policy ideas.

Similarly to the dynamic with Japan, the solicitation of input for categorising and assessing the possibilities from businesses backfired. Once the processes were in place for joint submissions to be presented and for businesses to take part in the promotion of the agreement, calls for an ambitious agreement became dominant. In this regard, once businesses understood the dynamic as a possible commitment at the political level, they engaged with both depth and breadth of possible regulatory cooperation initiatives. One example comes from multiple meetings between the EC and BusinessEurope:

On TTIP: EM emphasized that BE clearly supports this agreement, which has received a strong support from national business and sectoral associations across Europe, unlike some other FTAs where industry might be divided. BE stands behinds a comprehensive agreement. They are aware of the floating idea of having a smaller interim agreement, but TTIP can only be successful if it covers a critical mass of issues including on the regulatory part. Indeed, the regulatory part will be particularly beneficial for SMEs and moving towards transatlantic standards could influence the set up of higher standards in other regions such as China. The lack of concrete results achieved so far combined with the increasing voices in the public opinion against this agreement are making TTIP an increasingly challenging task. Moreover, they perceive a lack of commitment from the US side as an additional impediment. (Access to Documents, 2014)

¹⁴¹ Meetings with DigitalEurope, Orgalime, COCIR, Eucomed, EDMA, EGA (Access to Documents, 2013a).

The ability of the Commission to mobilise support around regulatory cooperation in the trade agreement and to an extent to present it as more than it was, was not matched by the communicative discourse, discussed in the next section.

7.3. Legitimising free trade and role of regulatory cooperation

The international stocktaking and guidance often involve the experience of the European Union itself due to the multiple regulatory cooperation mechanisms, which exist internally and with non-member states (OECD, 2017, 2013b, 1994). Using OECD's categorisation, these range from the Transatlantic Economic Council and the Transatlantic Business and Consumer Dialogues (least binding) to the integration and harmonisation through supranational institutions (most binding) (OECD, 2013, p. 23). What is more, the EC 'model' has been hailed as 'working' in targeting regulatory heterogeneity in the way that it allows for interactions 'among political representatives, regulatory officials and affected constituencies through innovative procedures, such as the relatively decentralized "new" and "global" EC approaches to regulation that rely on sustained exchange among cross-border public-private regulatory networks.' (Shaffer, 2002, p. 74). Thus it is evident that European Union's experience matters for how it approaches integrating markets and as existing studies have shown this experience often finds its way in the conception of EU's policies (Damro, 2012, 2001; Young and Peterson, 2014). As Damro (2001) points out, it forms part of EU's identity.

Before turning to the legitimising discourse, it is essential to differentiate on the perceived understanding of the means-ends relationship of regulatory cooperation internally and towards third countries. As Chapter 4 explored, in the 1980s, the European Economic Communities contemplated different forms of regulatory cooperation to deal with the regulatory protectionism and heterogeneity between its member states in the internal market (Commission of the European Communities, 1980). The initiative resulted in a mix of mutual recognition, harmonisation, and equivalence of regulatory outcomes through legal decisions and institutional tools aimed at removing unnecessary obstacles to trade and (un-)intended divergences, resulting from member states' regulatory activities. The Commission developed and revised its approach in the process recognising that ex-ante not all measures that may hinder trade have been identifiable (Idem.). Vis-à-vis third countries the approach to tackling regulatory differences is still being shaped. While closely informed by the experience of the EEC during the implementation of the Single European Market, it

has become clearer that the EU is not willing or able to extend the same understanding of mutual recognition and equivalence existing within the internal market to third countries. Put simply, mutual recognition within the Single Market ('mutual recognition of equivalent law and regulations') has a different conception of mutual recognition in principle. Similarly, partner countries are not willing to pay the same price as membership to the single market requires.

The aim of the exercise internally was the creation of a common market for goods, services, capital, and people, and it went beyond reciprocity, as the granting of mutual concessions in tariffs, quotas, and other restrictions. The distinction is vital because extending the logic of reciprocity to regulatory aspects is problematic. While the EU has sought on the international level to exchange market access to its market for adoption of international regulation (De Bièvre, 2006), the degree of influence has varied across different forms of regulatory interactions as well as the different stages of a negotiation process, including regulatory interaction in preferential trade agreements (Young, 2015b). Thus, the goals for regulatory interaction internally and externally are different – in the former, it is a common market, while in the latter – liberalisation. European Commission's framing of regulatory cooperation within the broader trade strategy reflects these opposing dynamics and illustrates a subtle subordination of regulation to trade via the following different links between trade and regulation: creating a market for regulation (Ashton); regulation comes at a price (De Gucht); regulatory barriers more complicated to remove than traditional barriers (De Gucht); regulatory choices impact trade (Malmström). The following sub-sections show how regulatory cooperation is defined by successive Commissioners and how two opposing discourses meet in the treatment of regulatory issues – evolution versus innovation.

Differentiating between regulatory cooperation, coherence, and convergence

The vagueness of the concepts used for regulatory cooperation and the different modes of implementation leaves substantial scope for the Directorate-General for Trade to define goals, instruments and specifications. Regulatory cooperation and terms such as 'regulatory coherence', 'regulatory compatibility' and 'regulatory convergence' reflect diverse dimensions of regulatory issues but the difference among them is not always clear in the rhetoric of the European Commission's Directorate-General for Trade. At the same time, all concepts pertain to an understanding of non-tariff

measures as regulatory heterogeneity and highlight the importance of the partner and the possibility for discrimination.

For example, regulatory convergence was used by Ashton to express the idea of convergence not just between the EU and the US but also other countries to avoid a situation where they would create ‘their own’ standards.

Moreover, regulatory convergence between the EU and US would also set an example to the rest of the world. If we don't try and find common cause on this difficult subject, then others might choose their own standards and regulatory solutions, and that would lead to fragmented markets and increased costs for our businesses. (Ashton, 2009d)

The threat of fragmentation resulting from other countries choosing their standards justifies negotiations with the US over regulatory issues. The formulation ‘if we don't try’ hints that not trying is equivalent to failure and the status quo is not a viable option. Early on regulatory convergence was set out as one of the goals of regulatory cooperation. The concept was also used by De Gucht in describing regulatory and economic dialogues with key trading partners (US, Japan, China, the neighbourhood), where convergence meant explicitly coming closer to EU's standards and regulatory approaches (De Gucht, 2010d). Moreover, regulatory convergence as used by De Gucht was subordinated to trade policy objectives, where government intervention (of the EU and at the time 27 MS) was justified to get rid of such barrier, whereas trade itself is ‘best left to traders’ (De Gucht, 2010). The speeches of De Gucht highlighted that regulatory cooperation is about addressing all barriers and red-tape and not specifically ‘trade barriers’ and that government need to ensure the opening of markets abroad.¹⁴²

With the move from the previous two Commissioners to Cecilia Malmström, the language between these different terms was slightly clarified: regulatory coherence is treated as the overarching approach or as she elaborates ‘a concept embracing a series of tools to reduce unnecessary regulatory incompatibilities’ (Malmström, 2015). Similarly, different terms started to be used to differentiate across partners and later to reassure different actors that regulatory cooperation is not about a race-to-the-bottom

¹⁴² It is important to note that between 2008 and 2017 regulatory cooperation has been largely absent from speeches of other Commissioners, different from the Commissioner President or the Commissioner for Trade. While focusing on the Commissioner for Trade in this sense is a selection bias, our aim to explain the trajectory of non-tariff measures justifies the selection of DG Trade. For a discussion on the limitations of the approach, see Conclusions.

when the EU faced criticism on its approach towards TTIP and CETA. Such higher level thinking is juxtaposed with the concept of regulatory compatibility, which is explicitly used in reference to the WTO and what is justified and recommended in WTO Law.

... the idea of regulatory compatibility deeply embedded in the World Trade Organisation. One of its founding principles is the idea of national treatment, which means that no government policy measure - including regulation - should explicitly discriminate against imports ... The WTO's Agreements on Technical Barriers to Trade, Sanitary, and Phytosanitary Measures and the General Agreement on Trade in Services go into much more detail. These rules have helped both keep markets open and guide high-quality regulation. (Idem.)

The parallels made between the EU's approach and the WTO aim to ensure legitimacy and give a legalistic background to the use of regulatory cooperation. However, as highlighted these provisions previously do not impose harmonisation, and regulatory convergence to international standards and such instruments are qualified with multiple exceptions. Moreover, Malmström's explanation of regulatory compatibility gives a different reading of the norm of national treatment – it should not only not be discriminatory but also conducive to liberalisation.

Through different Commissioners and strategies, the use of different terms has left the understanding of regulatory cooperation undefined. It has also left flexibility and discretion to the Directorate-General for Trade to define what are both the ends and the means. Moreover, the discourse has been mobilised to highlight regulatory cooperation as a natural next step in EU's trade policymaking, identifying two conflicting discourses – one presenting regulatory cooperation as a natural next step and another showing the innovative character of regulatory cooperation. Also, we see the progression of trade policy aimed at tackling regulatory protectionism to regulatory heterogeneity itself and much stronger language on how much regulation is needed.

Regulatory cooperation as regulatory evolution

One of the main discursive tools in the introduction of new policy ideas into the existing stream is by making them a natural extension of the existing mandate, competence and consensus. Going back to the approach presented by Ashton (outlined in the previous chapter), she called for realism in how much can be achieved explaining that: 'But no matter how enthusiastic we are, we cannot pull rabbits out of a hat. [...] We advocate regulatory evolution, not regulatory revolution'(Ashton, 2009d). This presentation of regulatory issues as 'evolutionary' tries to present the

agenda as a continuous process and to instate the idea that the ‘trade policy tank’ is not being moved substantially (Interview 2, DG Trade Civil Servant, 2016). Instead, regulatory issues are presented as the next logical step in securing ‘jobs and growth’. In this context, regulatory cooperation is presented not only as evolutionary in terms of the treatment of NTMs but also in terms of how trade relations between countries are governed. A major aspect of this is the understanding of regulatory cooperation as a potential dispute prevention mechanism since it can create the necessary structures for resolving conflict before it reaches a dispute and without necessitating compliance with a dispute settlement understanding. Such regulatory cooperation as a dispute prevention mechanism also echoes the discussion with one of the interviewees, who prompted on the link between regulatory issues and anti-dumping, voiced the perspective that:

Where you hit the nail is that if there were no NTBs in the first place, there is no use for anti-dumping; the more integration between markets there is the less need to price discriminate. (Interview 19, DG Trade Civil Servant, 2017)

They went further to explain that anti-dumping and dispute settlement mechanism can only tackle barriers in trade in goods, so regulatory cooperation has become even more important with dealing with trade in services, investment, and public procurement (Idem.). The goal of the Commission has been to use trade defence only as a last resort. The different instruments of EU’s trade policy are thus complementary and reinforce each other across the different types of trade impediments identified.

Similarly to the idea presented above, another discursive schema used to talk about regulatory cooperation is to present it as part of the historical imperative to trade or vis-à-vis trade and regulation – a historical imperative to regulate better. In setting out the agenda for regulatory convergence, Malmström talks about regulatory choices of trade and presents this an evolution in the trade policy of the EU from Cobden-Chevalier to this day, pointing to the historical lessons that prove that regulatory convergence is possible (Malmström, 2015a, p. 1). In her speech in front of Friends of Europe in particular, she portrays the historical lineage of trade agreements and how each takes a step further, presenting regulatory cooperation as the next natural step for trade governance (Malmström, 2015a). Outlining a picture of the developments from Korea to CETA to TTIP, the Commissioner for Trade shows the progressive development of the framework and compares existing elements, thus using gradation as a tool to highlight the importance of an evolving regulatory cooperation approach.

Such an approach extends the same type of framing used for FTAs overall, which was reiterated during the crisis. It also highlights an evocation of learning between different agreements and upgrading of trade policy. While globalisation has increased the number of externalities to be resolved, the way these issues have been included in EU FTAs is presented as natural and driven by two ‘clear’ even obvious logic: that of regulatory convergence and open markets (Malmström, 2015a). The logic of regulatory convergence is tied to the logic of open markets, where ‘unnecessary differences between different countries’ regulations and we stress, the unnecessary differences are a significant barrier to the benefits of open markets. Reducing incompatibilities means more growth and more jobs’ (Malmström, 2015a).

Finally, this intervention by the Commissioner also relates to the modes of evaluation, which are applied to regulation versus tariffs, noting for what seems to be the first time both their technical and political complexity and the limits of economics for their evaluation.

It's technically complex since a regulation is not a tariff whose trade impact is numerically obvious. And it's politically complex, since the issues at stake in a regulation on the environment or health or safety, for example, go far beyond economics. And we must advance on the economic front while maintaining our standards and our right to set them. (Idem)

At the same time, this legitimising discourse presenting regulatory aspects as the natural and logical progression of the trade agenda co-habits with the justificatory discourse, which presents EU’s approach as innovative and groundbreaking. Conceptually this can be seen as the two strands of regulatory heterogeneity strategies we explored: elimination of regulatory heterogeneity versus managing regulatory diversity.

Innovation and overselling regulatory cooperation

The evolutionary discourse seen earlier contrasts sharply with the innovative and ambitious character of the FTAs, which include regulatory issues, and even more so of the TTIP. Policymakers have insisted on the fact that regulatory cooperation matters ‘more than ever’ in a globalised economy (European Commission, 2015d). Pascal Lamy, as the former Commissioner for Trade and Director-General of the World Trade Organization, also used language highlighting the ground-breaking character of TTIP, e.g. ‘TTIP is the first show of the new world of trade’ (*The New World of Trade*, 2015).

The definition of the level of ambition of EU's FTAs is explicitly tied to what extent it can tackle regulatory heterogeneity.

