

2013

European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements

Youri Devuyst

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/jibl>



Part of the [Law Commons](#)

Recommended Citation

Devuyst, Youri (2013) "European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements," *Journal of International Business and Law*: Vol. 12: Iss. 2, Article 13.

Available at: <http://scholarlycommons.law.hofstra.edu/jibl/vol12/iss2/13>

This Legal & Business Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in *Journal of International Business and Law* by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

EUROPEAN UNION LAW AND PRACTICE IN THE NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

*Youri Devuyst**

ABSTRACT

As the world's largest trading block, the European Union (EU) has committed itself to an ambitious strategy of enhancing trade with its strategic partners through the conclusion of Free Trade Agreements (FTAs). The launching of negotiations between the EU and the United States for the conclusion of a Transatlantic Trade and Investment Partnership Agreement is part of this strategy. Understanding the EU's law and practice in the negotiation and conclusion of such agreements is essential for the Union's negotiating partners, who have often been puzzled by its decision-making complexity. Following a systematic presentation of the EU's institutions and their legal functions in the making of trade agreements, this Article provides an in-depth and step-by-step analysis of the EU's inter-institutional and legal practice in the negotiation and conclusion of international trade agreements. As such, this Article also constitutes a thorough assessment of the changes brought by the Treaty of Lisbon in the trade policy field. After almost three years of practice, it can be concluded that the enhanced role of the European Parliament in the making of trade agreements is the Lisbon Treaty's most important change in this area. Far from being the disruptive element that a number of prominent legal scholars had predicted, Parliament has not only brought a much needed element of democratization and open political debate in EU trade policy making, it has also delivered proof of its added value, notably by reinforcing the preservation of fundamental rights. The next step should be for Parliament to gain a formal role in the determination of the EU's negotiating directives.

* Professor Youri Devuyst is affiliated with the Institute for European Studies of the *Vrije Universiteit Brussel* (Free University of Brussels, Belgium), where he teaches at the Faculty of Law and the Department of Political Science.

I. Introduction.....	261
II. The EU's Common Commercial Policy	264
A. The Existence of an EU Competence in International Trade	264
B. The Nature of the EU's Competence in International Trade	264
C. The Scope of the EU's Competence in International Trade	266
III. The EU's Institutions and Trade Negotiations	268
A. The European Council.....	268
1. <i>Composition and Organization</i>	268
2. <i>Decision-making</i>	269
3. <i>European Council Responsibilities in Trade Negotiations</i>	269
B. The European Commission.....	271
1. <i>Composition and Organization</i>	271
2. <i>Decision-making</i>	272
3. <i>Commission Responsibilities in Trade Negotiations</i>	272
C. The Council of Ministers.....	273
1. <i>Composition and Organization</i>	273
2. <i>Decision-making</i>	277
3. <i>Council Responsibilities in Trade Negotiations</i>	280
D. The European Parliament.....	281
1. <i>Composition and Organization</i>	281
2. <i>Decision-making</i>	282
3. <i>European Parliament Responsibilities in Trade Negotiations</i>	282
E. The Court of Justice of the European Union.....	285
1. <i>Composition and Organization</i>	285
2. <i>Decision-making</i>	287
3. <i>Court of Justice Responsibilities in Trade Negotiations</i>	287
IV. EU Practice in the Conduct of Trade Negotiations	289
A. Requesting the Opening of Negotiations.....	289
B. Authorizing the Start of Negotiations	290
1. <i>Establishing the Negotiating Directives</i>	290
2. <i>Nominating the Negotiator</i>	292
C. Conducting Negotiations.....	293
1. <i>The Commission as Negotiator</i>	293
2. <i>The Relationship between Commission and Council during the Negotiations</i>	294
3. <i>The Relationship between the Commission and the European Parliament during the Negotiations</i>	296
4. <i>The Relationship between the Council and the European Parliament during the Negotiations</i>	298
5. <i>The European Parliament and the Substance of the Negotiations</i>	299
D. Initialing, Signing and Provisionally Applying International Trade Agreements.....	300
1. <i>Initialing</i>	300
2. <i>Determining the Legal Basis of the Agreement</i>	300
3. <i>Signing and Provisionally Applying</i>	304
E. Concluding Trade Agreements and Parliament's Consent Practice.....	306
V. The Future of the EU's Institutional Balance in the Conduct of Trade Negotiations	310
A. The European Council's Ambitions in EU Trade Policy Formulation.....	310

B. The European Parliament's Growing Role in Trade Policy Formulation.....	311
1. <i>Arguments against the Involvement of Parliament.....</i>	311
2. <i>The Constitutional Necessity of a Greater Role for Parliament in Trade Policy Formulation</i>	312
3. <i>The Added Value of Parliament's Increasing Involvement in Trade Policy Formulation: a Summary of the Practice</i>	314
4. <i>The need for Parliament's involvement in determining the EU's negotiating directives.....</i>	314
VI. Conclusion	316

I. INTRODUCTION

This article assesses the law and practice of the European Union (EU)'s decision-making in the negotiation and conclusion of international trade agreements. The subject is particularly relevant. First, the EU has remained the world's most important trading bloc, in spite of the current crisis in the Euro Area and the emergence of new economic powerhouses such as China, India and Brazil.¹ With an internal market of more than 500 million inhabitants and a combined GDP of €12,268,387 million in 2010, the EU continues to be the world's first exporter and first importer, both in goods and commercial services.² Its market power alone justifies that the EU's mechanism of making international trade law and policy is well understood.

Second, in contrast with the troubled governance of the Euro Area, the EU's decision-making process in the field of international trade policy is an example of the supranational Community method, whereby the Member States have effectively handed over competences and policy instruments from the national to the EU level and whereby the EU consequently speaks with a single voice.³ As Oxford University Professor Timothy Garton Ash has recently concluded, while Chinese policymakers may treat the EU with something close to contempt in geopolitical affairs, a "trade negotiation between China and the EU is a conversation between equals" because it is an area "where the EU really does act as one."⁴ It is worth taking a closer look at the institutional system that has provided the EU with such a powerful voice in international commercial diplomacy, and also because it serves as a model for other regional trade blocs.⁵

¹ EUROPEAN COMMISSION, *The European Union Trade Policy 2013*, at 6, http://trade.ec.europa.eu/doclib/docs/2011/august/tradoc_148181.pdf.

² *The Economy*, EUROPA.EU, http://europa.eu/about-eu/facts-figures/economy/index_en.htm (last visited Feb. 26, 2013); *Living in the EU*, EUROPA.EU, http://europa.eu/about-eu/facts-figures/living/index_en.htm (last visited Feb. 26, 2013); WORLD TRADE ORG. [hereinafter WTO], *WORLD TRADE REPORT 2012* 23 (2012). The EU represents 14.9% of the world's total exports in goods, 24.8% of exports in services, 16.2% of imports in goods and 21.1% of imports in services for the year 2011.

³ See Youri Devuyst, *The European Union's Institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed*, 39 GEO. J. INT'L L. 247, 250-53 (2008); Renaud Dehousse, *The 'Community Method' at Sixty*, in *THE 'COMMUNITY METHOD': OBSTINATE OR OBSOLETE?* 3 (Renaud Dehousse, ed., 2011) (describing the rationale and essence of the Community Method).

⁴ Timothy Garton Ash, *Can Europe Survive the Rise of the Rest?*, N.Y. TIMES (Sept. 1, 2012), http://www.nytimes.com/2012/09/02/opinion/sunday/can-europe-survive-the-rise-of-the-rest.html?_r=0.

⁵ Tobias Lenz, *Spurred Emulation: The EU and Regional Integration in Mercosur and SADC*, 35 W. EUR. POL. 155 (2012). See Finn Laursen, *Comparative Regional Integration and the EU Model: How to Achieve*

Third, the Community method is dynamic in the sense that it evolves over time as part of the constantly changing construction of Europe.⁶ Trade policy has been part of this process of change, with an emphasis on the search for greater efficiency and more democracy.⁷ As said by then-EU Trade Commissioner Pascal Lamy during the European Constitutional Convention of 2002-2003, the EU's trade policy mechanism is "*un exemple à parfaire*" (an example to improve).⁸ The most recent changes to the EU's procedures for making trade policy and international agreements – partly resulting from Commissioner Lamy's appeal – were introduced with the entry into force of the Treaty of Lisbon on December 1, 2009.⁹ After almost three years of practice, it is time to make an assessment of the impact of these Lisbon Treaty adaptations.

