**Transatlantic Investor Protection as a Threat to Democracy: The Potency and Limits of an Emotive Frame**

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A campaign by civil society organisations (CSOs) turned a relatively obscure area of international economic law, investor-state dispute settlement (ISDS), into the focus for opposition to the Transatlantic Trade and Investment Partnership (TTIP) – and later also the European Union (EU)-Canada Comprehensive Economic and Trade Agreement (CETA). This article analyses how CSOs had some power in shaping the EU's position but also highlights the limits of their influence. Combining insights from constructivist International Political Economy with scholarship emphasising the importance of emotions in the framing strategies of CSOs, I contend that such groups were able to create a polysemic 'injustice frame'. Characterising transatlantic ISDS as a threat to democracy and the rule of law aroused anger and was sufficiently ambiguously framed so as to have wide appeal. The ambiguity of the frame and concreteness of the target, however, were also its Achilles Heel. It provided space for the Commission to undertake reforms to a specific element of the agreement that could also be legitimated in terms of their democratic credentials.

## 1. Introduction

The negotiations on a Transatlantic Trade and Investment Partnership (TTIP) between the European Union (EU) and United States (US) have attracted much public attention. The most significant controversy involved the proposed investor protection provisions, in particular investor-state dispute settlement (ISDS). A mechanism allowing investors to seek redress in independent arbitration tribunals if their 'investor rights' are affected by the actions of states was labelled 'a full-frontal assault on democracy' (Monbiot 2013). A European civil society organisation (CSO) campaign against its inclusion in TTIP (and against the agreement more generally) found resonance amongst key Member States such as Germany and Social Democratic Members of the European Parliament (MEPs). It even politicised the hitherto uncontroversial EU-Canada Comprehensive Economic and Trade Agreement (CETA) and lead to the agreement's investment provisions being amended *after* the supposed conclusion of negotiations. While the TTIP negotiations appear to be headed – at the very least – for a hiatus with the Trump administration, CETA has gone into provisional application (with investor protection not yet applied, but still included in the agreement). A revised form of investor protection features in the EU's other recently concluded free trade agreement (FTA) with Vietnam while the EU is also pushing for its inclusion in an investment agreement with Japan. And the European Commission is currently engaged in international discussions to establish a multilateral investment court, while also pursuing proposals to expedite the ratification of trade agreements on the back of a European Court of Justice (ECJ) opinion clarifying the division of competences between the EU and Member States. These are all outcomes of the TTIP investor protection controversy.

Polemic is not what policymakers in the Commission's Directorate-General (DG) for Trade had expected at the onset of the TTIP talks.[1] They were keen to exercise the EU's new competence for negotiating on foreign direct investment (FDI) acquired in the 2009 Lisbon Treaty, a task previously carried about by Member States through individual bilateral investment treaties (BITs). This was supposed to strengthen the ability of the EU to negotiate investment agreements with third parties (Meunier 2014, 1006). In practice, academics have pointed out that despite being mandated by the Treaties, the implementation of the new FDI competence has not proceeded smoothly due to sovereignty consciousness amongst Member States (e.g. Bungenberg 2011; Meunier 2014). However, this on its own does not account for ISDS' politicisation: while there has been some sensitivity over inbound FDI, Member States '[a]ll want to open external markets for their own investments and obtain maximum protection for these investments' (Meunier 2017, 7). Germany, for example, was concerned about protecting the stringency of its approach to BITs (see Bungenberg 2010).

The TTIP ISDS episode is also not a straightforward story of CSO power as some Non-Governmental Organisations (NGOs) would claim (e.g. War on Want 2017). At a time when some pro-TTIP commentators encouraged the Commission to drop ISDS from the TTIP negotiations in order to not endanger the broader talks (e.g. Dullien *et al.* 2015), the Commission managed to craft a series of reforms that appeased several of the actors within the EU policy machinery key to TTIP's (and CETA's) ratification, notably Germany and a majority of Social Democratic MEPs. These reforms were not welcomed by the majority of

[1] Interview with a European Commission official, Brussels, 10 December 2014. Interviews were conducted with European Commission and USTR officials and NGO and business representatives in Brussels (December 2014, July 2015 and February 2016) and New York (April 2015). Where their insights are directly cited, interviewees were promised anonymity given the sensitive nature of on-going negotiations. I also attended the stakeholder events at the 9th, 10th and 12th TTIP negotiating rounds and participated in a meeting of the European Commission's TTIP Advisory Group on 9 October 2015 discussing the new Investment Court System proposals, the latter in my capacity as a European Public Health Alliance (EPHA) Trade and Investment Scientific Advisor. Over part of this period, I also served as President of the Health and Trade Network (of which I am currently still a Founding Member), another group campaigning on trade agreements.

CSOs, with one memorably claiming that they were merely 'putting lipstick on a pig' (Global Justice Now 2015).

This article analyses how, while wielding some power to shape the EU's position, CSOs also faced limits to their influence. Combining insights from constructivist International Political Economy (IPE) with scholarship emphasising the importance of emotions in the framing strategies of CSOs (Widmaier 2010; Jasper 2011; Cox and Béland 2013), I argue that such groups were able to create a 'polysemic' 'injustice frame'. Characterising transatlantic ISDS as a threat to democracy and the rule of law aroused anger and was sufficiently ambiguously framed so as to have wide appeal – even spilling over to the negotiations and ratification process for CETA. The ambiguity of the frame and concreteness of the target, however, were also its Achilles Heel. It provided space for the Commission to undertake reforms to a specific element of the agreement that could also be legitimated in terms of their democratic credentials. While the reforms have failed to satisfy most opponents, the Commission's counter-framing of TTIP as an opportunity to move ISDS towards a system of 'public law' has placated pivotal actors. Advocates of CETA were also able to successfully link opponents with the 'economic populism' associated with Brexit and Trump during the agreement's ratification battle.

In the next section, I outline the power (and potential constraints) faced by CSO framing in 'transnational [trade] politics' marked by regulatory issues and civil society mobilisation (Young this issue; see also recent work on 'contentious market regulation', Laursen and Roederer-Rynning 2017). The focus is on the role of ambiguous (or 'polysemic') 'injustice frames' in breaking the 'technocratic repression' of elites. In the third section I consider how the polysemy associated with the CSO frame put the European Commission under considerable pressure. In response, it adapted its approach to investor protection in the TTIP and other

concurrent negotiations (notably CETA). The fourth section will show that the ambiguities in the CSO narrative allowed the Commission to present this reformed 'Investment Court System' as a radically new departure – even though it actually represented more incremental change. Moreover, following the UK EU referendum and the election of Trump, policymakers were able to effectively lump CSOs together with 'economic populists' and, to an extent, delegitimise their opposition. The final section concludes, reflecting on the importance of not simply equating emotions with irrationality.