While the negotiations with Japan were framed in terms of benefits of the removal of non-tariff barriers, seen as regulatory protectionism, the negotiations with the United States marked an attempt to quantify an ambitious agreement solely in terms of the benefits of the removal of non-tariff measures with a study explicitly dedicated to those (Ecorys, 2009; Sunesen et al., 2009). The language of Commissioner De Gucht highlights the strong economic rationale for tackling regulatory heterogeneity:

There are compelling economic reasons to engage in this regulatory cooperation. Studies have shown that we can generate impressive savings – more than 200 billion Dollars - by reducing non-tariff measures and by aligning regulatory divergences. And even if we only tackle a number of specific areas, the gains are huge because of the sheer size of transatlantic trade. So, the formula of the TEC is to tackle regulatory issues at an early stage, before the actual regulation is in place. (De Gucht, 2011)¹⁴³

The economic rationale for engaging in regulatory cooperation is vivid in different Commissioners' speeches and reports, highlighting that the innovative approach will result in 'savings' rather than the wastefulness of high regulatory differences. The attainability of such ambitious goal is often made in reference to EU's own experience, and even though De Gucht clarifies that neither side is aiming to go that far, the objective is 'to progressively build a more integrated transatlantic marketplace' (Agence Europe, 2013). EU's experience is also given as an example to critiques who see TTIP as an attempt to 'water down Europe's current set of rules and regulations' or as he puts it: 'The reality is that over the last decades, Europe has seen its standards rise to a level of global excellence and leadership. And it's on this basis that both sides agree to use such a transformative process to raise their game' (Agence Europe, 2013). In comparison to the previous chapters, where non-tariff measures were equated predominantly to regulatory protectionism, the latest period expands into a direct offence on inefficient regulatory differences. Once again this becomes evident in the case of TTIP and one of De Gucht's speeches in its support:

But – intentional or not – regulation often also comes at a price... for international trade in particular: Regulations can block goods from entering a market by declaring them unsafe for instance, Or they can make imported

¹⁴³ In the same speech De Gucht also argued the importance of stakeholders, 'administrations, regulators, standard setters, legislators, business and consumers', to 'get behind this objective' for otherwise regulatory compatibility will not work.

products more expensive by adding compliance costs. Sometimes we have to pay this price in order to have high levels of protection. [...] Sometimes. But certainly not always: Regulations in different countries can be different simply because regulators weren't aware that there were other ways to solve the problem they were facing. Or because they had based their analysis on different scientific data. Or – in the most extreme cases – because some domestic businesses actually press for regulations to exclude foreign products from their market. [...] We do not have to accept these differences. (De Gucht, 2013a)

This is one of the most extreme statements vis-à-vis the link between trade and regulation, in that it insists that ‘we do not have to accept these differences’. Such a move away from the thinking that it would be logical to target NTMs to its imperative to do that also shows a shift in the thinking of what trade policy is about in the first place. This subtle subjugation of regulators’ choices to trade liberalisation principles goes substantially beyond GATT/WTO principles of national treatment and non-discrimination and trade policy should aim at the failures resulting from government intervention and also against the lack of agreement on the appropriateness of including regulatory cooperation in trade agreements. Moreover, the evocations of regulatory capture and regulatory failure are results of the broader neoliberal public philosophy of efficient regulation and optimal regulatory choices.

In the context of the long historical relationship between the US and the EU, the renewed efforts for achieving regulatory cooperation via the Trans-Atlantic Trade and Investment Partnership brought high expectations on what can be achieved and the innovative character of the provisions. In the words of Commissioner Malmström:

Of course, this negotiation is still going on, as is the public debate about it. But I firmly believe that we can deliver an outcome that will improve people's lives on both sides of the Atlantic – and simultaneously break new ground on what a trade deal can do on regulation. (Malmström, 2015a)

Such newness of the approach also comes across in one of the interviews, where they stated that:

In the case of TTIP, we tried a new approach, rather than removing NTBs when they appear, try to work towards avoiding them in the first place. With an updated regulatory cooperation (not like the once with Moldova and Ukraine where they have to take our standards), the issues of standards and procurement can be linked. We create join standards that make the existence of NTBs redundant. (Interview 5, DG Trade Civil Servant, 2016)

In the progress of the CETA and TTIP negotiations, the centrality of regulatory cooperation (and the challenges it poses to negotiators) has been reiterated some times

as the ‘most important part of these talks’ (Malmström, 2015c). The ‘reality’ of TTIP as illustrated by Malmström includes a ‘way to improve regulatory outcomes and deliver better public services’, through boosting ‘sharing of knowledge and best practices’, lowering medical costs; and encouraging growth and thus filling government revenue (Malmström, 2015d). The contrast between the underrated role of regulatory cooperation as one of the tools to an overrated presentation of its benefits reveals the issues posed by different audiences in the trade debate and subtle changes in the role of trade. While trade is done by economic operators, policymakers are more forceful in judging what legitimate regulatory interventions are.

Is regulatory heterogeneity just a TTIP thing?

The discussion above highlights one caveat – whether the understanding of regulatory heterogeneity is particular to the relationship with the US or whether this is a permanent shift in the thinking about non-tariff measures. As the discussion in the previous chapter pointed out, we argue that it is a permanent shift but still conditioned on the partner in terms of how in-depth the cooperation over regulatory measures can go and whether the EU advocates ‘elimination’ or ‘management’. One evidence for this is the 2015 ‘Trade for All’ strategy, which set out the new trade strategy of the European Commission.

The continuity of the bilateral negotiation track and focus over growth and jobs from the Global Europe Strategy is sometimes perceived as it is the ‘only strategy’ (Interview 8, DG Trade Civil Servant, 2016). Karel De Gucht’s ‘Trade, Growth, and World Affairs’ was also seen as a continuation of the same. In contrast, ‘Trade for All’ is illustrated as a different kind of strategy or in the words of one interviewee ‘communication tool since public interest changed the perception and made us act in different ways’ (Interview 8, DG Trade Civil Servant, 2016). It has been hailed for its strong communicative purpose rather than changing the strategy that the Commission is pursuing and its innovation also lied in the wider consultation, which surrounded its publication (Malmström, 2015e). For some of the interviewees, Trade for All ‘made sense’ in the way it tried to bring different elements together. Table 8 provides a snapshot of the perceived change brought by Commissioner Malmström and the Trade for All Strategy.

Table 8. Snapshot of perceived change with Trade for All

Description	Source
Since Malmstrom we definitely see the change in working culture, also Trade for All going in the right direction.	Interview 24, External Stakeholder - Horizontal, 2017
I definitely think that Trade for All makes sense. It brings a lot of key issues together.	Interview 23, Member of the European Parliament, 2017
Trade for All was good for us because it promoted openness to civil society; eliminating NTBs but not touching the right to regulate.	Interview 24, External Stakeholder - Horizontal, 2017
At the same time we cannot go back, very difficult to speak about reducing issues only to trade again.	Interview 27, TPC Member, 2017

Source: Interviews.

The newness vis-à-vis transparency and working culture are not matched in the newness of substance. The discussion surrounding trade and regulation features in a number of the elements of the strategy: global value chains angle, digital trade facilitation, international regulatory cooperation, needs of small businesses, the enforcement of EU’s rights and consumer confidence in the quality of products. Surprisingly, the expression ‘non-tariff measures’ does not feature once in the communication. Instead there is a separation of two terms: ‘non-tariff barriers’ and ‘regulatory issues’. Vis-à-vis NTBs, the task of the Commission is limited to the continued efforts to eliminate them via enforcement of trade agreements (concerning the EU-Korea agreement and the Annex 14-A Mediation Mechanism for Non-Tariff Measures¹⁴⁴) and regulatory cooperation. The other part of the story is on addressing regulatory issues as ‘a priority in negotiations and steer greater cooperation in international regulatory fora while maintaining high European standards’ (European Commission, 2015b, p. 13). This distinction highlights the difference in the bilateral versus the multilateral track – if the former is about liberalisation, the latter is about rule-creation.

¹⁴⁴ For further information on the mediation mechanism, see (Park, 2010).

The end of De Gucht's term and the beginning of Cecilia Malmström was marred by strong contestation, and the Trade for All Strategy was conceived as a communication device to respond to the challenges. With the Trade for All (TfA) Strategy, the dominant understanding is a discourse where the EU needs to champion liberalisation and rulemaking in a world defined by global fragmentation. The problem set out by the Commission is set within the context of growth of global value chains, where 'trade policy can no longer be approached from a narrow mercantilist angle' and where the EU has already started adapting to this reality through its 'holistic approach' in order to secure its place in global value chains (European Commission, 2015b, p. 10). Within this context, the problem is defined as 'addressing regulatory fragmentation', more precisely:

Requirements applied to products and services differ widely across the globe, sometimes because of cultural differences and societal choices, but often simply because regulatory approaches were developed in isolation. Such regulatory fragmentation implies significant additional costs for producers that have to modify their products and/ or undergo duplicative conformity assessments for no added safety or other public benefit; in some cases, this is just disguised protectionism. These costs are particularly significant for SMEs, for which they can constitute an insurmountable market access barrier. (European Commission, 2015b, p. 13)

The language on the cost of other countries' regulations is even stronger in the 2017 report of the implementation of the Trade for All Strategy (European Commission, 2017b). The report blames the frequent use of domestic policies by all countries for undermining the rules-based system (European Commission, 2017b, p. 2).

The problematisation of regulatory fragmentation and its costs are also to be addressed through FTAs. The imperative for the EU to strengthen its rightful place in global value chains allows the space for multiple instruments to be used but particularly it again situates trade agreements as both supporting the efforts at the international by encouraging international standards of transparency and good governance and also allowing for 'ambitious elimination of barriers' and regulatory cooperation (European Commission, 2015b, p. 13). Trade agreements are also pointed out as a 'way to give political momentum' to regulatory cooperation, which can then feed into future multilateral work. The surfacing of regulatory fragmentation as the main issue to address position the EU as the champion of regulatory issues in international fora and positions EU's FTAs as a global good.

The importance of the relationship between regulation and trade is also referenced vis-à-vis EU's other trade agreements – particularly EU-Canada CETA agreement and the modernisation of the EU-Mexico agreement. In relation to Mexico, Malmström advocated for ‘a much more ambitious approach to the relationship between regulation and trade’ (Malmström, 2015f, p. 3) while later in the same year praising the accomplishments of CETA ‘in the whole area of the relationship between regulation and trade’ (Malmström, 2015g, p. 2). In the first case, an ambitious review of the nexus between trade and regulation entailed:

... comprehensive chapters on non-tariff barriers for industrial goods, food and agriculture. We should also make commitments to promote good regulatory practices like impact assessments and public consultations. And we should address barriers in specific sectors where this is needed. (Malmström, 2015f, p. 3)

In the second, a much wider range of measures to make the regulatory framework of EU and Canada more compatible, including certification procedures, conformity assessment and a closer dialogue on upcoming regulatory issues in future (Malmström, 2015g).

The legitimising discourse shows how the level of ambition of tackling non-tariff barriers is adjusted across partners. While in all three examples – Mexico, Canada and US – the relationship between trade and regulation is central, it is not only the specific objectives of the EU that vary but also their ambition and whether it is trying to achieve removal of regulatory protectionism, elimination of regulatory protectionism / regulatory heterogeneity, or managing diversity. In line with existing theoretical approaches, this is conditioned on the economic size of the partner, but it's also conditioned on EU's regulatory capacity to devise cooperation approaches.

7.4. Contestation and legitimacy as a public philosophy

In this regard before concluding, we turn to the impact of contestation on this legitimising discourse.¹⁴⁵ The problematisation of the current backlash points to a number of reasons why trade policy is challenged: backlash towards the ‘neoliberalisation’ of the trade agenda, failure of communication by the EU executive, or unsuccessful implementation of the policy agenda. In all cases, a trend is emerging

¹⁴⁵ The origins and consequences of the backlash itself are detailed elsewhere (Aggarwal and Evenett, 2017; Ravenhill, 2017; Young, 2018), but the responses of the Commission illustrates the understanding of what trade policy is about and what kind of challenge it is facing.

that failure to agree on what trade policy is for in the first place is stumbling EU's legitimacy externally and internally.

Across the corpus of interviews and key speeches, the 'problem' of why trade policy has become so contested is positioned within the following themes: availability of evidence to support policymaking (Interview 10, Former DG Trade Official, 2016); communicating trade policy and the benefits of trade (Interview 10, Former DG Trade Official, 2016; Interview 11, Former negotiator, 2016; Interview 13, TPC Member, 2016); external imperatives – global competition, 'unfair' competition (Interview 1, Former DG Trade Official, 2016; Interview 13, TPC Member, 2016; Interview 33, National Business Association, 2017); complexity (European Trade Policy Day, 2015). The assessment of what led to the current backlash is summed up by one of the interviewees: 'Three issues – sentiment of injustice due to the negative consequences of globalisation, no nuance in liberalisation, and external stakeholders saw that they could draw blood from the Commission' (Interview 4, Former DG Trade Official, 2016). Thus doubt on the purpose of trade policy is mostly entering from outside the European Commission officials (Interview 27, TPC Member, 2017; Interview 31, Representative European Parliament, 2017; Interview 33, National Business Association, 2017).

The perspectives highlight a dissonance in consensus on the level of goals and objectives – on the one hand, the European Commission is actively engaged in restoring and gathering support for its trade agenda, for example through the 'Report on the Implementation of the Trade Policy Strategy Trade for All: Delivering a Progressive Trade Policy to Harness Globalisation' (European Commission, 2017b). The report is framed as a result of an active effort by the Commission to create an exchange of views highlighting that it 'invited a debate on what the EU can do to shape globalisation in line with our shared interests and values' (European Commission, 2017b, p. 3). In 2017, the Commission also published two major documents that set out different options for the future of the Union with trade policy as a core element – as one interviewee pointed out the importance of the 'White Paper on the Future of Europe' (European Commission, 2017c) and accompanying reflection paper on 'Harnessing Globalisation' (European Commission, 2017d) lies in the fact that they offer a choice for what kind of Europe is desired and the associated policies needed to achieve this (Interview 27, TPC Member, 2017, p. 27).

For some interviewees, ‘Harnessing Globalisation’ is also a defining moment for cooperation across multiple stakeholders and levels of governance within the EU itself - not only vis-à-vis trade but overall. Such cooperation goes beyond legal competence and highlights the cooperation between the Commission and member states, with the stronger involvement of member states in particular; cooperation between DG Trade and other DGs; between member states and regulators (Interview 26, TPC Member, 2017). This targets one of the problems highlighted by interviewees: the fact that counterbalancing the opening of markets has been left to member states, where some have not been very successful (Interview 4, Former DG Trade Official, 2016). These publications reflect a need for a wider discussion on trade policy and its different elements and present stakeholders as co-shapers of the approach, i.e. active policymaking participants.