Fourth, the EU is making a very active use of its new trade policy provisions and has committed itself to an ambitious strategy of enhancing trade with its strategic partners through the conclusion of Free Trade Agreements (FTAs).¹⁰ Thus, in February 2013, the EU and the United States agreed to take their economic relationship to a higher level by launching negotiations for a Transatlantic Trade and Investment Partnership Agreement.¹¹ At the same time, the EU and Japan have also decided to launch bilateral FTA negotiations in the course of 2013.¹² These are only the latest in an impressive series of FTA projects initiated by the EU in recent years. In 2010, the EU signed a FTA with the Republic of Korea that is going substantially beyond the mere elimination of tariffs on goods and restrictions on the provision of services, and includes detailed sections on the regulatory environment of the parties such as sector-specific non-tariff barriers, intellectual property protection, competition rules, and

Credible Commitments (NAFTA and MERCOSUR), in THE STATE OF THE UNION(S): THE EUROZONE CRISIS, COMPARATIVE REGIONAL INTEGRATION AND THE EU MODEL 161 (Joaquín Roy ed., 2012) (explaining the EU as a model for other regional integration agreements). See generally COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND (Finn Laursen ed., 2010).

⁶ Youri Devuyst, *The Community-Method after Amsterdam*, 37 J. COMMON MKT. STUD. 109, 110 (1999).

⁷ See generally Rafael Leal-Arcas, *Is EC Trade Policy Up to Par?: A Legal Analysis over Time – Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305 (2007) (providing an in-depth survey of the evolution in the EU's Treaty law on trade policy).

⁸ Pascal Lamy, *La politique commerciale et la Convention: un exemple à parfaire* (Oct. 15, 2002).

⁹ *The Treaty at a Glance*, EUROPA.EU, http://europa.eu/lisbon_treaty/glance/index_en.htm (last visited Feb. 28, 2013); Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. See also Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]; PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM* 388-91, 396-402 (2010); JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 280-86 (2010) (for insightful overviews of the Lisbon Treaty changes on EU trade policy).

¹⁰ European Council, Conclusions ¶ 4, Brussels (Sept. 16, 2010 EUCO 21/1/10), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116547.pdf; European Commission, *Trade, Growth and World Affairs: Trade Policy As a Core Component of the EU's 2020 Strategy*, at 9-10 COM (2010) 612 final (Nov. 9, 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf.

¹¹ Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Comm'n President José Manuel Barroso (Feb. 13, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/13/statement-united-states-president-barack-obama-european-council-president>.

¹² Memorandum, European Commission, *The EU's free trade agreements – where are we?* Brussels, 1 (Mar. 25, 2013) [hereinafter Overview of FTA Negotiations], available at http://trade.ec.europa.eu/doclib/docs/2013/2/november/tradoc_150129.pdf.

government procurement.¹³ In 2012, the EU signed FTAs with Central America (as a region), as well as with Columbia and Peru (as a multipart agreement).¹⁴ Also in 2012, it completed the technical stage of deep and comprehensive FTA negotiations with Singapore and Ukraine.¹⁵ In addition, the EU is currently in the process of negotiating FTAs with a host of other trading partners, including Canada, Malaysia, Vietnam, Thailand, Mercosur, Georgia, Armenia and Moldova.¹⁶

Fifth, while a solid understanding of the EU's decision-making mechanisms is important, particularly for the Union's negotiating partners, they have often been puzzled by its complexity.¹⁷ More than a decade ago, Ambassador Charlene Barshefsky, then President Bill Clinton's Trade Representative, characterized the EU's trade policy regime as "an opaque system" involving "unclear lines of authority between the Commission and the Member States."¹⁸ President Barack Obama expressed himself in a more diplomatic language, joking that he had "gotten a crash course in European politics over the last several days," after the G-20 meeting of November 2011 in Cannes, France, where the EU and its Euro Area crisis had been a central issue.¹⁹ Summarizing his newly gained insights in the EU's decision-making processes, he underlined "the fact that you're negotiating with multiple parliaments, a European Parliament, a European Commission – I mean, there are just a lot of institutions here in Europe ... And there are a lot of meetings here in Europe as well. So trying to coordinate all those different interests is laborious, it's time consuming."²⁰ Even experienced American lawyers based in Brussels depict EU decision-making as "complex machinery that is often confusing even for the initiated and still more puzzling to an outside observer accustomed to the U.S. model of federalism."²¹

Against this background, and particularly in light of the EU's current offensive in the negotiation of bilateral FTAs with its most important strategic partners, it is essential to clarify the legal and institutional aspects of the making of international trade agreements by the EU. Understanding EU trade policy in its various components first of all requires a brief

¹³ Council Decision 2011/265, 2011 O.J. (L 127) 1, 6 (EU) [hereinafter Council Decision 2011/265/EU]. See also Colin M. Brown, *The European Union and Regional Trade Agreements: A Case Study of the EU-Korea FTA*, 2 EUR. YB. INT'L ECON. L. 297, 307 (2011); Chang-Sang Cho, *Korea-EU FTA: a Blueprint for Co-prosperity*, in EU-KOREA RELATIONS IN A CHANGING WORLD 11, 35 (Axel Marx et al. eds., 2013); Der-Chin Horng, *Reshaping the EU's FTA Policy in a Globalizing Economy: the Case of the EU-Korea FTA*, 46 J. WORLD TRADE 301, 326 (2012). These three sources underline the broad scope of the EU-Korea FTA and label it "an important precedent," "a historic monument," and "a benchmark for a series of new FTA negotiations with other key trading partners," respectively.

¹⁴ Overview of FTA Negotiations, *supra* note 12, at 3.

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ TONY BLAIR, A JOURNEY 551 (2010) (revealing the astonishment of President George W. Bush's finding of a Belgian at the G-8 table as President of the European Council).

¹⁸ Charlene Barshefsky, *Reflections at a Moment of Transition: The Transatlantic Relationship and its Future*, Speech at the European-American Business Council (Jan. 17, 2001).

¹⁹ Press Conference by President Obama After G20 Summit, THE WHITE HOUSE, OFFICE OF THE PRESS SEC. (Nov. 4, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/11/04/press-conference-president-obama-after-g20-summit>.

²⁰ *Id.*

²¹ Roger Martella & Glory Francke, *Federalism in European Environmental Decision Making*, 27 NAT. RESOURCES & ENV'T 1 (2012), available at http://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/summer2012/nre_sum12_martella_francke.authcheckdam.pdf.

introduction into its legal nature and into the division of trade competences between the EU and its Member States. This is the focus of Section II. Section III is devoted to a presentation of the EU's institutions, with an emphasis on their legal functions in the making of international trade agreements. This opens the way for an in-depth and step-by-step analysis – in Section IV – of the EU's inter-institutional and legal practice in the negotiation and conclusion of international trade agreements. As such, this Article also constitutes a thorough assessment of the changes brought by the Treaty of Lisbon in the trade policy field. Based on the assessment of the legal practice, Section V formulates a number of recommendations – in light of the need for decision-making efficiency and democratic accountability – with respect to the two major changes resulting from the Lisbon Treaty for the EU's trade policy formulation: the rise of the European Council and the enhanced position of the European Parliament. The conclusion, reformulated in Section VI, underlines that Parliament has not only brought a much needed element of democratization and open political debate in EU trade policy making, but has also delivered ample proof of its added value, notably by reinforcing the preservation of fundamental rights during the negotiations. The next step should be for Parliament to gain a formal role in the determination of the EU's negotiating directives.

II. THE EU'S COMMON COMMERCIAL POLICY

A. The Existence of an EU Competence in International Trade

The EU's competences are governed by the principle of conferral,²² which means that the EU shall only act within the limits of the competences conferred or attributed to it by the Member States in the Treaties on which the EU is founded.²³ The first question is therefore that of the existence of a EU competence in external trade questions. In other words, it should be established whether the EU Treaties have conferred any powers on the Union in this area. This is the case.²⁴ The EU's primary law leaves no doubt that the EU shall have an external trade policy – formally called the Common Commercial Policy (CCP) – that shall contribute “to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”²⁵

B. The Nature of the EU's Competence in International Trade

Next, it is important to determine the nature of the EU's CCP competence. The Treaty on the Functioning of the EU makes a distinction between three broad categories of Union competence: those exclusively attributed to the EU, those shared between the EU and its Member States, and those where the EU's role is limited to supporting, coordinating or supplementing the actions of the Member States.²⁶ The CCP is explicitly listed as one of the

²² TEU art. 5(1).