## 2. The role of emotions in advocacy framing

Central to the politics of TTIP are discursive frames, strategically chosen and deployed by CSOs for their emotive content. My starting point in making this argument is that the impact of regulatory and investment protection is not only very difficult to quantify when compared to tariff elimination (De Ville and Siles-Brügge 2016, 27-31), but is also extremely uncertain (Woll and Artigas 2007). This is especially so when considering the pre-commitment to arbitration implied by ISDS provisions that are often broadly interpreted (Poulsen 2015). Such *uncertainty* is central to the constructivist IPE cannon, where ideas are necessary *cognitive* instruments for actors to navigate a complex social world (Blyth 2010). One strand of research has examined the 'power over ideas' (Carstensen and Schmidt 2016, 318), where particular narratives are deployed strategically by certain actors to *coerce* (rather than convince) another party (Krebs and Jackson 2007).

This subset of the 'communicative discourses' used to (de)legitimate policy (see Schmidt 2008) is particularly relevant in the case of CSOs, considered to be comparatively 'weak' in the traditional trade literature given the constraining logic of collective action (e.g. Dür and De Bièvre 2007). The literature on the sociology of social movements, in particular, has been

concerned with the importance of 'collective action frames', 'intended to mobilise potential adherents and constituents, to garner bystander support, and to demobilise antagonists' (Snow and Benford 1988, 198), the latter, for example, by 'shaming' policymakers (Keck and Sikkink 1998). Assessing the relative efficacy of such frames, one of the key issues has been the degree to which the frames deployed by social movements or CSOs 'resonate', especially in terms of their 'salience' to their intended audience's experiences and 'cultural narrations' (Benford and Snow 2000, 621-622). Following Hobson and Seabrooke (2007) we might refer to such framing as an instance of 'everyday' 'defiance' by weak actors.

Cognitive constructivism has, however, only provided part of the picture (Widmaier 2010), as it misses the emotional bases of social mobilisation and protest, including when it comes to framing (Goodwin *et al.* 2001; Jasper 2011). Crucial to this 'emotional turn' has been a critique of the dichotomy often drawn between emotion and rationality (cf. Eliasson and García-Duran 2017). Scholars of emotion in social movement theory and international politics have provided at least two different explanations of why this is the case. A 'cognitivist' (or 'constructionist') school has argued that 'they depend on cognitions', 'clearly allow[ing] learning and adaptation to one's environment' (Jasper 1998, 399). To others, the basis of emotions is not necessarily cognitive (ideational and conscious) but often unreflective and material: emotions are innately biological, permeating even seemingly 'rational' acts (Ross 2006).

It should be said that this is simplifying a complex debate in which both sides concede that emotions are neither entirely cognitive/ideational nor completely material (e.g. Jasper 1998, 400-401; Ross 2006, 207-208). The seemingly distinct ontological positions may therefore be more of a product of a difference of emphasis than underlying meta-theoretical differences. As a result, and adopting a 'hybrid position' in this debate (Hutchison and Bleiker 2014: 496), I

would argue that there are both cognitive and non-cognitive aspects to emotion. They are consciously mediated by ideas, can be the product of unconscious, biological processes and may also be the product of a combination of both. In focusing on the strategic agency of CSOs, my emphasis is not on adjudicating the relative importance of cognitive versus non-cognitive sources of emotion, but on understanding how emotions influence the success of their (coercive) frames in delegitimising certain practices.

The first step in doing so is to identify why emotion might matter in the technocratised 'field' of trade policy (Eagleton-Pierce 2013). Here it is useful to turn to Widmaier (2010). His starting point is Berger and Luckmann's (1966, cited in Widmaier 2010) distinction between 'primary socialisation' – the 'formation of unconscious and emotional attachments' that occurs during childhood to basic 'notions of ethical values, citizenship rights and the role of the state' – and 'secondary socialisation' – which in his framework corresponds to the conscious acquisition of knowledge relating to more specific (economic) policies. These 'emotional-cognitive syntheses' lie at the heart of economic paradigms such as Keynesianism (Widmaier 2010, 133). Elites' *anxiety* of 'cognitive-emotional dissonance' (where their second-order cognitive frameworks no longer chime with first-order emotional attachments of the populace) leads them to unconsciously seek to 'technocratically repress' emotional influences in policymaking.

Returning to trade policy, we can see such 'technocratic repression' at work: policymakers regularly dismiss concerns with the 'sociocultural consequences of globalisation' in the audiovisual industries as 'cultural protectionism' (Goff 2007, 176) or draw on discourses of external constraint – 'we must bow to the imperatives of globalisation' – as a means of legitimating potentially unpopular trade liberalisation policies (Siles-Brügge 2014). As Widmaier (2010, 127) points out, the 'repression' of emotions in policymaking is ultimately

counterproductive as it 'frustrates deliberation and can exacerbate populist resentments'. It can thus open up the necessary space for CSOs to seize upon (first-order) popular emotional attachments in order to construct a powerful frame.

I need to introduce two further elements of CSO framing strategies in the process of 'emotional liberation' (Jasper 2011, 12). Unlike Widmaier's (2010) conceptual bracketing between conscious second-order knowledge and unconscious first-order knowledge, I consider how the emotional interacts with the cognitive component of the frame. The first concept is that of an 'injustice frame'. Social movement theorists 'have recognised that a central element in framing concerns the conception of *injustice* that serves as a basis for articulating grievances and for envisioning an alternative social order' (Carroll and Ratner 1996, 608, emphasis in the original). Key to this is '[c]oncreteness in the target, even when it is misplaced and directed away from the real causes of hardship' (Gamson 1992, 32). This may lead to a situation where '[t]he need for strong emotions […] may lead organizers to *distort* their cognitive analyses' (Goodwin *et al.* 2001, 8, emphasis added). Although as a post-positivist I would not necessarily concur with Gamson's appeal to 'the real', the focus on 'injustice frames' thus highlights how the 'negative emotion' of anger (Jasper 1998, 414) can be a part of a deliberate strategy of frame construction that is distinct from cognition, albeit still interacting with it.