At the same time, the language from European Commission civil servants has a different nuance – some officials are not arguing about a change in direction and rethinking of trade policy overall (‘throwing the baby out with the bathwater’) but of changing the methods of justification. This was very clearly highlighted by one of the interviewees who shared that ‘we all know trade is good but then how do you best justify why’ (Interview 2, DG Trade Civil Servant, 2016). In this sense parts of the Directorate General are actively seeking how to legitimate trade policy in times of challenge. Source of justification is sought in recent policy and academic research within the ‘Brussels’ bubble but also work done by member states and US think-tanks and research institutes (Interview 2, DG Trade Civil Servant, 2016). The sources are not for new evidence but for the ways trade agreements can be justified differently. An important source of ideas for the Commission has been the National Board of Trade of Sweden, whose forward-looking research has often found its way in the language of the Commission (e.g. servicification). Some Commission officials, aware of the critique that they are pushing for liberalisation, explain: ‘Externally, we open markets, but always keeping in mind local sensitivities. We are not some crazy free traders. There is almost none left in the world now – maybe the Swedish but still not’ (Interview 2, DG Trade Civil Servant, 2016)

Some DG Trade officials understand the problem as a change in the audience of trade policy, which requires different types of justification:

TTIP also did not change strategy, but it essentially changed how we do things in terms of justification and the presentation of the benefits. Our target audience has almost always been business organisations, while now is the entire public. We need to communicate in different ways. (Interview 1, Former DG Trade Official, 2016, p. 1)

There is also a difference between current and former DG Trade officials. Language from former officials tends to be stronger in judging the crisis of trade policy and placing the focus on the modes of communicating the added value of the agenda pursued. The comments of former officials show a shift in the thinking of what is possible to be pursued, explaining that the measurements that the EC is using to communicate the benefits of trade are no longer viable (Interview 10, Former DG Trade, 2016). Former officials perceive this also like a longer-term erosion of the confidence in the European Commission brought about by member states since they ‘blame the Commission for everything’ (Interview 11, Former negotiator, 2016). The interviewee further elaborates that this is closely interrelated with the erosion in the support for the European project overall. Similarly, member states directly undercut the credibility of the Directorate-General for Trade as a negotiator by agreeing internally to a joint stance, which they negate externally (Interview 5, DG Trade Civil Servant, 2016).

In parallel, the crisis in confidence in EU’s trade policy has also been defined as a failure by the Commission, as one former DG Trade official explains passionately:

This is what happens when the Commission and certain Commissioners like Barroso do not want to take the political responsibility. As a security against criticism and in line with the Bolkenstein thinking that the Commission should legislate less, we ended up being emasculated! Why are we so emasculated? (Interview 4, Former DG Trade Official, 2016)

Such a representation of the Commission as ‘emasculated’ is often in contrast to how external stakeholders perceive it and especially as it has been often portrayed in the literature on the agency of the Commission.

The question ‘what trade policy is for’ has most vividly surfaced among plenary sessions in the European Parliament and has been often voiced by MEPs. Speaking with MEPs just after the publication of the White Paper, some voice the outlook that the opinion of the European Court of Justice is far more influential in terms of the future direction of free trade agreements (Interview 31, Representative European Parliament, 2017). The issue of mixity at the heart of the ruling is thus telling for the options the Commission have in terms of future FTAs. Interviewees are wondering

whether there will be a move to agreements minus investment and regulatory cooperation and whether there would be two separate agreements (under exclusive competence and mixity). About this, one of the interviewees, closely involved with the work of the Parliament on trade highlights that the Commission is trying to push forward the message that ‘trade agreements cannot do everything’ (Interview 31, Representative European Parliament, 2017). Such a stance being repeated on multiple occasions signals another inherent contradiction: while the European Commission repeats forcefully that trade agreements are the only way out of the crisis and that trade ‘supports’ thousands of jobs in the EU, it also highlights that trade should not be expected to do ‘everything’. External stakeholders sometimes have also echoed this as well: ‘trade cannot do everything, and an FTA cannot resolve all the issues’ (Interview 28, National Business Association, 2017)

The tension created by these two different discourses is that there is an unclear boundary between what ought to be included and what should stay out; and where does the external and internal dimension of EU policy finish. Broader discourse through the crisis presents the ‘internal and external’ as inherently linked.

Non-negotiability?

While the previous sub-sections showed how regulatory aspects are talked about in the framework of negotiations, signifying their potential negotiability, this section looks at the few instances where EU’s standards have been defined as ‘non-negotiable’. Societal actors opposed trade agreements such as TTIP, CETA, and TiSA for a variety of reasons, among which due to the provisions for investment protection, the creation of a harmonised transatlantic market, and race-to-the-bottom in the protection of workers, consumers, and the environment (Bertelsmann Foundation, 2016). TTIP has been perceived as enshrining such influence ‘into the policymaking rulebook...and thus endanger democracy’ and as institutionalising the power of big businesses (Commons Network et al., 2014). As studies have pointed out controversies surrounded each of the three areas of negotiation with the US – market access (e.g. GMOs), regulations (SPS measures), and rules (ISDS) (Buonanno and Dudek, 2015). Other have pointed out how regulatory cooperation can alter agenda-setting due to the formal and informal rules as well as the discursive context within which new regulatory proposals are made (De Ville and Siles-Brügge, 2017). Overall stakeholders were successful in framing the debate in terms of the race-to-the-bottom of regulatory

standards as well as the capture of EU regulators through a system allowing US businesses to comment on EU legislation.

The criticism sparked a series of responses from traditional EU actors, particularly from the Directorate-General for Trade, which developed a number of strategies to deal with the heightened contestation (Huet and Eliasson, 2018). Most notably, the recognition that the audience of trade policy has expanded beyond traditional core (business associations, member states) has resulted in a stronger role for Commission's legitimising discourse. One of the phrases that entered EU's discourse is that of 'non-negotiability'. As stated in the FAQ on the EU-US Partnership under the question 'Do I have to worry about existing EU standards of consumer, environment or health protection?', the response states:

No. We will not negotiate existing levels of protection for the sake of an agreement. Our high level of protection here in Europe is non-negotiable. But let us not forget that the US also takes protection of its citizens very seriously. (European Commission, 2013b)

This phrasing was reiterated at some occasions by the Chief Negotiator, Ignacio Garcia Bercero. In front of journalists in Berlin at the beginning of 2014, he restated that 'what is non-negotiable are food safety standards. Hormones are prohibited, there is a strict regime of genetically modified organisms, and this is not going to go away' (EU Observer, 2014). Similarly, President-elect Jean-Claude Juncker used the phrasing in declaring that the new Commission will pursue an ambitious standard, where food safety and personal data protection are 'non-negotiable' (Juncker, 2014). While in essence 'non-negotiable' is meant to reassure stakeholders that EU's regulatory model and specific standards will not be compromised and lowered, the fact that negotiations over regulatory cooperation continued, limited the effectiveness of the legitimising discourse.

In an attempt to address stakeholders' concerns further, the Commission in the 'Trade for All' Strategy 'made a pledge' that: 'no trade agreement will ever lower levels of regulatory protection; that any change to levels of protection can only be upward; and that the right regulate will always be protected' (European Commission, 2015b, p. 20). It also transformed worries over regulatory cooperation in a positive message on the beneficial aspects:

Regulatory cooperation [...], can also help promote high standards. By engaging partners in regulatory cooperation, the Commission can exchange

ideas and best practices and promote EU standards in a way that will help consumers everywhere to benefit from the highest and most effective levels of protection. Trade agreements are a way to give political momentum to this kind of dialogue. However, contrary to traditional trade negotiations, regulatory cooperation is not about give and take or trading one regulation for another. (European Commission, 2015b, p. 20)

The reframing of the positives of regulatory cooperation for consumers (and in other instances workers and the environment) aims to highlight the compatibility of trade deals with high standards.

Despite the freezing of TTIP well ahead of the interviews in Brussels, the concerns surrounding the relationship between trade and regulation not only persisted but took a strong turn towards rethinking of the relationship. The snapshot of stakeholders' comments during the interviews on trade and regulation, particularly vis-à-vis TTIP highlight concerns about both the argumentation used by the Commission ('naïve examples'), the process of negotiation, the implicit and explicit implications.

Table 9. Snapshot of stakeholder comments over the link between trade and regulation (post-TTIP freeze)

Description	Source
Very much institutionalising business power through the questionnaires and comments	Interview 22, External Stakeholder, 2017
The naïve examples they use for standard harmonisation in TTIP	Interview 22, External Stakeholder, 2017
Regulatory cooperation in this sense can both safeguard standards but also can be a limitation. 'provides a ceiling'	Interview 22, External Stakeholder, 2017
Biggest problem is the creation of certain bodies that will develop standards and principles for regulatory cooperation	Interview 23, Member of the European Parliament, 2017
What powers and responsibilities are given to the regulatory and harmonisation bodies	Interview 23, Member of the European Parliament, 2017
Our preferences will be for agreement on the multilateral level but also have to be pragmatic, so we've turned our attention to FTAs. What we don't want to see are very detailed commitments that tie down regulators especially with trading partners	Interview 24, External Stakeholder - Horizontal, 2017
In most proposals trade came first, consumers later but we want to make sure that their missions are properly set from the start	Interview 24, External Stakeholder - Horizontal, 2017

Source: Interviews.

In particular, the concerns of some organisations focused on the appropriateness of trade agreements to address regulatory issues, the structures created for discussions over regulatory issues, and the implications for the regular legislative process. Vis-à-vis CETA, for example, precisely these concerns necessitated the Parties to issue (and then clarify) a Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its member states (Official Journal of the European Union, 2017).

While the concerns of many of stakeholders were TTIP-specific, the legitimising discourse pre- and post-backlash of the European Commission does not reflect the concerns vis-à-vis the relationship between trade and regulation and in particular the overreaching of the existing approach towards FTAs into the realm of regulatory issues fully. Notably, the European Consumer Organisation (BEUC) came out with a strong

statement calling the coverage of trade agreements, ‘imperial overstretch’ of trade policy (BEUC, 2017). The ‘vision’ states:

Present-day trade negotiations...plan dialogues between regulators to make legislative standards match. But if trade deals plan this, the goal of such cooperation becomes trade facilitation, not consumer protection, and that’s just wrong.

While the dynamics of discourse-backlash-discourse can be further explored the evidence presented here focused on the shift of the understanding on non-tariff measures as regulatory heterogeneity through a series of discursive elements. These included: the lack of specification of regulatory convergence, cooperation and coherence; the illustration of regulatory differences as a natural next step of the trade agenda; and the presentation of regulatory cooperation as an innovative way to tackle such non-tariff measures. Building not only on Commissioner Malmström’s speeches but also previous Commissioners, the second part of this chapter showed an overreach of trade policy free trade discourse into regulation and positioning of regulatory issues in the heart of the ‘open markets’ agenda.

However, this chapter shows that stakeholders, representing a wide spectrum of interests, are not challenging trade agreements per se or the idea of regulatory cooperation, but the balance between ambitious regulatory cooperation, regulatory sovereignty and legitimacy concerns or how regulatory cooperation plays out in practice.¹⁴⁶ The intensified contestation of EU trade policy and the talk on regulatory cooperation has also driven a new discourse on regulatory issues, namely their ‘non-negotiability’. Finally, it showed how ‘non-negotiability’ is not a credible legitimising discourse. Moreover, we can see the slow transformation of the underlying public philosophy towards the legitimacy of trade agreements.

7.5. Discussion and conclusion

In line with the theoretical framework, the turn to regulatory cooperation is the extension of the free trade discursively to all regulatory disciplines as well as the transition from a domestic focus (through the lead by DG Growth) to an external focus through the lead by DG Trade, which closely reflects the international consensus that domestic regulatory choices can be harmful to international trade.

¹⁴⁶ On the balance between trade opening, regulatory sovereignty and democratic legitimacy, see Hoekman and Sabel, 2017; (Wiener and Alemanno, 2015)

Regulatory heterogeneity

Tracing different understanding of regulatory cooperation initiatives it becomes evident that regulatory cooperation is an all-encompassing term, which instead of a clear policy prescription allows for substantial policy discretion. It is defined more by the absence of clarity and the multiple possibilities it offers to those actors who are engaged on its side. Interestingly, in the transition between the period surrounding the Global Financial Crises to the period until Trade for All much of the focus has shifted from a problem definition in terms of regulatory protectionism to regulatory heterogeneity. While the talk about removing specific trade barriers persists, it is overshadowed by a ‘new’ but at the same time ‘evolutionary’ approach to dealing with non-tariff measures. This is defined by much more uncertainty about the demands of businesses and a difficult justification of the ambition of the agreements. This was captured in the explanatory document on regulatory cooperation in TTIP, where the Commission defines that the issue is ‘unnecessary regulatory differences’, while the solution or ‘the opportunity: helping regulators to work together to ensure high levels or protection of public policy goals’ (European Commission, 2016b).

Looking back and the distinction between shallow and deep integration – the negotiations over regulatory cooperation go beyond the principles of national treatment and non-discrimination to address the spillover effects of each country setting their regulations. While this is a mode of cooperation practised in the EU and learned through experience, the interaction of regulatory protectionism/heterogeneity have promoted actors to see regulatory cooperation with Japan, simply as a way of reversing gains from liberalisation. The deeper integration elements thus were presented only with CETA and TTIP when the Commission focused on ‘cooperation on regulatory policies, processes and standards that supports this outcome by lowering trade and operating costs for firms located in participating jurisdictions’ (Hoekman and Nelson, 2018, p. 10).

However, the choice of pursuing such cooperation has revealed the difficulty in reaching an agreement on focal points such as international standards – where the European Commission in comparison to the US administration is very supportive. The second area of difficulty is regulatory capacity – which the European Commission tried to increase by mobilising associations and businesses around the benefits of the removal of regulatory barriers. Finally, despite the move from a mindset around

regulatory protectionism to one focusing on heterogeneity, the Commission has not moved away from thinking of ways to describe these in terms of reciprocity and issue linkages. The main reason for this is the agreement in the Council.

As the chapter elaborates, the internal deliberations around non-tariff measures and regulatory cooperation highlight changes in their treatment on three factors. Firstly, on the level of how the issues are problematised, the principles for assessing the gains of regulatory cooperation are also framed in terms of the market value where existing modes of evaluation are extended to the new area. Similarly, the criteria for prioritisation is also based on an understanding of market efficiency and market value. Both of these aspects are positioned within the framework of global value chains and what rules are needed for the EU to take its rightful place. Secondly, vis-à-vis, problem solutions the inclusion of regulatory cooperation in FTAs has taken place after prior discussions within the same fora as traditional market barrier removal mechanism.

Moreover, the process of conducting the negotiations suffers from the same processes of exclusion of a wide range of actors. The discussion on whether trade agreements are the most appropriate venue to address regulatory issues versus addressing them through multilateral and plurilateral initiatives has been mostly absent from the public discourse and even the internal deliberations. Instead, practices focus on setting priority sectors and mobilising them in support of generating the rationale and justifications.