²³ *Id.* art. 5(2); Opinion 2/00, 2001 E.C.R. I-9713, para. 5.

²⁴ TFEU arts. 3(1), 206-207..

²⁵ TFEU art. 206..

²⁶ *Id.* art. 2.

EU's exclusive competences.²⁷ This means that only the Union may legislate and adopt legally binding acts in that area.²⁸ The Member States are able to act only if so empowered by the Union or for the implementation of Union acts.²⁹

That the CCP was included in the Lisbon Treaty's list of exclusive EU competences did not come as a surprise. Already in 1975, the European Court of Justice had held that the CCP was an exclusive competence of the European Economic Community (EEC) – the EU's predecessor.³⁰ In Opinion 1/75, the Court underlined that the CCP was conceived “for the defence of the common interests of the Community,” and stated that the exercise of concurrent powers by the Member States and the Community in this field was “impossible”:

To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.³¹

The exclusive nature of the CCP is the logical corollary of the customs union that was set up by the Treaty of Rome of 1957 establishing the EEC.³² As prescribed by Article XXIV of the General Agreement on Tariffs and Trade (GATT), customs unions have an internal and an external characteristic.³³ Internally, customs unions eliminate the duties and other restrictive regulations of commerce with respect to substantially all trade between the constituent territories of the union.³⁴ Externally, in relations with third countries, customs unions apply substantially the same duties and other regulations of commerce.³⁵ In the EU, these criteria have been interpreted strictly. This means that in trade between the EU Member States, customs duties on imports and exports, and charges having equivalent effect, are prohibited.³⁶ For imports from third countries, the EU has a Common Customs Tariff (CCT).³⁷ Individual Member States have lost the competence to levy their own customs duties on products that are imported from outside the EU.³⁸ For such products from third countries, only the CCT applies. It is fixed by the EU's Council of Ministers, on a proposal

²⁷ *Id.* art. 3(1)(e).

²⁸ *Id.* art. 2(2).

²⁹ *Id.*

³⁰ Opinion 1/75, 1975 E.C.R. 1355, 1365.

³¹ *Id.* at 1363-1364.

³² Treaty Establishing the European Economic Community art. 9, signed Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; TFEU art. 206.

³³ General Agreement on Tariffs and Trade art. XXIV, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, at A5, 55 U.N.T.S. 187 (1952) [hereinafter GATT 1947]; *See generally* Youri Devuyst & Asja Serdarevic, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18 DUKE J. COMP. & INT'L L. 1 (2007) (providing a detailed analysis of the provisions of GATT art. XXIV).

³⁴ GATT 1947, *supra* note 33, art. XXIV, ¶ (8)(a)(i).

³⁵ *Id.* ¶ (8)(a)(ii).

³⁶ TFEU art. 30.

³⁷ *Id.* art. 31.

³⁸ *Id.* arts. 2–3, 31.

of the European Commission.³⁹ In addition to the CCT, customs unions also apply the same other regulations of commerce to third countries.⁴⁰ In the EU, the latter has given rise to the CCP.⁴¹

C. The Scope of the EU's Competence in International Trade

The fact that the CCP belongs to the EU's exclusive competences does not say anything about its scope, i.e. about the range of subjects that fall within the CCP concept. But precisely because the Treaties attribute such strong powers to the EU in CCP matters, its scope has been the subject of a decades-long legal and political debate.⁴² International trade agreements that come entirely under the CCP can be concluded following a relatively straightforward procedure: on a proposal of the European Commission, the Council of Ministers takes the decision, generally by qualified majority voting, and after obtaining the consent of the European Parliament.⁴³ However, trade deals that come partly under the CCP, but partly remain within the competence of the Member States, are so-called mixed agreements that require the green light of each Member State separately in addition to EU-level approval.⁴⁴ The ratification of an agreement by all EU Member States, in addition to its conclusion by the EU, is a cumbersome process that creates multiple legal problems.⁴⁵ At this

³⁹ *Id.* art. 31.

⁴⁰ GATT 1947, *supra* note 33, art. XXIV, ¶ (8)(a)(ii).

⁴¹ TFEU arts. 3, 207.

⁴² The author has discussed this legal debate at length in another article. See Youri Devuyt, *The European Union's Competence in International Trade After the Treaty of Lisbon*, 39 GA. J. INT'L & COMP. L. 640, 647-660 (2011). See also Marise Cremona, *External Relations and External Competence of the European Union: the Emergence of an Integrated Policy*, in *THE EVOLUTION OF EU LAW 217* at 226-232 (Paul Craig & Grainne de Burca eds., 2d ed. 2011); PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* 11-69 (2d ed. 2011); Inge Govaere, *External Competence: What's In a Name? The Difficult Conciliation between Dynamism of the ECJ and Dynamics of European Integration*, in *30 YEARS OF EUROPEAN LEGAL STUDIES AT THE COLLEGE OF EUROPE* 461 (Paul Demaret et al. eds., 2005) (for extensive surveys of the historical evolution of the CCP's scope).

⁴³ TFEU art. 218(6). The various components of this decision-making process are the subject of Section IV in the present article.

⁴⁴ The practice that mixed trade agreements "shall be concluded jointly by the Community and the Member States" was explicitly added by the Treaty of Nice. See Consolidated version of the Treaty Establishing the European Community, 2006 O.J. (C 321) [hereinafter *TEC after Nice*], art. 133(6). This provision is no longer present in the currently applicable TFEU art. 207. In the words of the European Court of Justice, the common action that is required of the EU and its Member States by virtue of their shared competence in the signing and conclusion of mixed agreement allows the interest of the EU in establishing a comprehensive, coherent and efficient external commercial policy to be pursued whilst at the same time allowing the special interests which the Member States might wish to defend in the sensitive areas under national competence to be taken into account. According to the Court, the obligation of close cooperation between the Member States and the EU institutions in the process of negotiation and conclusion of such mixed agreements flows from the requirement of unity in the EU's international representation; Opinion 1/08, 2009 E.C.R. I-11129, ¶ 136.

⁴⁵ See generally MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD (Christophe Hillion & Panos Koutrakos eds., 2010) (providing an up-to-date overview of legal questions related to EU mixed agreements); MIXED AGREEMENTS (David O'Keefe & Henry G. Schermers eds., 1983) (the landmark study that raised academic attention to the topic of EU mixed agreements in 1983); LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES: QUELLES PERSPECTIVES? (Jacques H.J. Bourgeois et al. eds., 1997) (providing interesting perspectives by practitioners and academics).

moment, around three years typically pass between the signature and the ratification of mixed agreements by the EU and its Member States.⁴⁶ Logically, the European Commission – the EU institution charged with promoting the general interest of the EU – has argued over the years for a broad interpretation of the CCP in order to avoid the complexity of mixed agreements, while the Member States, together with the EU's Council of Ministers, have often insisted on remaining directly involved in the conclusion of international trade agreements.⁴⁷

The Treaty of Lisbon finally resolved much of the confusion on the scope of the CCP by fully integrating trade in services, commercial aspects of intellectual property and foreign direct investment into the CCP.⁴⁸ These had been the sub-sectors causing much of the disputes around the precise range of the CCP.⁴⁹ In the currently applicable Treaty on the Functioning of the EU, the scope of the CCP is defined in the following terms:

The common commercial policy shall be based on uniform principles, 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 taken in the event of dumping or subsidies.⁵⁰

While some important legal questions remain, especially on the precise scope of foreign direct investment (FDI), the Treaty of Lisbon constitutes a major breakthrough.⁵¹

⁴⁶ Frank Hoffmeister, *Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and Its Member States*, in MIXED AGREEMENTS REVISITED, *supra* note 45, at 249, 256.

⁴⁷ See generally SOPHIE MEUNIER, TRADING VOICES: THE EUROPEAN UNION IN INTERNATIONAL COMMERCIAL NEGOTIATIONS (2005); Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUB. POL'Y 906 (2006); Sophie Meunier & Kalypso Nicolaidis, *The European Union As a Trade Power*, in INTERNATIONAL RELATIONS AND THE EUROPEAN UNION 247 (Christopher Hill & Michael Smith eds., 2005) (providing a detailed surveys of EU decision-making in trade policy, the resistance of the Member States to expand the scope of the CCP and the practical consequences of mixity).

⁴⁸ TFEU art. 207(1).