I next unpack the concept of 'primary socialisation'. Cox and Béland have applied cognitive and social psychology's concept of 'valence' to policy studies: 'if policy ideas have valence, they would have a strong connection to people's emotional states or moods' (Cox and Béland 2013, 308, 313). Individuals are thus guided in their actions not by deliberation but more 'intuitively', spurred on by an 'emotional trigger' (Cox and Béland 2013, 311-312). To Cox and Béland, valence goes hand-in-hand with the concept of 'polysemy' – the quality of ideas

that are ambiguous and can thus be interpreted in multiple ways. This is because the valence of an idea is increased with the level of abstraction 'because at these levels, ideas evoke more fundamental levels of a person's identity'. This is said to reduce individuals' capacity for rational deliberation in the formation of preferences and makes them more susceptible to snap, intuitive judgments based on emotional attachment (Cox and Béland 2013, 316). Such 'ambiguity' can be positive in that 'broader – and vaguer – ideas are more likely to appeal to a greater number of constituencies that have heterogeneous preferences' (Béland and Cox 2016, 432).

In the hands of an appropriate 'policy entrepreneur' – such as a CSO – a polysemic idea can therefore transcend boundaries between various groups that might resist subscribing to more narrowly defined ideas, as well as allow such ideas to act as 'coalition magnets' bringing together a wide variety of actors in support (Béland and Cox 2016). An 'injustice frame' may thus envisage a *concrete* target, but the causes of injustice may still be ambiguously framed. While rejecting the dichotomy that Béland and Cox draw between emotions and 'rationality', it is possible to recast their focus on ambiguity and its connection to emotion as one about reflexive versus unflexive action. Thus, polysemic (injustice) frames can be powerful in forcing their targets into making 'snap' judgments that circumvent deeper cognitive engagement. This ambiguity, however, can also be a double-edged sword as it limits the power of frames as *coercive* 'shaming' mechanisms. While polysemic, abstract frames may act as a basis for 'social consensus' (Béland and Cox 2016, 432), overcoming the shorter 'life cycle' of narrower CSO frames (Morin 2011), they are also susceptible to co-option by the very policymakers activists are targeting. These can more easily argue that they righting the 'injustice' being targeted by an ambiguous frame, especially if it is directed at a specific target.

## 3. Politicising Investor Protection

Although formally an EU competence since late 2009, investor protection did not garner much public attention until the CSO campaign on TTIP kicked off in the summer of 2013 at the same time as the transatlantic negotiations. Before then, we could speak of 'technocratic repression' driven by the Commission and largely accepted by both Member States and the EP. The implementation of the EU-level competence was far more contentious than the merits of investor protection within democratic societies itself (European Commission 2010, 4-6; 8-10; Meunier 2014, 999). Thus, the Member States granted the Commission a mandate for the TTIP negotiations in June 2013 which pushed for the negotiation of an 'Investment Protection' chapter 'on the basis of the […] highest standards of protection that both Parties [EU and US] have negotiated' and featured 'an effective and state-of-the-art investor-to-state dispute settlement mechanism' (Council of the EU 2013, 8).

The Commission justified the inclusion of investor protection provisions as a means of 'supporting the competitiveness of European enterprises', helping to boost FDI flows (European Commission 2010, 5). This line on investor protection was also supported by the Member States in their TTIP mandate (Council of the EU 2013, 8) and by the EP in a 2011 plenary resolution on EU investment policy, which also did not oppose ISDS but merely called for some reform (EP 2011). In its first TTIP resolution (May 2013) the EP also failed to specifically identify ISDS as an area of concern in the TTIP talks (EP 2013). Crucially, the Commission's frame regarding the merits of investor protection echoed later economistic discourses in favour of TTIP's 'growth and jobs' potential (De Ville and Siles-Brügge 2016, 13-37) that stemmed from an explicit strategy of managing 'cognitive-emotional dissonance' (Widmaier 2010). In a leaked paper on its communication strategy for TTIP, the Commission explicitly spelled out its anxiety over the nature of public debate on the agreement – and the

need to repress (or, in its own words, 'define' in a 'proactive' manner 'the terms of the debate') potential value-based, emotional concerns with the likes of 'negotiating data privacy' or 'lowering EU regulatory standards' (European Commission 2013a).

*The CSO campaign and frame*

Some would claim that the CSO campaign was kicked off by German organisations that 'reached out to NGOs in other European countries' (Bauer 2016, 6). However, the assessment here is that the campaign was started in the summer of 2013 by key members of the 'Seattle-to-Brussels' network of NGOs, notably Corporate Europe Observatory (CEO) and 'other veterans of the first major mobilisation against trade and investment agreements of the late 1990s and early 2000s' (De Ville and Siles-Brügge 2016, 102).[2] These organisations set the tone of the campaign by arguing that ISDS in TTIP (and later CETA) represented a threat to democracy and sovereignty. Corporations would be able to bypass domestic courts in secretive investment tribunals, potentially saddling governments with costly lawsuits for decisions taken in the public interest (e.g. CEO 2013; Friends of the Earth Europe 2014). In the words of British environmentalist George Monbiot (2013) (himself drawing on CEO reports), ISDS was a 'full-frontal assault on democracy' allowing 'rapacious companies [to] subvert our laws, rights and national sovereignty'. CSOs also often drew on the metaphor of the 'Trojan Horse' to describe TTIP (e.g. Friends of the Earth 2014) insofar as (false) promises of 'growth and jobs' were used to disguise the affront to democracy and the rule of law represented by ISDS in particular.

[2] The Seattle-to-Brussels network was founded in the early 2000s by European organisations in what some have called the 'global justice movement' (see Della Porta 2007) to campaign on trade policy issues. Its membership includes both national organisations – such as branches of the 'Association for the Taxation of Financial Transactions and for Citizens' Action' (ATTAC), Friends of the Earth and the UK-based Global Justice Now – and Brussels-based and/or transnational organisations like CEO, Friends of the Earth Europe and the Transnational Institute (for more on the role of the network in the case of TTIP, see Strange 2015; for a full list of members, see Seattle-to-Brussels 2017).