In this way, despite the increased transparency prompted by the TTIP backlash, those actors who are asked are limited. While the Trade for All strategy tried to direct the discussion towards ‘values’, read in conjunction with other policy documents it reinstates the centrality of the free trade and neoliberal discourse and interactions. The insistence on values may also infer a position of regulatory superiority or even regulatory imperialism. As one interviewee shared, the EC feels that is always a demandeur and can apply discretion across partners:

It is very much on a case by case basis – we are always on the demanding side when it comes to this. Our starting position is clear – we are not going to change anything in our EU legislation, even Mutual Recognition is going too far.’ (Interview 12, DG Trade Civil Servant, 2016)

This transformation of regulatory issues as trade barriers has also been subject to intense criticism. As the criticism by European Public Health Alliance (EPHA) points out: ‘Regulations are continually put forward in public debate as mere bureaucracy,

red tape and a burden on business, and especially on SMEs, to the extent that this has often become an accepted “fact” (European Public Health Alliance, 2015).

Impact of this understanding and change of public philosophy

The context of the financial and economic crises and the imperative to avoid protectionism, keep opening markets and find new sources of growth reinstated trade agreements as the main instrument of the European Commission’s trade policy. The role of trade agreements has been reiterated in consecutive strategies, policy documents, impact assessments and speeches. At the same time, seeking ‘ambitious’ agreements required going beyond the reciprocal reduction of tariff levels. During this crucial period between the first serious mentioning of regulatory issues and regulatory cooperation in trade policy speeches and the first signs of a backlash from civil society towards the TTIP, the Commission used its discursive powers to define regulatory cooperation as the natural complement to the current market opening efforts. By discursively expanding what trade agreements can do it created the space for existing institutional practices on the technical aspects of trade negotiations to promulgate, therefore engaging only certain actors.

This also increased the role of the European Commission’s DG Trade outside of formal institutional processes. The framing of the link between trade and regulation has developed through different stages: vagueness of enhanced cooperation and different terms; possibility for regulatory change; and regulatory cooperation as trade policy. Communicative discourse also shows the use of the idea of evolution and historical imperative to highlight that regulatory cooperation is the next natural step for trade policy. This chapter suggests that including regulatory issues in the trade regime has provided an active role for traditional concentrated interests, businesses, which actively provide information or who take part in market opening efforts. However, it also aimed to show the influence of the challenge of policy solutions towards the change in public philosophy.

Finally, this chapter also carries implications for the way forward. In particular, it also has a normative question in mind: should regulatory issues belong to a different regime? Is it legitimate to include regulatory cooperation in trade agreements and in what forms? The existing literature tells us that FTAs/RTAs can provide a very useful laboratory and ground for more proactive and meaningful regulatory cooperation, but

this requires a different type of legitimating discourse and practice. At present, the discourse of the European Commission has led to a major backlash to what trade policy is for in the first place which has opened both a legal and institutional debate. Is the next step splitting trade agreements with regulatory cooperation outside? From existing practice, it is more likely that the Commission will strengthen its justificatory discourse instead.

Chapter 8. Conclusions

The main argument of this dissertation has been that the evolution of the treatment of non-tariff measures is neither natural nor inevitable since it results from actors' understanding of what is necessary and appropriate to achieve internationalisation of regulatory regimes. In turn, the definition of what necessary and appropriate is changes with the trade policy context. The more specific aim of the dissertation was to address two sub-questions: how do actors perceive being affected by the global economy; and what kind of trade policy results from such understanding. Moreover, the aim was to address a number of challenges emerging from the traditional trade policy literature: what is the role of the European Commission in accumulating and transforming interests vis-à-vis non-tariff measures; how regulatory cooperation emerged as the only solution to the treatment of non-tariff measures; and why has EU trade policy faced increased contestation. While positioning these arguments and responses within the institutional setting of the EU, we focused on a constructivist explanation drawing from International Political Economy and Public Policy to address these issues.

In the first and second part of the Conclusions, we revisit the theoretical framework, each of the arguments and the contribution of each chapter. We then briefly look at the framework for understanding negotiability. In the fourth part, we turn to the broader theoretical insights which the framework presented here can inspire. We highlight how the changing conception of non-tariff measures opens the space for new actors, issues, and modes of governance. In the third and fourth sections, we turn respectively to pitfalls of the research design and policy implications.

8.1. Theorising ideational change and the evolution from regulatory protectionism to regulatory heterogeneity

The research question, which my dissertation aimed to address, is what explains the evolution of the treatment of non-tariff measures in trade policy. To seek responses to this question we expanded on constructivist approaches in IPE and Public Policy to assess the role and function of ideas. More importantly, in comparison to previous studies, we disaggregated the ideational component in trade policy in three levels: public philosophies, policy programmes and policy ideas. Such a step allowed us to go beyond looking at neoliberal ideas but looking at neoliberalism as a public philosophy, which related to different policy programmes and policy ideas. Specifying how we can

trace the role of ideas at each level, further allowed us to distinguish a top-down dynamic and a bottom-up dynamic. More precisely, underlying philosophies influence policy programmes through established coordinative and communicative discourses. For a problem definition to get established and to survive it has to align with the existing public philosophy. How the problem of non-tariff measures is defined also influences available policy ideas and their selection and continuation. Even though it is easy to dismiss discourse as a mere rhetorical device to tame the fears of critics, our research shows that discourse has a role in shaping what regulatory issues are in the first place and shaping the scope of what can be achieved.

On the other hand, the bottom-up dynamic shows how a policy idea can transform a public philosophy. The inclusion of regulatory cooperation chapters in the latest FTAs, negotiated by the European Union, changed both policy programmes and underlying philosophies. Concerning the change in policy programme, it cemented the view of non-tariff measures as regulatory heterogeneity – non-tariff measures were amplified to the core problem in trade negotiations during the EU-Japan EPA and TTIP talks. Moreover, they became treated as a cost, which precludes the EU to take its rightful place in global value chains and the global economy. Hence, the policy idea expanded the policy programme to accommodate the existing solutions, which were perceived to work. Concerning the change in public philosophy, the change in the policy idea triggered a challenge to the solutions proposed and provoked a shift towards calls for more legitimacy in trade policy. While these dynamics do not constitute a new theory, they can be tested in further studies in terms of each of the mechanisms that are at play.

To highlight how non-tariff measures and regulatory issues change trade negotiations, we drew on previous studies to show that the inclusion of regulatory issues changes the means-ends of trade policy but more importantly how key actors understand means-ends relations (Lang, 2011b; Siles-Brügge, 2014; Woll, 2008). Hence, we saw that when regulatory issues are at the centre of attention, the main goal of trade negotiations is the internationalisation of regulatory regimes in order to facilitate trade and trans-border operations. We also outlined the deliberative effects of such a change – business, rather than making demands for or against market opening, take part in the elaboration of targeted rules specifying how to liberalise, in the language we introduced – make demands for specific policy ideas. Businesses bring technical expertise, but they depend on the policy programme as defined by policymakers and

operate in a highly complex and uncertain environment. What we showed further was that talking about the deliberative processes behind regulatory trade lobbying, the uncertainty that actors face is not about the global economy in general but other countries' regulatory choices. Within such uncertainty, a heuristic is to define the measures of partner countries as protectionism – what we trace as an understanding of regulatory protectionism. The transforming factor between regulatory protectionism and regulatory heterogeneity is not only the partner country but also the specific policy ideas through which each of these problems can be addressed.

However, we wanted to see how non-tariff measures increased their centrality in the policy agenda at the time that they did. To achieve this, we defined the ideational two competing and co-existing policy programmes: non-tariff measures as regulatory protectionism and non-tariff measures as the cost of regulatory heterogeneity. We further showed the difference in the coordinative and communicative discourse across these two types of problematisation and the policy ideas associated with each. Cognitive ideas refer to 'guidelines for political action and serve to justify policies and programs by speaking to their interest-based logic and necessity' versus the normative ideas which also 'attach values to political action and serve to legitimise the policies in a program through reference to their appropriateness, often with regard to underlying philosophies' (Schmidt, 2011, p. 113).

As we highlighted, regulatory protectionism, resulted from the logic that non-tariff measures are substitutes to tariffs and are commensurable to tariffs. The understanding of regulatory protectionism leads to the use of tools to justify what is protectionist and assess through legal means how to eliminate protectionism. In cognitive terms, this mobilises policy analysis associated with the use of legal tools to remove or respond to protectionism to avoid harm. It also pre-empts deliberative processes, which exclude a wide array of actors, which do not have the technical and judicial expertise. Regulatory protectionism's dominance is linked to the overall public philosophy – embedded liberalism. The ideas which form part of 'embedded liberalism' have not been completely replaced in the way that international norms leave much scope on what is acceptable for domestic institutional arrangements. This dissertation paints a picture where a view of non-tariff measures as 'regulatory protectionism' stems from the 'embedded liberalism' compromise and particularly, the understanding that illegitimate are those measures that are unlawful. The embedded liberalism

compromise also informs the ways to tackle them at the international and bilateral level – through shallow integration and agreement on the legalistic tools to deal with such barriers. Since this is still a major pillar of both the European and international approaches, embedded liberalism’s influence should not be limited to the context to which it pertained but is also visible now.

Regulatory heterogeneity results from an understanding of non-tariff measures as the cost of diversity. Defining the problem as regulatory heterogeneity allows for a much broader scope for what is to be considered protectionist and in particular, it allows for the targeting of government or regulatory failures as the rationale for action. Moreover, regulatory heterogeneity in itself often carries the normative judgment that the other countries’ practices should be amended in the sense that they require reform and move towards efficiency. While regulatory heterogeneity has a wider definition of what a non-tariff measure is, it has a limited range of solutions, which work, with regulatory cooperation in FTAs as the dominant solution, reached by the EU.

The evolution from regulatory protectionism to regulatory heterogeneity helped us identify how regulatory cooperation became dominant and also to identify a framework for assessing how regulatory issues in trade agreements are viewed.

8.2. Summary of empirical findings

In Chapter 5 we saw that the frame of reference for the treatment of non-tariff measures was the juridical system built around the GATT/WTO system. The progression of disciplines at the international level illustrates the uncertainty about what can be considered protectionist and what kind of processes are legitimate with regards to the international trading system. The problematisation of non-tariff measures as regulatory protectionism brought them early on the negotiation agenda, requiring an approach to evaluating their relationship to tariffs and the approach to be taken. The large number of submissions and diversity of measures prompted Members to agree only on the broad principle on non-discrimination, leaving discussions on necessity and legitimacy to the legal-technical realm. However, the norms, resulting from a series of judgements, rather than pointing to a circumscribed area of measures that are outright protectionist, focused on the types of justification provided by Members. Moreover, the recognised modes of justification in terms of the monetary value of measures, judged by their effect on market segmentation, set out a trajectory for other forms of

value judgement to take a second place. After the Tokyo Round, the WTO already made the first steps towards harmonisation by referring to the use of international standards, but while it defined standard, it did not define what an ‘international standard’ constitutes, leaving a lot of scope for discretion and for deliberations, of which standards should be used as a reference point.

The disciplines created at the international level strongly influenced the approach of the European Union. The European Commission had the discretion to assess what can be justified in reference to the rule of law, which in itself reflects a broader embedded liberalism compromise about sovereignty. The communicative discourse of regulatory protectionism is straight-forward – targeting protectionism is essential for the functioning of markets. On the other hand, the communicative discourse, particularly post-Seattle, started to evoke ideas associated with regulatory heterogeneity, which substantially expand both the policy analysis and the modes of justification. We identified what is perceived to be the reality of problems of regulatory diversity such as the cost created by different regulatory jurisdictions, the distortion of international competition via regulatory competition, and the threat of over/under-regulation. Regulatory heterogeneity brings specific policy ideas around convergence, coherence, harmonisation and trade-offs between them. We illustrated that during the first period reviewed there was a consensus that it is best to negotiate only over tariffs and agree upon general rules committing countries to non-discrimination.

While other authors point to a shift in the way trade policy is perceived with the Global Europe Strategy, vis-à-vis non-tariff measures and regulatory issues, the demands the EU wanted to make on other countries’ regulatory choices was evident even before the GES. The limited regulatory capacity of the EU to tackle the full range of barriers identified by businesses led to a multi-pronged approach to addressing regulatory protectionism. What became clear is that only negotiations over free trade agreements provide the necessary forum and commitment for tackling such issues.

With the move towards a broader regulatory reform agenda, deeper forms of cooperation emerged as alternatives (Chapter 6 and 7). While there is still a disagreement on the use of trade agreements as a channel for tackling regulatory aspects, the European Commission firmly moved towards free trade agreements as the appropriate instrument. However, regulatory heterogeneity faces a difficulty in the modes of evaluation – how to assess the cost of diversity. In Chapter 5, at the level of

justificatory discourse, narratives of the imperative to construct and maintain open markets, promote competitiveness, deliver openness internally and externally have been a persistent part of the communication from different European Commissioners for Trade. This was evident in all empirical chapters with the difference that since the Global Financial Crisis the discourse started expanding towards the broader regulatory environment as a trade obstacle (Chapter 6). One finding of the thesis is how the inclusion of regulatory issues in FTAs, allowed the Directorate-General for Trade to establish the dominant discourse on regulatory aspects and regulatory cooperation. The discourse used paved the way for a regulatory heterogeneity as a policy programme.

In Chapter 6 during the negotiations with Japan, both a perception of regulatory protectionism and regulatory heterogeneity interacted. The tracing of the coordinative and communicative discourse showed that while there were elements of targeting regulatory heterogeneity, there was the stronger dominance of the regulatory protectionism discourse, due to the historical differences in the regulatory cultures between EU countries and Japan. Difference in the regulations, which results in specific measures, was addressed as a ‘non-tariff barrier’. At the same time, the communicative discourse which aimed at the mobilisation of member states and interest groups in support of the negotiations backfired. The negotiations were captured by the discourse of the removal of non-tariff measures rather than the discourse to manage diversity. This is not to say that the Japanese side was eager to engage in tackling the roots of regulatory heterogeneity. While there was a lot of reception in one of the Ministries – Ministry of Economy, Trade and Industry – other regulators were reluctant to engage in domestic regulatory issues. We engage further below with the possible extension of the dissertation by looking more in-depth in the communicative and coordinative discourse of partner countries. Most importantly, further research is needed on how the alignment in the framing of non-tariff measures can yield better results for regulatory cooperation and whether it will be a sufficient condition.