⁴⁹ Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, 1 EUR. Y.B. INT'L ECON. L. 123 (2010); ECKHOUT *supra* note 42, at 57-67; Markus Krajewski, *The Reform of the Common Commercial Policy: Coherent and Democratic?*, in EU LAW AFTER LISBON 292 (Andrea Biondi et al. eds., 2012); Gonzalo Villalta Puig & Bader Al-Haddab, *The Common Commercial Policy after Lisbon: An Analysis of the Reforms*, 36 EUR. L. REV. 289, 291-296 (2011).

⁵⁰ TFEU art. 207(1).

⁵¹ Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, EUR. Y.B. INT'L ECON. L. 29 (2011); Pieter-Jan Kuijper, *Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy*, 37 LEGAL ISSUES ECON. INTEGRATION 261 (2010); Federico Ortino & Piet Eeckhout, *Towards an EU Policy on Foreign Direct Investment*, in EU LAW AFTER LISBON, *supra* note 49, at 312.

III. THE EU'S INSTITUTIONS AND TRADE NEGOTIATIONS

This section introduces the EU's institutional framework, with specific reference to the making of international trade agreements. As said at the start of this article, the CCP is an example of the Community method.⁵² In other words, EU trade policy works by maintaining a balance in the process of negotiating and concluding international agreements between those institutions representing the interests of the Member States (European Council and Council of Ministers) and those representing the supranational interests of the Union as a whole (European Commission, European Parliament and European Court of Justice).⁵³ The following sections will briefly introduce each of these institutional actors.

A. The European Council

1. Composition and Organization

The European Council is the meeting of the Heads of State or Government of the EU's Member States (i.e. the highest political leaders of the Member States with responsibility for EU affairs, such as the French President, the German Chancellor and the British Prime Minister), together with its President and the President of the European Commission.⁵⁴ The European Council elects its President for a period of two and a half years, renewable once.⁵⁵ The President cannot at the same time hold a national office.⁵⁶ The current incumbent is Herman Van Rompuy, a former Prime Minister of Belgium.⁵⁷ The tasks of the European Council President include preparing and chairing the meetings, facilitating cohesion and consensus, ensuring continuity, driving forward the European Council's work, and representing the EU at his level (for instance in meetings with the President of the United States) on issues concerning the Common Foreign and Security Policy (CFSP).⁵⁸

While it is foreseen that the European Council meets at least twice every six months in Brussels, it has been gathering more frequently in recent years to deal with the crisis in the Euro Area.⁵⁹

⁵² See Devuyt, *supra* note 3 and accompanying text.

⁵³ Alberta M. Sbragia, *The European Community: A Balancing Act*, 23 *PUBLIUS*, no.1, 23, 27 (1993). See also TEU art. 10(2).

⁵⁴ TEU art. 15(2). It must be noted that the name "European Council" cannot be abbreviated to the "Council" since the latter is a different EU institution. See TEU art. 13(1). For a general introduction to the European Council, see generally PAUL CRAIG & GRAINNE DE BURCA, *EU LAW. TEXT, CASES, AND MATERIALS* 47-49 (5th ed. 2011); KOEN LENAERTS & PIET VAN NUFFEL, *EUROPEAN UNION LAW* 474-484 (Robert Bray & Nathan Cambien eds., 3d ed. 2011); NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 161-178 (7th ed. 2010); Philippe de Schoutheete, *The European Council*, in *THE INSTITUTIONS OF THE EUROPEAN UNION* at 43-67 (John Peterson & Michael Shackleton eds., 3d ed. 2012).

⁵⁵ TEU art. 15(5).

⁵⁶ TEU art. 15(6).

⁵⁷ For the profile, speeches and agenda of the European Council President, see *The President*, EUROPEAN COUNCIL, <http://www.european-council.europa.eu/the-president?lang=en> (last visited Feb. 17, 2013).

⁵⁸ TEU art. 15(6).

⁵⁹ TEU art. 15(3). See also European Council, *Conclusions*, available at, <http://www.european-council.europa.eu/council-meetings/conclusions?lang=en> (last visited Feb 17, 2013) (The *Conclusions* page of the European Council website provides material on European Council meetings and their conclusions).

2. *Decision-making*

As a general rule, the European Council takes its decisions by consensus.⁶⁰ This concept is not defined in the EU Treaties, but it must be understood that the European Council has a “decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”⁶¹ This implies that each Head of State or Government has a *de facto* veto-right.⁶² European Council meetings are prepared by the Council of Ministers in its General Affairs configuration, i.e. by the meeting of the Ministers of European or Foreign Affairs of all EU Member States.⁶³

3. *European Council Responsibilities in Trade Negotiations*

The overall responsibility of the European Council is “to provide the Union with the necessary impetus for its development” and to “define the general political directions and priorities thereof.”⁶⁴ It does not exercise legislative functions and does not take formal action in the conclusion of international agreements by the EU.⁶⁵ With respect to the EU’s external action, the European Council identifies the strategic interests and objectives of the Union.⁶⁶ On September 16, 2010, it devoted a special session to this theme.⁶⁷ In its Conclusions, the European Council explicitly referred to the importance of international trade policy:

The European Union’s strategic partnerships with key players in the world provide a useful instrument for pursuing European objectives and interests ... In this context, enhancing trade with strategic partners constitutes a crucial objective, contributing to economic recovery and job creation. We must take concrete steps to secure ambitious Free Trade Agreements, secure greater market access for European businesses and deepen regulatory cooperation with major trade partners.⁶⁸

Similarly, when adopting the Compact for Growth, the European Council of June 28-29, 2012, underlined the contribution of international trade agreements:

Whilst strengthening the multilateral system remains a crucial objective, the ongoing and potential upcoming bilateral negotiations have a

⁶⁰ TEU art. 15(4).

⁶¹ Marrakesh Agreement Establishing the World Trade Organization art. IX(1) n.1, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144. *See also* United Nations Convention on the Law of the Sea art. 161(7)(e), Dec. 10, 1982, 1833 U.N.T.S. 397 (providing the first formal definition of the concept “consensus” in public international law).

⁶² Devuyst, *supra* note 3, at 275-276.

⁶³ TEU art. 16(6).

⁶⁴ TEU art. 15(1).

⁶⁵ *Id.*

⁶⁶ TEU art. 22(1).

⁶⁷ European Council, Conclusions, *supra* note 10.

⁶⁸ *Id.* para. 4.

particularly high economic importance. More efforts should in particular be geared to the removal of trade barriers, better market access, appropriate investment conditions, the protection of intellectual property and the opening up of public procurement markets. Agreements which have been finalised must be rapidly signed and ratified. The Free Trade Agreements with Singapore and Canada should be finalised by the end of the year; negotiations with India need a new impulse from both sides, and work should continue towards the deepening of the EU's trade relationship with Japan. Heads of State or Government look forward to the recommendations of the EU-US High Level Working Group on Jobs and Growth and commit to working towards the goal of launching in 2013 of negotiations on a comprehensive transatlantic trade and investment agreement.⁶⁹

The statements above are significant because they indicate that the European Council has, in recent years, been taking an active interest in trade policy developments.⁷⁰ It has not, however, been an active player in the politics of brokering concrete deals at the end of important international trade negotiations: that would go beyond its mandate of defining the EU's strategic policy directions.⁷¹ For instance, it was the Council of Foreign Affairs Ministers rather than the European Council that dealt with the EU's internal bargaining process and the external policy setting during the conclusion of the Uruguay Round creating the World Trade Organization.⁷² In comparison with topics such as the modification of the EU's Treaties, the EU's budgetary perspectives, macroeconomic coordination, and financial crisis management, external relations in general are seldom discussed in detail by the Heads of State or Government.⁷³

⁶⁹ European Council, Conclusions, Brussels (Jun. 29, 2012 EUCO 76/12), Annex: Compact for Growth and Jobs, ¶ 3(m).

⁷⁰ See also European Council, Conclusions, Brussels (Oct. 18-19, 2012 EUCO 156/12), ¶ 2(k); European Council, Conclusions, Brussels (Feb. 7-8, 2013 EUCO 3/13), ¶¶ 1-8 (for similar statements).

⁷¹ The failure of many scholarly works, both recent and older, to reference the European Council as an important actor in trade policy is striking—particularly in works analysing the impact of the European Council Conclusions on various areas of EU law and policy. See generally, e.g., FREDERIC EGGERMONT, *THE CHANGING ROLE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION* (2012); JAN WERTS, *THE EUROPEAN COUNCIL* (1992).