This represents a strong appeal to abstract, and widely held values of the sort that Berger and Luckmann (1966, cited in Widmaier 2010) would associate with 'primary socialisation'. We can therefore see the sort of 'cognitive-emotional dissonance' created between these arguments about democracy, sovereignty and the rule of (EU) law and the Commission's economic (and technocratic) defence of ISDS as a means of encouraging FDI flows (and by extension growth and jobs). Campaigners may have thus also been tapping into broader public discontent over the 'technocratic repression' associated with European integration and with the move from a 'permissive consensus' to a 'constraining dissensus' (Hooghe and Marks 2009; see also Novotná 2016). In the UK, for example, a number of anti-TTIP groups made much hay of the agreement – and ISDS especially – to highlight the threat that this, and the fact that it was the EU negotiating it, represented to the National Health Service (e.g. Hilary 2015). There was, of course, variation across EU Member States in the degree of public mobilisation on the issue, with Germany leading the pack. This could be seen by some as being a product of differences in the intensity of the CSO campaign rather than in the resonance of the frame (Bauer 2016). While there is no space here to explore this issue, I would argue that the nature of the frame itself was instrumental in putting certain key actors under pressure, notably Social Democratic politicians in key Member States (especially, but not just in Germany) and across countries and political groupings in the EP (as argued below).

The frame's polysemy also made it a useful 'coalition magnet' amongst CSOs. Criticism of TTIP and ISDS did not just involve the 'usual suspects' of Seattle-to-Brussels network members which had initiated the campaign. It subsequently also drew in CSOs either not previously involved in trade policy such as public health groups (e.g. the European Public Health Alliance, EPHA) or those having previously taken a more positive view of trade policy – notably trade unions (including German export unions) or consumer organisations (e.g. the

European Consumer Organisation, BEUC) (De Ville and Siles-Brügge 2017, 1495). The 'injustice frame' was thus deployed by both those CSOs opposed to TTIP as a matter of principle ('rejectionists', to use a typology from Scholte 2003; see also Young this issue) – which comprised much of the Seattle-to-Brussels network – and those who were willing to see an improved trade agreement ('reformists') – which accounted for a number of the newcomers and newly critical actors.

While both types of CSO were concerned over a potential erosion of levels of social, environmental or public health protection, and did sometimes produce joint materials (e.g. Friends of the Earth Europe 2015), their emphasis was somewhat different. Rejectionists billed the agreement as a 'transatlantic corporate bill of rights' (CEO 2013; see also Hilary 2015), bemoaning the rise of corporate power in an implicit (and at times more explicit) critique of (neoliberal) capitalism. Reformists, on the other hand, argued that such a mechanism was unnecessary between democracies with developed legal systems, pointing to its discriminatory nature, which privileged foreign investors at the expense of other public policy objectives, with some also emphasising its potential to infringe EU law (e.g. BEUC 2014; T&E 2014; ClientEarth 2015). Turning to their approach to campaigning, rejectionists therefore largely focused on an 'outside strategy' (targeting public opinion, and thus policymakers indirectly). While reformists also pursued this, a number of such CSOs also pursued an 'inside strategy' of influencing policymakers directly, e.g. by participating in the TTIP Advisory Group[3] set up by DG Trade (on this distinction, see Dür and Mateo 2014).

[3] CSO members of this group at the time of their last meeting in March 2017 included representatives of EPHA, BEUC, Transport and Environment (T&E), the European Environment Bureau, the Danish Consumers' Organisation (Forbrugerrådet) and the European Trade Union Confederation (ETUC) (European Commission 2017e, 6).

While being open to multiple interpretations, the frame focused on the concrete 'injustices' of a specific instrument (ISDS), used by clearly identified wrong-doers (transnational corporations) and with implications for citizens' everyday lives. Gheyle (2016, 19) points out that CSOs were helped by the prominence of a number of concrete, high-profile ISDS cases in Europe at the time of the start of the TTIP negotiations. German campaigners, for example, often picked up on a case involving Vattenfall – a Swedish energy firm suing the German government for the latter's (fairly popular) policy of phasing out nuclear power (Campact 2016). Even where there were few or no ISDS cases involving the national government, as in the UK, campaigners were able to link claims against developed countries elsewhere to on-going policy discussions at home, for example tobacco firm Phillip Morris' claim against Australia for the latter's plain packaging laws. This happened even after the latter successfully saw off the claim (Taylor 2015). Key was the perception (notably, but not exclusively, in Germany) that *US* multinationals were particularly 'rapacious' and a threat to the European social market economy (Mayer 2015, 47-48; see also Eliasson and García-Duran 2017). While the Seattle-to-Brussels network had already been highlighting the menace to democracy posed by the EU's new investment policy competence (and especially ISDS) since the Treaty of Lisbon (e.g. Seattle to Brussels 2010, 2012), including in reference to CETA, it was only when it chose to draw on these ready-made materials in the early phase of the anti-TTIP campaign (e.g. CEO 2013; CEO *et al.* 2013)[4] that the 'injustice frame' acquired resonance. To be more precise then, we should refer to the powerful emotive content of a frame focusing on *transatlantic* (US-centred) investor protection from a *European* perspective.[5]

[4] Interview with an NGO representative, Brussels, 10 December 2014.

[5] This might also explain why TTIP never acquired the same salience in the US, despite contacts and joint statements between US and European groups (e.g. in the Transatlantic Consumer Dialogue). The focus of US trade policy controversies was more on the perceived job losses from the Trans-Pacific Partnership, while several key US CSOs saw TTIP as a means of potentially increasing the stringency of US social, environmental or consumer regulations (De Ville and Siles-Brügge 2016: 101-2).

The decision by Seattle-to-Brussels to focus on ISDS in their early campaigning on TTIP also reflected the long-standing 'Dracula strategy' of rejectionist CSOs. In the words of prominent UK trade campaigner John Hilary (2016), the idea was to 'expose the vampire [agreement] to sunlight and it will die'. This strategy had been at the heart of a late 1990s campaign against investor protection and liberalisation in the proposed Multilateral Agreement on Investment (MAI), which had kicked off with the coordinated leak and analysis of the draft text (Johnston and Laxer 2003, 53). The focus on ISDS during this campaign was identified by long-time ATTAC France activist Susan George (2015, 76) as 'the best single tool in the activist kit for practising the "Dracula Strategy"' (on the prominence of ISDS in the MAI campaign, see Graham 2000, 37-49). The continued role of such veteran campaigners in the Seattle-to-Brussels network may therefore be part of the explanation as to why the network chose to focus on ISDS in its post-Lisbon campaign materials and was subsequently quick to draw on these to launch its TTIP campaign. Their experience of previous episodes of contestation may have led them to see this as a potentially effective discursive strategy. In this vein, another experienced activist stressed the importance in the early TTIP campaign of being able to draw on existing analysis of draft CETA texts (given the lack of publicly available TTIP negotiating texts at the time) and described the issue of ISDS in TTIP as an easy target.[6]