Contextualising the progression of treatment of regulatory issues within the communicative discourse showed us that defining the ambition of trade agreements regarding the economic value of non-tariff measures turned them into a key deliverable from the on-going negotiations. The Directorate-General for Trade had to tackle multiple aspects of negotiability simultaneously. Such move to the centre of the agenda

brought about uncertainty on their negotiability, defined in terms of their mode of treatment vis-à-vis tariffs, their economic impact as measured through impact assessments and evaluations, as well as their implementation and enforcement. The uncertainty, which the inclusion of regulatory issues creates, is not limited to the negotiators, or main actors in the Directorate-General for Trade, but also extends to businesses. Moreover, firms wait and see whether there is political will before engaging with uncertain policy solutions.

Such dynamic was particularly apparent in the final empirical chapter, where we could further differentiate between regulatory heterogeneity and ideas about eliminating heterogeneity and managing diversity. While the former can be associated with a prescription that there are optimal technical solutions, the latter provides scope for experimentation, learning and innovation. At the communicative level, the dominant discourse was not challenged by other Directorates with alternative discourses, and non-tariff measures and regulatory issues were presented as the natural extension of the trade agenda – both as evolution and innovation, which the European Union is introducing to how these are governed (Chapter 7). Moreover, DG Trade's strengthened its communicative discourse at moments of challenge and uncertainty – both during the GFC and the contestation surrounding the TTIP. Most notably, the material gains from the removal of non-tariff measures in the case of Japan and regulatory cooperation with the US could not be precisely evaluated, but by mobilising member states and companies around the potential gains, the communicative discourse was strengthened further. Crucially, and not far from what Woll and Siles-Brügge have argued, the Directorate-General for Trade managed to mobilise businesses around the perceived gains vis-à-vis regulatory cooperation in a dynamic of reverse capture (Siles-Brügge, 2014; Woll, 2008). Policymakers' preferences of tackling regulatory issues at the WTO due to the degree of judicialization was shifted to the FTA fora, where the EU has aimed to exchange market access to the internal market for the adoption of international regulation (De Bièvre, 2006). But the turn to regulatory cooperation was not demanded by firms or other societal actors. Firms did not doubt the potential gains but were uncertain of whether there is a political will from policymakers and regulators to deliver an ambitious agenda, and also uncertain of how much regulatory cooperation can deliver the benefits communicated. As seen in Chapter 7, in a series of meetings in the period of 2012 and 2013 the Commission, the Directorate-

General for Trade often accompanied by other DG representatives, convinced companies that regulatory cooperation is desirable and that companies should provide as detailed information as possible and liaise with companies on the other side of the Atlantic to deliver joint submissions.

Thus rather than explaining the shift to bilaterals, we contribute to explaining the shift to negotiating with some of the largest developed country partners under the De Gucht tenure (US, Japan, Canada). An ideational shift from non-tariff measures as regulatory protectionism to regulatory heterogeneity at the level of ideas, show us how the EU eliminates and manages diversity. At the same time – and this is where the coordinative and communicative discourse interacts the most – the ideational shift is not a sudden transformation but results from a series ad hoc decisions, lessons learned, and inconsistencies.

How does this shift relate to the overarching public philosophies? In the theoretical chapter, we saw the dominance of neoliberal ideas in the trade policy literature. However, we argue that the lack of sufficient differentiation between different levels and types of ideas is a pitfall. In our theoretical framework, we managed to link together the broader public philosophy, policy programmes and policy ideas and identify pathways of change. Analysing the interview data and documents, we found substantial evidence that ideational development in the field of trade and regulation resembles more a hybridisation of ideas or at times ideational bricolage, showing how an issue area emerges within the existing frames, gets transformed and eventually challenged. Even the Global Europe Strategy from this perspective is no fundamental shift in how trade policy is done.

Concerning the coordinative discourse, the continuity in the neoliberal paradigm is ridden with inconsistencies. In Chapter 2 we attempted to form a number expectations on how neoliberalism translates into different types of coordinative and communicative discourses. To see which problem definitions ‘stick’, we also had to look at the deliberative processes, which make an idea dominant. Methodologically, for each of the periods, we looked at the interaction of the Directorate-General for Trade with two key committees – Trade Policy Committee within the Council of Ministers, and the Market Access Advisory Committee falling under comitology and chaired by the Commission. The technicality of non-tariff measures and their perception as the cost for firms strengthened the centrality of business-Commission

interactions vis-à-vis the trade regulation agenda. One of the reasons highlighted in Chapters 5, 6, and 7 is the flow of information, which forms the baseline for the modes of evaluation. When it comes to the effect of non-tariff measures, companies are a key source of information, which can justify action by the European Commission. DG Trade actively seeks out supporting evidence on the type of measures, which exist; their economic cost to companies; as well as on different occasion prioritisation of these measures by businesses themselves. But the information itself is value-ridden in terms of cementing any barriers, which exist to competition, as trade barriers. As a result, businesses supply information on the existence of different measures in third countries and the Directorate-General for Trade has the role to systematise, prioritise and assess to what extent third country restrictions are justified but the forms of justification are also informed by businesses. While this process pertains to technical aspects of importing and exporting goods, which given that trade is business induced seems natural, the interactions between member states, businesses, and the Commission are not only technical. The intensified information exchanges and deliberations on what constitutes a barrier are conditioned on the partner country and the perceived regulatory gap. While EU trade policy has adjusted to accommodate civil society concerns regarding processes of inclusion and transparency, both the negotiability of specific measures and the conduct of regulatory cooperation are structurally dependent on the participation of businesses.

Coordinative discourse also shows strong uncertainty about the modes of evaluation of non-tariff measures and their relationship to existing norms such as reciprocity and non-discrimination. Commission and member states' representatives show pragmatism in the way they tackle non-tariff measures where sometimes discussions revolve around what is an optimal technical regulation and to what extent harmonisation and convergence can be policy solutions. The coordinative discourse also shows the much more dynamic process of defining negotiability. Both the coordinative and communicative discourse highlight that the largest gains from regulatory cooperation are with the countries with a widest regulatory gap, in practice delivering regulatory cooperation has been challenging. Finally, the coordinative discourse also highlights the gaps in EU's regulatory capacity to devise cooperation approaches due to the need to engage regulators, member states, businesses and the partner country to define what is necessary.

One of the implications of the inclusion of regulatory issues in the negotiations has been the intensified contestation of trade policy and trade agreements in particular. While multiple current studies are aiming to define contestation, identify the factors behind it, and explain the variation of contestation across agreements, this dissertation had a much more modest objective. Even though politicisation has been constrained predominantly to the negotiations on the Trans-Atlantic Trade and Investment Partnership, spilling over to the Canada Economic and Trade Agreement, other agreements have not been subject to the same levels of contestation, intense public discourse and polarisation of opinions. Instead, the dissertation showed that contestation reflects the modes of inclusion of regulatory issues. As this research showed, the inclusion of regulatory issues and move to regulatory cooperation as the dominant mode of dealing with such issues has been one of the main elements of public contestation. As A.R.Young observes ‘the source of Europeans’ fears about globalization is not, as the Commission tends to emphasize, increased foreign competition. Rather it concerns other facets of globalization – including developing disciplines on domestic policies’ (Young, 2017, p. 22). We would add the processes through which the Commission tackles disciplines on domestic policies, leading to a slow bottom-up transformation towards a change in the public philosophy.

To sum up the progression, non-tariff measures as regulatory protectionism mobilised technical coordinative discourse in the way that DG Trade, member states, and businesses contemplated the barriers in other countries, which needed to be tackled. In the process, the problem definition of what constitutes a barrier expanded both on the international and domestic levels. While the technical coordinative discourse was still essential to understand modes of categorisation and evaluation, DG Trade strengthened its legitimising communicative discourse to mobilise support for the ambitious trade agreements. It became clear that existing modes of categorisation and evaluation are insufficient, so regulatory cooperation was conceived as a dynamic solution to regulatory heterogeneity. Finally, the backlash towards the proposed solution required strengthening of the legitimising discourse and a call for a different public philosophy.

8.3. Framework for understanding the negotiability of non-tariff measures

The evolution of non-tariff measures in EU trade policy raises a vital question of how much the negotiability of non-tariff measures can travel to other settings and other agreements and what a model for negotiability looks like. The theoretical chapter aimed to contribute to the understanding of non-tariff measures from a qualitative point of view. In the process, we also identified a framework for assessing how regulatory issues in trade agreements are viewed.

Existing studies highlight fundamental gaps in the study of NTMs, which we aim to remedy with a qualitative approach. Broadly, these gaps are: the difficulty in disentangling the impact of one NTM from impact of others and identifying when different NTMs can be used as alternatives (Bacchetta et al., 2011; de Melo and Nicita, 2018) and disentangling the protectionist intent of policies from those that have a legitimate public policy purpose (Grundke and Moser, 2014). In particular, it has been difficult to move away from the treatment of NTMs as the additional costs to trade. This ‘tariff equivalence syndrome’ means that many studies assume ex-ante that ‘FTAs are about discriminatory reductions in trade barriers, just like tariffs’ (Melchior, 2018d, p. 10). This dissertation attempts to remedy these two difficulties with a qualitative approach, which allows us to explore the interlinkages between NTMs and the broader negotiating context within which they are discussed as well as the coordinative and communicative discourse, which cut across the different measures. What the dissertation shows is how an agent decides whether something is protectionist (or forms such a perception) and how it formulates its opposition in terms of accepted modes of justification. In this context, what is ‘just’ is ‘what is sufficiently justified’ thus providing part of the rationale for the focus on ideas and language, which this dissertation offers (Griller et al., 2017).

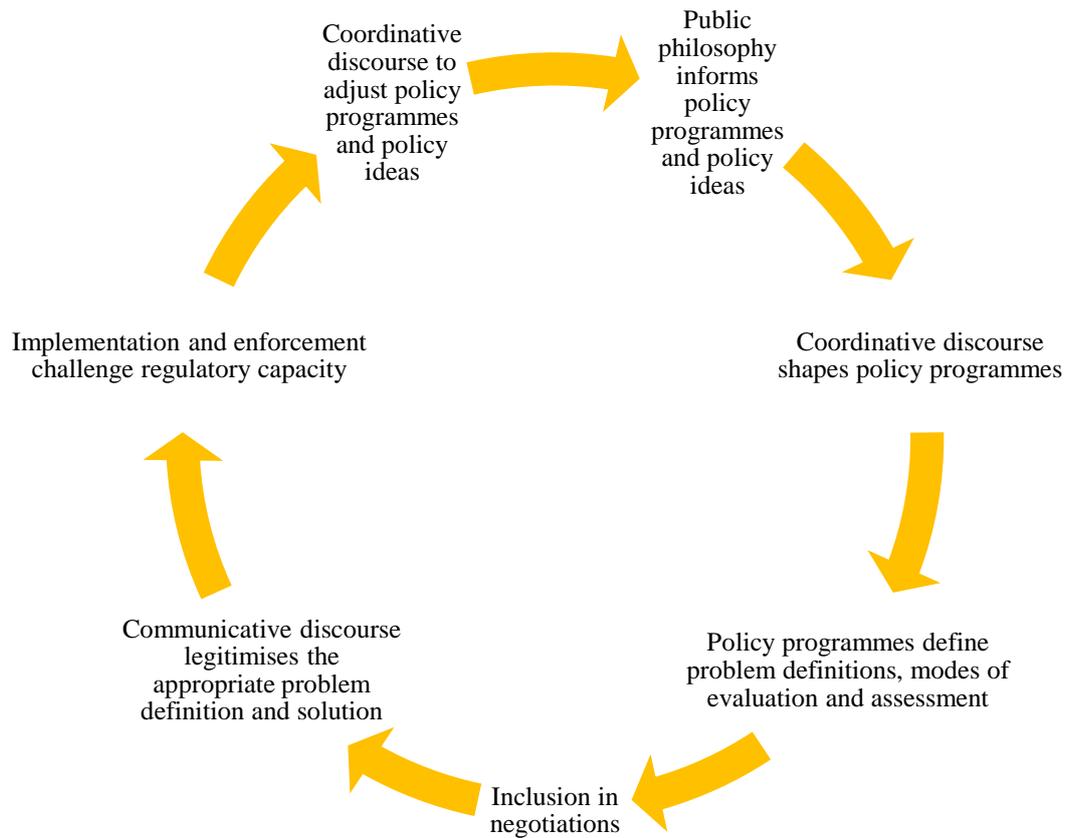
The position of non-tariff measures in the nexus between trade and regulation brings in different notions of the market and markets – how are they constituted and how much government involvement goes into market-building and market-managing. NTMs per definition do not adjudicate what is legitimate and what is not. WTO rules on NTMs aim to establish transparency and non-discrimination as basic principles as well as reliance on international rules. Where substantive rules do not exist, WTO

agreements guide the procedures through which measures are assessed as legitimate. Judging and adjudicating what is legitimate becomes a way to study the strategies trade policy actors use and how defining something as a barrier increases the scope for the agency. To assess whether NTMs are legitimate, one has to see who is responsible for certain policies and what actions are taken in terms of balancing between liberalisation and other concerns. For example, the European Commission, having the authority to both categorise and monitor barriers to trade through its Trade and Investment Barriers (TIBR) report as well as to negotiate trade agreements with third countries, has used the ‘market access work’ to channel issues on the negotiations agenda. Such considerations have been explicitly stated in the 2017 TIBR report but as Chapter 5 shows it has been a long-term practice.

Moreover, the interviews show evidence that the Commission has used the identification of barriers as leverage in efforts to remove them before the negotiations start (e.g. the negotiations with Japan), thus defining the level of ambition within the pre-negotiation phase. At the same time, uncertainty about the legitimacy of measures is not only the work of the Commission. The dissertation highlighted the ongoing legal debate within the WTO as well as within the European Union on how to interpret provisions on non-tariff measures, concerning the tests of *among other things* non-discrimination (especially national treatment obligation), necessity and proportionality and precaution versus protection.

From the discussion in each of the chapters, it becomes clear that negotiability is a dynamic concept. Compared to the negotiation of tariffs, the process surrounding non-tariff measures can be conceptualised as a ‘negotiability cycle’, where we not only need to understand the interests and institutional constraints, but the ‘concepts, assumptions, techniques of classification, analytical structures as well as processes for producing these elements’ which operate in the social domain (Rasulov et al., 2014, chap. A. Lang).

Figure 7. Negotiability cycle



Finally, the three channels through which negotiability changes the treatment of NTMs is through the choice of venue or what the global regulation literature deems the form of interaction – NTMs are discussed or included at the multilateral level; included in preferential trade agreements, unilateral treatment; or through implementation channels. Secondly, negotiability affects the sequencing and prioritisation of measures – non-tariff measures are discussed before, during, and after the negotiations; strategically can be discussed in parallel to tariffs and can include frontloading. Finally, it changes the definition of reciprocity – defines the types of reciprocity which can be applied to non-tariff measures and the level of ambition.