⁷² See generally Youri Devuyst, *The European Community and the Conclusion of the Uruguay Round*, in *THE STATE OF THE EUROPEAN UNION. VOL. 3: BUILDING A EUROPEAN POLITY?* 449-467 (Carolyn Rhodes & Sonia Mazey eds., 1995).

⁷³ See generally Youri Devuyst, *The European Council and the CFSP after the Lisbon Treaty*, 17 EUR. FOR. AFF. REV. 327 (2012).

B. The European Commission

1. Composition and Organization

The European Commission is the EU's permanent executive.⁷⁴ It is in charge of promoting the general interest of the Union, which is different from the interests of particular Member States.⁷⁵ The College of Commissioners is composed of one national of each Member State.⁷⁶ The Commission's term in office is five years, but members may be reappointed for subsequent terms.⁷⁷ While Commissioners are in fact designated by the Governments of their Member State, they may neither seek nor take instructions from any Government or other entity once appointed.⁷⁸ In carrying out their responsibilities, the Commissioners act in complete independence.⁷⁹ The College of Commissioners is responsible before the European Parliament.⁸⁰ At the start of its term, the College is – as a body – subject to a vote of consent by the Parliament.⁸¹ In the course of its term, the Commission can be forced to resign collectively following the adoption of a motion of censure by Parliament.⁸²

One of the members of the College of Commissioners is specifically in charge of the trade portfolio.⁸³ It is one of the Commission's most significant political assignments.⁸⁴ In the College that serves from 2010 to 2014, the Trade Commissioner is Karel De Gucht, a former Belgian Deputy Prime Minister and Minister of Foreign Affairs, former Member of the European Parliament and Professor in EU law at the *Vrije Universiteit Brussel*.⁸⁵ The Trade Commissioner works under the leadership of the Commission President and has the political responsibility for the preparation and implementation of the EU's trade policy.⁸⁶ He acts as the Commission's spokesperson on international trade questions at Ministerial level conferences, in the EU Council of Ministers and at the European Parliament.⁸⁷ A small private

⁷⁴ For a general introduction to the European Commission, see CRAIG & DE BURCA, *supra* note 54, at 32-40; LENAERTS & VAN NUFFEL, *supra* note 54, at 505-522; NUGENT, *supra* note 54, at 105-138; John Peterson, *The College of Commissioners*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 71-94.

⁷⁵ TEU art. 17(1).

⁷⁶ TEU arts. 17(4)-(5).

⁷⁷ TEU art. 17(3).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ TEU art. 17(8).

⁸¹ TEU art. 17(7).

⁸² TEU art. 17(8).

⁸³ *The Members of the Barroso Commission (2010-2014)*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/index_en.htm (last visited Mar. 19, 2013) (for the current composition of the College of Commissioners).

⁸⁴ José Manuel Barroso, *Mission Letter to Commissioner-designate Karel De Gucht* (Brussels, Nov. 27, 2009), available at http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145787.pdf. See generally PETER MANDELSON, *THE THIRD MAN. LIFE AT THE HEART OF NEW LABOUR* 393-395 (2010) (for the testimony of someone who held the post of EU Trade Commissioner).

⁸⁵ *About the Commissioner, Biography*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/degucht/about/cv/ (last visited June 12, 2013).

⁸⁶ Barroso, *supra* note 84.

⁸⁷ *About the Commissioner, Commissioner's Agenda*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/degucht/diary (last visited June 12, 2013) (for the Trade Commissioner's agenda).

office (or Cabinet), consisting of nine officials with policy assignments, assists the Commissioner in the preparation of the weekly meetings of the College of Commissioners, in preparing the Commissioner's meetings and other engagements, and in relations with the Commission's Directorate General (DG) for Trade.⁸⁸

DG Trade is one of the Commission's 33 functional departments.⁸⁹ Other DGs include, for example, Agriculture and Rural Development, Competition, Environment, and Internal Market.⁹⁰ DG Trade works under the political authority of the Trade Commissioner.⁹¹ It consists of eight Directorates that cover the various functional and geographic responsibilities of the Commission in the trade field.⁹² In 2012, it counted 518 officials, of which 322 were in a role of operational policy official such as trade negotiator or antidumping investigator.⁹³

2. *Decision-making*

The College generally takes its decisions by consensus, on a proposal of the Commissioner who holds special responsibility for the file in question.⁹⁴ While the Commission can legally act by a majority of its members, the two Colleges under the Presidency of José Manuel Barroso, the former Prime Minister of Portugal, have refrained from doing so.⁹⁵

3. *Commission Responsibilities in Trade Negotiations*

The Commission has several crucial responsibilities in the functioning of the EU in general and the CCP in particular.⁹⁶ They include the following:

- Within the EU, the Commission has the exclusive right to propose legislative acts defining the framework for implementing the CCP, to be adopted by the European

⁸⁸ *About the Commissioner, Team*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/degucht/about/team/ (last visited June 12,, 2013) (for the composition of Commissioner De Gucht's Cabinet).

⁸⁹ *About the European Commission, Departments*, EUROPEAN COMMISSION, http://ec.europa.eu/about/ds_en.htm (last visited June 12,, 2013) (for an overview of the Commission's departments and other services).

⁹⁰ *Id.*

⁹¹ Barroso, *supra* note 84, at 2.

⁹² *About the Commissioner*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/trade-policy-and-you/contacts/people/index_en.htm (last visited June 12,, 2013) (for the structure of the Commission's DG Trade).

⁹³ *Distribution of active officials and temporary agents by directorate general and gender (all budgets)*, EUROPEAN COMMISSION, http://ec.europa.eu/civil_service/docs/europa_sp2_bs_cat-sexe_x_dg_en.pdf (last visited June 12, 2013) (for the number of officials in the various Commission departments).

⁹⁴ NUGENT, *supra* note 54, at 119-120 (for a good explanation of the Commission's internal decision-making practice).

⁹⁵ TFEU art. 250; Michael Shackleton, *The College of Commissioners*, in *THE INSTITUTIONS OF THE EUROPEAN UNION*, *supra* note 54, at 112.

⁹⁶ *See* TEU art. 17(1) (declaring that the Commission is responsible for overseeing the application of European Union law). *See also* TFEU art. 207(3) (declaring that the Commission is responsible for making recommendations to the Council in case of negotiations with third countries or international organisations and that the Commission is to lead such negotiations and report their progress).

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

Parliament and the Council of Ministers in accordance with the ordinary legislative procedure.⁹⁷

- Before the EU can engage in the negotiation of international agreements with third countries or international organizations in CCP matters, the Commission must take the initiative of making recommendations requesting the authorization of the Council of Ministers to open negotiations;⁹⁸
- The Commission ensures the EU's external representation, for example at the WTO, and conducts international negotiations on CCP matters following the authorization of the Council of Ministers;⁹⁹
- The Commission manages the application and implementation of the EU's trade policy instruments such as the EU's anti-dumping, anti-subsidy, safeguard and trade barriers legislation;¹⁰⁰
- As the guardian of the EU Treaties, the Commission oversees the application of EU law by the Member States, also in the field of the CCP.¹⁰¹ This includes the possibility of bringing Member States before the Court of Justice for failure to fulfill an obligation under EU law.¹⁰² Since international agreements concluded by the EU are binding on the Member States, the Commission could bring a Member State before the Court for an infringement of the provisions of an international agreement.¹⁰³

C. The Council of Ministers

1. Composition and Organization

Together with the European Council, the Council of Ministers represents the interests of the Member States in EU decision-making.¹⁰⁴ It consists of a representative of each Member State at ministerial level (and in contrast with the European Council, not at the level of Heads of State or Government), with the authority to commit the Government of that Member State and cast its vote.¹⁰⁵ Although it is legally one institution, in practice, the

⁹⁷ See TEU art. 17(2); TFEU arts. 207(2), 294(2).

⁹⁸ TFEU art. 207(3).

⁹⁹ See TEU arts. 207(2), 207(4), 17(1) and TFEU art. 207(3). The Commission's external representation duty is with exception of CFSP matters. In CFSP questions, the EU is represented by the High Representative of the Union for Foreign Affairs and Security Policy who is also a Vice-President of the Commission and Chair of the Council of Foreign Affairs Ministers. See TEU arts. 18, 27. (on the role of the High Representative).

¹⁰⁰ See TEU art. 17(1). For information on the Commission's role in the implementation of this legislation, see *Trade Defence*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/> (last visited June 12, 2013) and *Trade Barriers*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/> (last visited June 12, 2013).