Although interviews with NGO representatives from both reformist and rejectionist CSOs suggested that these groups had a genuine concern regarding investor protection, a number of interviewees identified TTIP's regulatory cooperation and coherence provisions as being at least equally if not more problematic (in some cases) than ISDS. However, and following the initial targeting of ISDS by Seattle-to-Brussels, a number of NGO representatives themselves conceded that this concrete part of the agreement became a central element in the campaign

[6] Interview with an NGO representative, Brussels, 10 December 2014.

against or to reform TTIP. Some also stressed that it was much more difficult to campaign on these other 'technical', regulatory issues,[7] echoing the sentiments expressed by George regarding the suitability of ISDS as a 'Dracula-like' issue. The implications of these are more difficult to communicate as emotively as ISDS: once the Commission abandoned some of its more radical proposals (see De Ville and Siles-Brügge 2016, 75-6) they became instruments of 'soft law' largely affecting the agenda-setting process and thus did not appear to *prima facie* violate core principles of democratic decision-making as they do not *formally* usurp the powers of legislators or domestic courts (De Ville and Siles-Brügge 2017, 1497).

Similar considerations likely also informed the very focus on previous ISDS *cases*, which may involve very different provisions to the ones being contemplated in TTIP, rather than the more general 'chilling effects' of investor protection. While it is true that the high-profile examples of 'chlorinated chicken' and hormone-treated beef were also successfully used by CSOs (especially in Germany) to highlight the dangers of regulatory alignment/cooperation and corporate power, in contrast to ISDS cases these remained *hypothetical*[8] and were thus likely to be seen as more susceptible to the Commission counter-argument that it had no intention of watering down food safety regulations.

*The initial impact of the CSO campaign*

The CSO campaign – which, as we saw, brought together a rather broad church of organisations – was successful at raising the profile of the issue of investor protection and in forcing the Commission to adapt its approach to the issue. Following a few months of considerable pressure from the EU-level NGOs the Commission announced in January 2014 that it was

[7] Interviews with NGO representatives, Brussels, 14 December 2014, 16 and 17 July 2015 and 26 February 2016
[8] Less hypothetical cases such as the dilution of the fuel quality directive were also mentioned (Friends of the Europe *et al.* 2014), but these never had the traction of the food safety examples.

suspending negotiations on investor protection, pending a public consultation (held March-July 2014). The summer of 2014 also saw the launch of a European Citizens' Initiative (ECI) against TTIP and CETA. Although rejected for formal submission by the European Commission, it attracted 3.3 million signatures by the time it was closed in October 2015 (Stop TTIP 2016). Support for TTIP in the Eurobarometer polling also declined EU-wide over the period of the talks – from a net approval rating of 33 percentage points in November 2014 to 19 percentage points two years later (on the 'constraining' role of public opinion, see also Novotná 2016). While there were large inter-state variations, key Member States like Germany (where net approval dropped from -2 to -20 percentage points) and France (a drop in net approval from 18 to 1 percentage points) experienced particularly dramatic declines in support.[9] Over this period, several national parliaments also adopted a critical line on ISDS, including Austria's National Assembly, the Dutch Lower House and the French Senate (De Ville and Siles-Brügge 2016, 104).

The issue also began attracting considerable attention from MEPs, starting in the run-up to the May 2014 EP elections. Illustrating the polysemic nature of the CSO framing, parties and groupings as diverse as the Socialists and Democrats (S&D), the European Greens, the Left Group and the French *Front National* (as well as other far-right parties) strongly criticised ISDS, for varying reasons. The Greens' election manifesto rejected ISDS as it would 'allow private companies to sue democratically elected governments in order to protect corporate interests against social or environmental reforms' (European Green Party 2014, 31), with similar objections voiced by the Left Group (Party of the European Left 2014). In contrast, the *Front National*'s leader Marine Le Pen referred to her party's struggle against TTIP as one not only against 'private justice for multinationals' but, more importantly, for 'the defence of

[9] Author's calculation using Standard Eurobarometer surveys, ignoring non-committal responses.

norms, of values and of the French model' (author's translation from Le Pen 2015). Highlighting how both pro-European and Eurosceptic arguments against ISDS have co-existed, a group of MEPs – including from the S&D, Green, Left groupings – eventually proposed a resolution in the EP that called for CETA to be referred to the ECJ to assess the compatibility of its investor protection provisions with EU law (EP 2016).

Given the emerging din, it is important to single out the role of Social Democratic politicians. Within the EP, which was becoming increasingly 'assertive' on trade policy (Roederer-Rynning this issue; see also Jančić 2016), these were considered key to securing a majority in favour of a ratification of TTIP (and CETA). Not only would a sufficient number of S&D votes be needed to bring the more unambiguously pro-TTIP groupings (the European Peoples' Party [EPP], the Alliance of Liberals and Democrats for Europe [ALDE] and the European Conservatives and Reformists [ECR]) to the simple majority needed to ratify a potential agreement, but the S&D group itself held a hedged position in support of the agreement. This hinged (in large part) on the inclusion of ISDS, which the group voted to oppose at their meeting of 4 March 2015 on grounds that mirrored CSOs' framing: 'It is not reconcilable with the rule of law, that investors get a legal forum outside well-functioning judicial systems of the parties through a trade agreement' (S&D Group 2015, 1). Moreover, over the course of the TTIP negotiations Social Democrats were in government in key EU Member States (notably Germany, France and Italy), of which the former two expressed critical views, starting with Germany in March 2014 (Donnan and Wagstyl 2014). This is not entirely surprising if we consider the evolution of public opinion on TTIP.

Thus, in late 2014, the incoming Commissioner, Cecilia Malmström faced considerable pressure to drop the provision. Jean-Claude Juncker, the new European Commission President,

delegated the final responsibility for deciding on the inclusion of ISDS to Commission Vice-President Frans Timmermans (whose dossier included the 'Rule of Law and the Charter of Fundamental Rights'). At the time this was widely perceived as a snub to Malmström and her pro-ISDS line; fourteen Member States even went as far as to send Juncker a letter, calling on him not to water down the agreement's investor protection provisions (Oliver and Spiegel 2014). This could be seen as the low-point for the Commission (more specifically DG Trade) and its approach to investor protection. Soon after, in January 2015, it published its report on the public consultation, showing that 97 per cent of the 149,399 respondents were opposed to ISDS – although these were template-based submissions coordinated by various NGOs, with responses largely coming from a small number of Member States (European Commission 2015a, 10).