Box 3. Effect of negotiability on the treatment of NTMs

- **Mode of cooperation:** Choice of venue for addressing non-tariff measures and coherence across venues.
- **Sequencing and prioritisation of measures:** non-tariff measures are discussed before, during, and after the negotiations; strategically can be discussed in parallel to tariffs;
- **Types of bargaining and reciprocity:** refers to understand the type of reciprocity which can be applied to non-tariff measures.

8.4. Wider contribution

8.4.1. International Political Economy and the IPE of Trade

The dissertation addressed three aspects of existing scholarship in IPE: how actors perceive complexity, how actors perceive uncertainty, and to what extent societal explanations can accommodate the move from tariff liberalisation to the internationalisation of regulatory issues.

Existing perspectives underline the increased complexity in managing integrating markets and uncertainty due to the difficulty to evaluate different courses of action and assess the future regulatory context. Firstly, countries operate within a highly complex system defined by international regime complexity (Alter and Meunier, 2009), defined as ‘a system with a large number of elements, building blocks or agents capable of interacting with each other and with their environment’ (Alter and Meunier, 2009, p. 14). This means that trade policy decisions ‘at every level of a trade negotiation must take into account related institutions’ (Davis, 2009) and each of the decisions made is embedded in a broader institutional context. Thus trade policymaking is subject to a wider set of discursive tools. Complexity has become a defining characteristic of global trade, not only in terms of the interaction of different institutional structure, but also in terms of the expansion of global value chains and the rules that govern them (Baldwin, 2006; Blinder, 2006; Gereffi et al., 2005; Hummels et al., 2001). Analytically, the effect of global value chains can be seen as both through the direct impact – ‘changing the interests of stakeholders in trade negotiations and increasing the number of stakeholders; as well as indirect – changing the negotiating agenda from market access to behind-the-border issues’ (Altenberg, 2015). The increased scope of

trade policy creates a situation where any regulatory issue can be deemed as a non-tariff measure or the problem with the eye of the beholder. What kind of rules are needed to govern global production networks and consumer demands?

In this context, trade and investment agreements have even been interpreted as ‘living organisms’ as the European Commission called the Trans-Atlantic Partnership Agreement a ‘living agreement’ (Meunier and Morin, 2015). One of the implications is that the institutional setting of a ‘living agreement’ provides for more flexibility and learning from experimentation (Meunier and Morin, 2015). At the same time, we showed that from a legitimacy perspective, there is a need for more inclusivity in the creation of such structures. Not in defining the specific tasks but engaging in broader societal discussion on what is the role of FTAs and what they can achieve.

These reflections also highlight one of the findings of this dissertation – we need to move away from focusing on the dynamics of negotiation during the negotiation but look at the broader framework within which countries interact since the perception of the regulatory gap is essential to understanding the possibility for an agreement. Beyond the particular case, the insights from the dissertation travel to understanding the ‘regulatory distance’ or ‘regulatory gap’ between different countries. Thus it is relevant to assess both the ‘vertical’ regulatory distance in terms of the levels of regulation and levels of development of countries and ‘horizontal’ regulatory distance where the level achieved across countries (most often for developed economies) is the same but the regulations to achieve the objectives are different (Melchior, 2018c).

In practice, this also entails moving away from dealing with separate aspects of trade policy as compartmentalised, but looking at all of the components together (multilateral, bilateral, and unilateral) as one continuum. Similarly, further research needs to pay attention to how different agreements interact.

Secondly, the international political economy in this complex system is also defined by uncertainty. The expansion of issues that encroach domestic regulatory space has increased dramatically in both multilateral and bilateral agreements. This fact though not newly established has raised questions on what is the appropriate way to manage integrating markets given different ‘value-based preferences’ (Lamy, 2004) or what we discuss as regulatory heterogeneity. Non-tariff measures and regulations, in particular, can act as discriminatory trade barriers. However, there is no consensus on

the impact of these measures on trade flows as well as the most efficient methods for their removal, even in the burgeoning Economics literature on the topic (Bacchetta and Beverelli, 2012; Beverelli et al., 2014; J. Ederington and Ruta, 2016; Nicita and Gourdon, 2013).

Most importantly, not all regulatory barriers can be negotiated away, a postulate widely recognised by policymakers, practitioners and academics (Cernat, 2013). More importantly, we showed that we need to be a lot more precise about what kind of uncertainty agents are facing – the uncertainty of other countries regulatory choices provides the background for the creation of forums for rule-setting and the elaboration of rules. Once again this is influenced by the existing regulatory gap and ways in which it can be narrowed.

Finally, within this context new modes of dealing with regulatory issues have emerged, which have broader effects on how we conceive trade policy-making and what are the appropriate ways to deal with the current trade agenda. What existing research highlights is that with regulatory competition in mind, the pursuit of regulatory cooperation and the type of cooperation has different implications for legitimacy and contestation (Hoekman, 2015; Hoekman and Sabel, 2017). Thus the dissertation contributes to a growing question on what role ideas play when there are contestation and uncertainty about precisely what is in the interest of actors. Firmly positioned in the worldview that the world of trade policy and trade agreements as socially constructed, we showed that at a time of uncertainty agents within complex systems rely on existing ideas about how the world economy works and what is both necessary and appropriate. Due to the importance of this last point, we develop this further below.

The first theoretical contribution that we aim to make is to go beyond the debates in EU Area Studies and develop a framework, which is positioned in the field of IPE. At the same time, the dissertation is positioned in a much more ‘European’ variant of IPE, away from neoclassical economics and rational choice models, towards an understanding that economic activity is embedded in the broader social, political, and historical contexts (Higgott, 2017, p. 153). The dissertation attempts to contribute to the question of how agents in the face of uncertainty inform and articulate judgements and how this affects ideational development. While the importance of ideas for developments in IPE is widely established, we add three dimensions to existing work. Firstly, we show how transformation occurs at the level of policy programmes by

tracing the subtle shifts in communicative and coordinative discourse, where agents draw on existing heuristics and experience in developing a problem definition. Secondly, we showed that for a problem definition to become dominant, it has to be in line with the broader public philosophies and match the available policy solutions. It also needs to be supported by the strong regulatory capacity to mobilise agents behind the problem definition. By analysing how ideas are mobilised via discourse, we illustrated that uncertainty in terms of other countries regulatory choices is a defining characteristic of global trade and it thus needs to be included in further analysis through the study of the regulatory gap but more so of the perceived regulatory gap. Thirdly, we showed that we could distinguish between different types of legitimation and justification regarding different types of value. This gives us a stronger understanding of how we can approach the question of legitimacy when it comes to the trade regulation agenda. As we aimed to show, the contestation of policy solutions can lead to a broader change in the public philosophy.

Concerning the legitimation of free trade, the contestation surrounding the Trans-Atlantic Trade and Investment Partnership and the EU-Canada Comprehensive Economic and Trade Agreement came as a surprise to many of the actors in the EU and caused some observers to wonder whether this is a fundamental shift or a temporary hiccup. The backlash towards trade liberalisation as a component of integrating markets was not limited to Europe, but the European Union took a strong stand in support of both international cooperation and also pushing further for the re-opening, launching and concluding of the preferential trade agreement pipeline. Surprisingly, the critical political economy¹⁴⁷ has not shown too much interest towards EU trade policy except in relations with developing countries, challenging its neoliberal direction and imposition of neoliberal policies on member states (Orbie and De Ville, 2011, p. 7).¹⁴⁸ Despite the scarce contributions, we learn much from these accounts, which similarly to this work emphasise the mutual constitution of agents and structures. Authors thus study the dominance and resilience of ‘neoliberal’ ideas through the ways, in which ‘neoliberal’ thought acts as a system of ‘justification and legitimation for whatever needed to be done to achieve this goal’ (Perkins, 2006, p.

¹⁴⁷ Even though there is no ‘uniform’ critical school in IPE, a common agenda exists in criticizing the mainstream by studying the underlying structures dividing power and wealth, proposing methods beyond rational choice and causal models as well as moving away from hypothesis testing (Verdun, 2003, p. 92).

¹⁴⁸ For a detailed account of critical approaches, see (Bollen, 2018)

19). Even though this rich literature provides insight into how neoliberalism has underpinned EU trade policymaking, they tend to see the approach of the European Commission, and more precisely the Directorate-General for Trade, as coherent across partners and issues, and also to place disproportionate focus on the Commission, at the expense of member states and other actors. Another caveat is that neoliberal ideas are treated as a uniform body of principles that the European Commission and actors have received, adapted, and adopted.

The application of this ‘neoliberal’ ideas’ explanation has also stayed away from looking at regulatory aspects.¹⁴⁹ Often the understanding what ‘neoliberal’ constitutes has been almost taken for granted and we argued for a revised and more nuanced definition of what ‘neoliberal’ is in terms of norms shaping regulatory barriers (Buch-Hansen and Wigger, 2010; Wigger and Buch-Hansen, 2014). Looking at the area of non-tariff measures and regulatory issues, we see a slightly more nuanced story in the ideational developments in the EU. In this way, the current research shows that rather than full replacement of policy paradigms à la Hall (1993), trade policy has experienced a hybridisation of ideas. More specifically this is not a unique European experience since, despite its institutional characteristics (follow in Chapter 5), the parallelism between internal and external developments and the role of agents can be transposed to other situations.

8.4.2. European Union Area Studies

The second body of literature we aimed to address are the explanations drawing on arguments of ‘collusive delegation’ and the principle-agent model. Thus we had to address two questions what has been the impact of the inclusion of non-tariff measures in FTAs on agents or how has the European Commission’s agency changed as a result if the inclusion of non-tariff measures in free trade agreements?

Approaches in EU studies focus on the explanatory power of the principle-agent model defining how interests are accumulated in EU trade policy and what the levels of control and discretion are. Recent research has concluded that the space of the

¹⁴⁹ There are a multiplicity of definitions of ‘regulation’ ‘ranging from narrow ones that just cover the making, enforcement and monitoring of formal rules by government to very broad ones comprising all mechanisms of social control.’ Thatcher, 2002, p.862. Expanding Thatcher’s definition, I look at regulation as the formal and informal rules ‘governing supply of goods and services, the organizations responsible for determining those rules, their powers and features, but also public policies and goals.’ Thatcher, 2002, p. 862.

European Commission is rather limited (Gastinger and Adriaensen, 2018). By proposing the variable of ‘interest in a decision’ by principles as a proxy for agency discretion, this recent study has shown that interest in a decision over certain chapters of the Transatlantic Trade and Investment Partnership (TTIP) under the assumption of multiple principles, constraints the discretion of the European Commission. In particular, while they find that Council follows all chapters, acting as a ‘safety net’, citizens and EP focus on specific chapters, acting as fire alarms (Gastinger and Adriaensen, 2018). Instead, we define discretion in terms of the negotiability and the assessment of what is necessary to achieve these goals and what is appropriate. With the move to negotiating FTAs, DG Trade managed to increase its regulatory capacity to tackle non-tariff measures and regulatory issues through the focus on partnerships (chapter 5), pre-negotiation phase (chapter 6), and focus on regulatory cooperation (chapter 7).

While the principle-agent model helps in explaining the accumulation of member states interest and control, such models can be adjusted in terms of the deliberative processes presented in this dissertation. First of all, inclusion and exclusion from deliberative processes are important for understanding the extent of both interest and control. The institutional framework within which trade policy is made creates much scope for DG Trade to solicit business and member state participation in the processes of negotiability. Simply put, DG Trade can create interests in specific aspects of the agreement and often its ideational entrepreneurship, and discursive framing predetermines the structures within which interests and control are exerted. DG Trade’s framing of regulatory issues as part of the trade policy agenda also defined a range of possible solutions.

8.4.3. Implications for global economic governance

Existing studies, which draw on IR and regime theory to explore the global regulation-nexus have inspired some components of the approach presented in this dissertation. Notably, research on the externalisation of market power and the conditions for such processes to take place have provided both a definition for regulatory capacity and regulatory interactions. However, the discussion around legitimacy in global economic governance transcends the EU and trade policy (Bernstein and Hannah, 2008; Buchanan and Keohane, 2006b; Duina and Lenz, 2017; Hoekman and Sabel, 2017). This has shifted the discussion towards the appropriate modes to tackle ‘deep

integration' elements and the actors who take part in the processes of global economic governance?

First of all, we can distinguish different dynamics between shallow and deep integration or between the negotiations over tariffs and at the border barriers, on the one hand, and non-tariff measures and regulatory issues, on the other. However, surprisingly there is the persistence of existing ideas of reciprocity and bargaining in style applicable to tariffs. Therefore, we need to look at how different new modes of governance can overcome this persistent thinking and what kind of types of regulatory cooperation allows us to go beyond the limitations of reciprocity. As the dissertation highlighted, modes of governance need to be based on trust within a polity (in our case actors in the EU) and trust between partners, and this cannot be imposed through a trade agreement, but it has to be a continuous learning process.

One of the modes for tackling deep integration – regulatory cooperation is neither new nor restricted to free trade agreements. We highlighted the absence of an agreement on whether this is an appropriate policy solution. As we highlight, the inclusion of regulatory cooperation in FTAs brings subjects them to reciprocity and issue linkages, as well an active role for businesses to define the scope of regulatory cooperation ex-ante. What we wanted to show is that regulatory cooperation is not only excludable but also discriminatory and while earlier EU agreements were seen as a building (rather than stumbling) block towards multilateralism, the latest wave has the potential to entrench regulators and business cooperation into some endeavours at the expense of others. As we highlighted, regulatory cooperation is not currently 'open' to any EU partner (for example, current exclusion of Mexico).

8.5. Pitfalls and extensions

The dissertation has three key pitfalls, which need to be examined further and thus provide an avenue for future research. In empirical terms, as the research strategy indicated the theoretical steps would benefit from comparative analysis with the approaches and transformation of non-tariff measures in other countries and regions, to assess the regulatory distance between different regimes. A comparative approach is a natural extension of the current work and should be implemented both at the level of processes and discourse. Such an extension is particularly relevant due to the multiplication of mega-regional initiatives, which tackle commitments on non-tariff

measures in different ways, one example being the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or also known as TPP-11). While the European Union has advanced the most in tackling regulatory aspects in its trade agreements, through regulatory cooperation and specific sectoral annexes, other initiatives can point to the understanding of non-tariff measures in different contexts. What I highlighted in the dissertation is that the international and domestic levels interact continuously in the development of the norms of non-discrimination, necessity, and legitimacy.