¹⁰¹ See TEU art. 17(1).

¹⁰² TFEU art. 258.

¹⁰³ See TFEU art. 216(2) ("Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.").

¹⁰⁴ For a general introduction to the Council of Ministers, see CRAIG & DE BURCA, *supra* note 54, at 41-46; LENAERTS & VAN NUFFEL, *supra* note 54, at 484-504; NUGENT, *supra* note 54, at 139-160; Fiona Hayes-Renshaw, *The Council of Ministers*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 68-95.

¹⁰⁵ TEU art. 16(2).

Council (as the Council of Ministers is formally called) appears in ten different functional configurations.¹⁰⁶ One of these is the Foreign Affairs Council, composed of the Ministers for Foreign Affairs of the EU's Member States and chaired on a permanent basis by the EU's High Representative for Foreign Affairs and Security Policy.¹⁰⁷ The monthly meeting of the Foreign Affairs Council is responsible for treating international trade items.¹⁰⁸ However, the Foreign Affairs Ministers traditionally prefer to focus on urgent questions related to the CFSP and hardly devote any time on trade topics.¹⁰⁹ In the second half of 2010, to improve the ministerial treatment of trade policy issues, the Commission requested the revival of the specific "Trade" formation of the Council.¹¹⁰ Since that moment, the Foreign Affairs Council has effectively met at least once, and sometimes twice, per semester in the specific composition of the Ministers for Trade, with a full agenda devoted only to trade policy questions.¹¹¹ As provided for in the Council's Rules of Procedure, Council meetings of Trade

¹⁰⁶ TEU art. 16(6). *See also* Council Decision 2010/594/EU, 2010 O.J. (L 263) 12 (amending two points of the list of configurations of the European Council). *See also* Council Decision 2009/878/EU, 2009 O.J. (L 315) 46 (establishing a list of configurations that amend Art. 16(6) of the Treaty on European Union by ten areas of responsibility).

¹⁰⁷ *See* TEU arts. 16(6), 18(3).

¹⁰⁸ *Foreign Affairs*, COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/policies/council-configurations/foreign-affairs?lang=en> (last visited June 12, 2013).

¹⁰⁹ *See, e.g.*, Press Release of the 3183rd Council Meeting Foreign Affairs, Council of the EU (Jul. 23, 2012) (discussing mainly the political situations in Syria, Sudan, Libya, Egypt, Mali and a common security and defence policy), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/131990.pdf; Press Release of the 3179th Council Meeting Foreign Affairs, Council of the EU (Jun. 25, 2012) (discussing mainly the political situation in Syria, Egypt, Iran and adopting a strategic framework for human rights and democracy), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/131188.pdf.

¹¹⁰ Frank Hoffmeister, *The European Union's Common Commercial Policy a Year after Lisbon – Sea Change or Business as Usual?*, in *THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON* 83, 93 (Panos Koutrakos ed., 2011).

¹¹¹ *See* Press Release of the 3031st Council Meeting Foreign Affairs, Council of the EU (Sept. 10, 2010) (discussing trade relations with China and Malaysia and discussing the development of an EU policy on international investments); Press Release of the 3086th Council Meeting Foreign Affairs – Trade, Council of the EU (May 13, 2011) (discussing bilateral investment treaties, trade-related aspects of the EU-Japan Summit and the Doha Development Agenda negotiations); Press Release of the 3112th Council Meeting Foreign Affairs – Trade, Council of the EU (Sept. 26, 2011) (discussing its commitment to success in the Doha round of world trade negotiations, prospects for the conclusions of negotiations on free trade agreements with India and Ukraine, Russia's accession to the WTO and strengthening trade relations with the countries of Southern Mediterranean); Press Release of the 3136th Council Meeting Foreign Affairs – Trade, Council of the EU (Dec. 14, 2011) (discussing its preparation for the 8th ministerial conference of the WTO, approving the accession of Russia and Samoa to the WTO, discussion bilateral negotiations with Egypt, Jordan, Morocco and Tunisia to establish free trade areas, discussing giving preferential treatment to service suppliers of least-developed countries); Press Release of the 3154th Council Meeting Foreign Affairs – Trade, Council of the EU (Mar. 16, 2012) (discussing the EU's generalised scheme of tariff preferences for developing countries, discussing free trade agreements with Colombia and Peru); Press Release of the 3170th Council Meeting Foreign Affairs – Trade, Council of the EU (May 31, 2012) (discussing the free trade agreements with Colombia and Peru, free trade negotiations with Vietnam, regulations for bilateral investment treaties of the EU, possible free trade agreement with Japan, an EU-US working group on growth and jobs and trade liberalizations in the "green" sector).

Ministers are chaired by the Minister for Foreign Trade of the Member State holding the six-monthly rotating Council Presidency, and not by the High Representative.¹¹²

The meetings of the various Council configurations are prepared by a system of working groups, bringing officials and diplomats from each of the Member States together with Commission officials.¹¹³ For trade policy questions, two important working parties must be mentioned. First is the Trade Policy Committee.¹¹⁴ The Committee has been active since the early days of the European Economic Community (EEC) as the so-called 113 Committee, referring to Article 113 EEC that was the basis for the CCP in the Treaty of Rome.¹¹⁵ The Council's guide to preparatory bodies describes the tasks of the Trade Policy Committee as assisting and guiding the Commission in the negotiation of trade agreements and advising it on the CCP.¹¹⁶ In practice, there are two aspects to its deliberations. First is the element of permanent dialogue with the Commission. While the Commission makes a systematic presentation regarding each point on the Committee's agenda, the subsequent discussion provides the Commission with a direct feedback from the Member States.¹¹⁷ Second, the Committee allows the Member States to have "extensive, frequent and in-depth discussions of all trade matters," thus preparing decision-making on trade issues in the Council of Ministers.¹¹⁸ The Committee appears at three levels: the Full Members (the Director Generals for Foreign Trade of the Member States) who are responsible for discussing the general strategic aspects of EU trade policy; the Deputies (mid-level trade policy officials of the Member States) who maintain a horizontal overview of EU trade policy questions and deal in-depth with trade in goods; and the Experts (in services and investment; mutual recognition; and steel, textiles and other industrial sectors).¹¹⁹ The three Expert formations report to the Full Members on their work.¹²⁰

The Committee meets three Fridays a month at Deputies level and one Friday a month at Full Member level, which, in the words of insider Matthew Baldwin, "enables both

¹¹² Council Decision 2009/937/EU, 2009 O.J. (L 325) 35, 38, fn. 1 [hereinafter Council Rules of Procedure] ("When the Foreign Affairs Council is convened to discuss common commercial policy issues, its President [i.e. the High Representative] will ask to be replaced by the six-monthly Presidency...").

¹¹³ See Note from the General Secretariat of the Council to the Delegations, Council of the EU, Annex I, List of Council Preparatory Bodies (Jul. 4, 2012) (listing the different working groups on each topic).

¹¹⁴ See generally MICHAEL JOHNSON, EUROPEAN COMMUNITY TRADE POLICY AND THE ARTICLE 113 COMMITTEE (1998) (providing an insider's perspective); Anna Murphy, in *The Maelstrom of Change: The Article 113 Committee in the Governance of External Economic Policy*, in COMMITTEE GOVERNANCE IN THE EUROPEAN UNION 98, 107 (Thomas Christiansen & Emil Kirchner eds., 2000) (for a political science perspective).

¹¹⁵ See Note from the Presidency to the Permanent Representatives Committee (Pt. 2), Council of the EU, ¶ 2 (Dec. 1, 2009) (renaming the 113 Committee to the Trade Policy Committee; See also TFEU art. 207(3); EEC Treaty art. 113(3); TEC after Nice art. 133 (all declaring that negotiations with third countries should be undertaken by the Commission in collaboration with a special committee appointed by the Council)).

¹¹⁶ Note from the General Secretariat of the Council, *supra* note 113, at 3.

¹¹⁷ Murphy, *supra* note 114, at 106.

¹¹⁸ Hoffmeister, *supra* note 110, at 93.

¹¹⁹ Note from the General Secretariat of the Council, *supra* note 113, at 4. See also STEPHEN WOOLCOCK, EUROPEAN UNION ECONOMIC DIPLOMACY, THE ROLE OF THE EU IN EXTERNAL ECONOMIC RELATIONS 54, (2012) (on the composition and functioning of the Committee).