## 4. From ISDS to ICS and beyond

The Commission used this report to begin a process of reformulating its investor protection proposals (see European Commission 2015b), culminating in an initial proposal for a TTIP investment chapter in September 2015 (European Commission 2015c). This was mildly revised following consultations with stakeholders, Member States and the EP and formally presented to US negotiators in November 2015. It sought to establish an 'Investment Court System' (ICS), where the most significant innovation was said to be a transparent and court-like mechanism for resolving investment disputes that included an appellate mechanism. Fifteen 'publicly appointed judges' (five EU nationals, five US nationals and five third country nationals) would be adjudicating on cases (in tribunals presided over by a third country national and composed of one EU and US national each) and bound by a code of conduct (European Commission 2015d). It was also to be up-scaled into a full 'multilateral investment court' (European Commission 2015e).

*From technocratic repression to co-opting injustice frames*

Irrespective of the view we take of the reforms themselves, the Commission shifted its discourse on investor protection. After subscribing to and defending the ISDS system in the past, it now argued that the ICS represented an entirely new system that addressed the concerns raised by critics of investor protection (European Commission 2015e,f). It put a lot less emphasis on the competitiveness and investment boosting potential of the proposals and now stressed how the ICS promised to uphold 'the rule of law' (Timmermans, cited in European Commission 2015e). The polysemic framing of ISDS by activists as a series of 'corporate tribunals' that 'threaten democracy', had provided the Commission with the discursive space to frame its reforms as a radical remaking of investor protection.

Thus, the Commission claimed in a factsheet that '[w]hen compared with "old style" Investor to State Dispute Settlement (ISDS) mechanisms, the EU text proposal has key advantages for both States and investors', notably through '[c]lear rules applied by impartial judges through a transparent and neutral process'. On the issue of the 'right to regulate', the EU proposal was said to 'clarif[y] the content of key substantive standards of protection and the way that the right to regulate in the public interest is fully preserved'. This masked the fact that the proposals roughly corresponded to EU intentions *prior* to the start of the CSO campaign (European Commission 2015g, emphasis omitted; cf. European Commission 2010, 2014). Crucially, what could be said was a form of expanded arbitrator 'roster' – which was already agreed in the CETA talks (albeit under more limited circumstances) even when TTIP had only just entered the scene (see European Commission 2013b) – was depicted as a radical break with the past; the Commission no longer talked about the alternative dispute resolution mechanism of 'arbitration' but rather of adjudication by 'publicly-appointed' and 'salaried' 'judges'.

Meanwhile, the elimination of the possibility of parallel claims was said to help ensure that '[a] clear distinction between international law and domestic law will be maintained' (European Commission 2015e): arbitration would not usurp the power of domestic courts.

This framing strategy appeared targeted at the potential veto players in the EU trade policymaking machinery, namely Germany, its Social Democratic Party and Social Democrats in the EP – rather than at public opinion itself (see above on 'inside'/'outside' strategies) – especially as it seemed to have been constructed in concert with key 'insiders'. After initially voicing very critical views of ISDS, Vice-Chancellor and leader of the Social Democratic Party of Germany (SPD) Sigmar Gabriel sought, at a February 2015 meeting of European Social Democrats, to come up with a compromise proposal centred on creating an investment international court, having previously been engaged in conversations with the Trade Commissioner (*EurActiv* 2015). In response to the ICS proposals, he was then to state in the *Bundestag* that '[t]he step towards a fundamental reform [of] the investor-state court process is the right one' (cited in Cermak 2015). Another SPD politician, the EP's Committee on International Trade (INTA) Chairman Bernd Lange, also went from a fairly critical report on ISDS (protecting investor rights 'can be attained in TTIP without the inclusion of ISDS provisions'; EP 2015a, 7) to (together with yet another German Social Democrat, EP President Martin Schulz) shepherding the EP's second TTIP resolution through various (and somewhat contentious) INTA committee sessions and eventually the plenary in July 2015 (Sopinska 2015).[10]

[10] A key consideration may have been the perceived need to work with the EPP as 'grand coalition' partners, with the frame of ICS as 'progressive' providing important cover from critics.

This resolution talked of 'replac[ing] the ISDS system with a new system for resolving disputes between investors and states', with the more specific elements enumerated ('publicly appointed' 'judges', respecting 'the jurisdiction' of EU and Member State courts as well as the 'right to regulate') being precisely those of the subsequent Commission ICS proposal (EP 2015b). There remained some divisions within the S&D group on this (65, or just over a third of the group, voted against or abstained; VoteWatch Europe 2015), but having two-thirds of S&D MEPs on board was considered to be sufficient (if added to largely pro-EPP, ALDE and ECR votes) to have TTIP ratified. Member States were also largely supportive at this stage, as the inclusion of the ICS proposal in the EU-Vietnam FTA (where negotiations were concluded in December 2015) and most elements in CETA suggested (European Commission 2016a,b).

Although the broad coalition of CSOs campaigning on investor protection did not splinter (with key 'reformist' CSOs on the TTIP Advisory Board remaining opposed to the proposals, see T&E *et al.* 2015),[11] it faced four specific challenges in dealing with this counter-frame. Firstly, the discourse about its relationship to democracy was effectively co-opted by the Commission and those Social Democrats favouring the ICS. Including investor protection provisions was now presented as a means of addressing the problems of the global investment regime, in particular the proposal to upscale the ICS into a full-blown 'multilateral investment court'. The Trade Commissioner argued that the problems of the past were associated with a system of 'private justice' and that ICS represented a novel 'public justice system' for the resolution of investment disputes (Malmström 2015). Critics of ICS were thus implicitly being accused of opposing a progressive development, undermining the resonance of their 'injustice frame' with key 'insiders' (for an explicit example of this line of argumentation, see Quick 2015, 206-8).

[11] Interview with an NGO representative, Brussels, 25 February 2016.

Secondly, in order to argue that the ICS represents nothing more than 'Zombie ISDS' 'back from the dead' (Eberhardt 2016, 5), CSOs had to turn to the details of the proposed provisions, writing in-depth, technical factsheets and reports to highlight continuity with existing system (e.g. T&E *et al.* 2015). This ran the risk of being less effective with ('outside') public-opinion than the initial emotive framing. Illustratively, one German newspaper reported that despite having made several negotiating texts public on the Commission website, very few people were actually consulting these documents three months into this much-publicised 'transparency initiative' (Kafsack 2015). Thirdly, and related to the preceding two points, the fact CSOs had placed many of their eggs in the metaphorical ISDS basket (emotively campaigning on TTIP by focusing on a concrete instrument of injustice) also meant that it was harder to fall back on other criticisms of the agreement – such as the regulatory cooperation and coherence.