Similarly, one of the empirical aspects, which needs further exploration is to what extent the focus on the Directorate-General for Trade creates a bias towards market opening as a goal of regulatory cooperation. One of the issues raised in the dissertation are the intra-institutional dynamics between DG Growth and DG Trade as well as the changing position of other DGs as ‘regulators’ with relevance to the trade policy agenda. The in-depth study of DG Growth would have allowed for a better understanding of the interaction between different philosophies and approaches to regulatory cooperation, particularly thinking about internal market building versus external market building. At the same time, the methodological choices, which focused on the ‘trade negotiators’ gave priority to understanding the Directorate-General for Trade and the dynamics within the Directorate. As we have occasionally noted, there were surprising absences of a different stance on regulatory cooperation from other DGs. This could reflect an internal consensus on the limits of what is achievable vis-à-vis third countries. To recall what one of the interviews shared:

We will never put regulators in the corner – we don’t necessarily think that we have been thinking correctly. We mostly focus on instruments of trade facilitation, and we try to use creativity versus the conservatism of the regulators. (Interview 12, DG Trade Civil Servant, 2016)

Not differently from excluding other DGs, we have also excluded the perspective of the partner countries. The research would have benefited from interviews and exchanges with officials from Japan, Canada, the US and other key trading partners to understand how they see the Commission’s position. Furthermore, this would again help in assessing the regulatory gap in the sense that it would have indicated to what extent other countries are willing to reform or pay to access the internal market. Such an extension of the current research would also be helpful in analysing the power of the EU to externalise the rules of the internal market and developed further existing

factors, influencing whether a country is willing to adopt and adhere to EU's approaches.

Secondly, we aimed to extend previous research involving discourse analysis, which focused on the changes and continuities of the global financial crisis and looks at the different EU Trade Commissioners' discourses covering the timeframe mostly between 2008 and 2012 (De Ville and Orbie, 2014). Those that go further back get as far as the discourse before and after the introduction of the Global Europe strategy, but again not further than 2001 (Crespy, 2014; Siles-Brügge, 2014). To understand the processes of legitimation and justification and possible changes and continuities, I looked further back both into the archives of previous Commissioner's interviews as well as earlier strategies and papers, which look at the trade-related aspects. However, due to the chosen methodological approach, the coverage of all the existing documents proved a daunting task, even with the use of the NVivo coding software. Particularly challenging was the coding of picture files from the EUI Archives, and thus much of the material collected was not included in the empirical chapters.

Moreover, methodologically, the lack of zooming in sub-cases within the NTM universe, without doubt, increased the number of meetings and documents to be tackled. However, this allowed us to move away from the 'technicality' of each area and understand the narratives, which have emerged, the commonalities and inevitabilities in talking about non-tariff measures. Notably, in-depth study of Technical barriers to trade, Sanitary and phyto-sanitary measures, and specific services sectors require further differentiation between the norms, which guide trade and regulation with the particular reference to the norms, which are inherent in the nexus between trade and specific services such as water governance.

From a theoretical point of view, the pitfalls are in the insufficient clarification of whether Commission officials have internalised ideas or pursue those strategically. While the interview technique was crucial to understanding how non-tariff measures are understood, in comparison to previous research, we did not assess to what extent the differentiation between coordinative and communicative discourse reflects what agents think versus what they say. The reason for this is that the distinction was not necessary for understanding how agents formulate judgements about necessity and legitimacy. From a theoretical, but also empirical perspective, the juxtaposition between coordinative and communicative discourse was more relevant in assessing the

discretion of the European Commission's Directorate-General for Trade in the negotiability of non-tariff measures. Theoretically, further work is needed in understanding the ideational power of discourse and how ideas are mobilised with discourse, which has been the subject of Discursive Institutionalism. This dissertation did not engage with the debate, on when ideas become powerful, but rather how they are transformed and challenged. A key question here is then whether challenging them makes them less powerful or only prompts agents to change the communicative discourse.

8.6. Policy implications

The policy relevance of my research has two dimensions: re-thinking of non-tariff measures and re-thinking of the legitimising discourse. *Vis-à-vis* the first aspect, the research showed that uncertainty of the future regulatory context brings different calculations of the cost and benefits of trade and alters the goals of trade policy. The move towards regulatory cooperation reflects the need to apply flexibility in cooperating over regulatory diversity and the political and institutional difficulties such cooperation. But the treatment of regulatory aspects within trade agreements does have a limit – firstly, due to the differentiation it creates across agreements, which cannot be extended towards third countries or the multilateral level, and secondly, effectiveness of addressing non-tariff measures through an ‘identify-negotiate-eliminate’ approach (Cadot et al., 2018, p. Kindle location 510). While the debate on how much bilateral and regional agreements can act as laboratories for multilateral negotiations is still divided, my contribution points to elements of discrimination in FTAs *vis-à-vis* regulatory aspects. The recent contribution to the analytical and empirical understanding of non-tariff measures by Cadot et al. allows us to draw useful parallels to other regional initiatives. What they point to is that positioning NTM streamlining (rather than removal) as part of a “better regulation” agendas is likely to be more promising than the current “identify-negotiate-eliminate” approach at the regional level’.

Their reasoning is based on the examination of different regional initiatives, such as ASEAN and East Africa, where they see that eliminating NTMs has become part of the trading-concession angle and thus has not been successful. One such example, the ASEAN Trade in Goods Agreement (ATIGA), shows the typical ‘collective action’ problem in international cooperation – governments are expected to reveal

information, which would then be used to bargain away some of the restrictions they have in place thus the least information they provide the better. The provision of the public good, in this case, regional market building, becomes undersupplied without incentives (Cadot et al., 2018, p. Kindle locations 515-518). What the authors point to is also important for bilateral negotiations seen from a market building perspective. The two partners have an interest for common rules and regulations, but the framing of the issues within trade negotiations brings this closer to a bargaining style dynamic, extending trade norms over-regulation. At the same time, the ‘better regulation’ agenda itself is defined by the difficulty to reach an agreement of optimal solutions, where different regulatory cultures are concerned. In the language of the European Consumer Organisation, there is a possibility for ‘imperial overstretch’ if the European Union uses trade agreements to impose a specific ‘better regulation agenda’.

Finally, the treatment of non-tariff measures evokes the need for institutional structures, which can produce a legitimate outcome and ensure transparency. What the dissertation argues is that the treatment of regulatory issues brings key questions of the legitimacy of the trade policy regime. More notably, legitimacy will become a crucial characteristic of the future trade agenda. The dissertation cautions against the extension of trade over-regulation in the communicative discourse, particularly via the modes of evaluation (‘tariff equivalence syndrome’) and the othering of third country regulatory choices as protectionist. The backlash to EU’s trade agenda, as we show, was not against free trade and openness but rather against the expansion of trade agreements over regulatory issues. For societal actors, particularly CSOs, such a trend fears that trade norms will be prioritised over regulatory norms, and institutional structures will reflect such ordering of priorities. The recent contribution of the Federation of German Consumer Organisations and Friends of the Earth Sweden highlights such fears:

In order to prove that regulatory cooperation can be positively managed in a trade framework it is essential to make sure that it will be defined and managed by regulators and specialists of the respective sectors under discussion, and not only by trade experts. On the EU side, this means that DGs like DG SANTE and DG JUST and their respective regulators must be involved from the beginning of the dialogue and not only at the end. (Federation of German Consumer Organisations (vzbv), 2017)

We are critical towards the fact that we are only invited to help identify sectors/issues to be discussed within the RCF. We would argue that the content of the discussion is more relevant than the exact sectors/issues discussed. Since

we are not invited to the dialogue itself, we have no way of influencing the content. Furthermore, the call for proposals contains no information about who will decide which topics will be chosen for discussion within the RCF or how this choice is made. (Friends of the Earth Sweden, 2017)

The excerpts from the two submissions highlight the extent to which coordinative and communicative discourse are interrelated. Essentially, they are firmly interconnected since questions of necessity and appropriateness, which form part of the internal deliberative processes, gain relevance for external legitimacy. To conclude, we pose the question: if neoliberalism has been temporarily discredited, then can EU's approach to integrating markets tell us something of what is to come next?

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Appendix 1. Document corpus

Type of document & description	Document
<p style="text-align: center;">STRATEGIES</p> <p>Documents that are formally defined as ‘strategies’</p>	European Commission (1993). Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century: White Paper (Brussels, 5 December 1993, COM (93) 700 final).
	European Commission (1996). The Global Challenge of International Trade: A Market Access Strategy for the European Union (Brussels, 14 February 1996, COM(1996)53final). Sir Leon Brittain: new ‘market access strategy’ (European Commission 1996).
	European Commission (2006). Communication from the Commission: Global Europe: Competing in the World: A Contribution to the EU’s Growth and Jobs Strategy, (Brussels, 4 October 2006, COM(2006)567final). Peter Mandelson’s Global Europe strategy
	European Commission (2010). Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU’s 2020 Strategy (Brussels, 9 November 2010, COM(2010)612).
	European Commission (2015). Trade for All: Towards a more responsible trade and investment policy (Brussels, October 2015).
<p style="text-align: center;">SPEECHES¹⁵⁰</p> <p>Selected speeches, which have been categorised as “Policy”; “Policymaking”; “EU Position in World Trade”; “United States”¹⁵¹; “MERCOSUR”; “EU AND WTO”; “TRADE DEFENCE”.</p>	Juncker Commission – Cecilia Malmström 2015-2017 – 121 total speeches
	Barroso Commission II – Karl De Gucht 2010-2014 – 230 total documents; removing duplications and speeches focusing explicitly on development
	Barroso Commission I: Benita Ferrero-Waldner 2009-2010 – Catherine Ashton 2008-2009 Peter Mandelson 2004-2008 Total 411 documents located, none by Commissioner Waldner; a large number of articles removed, plus conference materials
	Prodi Commission: Pascal Lamy 1999-2004 Total 285 documents located; with French results 369
	Delors Commission III /Santer Commission: Leon Brittan 1993-1999
<p style="text-align: center;">ARCHIVAL DOCUMENTS</p> <p>Cover the years of the Commissioners</p>	Delors Commission II Frans Andriessen 1989–1992
	Delors Commission I Willy De Clercq 1985–1988
	Jenkins Commission Thorn Commission Wilhelm Haferkamp 1977–1985
	Ortoli Commission Christopher Soames 1973–1977

¹⁵⁰ Results of search within speeches & articles on DG Trade website.

¹⁵¹ TTIP debate caused a lot of speeches of the Commissioner to be classified as United States, while they reflect broader policy concerns.

	<p>Malfatti Commission Mansholt Commission Ralf Dahrendorf 1970–1973</p>
	<p>Rey Commission Jean-François Deniau 1968–1970</p>
	<p>Hallstein Commission I Hallstein Commission II Jean Rey 1957–1967</p>
TBR REGULATION REPORTS	<p>Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers 1 January – 31 December 2017</p>
	<p>Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers 1 January – 31 December 2016</p>
	<p>Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers and Protectionist Trends 1 July 2014 - 31 December 2015, COM(2016) 406 final</p>
	<p>Report from the Commission to the European Council, Trade and Investment Barriers Report 2015, COM(2015) 127 final</p>
	<p>Report from the Commission to the European Council, Trade and Investment Barriers Report 2014, COM(2014) 153 final</p>
	<p>Report from the Commission to the European Council, Trade and Investment Barriers Report 2013, COM(2013) 103 final</p>
	<p>Report from the Commission to the European Council, Trade and Investment Barriers Report 2012: EU enforcement agenda to break down barriers to trade: Engaging our strategic economic partners on improved market access, COM(2012) 70 final</p>
	<p>Commission Staff Working Document Accompanying the document Report from the Commission to the European Council Trade and Investment Barriers Report 2012, SWD(2012) 19 final</p>
	<p>Report from the Commission to the European Council, Trade and Investment Barriers Report 2011: Engaging our strategic economic partners on improved market access: Priorities for action on breaking down barriers to trade, COM(2011) 114</p>
MEETING REPORTS, ACCESS TO DOCUMENTS, BUSINESS SUBMISSIONS	<p>TPC Meetings, agendas; MAAC Meetings, agendas; Access to Documents: GestDem 2017/2503; GestDem 2017/1467; GestDem 2017/5325; GestDem 2018/1280; GestDem 2018/1219; GestDem 2017/7420; GestDem 2017/5325. Access to Documents also includes the submission by business organisations, described in Chapters 5, 6, and 7. This entails position papers by individual companies, sectoral and horizontal associations in the EU and partner country. A full list of policy positions is available on the website of https://www.asktheeu.org.</p>

Appendix 2. Interview guides

Semi-structured Questionnaire For the Directorate-General for Trade, European Commission and Former Civil Servants (Round 2)

1. Background & context

- 1.1. What roles have you held in the Directorate-General for Trade?
- 1.2. What are your responsibilities (and the unit/directorate's) vis-à-vis deliberations with Member States on a specific approach and negotiations with third countries?

2. Process and treatment of NTMs

- 2.1. Comparing to other areas, do you think that there is a uniform approach behind the treatment of non-tariff measures:
 - 2.1.1. Based on the negotiating partners;
 - 2.1.2. Based on the sectors;
 - 2.1.3. Based on the type of measure discussed;
 - 2.1.4. Based on complementarity of issues;
 - 2.1.5. External factors – timing? Shocks?
- 2.2. Would you identify one of those elements as dominant and how does it affect the approach?
- 2.3. In your area of coverage, how do you decide whether to address an issue area horizontally or with a sector-specific chapter?
 - 2.3.1. In which cases would you decide to address an area via an annex? How does it differ legally / procedurally?
 - 2.3.2. Does the structure of the Committees formed during the negotiation rounds reflect the treatment of the NTM?
 - 2.3.3. Do the informal contacts also follow a similar structure?
- 2.4. What other factors influence the choice of issue treatment? Do Member States play a role?

3. Actors

- 3.1. Would you say that DG Trade had led the thinking behind non-tariff measures and what extent did that differ from how it dealt with these issues in a multilateral setting?
- 3.2. To what extent is the Trade Policy Committee a key forum for tackling different ideas about trade and about the nature of single market versus 3rd country opening?
- 3.3. Is there a difference in the dynamics vis-à-vis the issues falling within non-tariff measures?
 - 3.3.1. Intensity of discussion in the TPC / in the Commission itself;
 - 3.3.2. Particular Member State or the commission leading;
 - 3.3.3. Technical aspects
 - 3.3.4. Legal aspects?