¹²⁰ See Note from the Presidency to the Permanent Representatives Committee (Pt. 2), Council of the EU, ¶¶ 2, 4 (Jan. 22, 2010) (modifying the working parties and committees participating in the Council's preparatory work).

discussion of the day-to-day details of ongoing negotiations, and a monthly strategic ‘check-up.’¹²¹ The agenda of the meetings is available on the Council’s website.¹²² The minutes, however, are only partially accessible to the public.¹²³ References to the substance of the EU’s negotiating directives, for instance, are systematically deleted from the public version.¹²⁴

The second relevant preparatory Council group is the Working Party on Trade Questions, composed of the Trade Counselors in the Permanent Representations of the various Member States to the EU.¹²⁵ In contrast with the Trade Policy Committee, the Working Party does not deal with international negotiations, but with the preparation of the EU’s internal trade legislation and the follow-up of the EU’s trade policy instruments such as the anti-dumping regulation.¹²⁶ While the Working Party is not directly involved in international negotiations, its work is often linked with such negotiations, since free trade agreements usually include safeguard clauses that need to get a legislative follow-up in internal EU law.¹²⁷

Other Council preparatory groups deal with trade issues on a more specific or topical basis.¹²⁸ They include the geographical Working Parties responsible for bilateral relations with third countries (such as those on Transatlantic Relations, Eastern Europe and Central Asia, Asia-Oceania, Latin America, and Africa) as well as the Working Parties on the Generalized System of Preferences, Commodities, Development Cooperation, Dual-Use Goods, and Conventional Arms Exports and Arms Trade.¹²⁹

Council Working Parties generally report on their activities to the Committee of Permanent Representatives (Coreper).¹³⁰ Coreper is composed of the Permanent Representatives (Ambassadors) of the Member States to the EU.¹³¹ It is in charge of making

¹²¹ Matthew Baldwin, *EU Trade Politics — Heaven or Hell?*, 13 J. EUR. PUBL. POL’Y 926, 942 (2006).

¹²² COUNCIL OF THE EUROPEAN UNION, Agendas of Meetings, available at <http://www.consilium.europa.eu/documents/legislative-transparency/timetables-and-agendas/agendas-of-meetings> (last visited June 12, 2013).

¹²³ See, e.g., Council of the EU, Outcome of Proceedings of the Trade Policy Committee (Full Members) Meeting on 13 July 2012, 12594/12 (July 17, 2012).

¹²⁴ *Id.* at 3.

¹²⁵ Note from the General Secretariat of the Council, *supra* note 113, at 7.

¹²⁶ Swedish Presidency of the EU, *Working Party on Trade Questions (COMER)*, <http://register.consilium.europa.eu/pdf/en/12/st13/st13065.en12.pdf> (last updated Dec. 30, 2009). For the agenda of the Working Party on Trade Questions, see http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&ssf=DATE_DOCUMENT+DESC&fc=REGAISEN&srm=25&md=400&typ=Simple&cmsid=638&ff_COTE_DOCUMENT=&ff_TITRE=Working+Party+on+Trade+Questions&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&single_comparator=&single_date=&from_date=&to_date=.

¹²⁷ The adoption of such regulations implementing a bilateral safeguard clause of a particular trade agreement often takes many meetings. See Information Note, Council Secretariat to Working Party on Trade Questions, 9163/11 (April 14, 2011) (enumerating documents related to the regulation implementing the safeguard clause of the EU-Korea Free Trade Agreement).

¹²⁸ Note from the General Secretariat of the Council, *supra* note 113, at 7.

¹²⁹ *Id.*

¹³⁰ See TEU art. 16(7); TFEU art. 240(1); Council Rules of Procedure, *supra* note 112, art. 19(3).

¹³¹ In practice, Coreper appears in two Parts. Coreper Part II is composed of the Permanent Representatives (and deals with the preparation of the high-politics Council configurations such as the Foreign Affairs Council). Part I is composed of the Deputy Permanent Representatives (and deals with the preparation of the more technical Council configurations). See NUGENT, *supra* note 54, at 144; Jeffrey Lewis, *National Interests: the Committee of Permanent Representatives*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 316, 322.

the final preparations for the work of the various configurations of the Council of Ministers, and divides their agenda in A-items (on which a consensus has already been achieved in the Working Parties or in Coreper) and the B-items (on which further political discussion at ministerial level is needed).¹³²

2. Decision-making

As a general rule, the Council can take its decisions by a qualified majority, except where the Treaties provide otherwise.¹³³ Already in the Treaty of Rome establishing the EEC, it was foreseen that decision-making on CCP questions could take place by qualified majority voting.¹³⁴ This is also the principle under the CCP provisions of the Treaty of Lisbon.¹³⁵ Qualified majority voting functions as follows:¹³⁶ Each Member State receives a number of votes.¹³⁷ The allocation of votes is not based on objective criteria, but is the result of a purely political bargaining process that makes a rough distinction between the bigger, medium-sized, and smaller Member States.¹³⁸ Under the currently applicable rules, the qualified majority in the EU of 27 Member States is attained – and the decision is adopted – if three conditions are met:

- The qualified majority threshold of 255 out of 345 votes must be reached;¹³⁹
- At least a majority of the number of Member States must support the decision when it is made on a proposal from the Commission (as is the case for decisions in the CCP field);
- At the request of any member of the Council, a check will be made to ensure that the majority represents at least 62% of the EU population.¹⁴⁰

Qualified majority voting implies that one or more Member States may be put in the minority, without the possibility of blocking the decision from being taken.¹⁴¹ Once adopted, Member States opposing the decision are nevertheless bound by it.¹⁴² In practice, the Council will first

¹³² Council Rules of Procedure, *supra* note 112, arts. 3(6), 19(2).

¹³³ TEU art. 16(3).

¹³⁴ EEC Treaty art. 113.

¹³⁵ TFEU arts. 207(2), (4).

¹³⁶ See Devuyst, *supra* note 3, at 277-283 (for the history, rationale, and details on qualified majority voting before and after the Lisbon Treaty).

¹³⁷ See Protocol (No. 36) On Transitional Provisions, 2010 O.J. (C 115) 322, art. 3(3) [hereinafter Protocol 36] (detailing how the votes of member states are weighted).

¹³⁸ Matthias Sutter, *Fair Allocation and Re-Weighting of Votes and Voting Power in the EU before and after the Next Enlargement*, 12 J. THEORETICAL POL. 433, 448 (2000); Annick Laruelle & Mika Widgrén, *Is the Allocation of Voting Power Among EU States Fair?*, 94 PUB. CHOICE 317, 318 (1998).

¹³⁹ A voting calculator is available on the Council website. See CONSILIUM, <http://www.consilium.europa.eu/council/voting-calculator?lang=en&cmsid=1690> (last visited June 12, 2013).

¹⁴⁰ See Protocol 36 art. 3(3). As indicated in TEU art. 16(4), the qualified majority system will change in a fundamental manner as from Nov. 1, 2014. It will then require at least 55% of the members of the Council, representing at least 65% of the EU population. See Devuyst, *supra* note 3, at 280-283 (for a more detailed explanation).

¹⁴¹ This, of course, is the essence of any majority voting system.

¹⁴² Once adopted, the legal instruments used in the CPP, i.e. regulations and international agreements, are explicitly binding on all Member States. See TFEU art. 216(2).

strive for consensus and only move towards a vote in case consensus proves impossible.¹⁴³ Between July 2009 and July 2012, only two Member States (the United Kingdom and Denmark) have each once been placed in a minority position during a Council vote on an international trade question.¹⁴⁴

In a limited number of specific cases related to the conclusion of international agreements under the CCP, the Council is required to act by unanimity, meaning that the agreement cannot be adopted if a Member State votes against.¹⁴⁵ This applies for the adoption of:

- (1) International agreements in the fields of trade in services, the commercial aspects of intellectual property, and foreign direct investment that include provisions for which unanimity is required for the adoption of internal rules;¹⁴⁶
- (2) International agreements on trade in cultural and audiovisual services that risk prejudicing the EU's cultural and linguistic diversity;¹⁴⁷ and
- (3) International agreements on trade in social, educational, and health services that risk seriously disturbing the national organization of such services and prejudicing the responsibility of the Member States to deliver them.¹⁴⁸

The first exception is not specific to the CCP but is valid for international agreements in all EU domains.¹⁴⁹ It establishes a parallelism between the voting requirement on internal EU legislation and international agreements regarding the same content.¹⁵⁰ The concrete impact for the approval of international agreements in the CCP seems rather limited because most internal market measures (which is the internal side of the CCP) can be adopted by qualified majority voting.¹⁵¹ The second exception was a *conditio sine qua non* for France, supported

¹⁴³ See Jeffrey Lewis, *Council of Ministers and European Council*, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 321 at 322-324 (Erik Jones et al. eds., 2012); NUGENT, *supra* note 54, at 157 (both sources emphasize the Council's general preference for consensus over qualified majority voting); Hoffmeister, *supra* note 110, at 93; Stephen Woolcock, *The Treaty of Lisbon and the European Union as an Actor in International Trade*, ECIPE WORKING PAPER 8 (ECIPE Working Paper No. 01, 2010) (both sources underline the Council's preference for consensus in the specific CCP area).