Finally, in the wake of the supposed populist 'backlash against globalisation' heralded by the vote for Brexit (June 2016) and the election of Donald Trump (November 2016), the anti-establishment 'injustice frame' deployed by activists, and the polysemy of their anti-trade agreement discourse – shared by some far-right and populist politicians (including the French *Front National* and Trump himself) – rendered this emotive appeal vulnerable with policymakers (and segments of public opinion) to the Commission's (and Member States') own 'anti-populist' frame. This played out during the CETA ratification battle, which highlights how the effects of the TTIP negotiations will be felt regardless of whether these are successfully concluded or not.

*Spill-over to CETA*

Earlier in the anti-ISDS/TTIP campaign there had already been attempts to link the agreement to CETA (e.g. the ECI) – with some success. At the time of the conclusion of the formal

negotiations in September 2014 – which had been relatively uncontroversial before the start of the TTIP talks – the text was not initialled as is customarily the case, following German reticence (Willy 2014). CETA then went into an unusually lengthy 'legal scrubbing' phase that lasted until February 2016. This also unusually saw the text on investor protection changed from a previous ISDS model to the ICS (with only small differences to the TTIP proposal) – all the more remarkable because in contrast to the EU-Vietnam FTA, ICS was being inserted *after* the supposed conclusion of the negotiations. By this point, the broad coalition of CSOs was gearing up for the CETA ratification battle in the EU, as it was seen by a number as precedent-setting for TTIP (on the interaction between different trade and investment agreements, see Goff this issue; Meunier and Morin 2017).[12]

But CETA was to present greater difficulties than TTIP, for two reasons: the agreement was already in place *and* it was with a trading partner that elicited fewer fears of (to cite Monbiot 2013) 'rapacious companies' than TTIP. We should not forget, as noted above, that the Seattle-to-Brussels network had previously campaigned on the inclusion of ISDS in CETA without generating much public interest (e.g. Seattle-to-Brussels 2012). A number of its members thus sought to paint CETA as 'TTIP's little brother' (Global Justice Now 2016), and as a 'backdoor' for US multinationals, many of which had subsidiaries in Canada (Eberhardt *et al.* 2016, 3). Many of the CSOs which had taken a reformist position on TTIP also opposed CETA (at least in its current form) – emphasising the same arguments regarding investor protection and sometimes calling for improvements to the text (e.g. BEUC 2016; T&E 2016; ETUC 2016).

This did garner some success in putting policymakers on the spot. Despite the fact that it requested an ECJ opinion on the EU-Singapore FTA to clarify the division of trade policy

[12] Interview with an NGO group representative, Brussels, 26 February 2016.

competences (including FDI) between the EU and the Member States (likely a means of shoring up its own position) (Meunier 2017, 13), the Commission (under pressure from governments) formally presented CETA as a 'mixed agreement' to the Council in July 2016. This meant that national (and some sub-national) parliaments would also have to ratify the deal before its final entry into force (European Commission 2016c). Similarly, although it sought to have most of the agreement provisionally applied (following EP consent) prior to national ratifications (European Commission 2016d), the Council, under pressure from Germany and other Member States, insisted on excluding investor protection from the scope of provisional application (McGregor 2016). This was followed by a drawn out stand-off involving the region of Wallonia, which blocked Belgium's signature of the agreement from late September to late October 2016 because of its parliament's and regional Premier's opposition to CETA (Novotná 2017, 10).

Wallonia justified its position in large part on the grounds (echoing CSO arguments against ISDS, especially of the pro-European variety) that it would potentially be contrary to European law and enable 'US-based firms to attack European, Belgian and Walloon public decisions via their Canada-based subsidiaries' (author's translation of Parliament of Wallonia 2016, 3).[13] As a result, the Council decisions authorising CETA's signature and provisional application were accompanied by a mutually agreed 'Joint Interpretative Instrument'. Thirty-eight statements and declarations from EU Member States and institutions were also attached to these decisions (Van der Loo 2016). The most important of the latter saw some of Belgium's sub-federal governments declare that they would reject CETA on the basis of its existing ICS provisions

[13] It is true that this also reflected domestic political rivalries between the (Walloon) Socialist Party and the liberal-led coalition at the federal level (De Schamp and Frantescu 2016), with the Socialists having supported the revised CETA and TTIP mandates featuring ISDS whilst in the federal government. However, the issue of trade and investment policy only captured the attentions of elected politicians in Belgium following the national CSO TTIP campaign. This was led by local Seattle-to-Brussels members the National Centre for Development Cooperation (CNCD) and 11.11.11 and focused prominently on the issue of ISDS (Bollen *et al.* 2017).

(unless their parliaments decided otherwise) and asked for the ICS to referred to the ECJ to assess its compatibility with EU law (Kingdom of Belgium 2016). Further debates in the EP's various committees followed, with the plenary then voting quite convincingly by 408 votes to 254 in favour of ratifying CETA on 15 February 2017 – splitting the S&D group (95 voted in favour, 66 against and 13 abstentions) (VoteWatch Europe 2016).

For those CSOs opposed to CETA (either *tout court* or in its current form), the ISDS-based frame ran into trouble with Member States and MEPs because it was shared by the populist right, leading many of these CSOs to explicitly distance themselves from such arguments (e.g. Bersch 2017). In addition to the arguments presented during the debates around TTIP – that ICS (and CETA) represented 'progressive' trade and investment policies, which swung the key powerbroker of the SPD into supporting the agreement (SPD 2016) – the Commission and CETA's other advocates sought to turn critics' polysemic injustice frame against them, linking it to the economic populism associated with Brexit and Donald Trump (e.g. Malmström 2017a). The EU's very 'credibility' as an institution promoting liberal values and prosperity was at stake if it could not even complete a trade agreement with Canada, a country now lead by the photogenic posterchild of liberalism – an argument repeated by the likes of Malmström or European Council President Donald Tusk (*EurActiv* 2016). Canada's Prime Minister Justin Trudeau was even invited to address the EP plenary voting on CETA, giving (in one *Guardian* journalist's words) a 'rousing speech' about the EU's positive international role (Boffey 2017). Advocates of CETA were now also appealing to the 'primary', abstract values that before had only been instrumentalised by CSOs.