4. Rationale & justification

- 4.1. How would you assess the balance between the economic/ political/ ideological rationale for the strategy / policy?
- 4.2. To what extent does EU Trade Policy respond to what is happening in the internal market and to what is happening in the multilateral trade negotiations?
- 4.3. What methodology to decide which partner and domestic approaches are legitimate, which need removing and which can feasibly be removed?

5. Any other suggestions:

- 5.1. Could you recommend three people who I need to speak to?
- 5.2. Is there anything else you think is relevant to the research?

Additional questions:

What do you think about the current proposals on:

- International Procurement Instrument
- TDI reform

Semi-structured Questionnaire

For external stakeholders / civil society & businesses organisations

1. Background

- 1.1. What are your / your team's responsibilities vis-à-vis EU trade policy?
- 1.2. What are your responsibilities vis-à-vis communication with the Commission, Member States' representatives and other EU bodies?
- 1.3. Who do you interact with the most on issues relevant for your members / for the issues you cover?
- 1.4. Are these responsibilities and activities focused predominantly on:
 - 1.4.1. Ongoing negotiations;
 - 1.4.2. General strategy;
 - 1.4.3. Sector-specific issues;
 - 1.4.4. National legislations / regulations
 - 1.4.5. Others?

2. Process and treatment of NTMs

- 2.1. Comparing across issues, do you think that there is a uniform approach behind the treatment of non-tariff measures by the Commission and Member States (separately and together):
 - 2.1.1. Based on the negotiating partners;
 - 2.1.2. Based on the sectors;
 - 2.1.3. Based on the type of measure discussed;
 - 2.1.4. Based on complementarity of issues;
 - 2.1.5. External factors – timing? Shocks?
- 2.2. Would you identify one of those elements as dominant and how does it affect the approach?
- 2.3. In your opinion, how does the European Commission decide whether to address something horizontally, with a specific chapter, or in an annex?
- 2.4. What other factors influence the choice of issue treatment? Do Member States play a role?
- 2.5. Do you think that the Commission has become more proactive in addressing NTMs in advance to concluding negotiations?

3. Actors

- 3.1. Would you say that DG Trade had led the thinking behind non-tariff measures and what extent did that differ from how it dealt with these issues in a multilateral setting?
- 3.2. What is your impression of the role of Member States in the policymaking process outside and during discussions of negotiations?
- 3.3. To what extent is the Trade Policy Committee a key forum for tackling different ideas about trade and about the nature of single market versus 3rd country opening?

- 3.4. Is there a difference in the dynamics vis-à-vis the issues falling within non-tariff measures?
 - 3.4.1. Intensity of discussion within the Commission itself;
 - 3.4.2. Complementarity of issues;
 - 3.4.3. Role for domestic regulators;
 - 3.4.4. Particular Member State or the commission leading;
 - 3.4.5. Technical aspects
 - 3.4.6. Legal aspects?

4. Rationale & justification

- 4.1. How would you assess the balance between the economic/ political/ ideological rationale behind EU's current approach? Could you compare to past strategies / negotiations?
- 4.2. To what extent does EU Trade Policy respond to what is happening in the internal market and to what is happening in the multilateral trade negotiations?
- 4.3. What methodology to decide which partner and domestic approaches are legitimate, which need removing and which can feasibly be removed?
- 4.4. To what extent are Impact Assessments helpful for the direction of policy?
- 4.5. How would you assess the balance between consistency with an overall rule-based framework and achieving gains vis-à-vis market access?

5. Any other suggestions:

- 5.1. Could you recommend three people who I need to speak to?
- 5.2. Is there anything else you think is relevant to the research?

Semi-structured Questionnaire
For Member State Representatives and Members of the TPC / European Parliament

1. Background

- 1.1. What is your current role and what roles have you held prior to that?
- 1.2. What are your responsibilities (and those of your team) vis-à-vis deliberations with the Commission on non-tariff measures and negotiations with third countries? In which issues are you most interested in?

2. Process and treatment of non-tariff measures

- 2.1. Comparing across issues, do you think that there is a uniform approach behind the treatment of non-tariff measures by the Commission and Member States:
 - 2.1.1. Based on the negotiating partners;
 - 2.1.2. Based on the sectors;
 - 2.1.3. Based on the type of measure discussed;
 - 2.1.4. Based on complementarity of issues;
 - 2.1.5. External factors – timing? Shocks?
- 2.2. Would you identify one of those elements as dominant and how does it affect the approach?
- 2.3. Based on your observations, what is the process behind deciding whether to address an issue area horizontally or with a sector-specific chapter?
 - 2.3.1. In which cases would an issue be included in an annex?
 - 2.3.2. Does the structure of the Committees formed during the negotiation rounds reflect the treatment of the NTM?
 - 2.3.3. Do the informal contacts also follow a similar structure?
- 2.4. What other factors influence the choice of issue treatment? Do Member States play a role?
- 2.5. Do you think that the Commission has become more proactive in addressing NTMs in advance to concluding negotiations?

3. Actors

- 3.1. Would you say that DG Trade had led the thinking behind non-tariff measures and what extent did that differ from how it dealt with these issues in a multilateral setting?
- 3.2. To what extent do you communicate with MS and Commission reps?
- 3.3. What is your national preference for the balance between following a general rule-based framework and ensuring market access for businesses?
- 3.4. Is there a difference in the dynamics vis-à-vis the issues falling within non-tariff measures?
 - 3.4.1. Intensity of discussion in the TPC / in the Commission itself;
 - 3.4.2. Particular Member State or the Commission leading;
 - 3.4.3. Technical aspects
 - 3.4.4. Raising more legal issues – mandates?
- 3.5. How would you define your position vis-à-vis these issues: are there any red lines that are non-negotiable across all variables?

3.6. Does it feel that the national ideas are not supported by the rest of the member states?

4. Rationale & justification

4.1. How would you assess the balance between the economic/ political/ ideological rationale for the strategy / policy?

4.2. To what extent does EU Trade Policy respond to what is happening in the internal market and to what is happening in the multilateral trade negotiations?

4.3. What methodology to decide which partner and domestic approaches are legitimate, which need removing and which can feasibly be removed?

4.4. To what extent are Impact Assessments helpful for the direction of policy?

4.5. How would you assess the balance between consistency with an overall rule-based framework and achieving gains vis-à-vis market access?

5. Any other suggestions:

5.1. Could you recommend three people who I need to speak to?

5.2. Is there anything else you think is relevant to the research?

Pilot questions

Background

1. What roles have you held in the Directorate-General for Trade?
2. What were the responsibilities of the Unit for Intellectual Property and Public Procurement at the time and how were they shared with DG MARKT vis-à-vis public procurement? How did this joint responsibility affect the policy outcome?
3. What about those of the Unit for Market Access, Industrial Sectors, Energy and Raw Materials?

Rationale for EU Trade Policy

4. How would you define the overarching idea behind EU trade policy at the time? Did this change during your time at DG Trade? Do you see any changes now?
5. How would you assess the balance between the economic/ political/ ideological rationale for the strategy / policy?
6. To what extent does EU Trade Policy respond to what is happening in the internal market and to what is happening in the multilateral trade negotiations?
7. What brought about the thinking behind the Market Access Scheme for Procurement? How was it justified to Member States and business organisations?
8. Since then the rationale has been challenged – do you agree with the assessments that the *de facto* opening of the EU public procurement market matches that of other key partners?
9. What were the issues faced in discussions with Member States on public procurement and intellectual property at the time? What were the main objections raised?
10. Have you come across the debate, which exists on whether EU trade policy has become more neoliberal, pushing both internally and externally for further deregulation despite MS interests. Would you assess EU trade policy as neoliberal? If not, which other economic principles would you say underline it?

Actors – Council and DG Trade

11. Would you say that DG Trade had led the thinking behind non-tariff measures and what extent did that differ from how it dealt with 'old trade policy issues'?
12. To what extent is the Trade Policy Committee a key forum for tackling different ideas about trade?
13. Is there a difference in the dynamics vis-à-vis the issues falling within non-tariff measures? Intensity of discussion, Commission leading etc.

Appendix 3. Interview summary

# in database	city, country	negotiator	category	Interviewed in person / phone	Round of interviews
Discussion	LON	Y	FORMER TPC MEMBER	discussion format	Sep 2016
Discussion	BRU	Y	COM - FORMER TRADE	discussion format	Sep 2016
Discussion	LON	N	EXTERNAL CONSULTANT	discussion format	Sep 2016
Interview 1	FLO	Y	COM - FORMER TRADE	In person	Aug 2016
Interview 2	BRU	Y	COM - TRADE	In person	Sep 2016
interview 3	BRU	N	COUNCIL of MINISTERS	In person	Sep 2016
interview 4	BRU	Y	COM - FORMER TRADE	In person	Sep 2016
Interview 5	BRU	N	COM - TRADE	In person	Sep 2016
interview 6	BRU	N	COM - TRADE	In person	Sep 2016
Interview 7	BRU	Y	COM - TRADE	In person	Sep 2016
interview 8	BRU	Y	COM - TRADE	In person	Sep 2016
interview 9	BRU	Y	COM - TRADE	In person	Sep 2016
Interview 10	BRU	Y	COM - FORMER TRADE	In person	Sep 2016
Interview 11	BRU	N	COM - FORMER AGRI	In person	Sep 2016
Interview 12	BRU	Y	COM - TRADE	In person	Sep 2016
Interview 13	BRU	N	TPC MEMBER	In person	Sep 2016
Interview 14	BRU	N	TPC MEMBER	In person	Sep 2016
Interview 15	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interview 16	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interview 17	BRU	N	BUSINESS ASSOCIATION – EUROPEAN - HORIZONTAL	In person	Mar/Apr 2017
Interview 18	BRU	N	BUSINESS ASSOCIATION – EUROPEAN - HORIZONTAL	In person	Mar/Apr 2017
Interview 19	BRU	N	COM - TRADE	In person	Mar/Apr 2017
Interview 20	BRU	N	COM - TRADE	In person	Mar/Apr 2017
Interview 21	BRU	Y	COM - TRADE	In person	Mar/Apr 2017

Interview 22	BRU	N	EXTERNAL STAKEHOLDER SOCIAL	In person	Mar/Apr 2017
Interview 23	BRU	N	EUROPEAN PARLIAMENT MEMBER	In person	Mar/Apr 2017
Interview 24	BRU	N	EXTERNAL STAKEHOLDER - HORIZONTAL	In person	Mar/Apr 2017
Interviews 25	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interviews 26	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interview 27	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interview 28	BRU	N	BUSINESS ASSOCIATION – NATIONAL	In person	Mar/Apr 2017
interview 29	BRU	N	BUSINESS ASSOCIATION - EUROPEAN	In person	Mar/Apr 2017
Interview 30	BRU	N	TPC MEMBER	In person	Mar/Apr 2017
Interview 31	BRU	N	REPRESENTATIVE EP	Phone	Mar/Apr 2017
Interview 32	BRU	Y	COM - TRADE	In person	Mar/Apr 2017
Interview 33	BRU	N	BUSINESS ASSOCIATION	In person	Mar/Apr 2017
Interview 34	BRU	Y	COM - TRADE	In person	Mar/Apr 2017
Interview 35	BRU	N	EXTERNAL STAKEHOLDER - HORIZONTAL	Phone	Mar/Apr 2017
Interview 36	BRU	N	BUSINESS ASSOCIATION - NATIONAL	In person	Mar/Apr 2017

Table 10. Summary of interviewees¹⁵²

Organisation	Number of interviewees
European Commission – current civil servants of DG Trade	11
European Commission – former civil servants of DG Trade	4
Council of Ministers – members of the Trade Policy Committee (TPC) and Market Access Advisory Committee (MAAC)	10
European Parliament – members of the International Trade Committee (INTA)	2
Civil society – business associations, trade union representatives, consumer associations	9
Informal discussions with trade policy advisors to the European Commission	(4)
Total	36 interviews

¹⁵² Body of text – 48,876 words; 4085 word types (AntConc); Three rounds of interviews conducted in Brussels, London, and Florence.

Appendix 4. Structure of the EU-Japan Agreement

Preamble

Chapter 1	General provisions
Chapter 2	Trade in goods
Chapter 3	Rules of origin and origin procedures
Chapter 4	Customs matters and trade facilitation
Chapter 5	Trade remedies
Chapter 6	Sanitary and phytosanitary measures
Chapter 7	Technical barriers to trade
Chapter 8	Trade in services, investment liberalisation and electronic commerce
Chapter 9	Capital movements, payments and transfers and temporary safeguard measures
Chapter 10	Government procurement
Chapter 11	Competition policy
Chapter 12	Subsidies
Chapter 13	State-owned enterprises, enterprises granted special rights or privileges designated monopolies
Chapter 14	Intellectual property
Chapter 15	Corporate governance
Chapter 16	Trade and sustainable development
Chapter 17	Transparency
Chapter 18	Good regulatory practices and regulatory cooperation
Chapter 19	Cooperation in the field of agriculture
Chapter 20	Small and medium-sized enterprises
Chapter 21	Dispute settlement
Chapter 22	Institutional provisions
Chapter 23	Final provisions
	Annexes.

Source: Directorate-General for Trade (2017). EU-Japan Economic Partnership Agreement: texts of the agreement. Last updated 2 August 2018. Available at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>.

Appendix 5. UNCTAD definition and classification of NTMs

Imports	<i>Technical measures</i>	<p>A. Sanitary and Phytosanitary Measures (SPS)</p> <p>B. Technical Barriers to Trade (TBT)</p> <p>C. Pre-Shipment Inspection and Other Formalities</p>
	<i>Non-technical measures</i>	<p>D. Contingent Trade-Protective Measures</p> <p>E. Non-Automatic Licensing, Quotas, Prohibitions and Quantity-Control Measures Other than For SPS or TBT</p> <p>Reasons</p> <p>F. Price-Control Measures, Including Additional Taxes and Charges</p> <p>G. Finance Measures</p> <p>H. Measures Affecting Competition</p> <p>I. Trade-Related Investment Measures (TRIMs)</p> <p>J. Distribution Restrictions</p> <p>K. Restrictions on Post-Sales Services</p> <p>L. Subsidies (Excluding Export Subsidies Under P7)</p> <p>M. Government Procurement Restrictions</p> <p>N. Intellectual Property (IP)</p> <p>O. Rules Of Origin (RoO)</p>
Exports		P. Export-Related Measures

Source: UNCTAD, 2012b, p. 3.