The jury is still out regarding whether CSOs have successfully prevented a full implementation of the agreement, including its provisions on investor protection. Belgium's sub-national

parliaments (as well as other Member State parliaments) can still fail to ratify CETA.[14] That said, the 'Joint Interpretative Declaration' suggests a high degree of Member State consensus regarding the content of investor protection, essentially rehearsing key elements of the ICS text (European Union 2017, 2). If the ECJ were to issue an opinion that the ICS and EU law are compatible, following Belgium's request pursuant to its CETA declaration, this suggests there would likely be considerable pressure on potential 'hold-outs'– with CSOs' 'injustice frame' that ISDS infringes the rule of law losing more of its potency. More generally, CSOs' emphasis on one particular element of CETA (the ICS) also constrained the resonance of their other criticisms of the agreement (e.g. on regulatory cooperation or coherence, EPHA 2016, 12).

What is more, and independently of CETA's fate, May 2017 saw the ECJ issue its much-anticipated Opinion 2/15. This stated that all areas of trade policy *save* provisions concerning 'dispute settlement between investors and states' and 'non-direct foreign investment' fall under EU exclusive competence (CJEU 2017, 2). It has opened the door to a Commission proposal (reflected in recent proposed mandates for negotiations with Australia and New Zealand and recently concluded trade talks with Japan) to split future agreements into EU-only competence trade deals (also covering investment market access issues) and mixed competence investment protection agreements as a means of expediting ratification (Von der Burchard 2017; European Commission 2017a,b,f). While these proposals still need to be approved by the Member States, which may have some sovereignty-based sensitivities, we are already seeing advocates of this agenda increasingly turn to the sorts of arguments against economic populism first deployed during the CETA episode – and which will likely continue to constrain CSO campaigns targeting the EU's liberal trade and investment policies. For example, Malmström (2017b, 4)

[14] Interestingly, the Socialist-led government of Wallonia was recently ousted for reasons unrelated to this episode, which may have eliminated one potential veto player for CETA.

has spoken of 'work[ing] with likeminded partners to shape globalisation […] When others are looking to build walls, we are ready to build bridges.'

In this climate, the Commission has continued its work on upscaling the ICS through a multilateral investment court with support from Canada (European Commission 2016e, 2017c). This raises the question as to whether CSOs will be able to sustain their campaign against the investor protection provisions envisaged by the Commission. These have largely gone unremarked in the case of the completed EU-Vietnam FTA featuring the ICS or the EU-Japan Economic Partnership Agreement talks, where negotiations on a trade agreement were concluded in December 2017 (European Commission 2017d). While this agreement does not cover investment protection, it does reflect the new policy of 'splitting' trade and investment protection, with the EU seeking to promote the ICS in its on-going negotiations on a separate agreement with Japan concerning 'investment protection standards and investment protection dispute resolution' (European Commission 2017f). We may yet see a return to the days where Seattle-to-Brussels members criticised the EU's new competence to negotiate on investment, but lacked a frame with the emotiveness of the supposed threat posed by US multinationals.

## 5. Conclusion

The election of Trump has been an exogenous shock to the negotiations that few were expecting. Regardless of the outcome, however, TTIP and the anti-ISDS campaign continue to shape other EU trade and investment agreements. The campaign was clearly successful at breaking through the Commission's attempts at 'technocratic repression'. Forcing the European Commission to initially suspend and subsequently adapt its approach to investor protection was no meaningless feat. However, CSOs also faced constraints derived from the nature of the frame they deployed and the concreteness of the target. Crafting a polysemic and

highly emotive 'injustice frame' – invoking the threat to democratic decision-making from (US-based) corporations – may have been useful at mobilising a broad coalition of CSOs, inflaming public opinion and putting pivotal decision-makers under pressure. But the nature of this discourse was also exploited by the Commission to justify a series of more minor, incremental reforms to ISDS as a radical break with the past. The campaign's focus on ISDS also limited the ability of CSOs to subsequently draw on other criticisms of the agreement. The battle over the ratification of CETA showed how CSOs' anti-establishment 'injustice frame' was also vulnerable to accusations that civil society groups were siding with the 'economic populism' associated with Trump and Brexit. In the end, CSOs did not prevent CETA from going into provisional application (with investor protection not fully excised from the agreement), while the outcome of ECJ Opinion 2/15 and the anti-populist discourse are providing some cover for the Commission to put forward a proposal to (from its perspective, finally) expedite the process for ratifying trade agreements. Investor protection also lives on in the ICS found or sought by the EU in its recent agreements and negotiations and in Commission efforts to create a multilateral investment court, having the support of Member States and a significant body of MEPs.

These findings point to some of the broader theoretical contributions of this article. It aims to provide greater insight into 'transnational [trade] politics' (Young this issue; see also Young 2016) and 'everyday political economy' (Hobson and Seabrooke 2007) by focusing on CSOs' strategically emotive framing. The ISDS and TTIP episode prefigures much of the concern post-EU referendum and the election of Trump with the role of emotion in politics, illustrating how it makes little sense to juxtapose liberal rational argumentation with populist hysterics (cf. Eliasson and García-Duran 2017). Emotions are just as much a part of the 'technocratic repression' associated with Commission discourse on ISDS as they are part of CSO arguments,

even if some might argue that these frames need not all equally contribute towards creating a more deliberative 'transatlantic agora' (Birchfield this issue). In fact, the Commission's success in crafting an ICS proposal that was perceived as legitimate by key powerbrokers was itself a result of embracing more overtly 'emotive' argumentation.

The challenge for CSOs is thus crafting a frame that is both effective emotively, but not overly ambiguous or too specific in its target as is the case with many 'injustice frames'. In this there might be some historical lessons from the anti-MAI campaign, where activists in Australia put more emphasis on distinguishing their message from that of an emerging xenophobic, anti-establishment party (Capling and Nossal 2001, 450-1). Thus, more carefully identifying intended constituencies – in this case the receptive veto player represented by European Social Democrats – and formulating an effective frame that is not too polysemic or concrete in its target (e.g. that certain trade agreements threaten core functions of the welfare state) may have been a more appropriate strategy than appealing across the entire political spectrum on the basis that ISDS puts sovereignty in jeopardy. While the Commission would likely also have responded to such a frame, it would not have been in as strong a position to equate it with economic populism.

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