¹⁴⁴ *Minority Trends on International Trade*, VOTEWATCH EUROPE (last visited June 12, 2013), <http://www.votewatch.eu/en/council-minority-votes-international-trade.html/#/23/18/2009-07-14/2013-01-01/INT>.

¹⁴⁵ See TFEU art. 207(4); See also LENAERTS & VAN NUFFEL, *supra* note 54, at 494, for the definition of unanimity in the EU. Abstentions do not prevent a decision from being adopted by unanimity.

¹⁴⁶ TFEU art. 207(4).

¹⁴⁷ TFEU art. 207(4)(a).

¹⁴⁸ TFEU art. 207(4)(b).

¹⁴⁹ The parallelism between the unanimity requirement in TFEU art. 207(4), on the one hand, and TFEU, art. 218(8), on the other hand, is not complete, however, because the latter requires unanimity "when the agreement covers a field for which unanimity is required for the adoption of a Union act" (emphasis added). This could be interpreted as requiring the coverage of a broad policy field. In TFEU, art. 207(4), unanimity applies "where such agreements include provisions for which unanimity is required for the adoption of internal rules" (emphasis added). This could be interpreted as requiring unanimity, even in case of a minor provision, even when the "centre of gravity" of an agreement is in another field. See Ricardo Passos & Stephan Marquardt, *International Agreements – Competences, Procedures and Judicial Control*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 875, 904 (Giuliano Amato et al. eds., 2007).

¹⁵⁰ Krajewski, *supra* note 49, at 306.

¹⁵¹ Marco Bronckers, *Common Commercial Policy*, in LISBON TREATY MEETING SUMMARIES, 46, 46 (Christa Tobler ed., 2008).

by Belgium, since they wanted to preserve their cultural and linguistic policies.¹⁵² The third exception was a request of Sweden, Finland, and France, to safeguard their national policies concerning social, educational, and health services.¹⁵³

The Treaties provide no guidance on how it must be established that a particular international trade agreement constitutes a *risk prejudicing* the EU's cultural and linguistic diversity and/or a *risk seriously disturbing* the national organization of social, educational and health services and *prejudicing* the responsibility of the Member States to deliver them.¹⁵⁴ It is safe to say, however, that (a) the burden of proof is on the side of the Member State invoking one of these exceptions;¹⁵⁵ and (b) the exceptions must be interpreted and applied strictly.¹⁵⁶ On their impact for the conclusion of international trade agreements, opinions are divided.¹⁵⁷ Professor Marco Bronckers argued that their effect would be limited because the EU is simply not expected to conclude agreements that would jeopardize the aforementioned public services and policies.¹⁵⁸ Professor Markus Krajewski, on the other hand, believes the Council might well conclude all agreements involving the above-mentioned services by unanimity to avoid interpretative uncertainties.¹⁵⁹ Such an outcome would, however, not be in conformity with the principle that exceptions must be applied strictly.¹⁶⁰

Because the Council is formally a single institution, any of its ten configurations can adopt decisions on all matters under the Council's competence, including on CCP issues.¹⁶¹ As such, every Council meeting has, in addition to those items effectively debated by the Ministers, a list of "other items" to be approved.¹⁶² This refers to the so-called A-points on the Council's agenda, i.e. issues that form the object of a consensus at the preparatory level of

¹⁵² During the European Convention resulting in the draft Treaty establishing a Constitution for Europe, amendments were submitted by French Minister of Foreign Affairs Dominique de Villepin, Proposition d'amendement à l'article III-212 [Proposed Amendment to Article III-212] (last visited June 12, 2013), <http://european-convention.eu.int/docs/Treaty/pdf/3/global3.pdf>; Pierre Lequiller, the President of the Committee for European Union Affairs in the French National Assembly, Proposition d'amendement à l'article III-212 [Proposed Amendment to Article III-212] (last visited June 12, 2013), <http://european-convention.eu.int/docs/Treaty/pdf/866/Art%20III%20212%20Lequiller%20FR.pdf>; and Belgian Minister of Foreign Affairs Louis Michel, Proposition d'amendement à l'article: 24 [Proposed Amendment to Article: 24] (last visited June 12, 2013), <http://european-convention.eu.int/docs/Treaty/pdf/866/Art%20III%20212%20Michel%20FR.pdf>, to safeguard the Member States' powers in these areas. See also *Bulletin Quotidien Europe*, 13 (Feb. 11, 2003) (on the French desire to safeguard its "cultural exception").

¹⁵³ See Arne Niemann, *The Common Commercial Policy: From Nice to Lisbon*, in *THE EU'S LISBON TREATY. INSTITUTIONAL CHOICES AND IMPLEMENTATION* 219 (Finn Laursen ed., 2012).

¹⁵⁴ See Krajewski, *supra* note 49, at 307 (emphasis added); Angelos Dimopoulos, *The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?*, 4 CROATIAN Y.B. EUR. L. & POL'Y 101, 125 (2008).

¹⁵⁵ Krajewski, *supra* note 49, at 307.

¹⁵⁶ It is settled case law of the European Court of Justice that provisions that are in the nature of exceptions to a principle must be interpreted strictly. See, e.g., Case T-529/09, *Sophie in 't Veld v. Council*, 2012 E.C.R. II-0000, ¶ 18 [hereinafter *Sophie in 't Veld's Case*].

¹⁵⁷ See *infra* notes 158-159 and the accompanying text.

¹⁵⁸ Bronckers, *supra* note 151, at 47.

¹⁵⁹ Krajewski, *supra* note 49, at 307-308. See also Dimopoulos, *supra* note 154, at 125 (for a similar interpretation).

¹⁶⁰ See *supra* note 156 and the accompanying text.

¹⁶¹ See generally TEU arts. 13, 16.

¹⁶² See Council Rules of Procedure, *supra* note 112, art. 3(6).

officials and diplomats and require no further discussion at ministerial level.¹⁶³ For instance, it was the Competitiveness Council – and not the Foreign Affairs configuration – that formally decided to repeal – in light of Russia’s admission to the WTO – an earlier regulation, which restricted imports of certain steel products from Russia.¹⁶⁴ A large number of Council meetings – in their different configurations – regularly have anti-dumping decisions on their agenda as A-points.¹⁶⁵

3. *Council Responsibilities in Trade Negotiations*

The Council of Ministers is the key decision-taker in EU trade policy.¹⁶⁶ This has been the case since the entry into force of the Treaty of Rome establishing the EEC in 1958.¹⁶⁷ According to the current EU Treaties, the Council’s main trade policy tasks include:

- Adopting – in co-decision with the European Parliament – regulations that contain the legal framework for implementing the CCP;¹⁶⁸
- Authorizing the opening of negotiations for international agreements with third countries or international organizations and adopting the negotiating directives;¹⁶⁹ and
- Adopting the decisions authorizing the signing of the agreement, its provisional application, and its conclusion (or ratification) on behalf of the EU.¹⁷⁰

The Treaty stipulates that the CCP must be conducted in the context of the general principles and objectives of the EU’s external action.¹⁷¹ In this context, it is useful to point out that in addition to its specific tasks under the CCP, the Council defines and implements the EU’s overall foreign policy on the basis of the general guidelines and strategic lines of the European Council.¹⁷² The Council of Ministers, together with the Commission, is also responsible for ensuring the consistency between the different areas of the EU’s external action.¹⁷³

¹⁶³ *Id.*

¹⁶⁴ Press Release, Council of the EU, 3169th Council Meeting Competitiveness (Internal Market, Industry, Research and Space) 24 (May 30-31, 2012) (on file with the author), *available at* <http://www.consilium.europa.eu/Newsroom>.

¹⁶⁵ See e.g., Press Release, Council of the EU, The 3182d Council Meeting Agriculture and Fisheries 19 (Jul. 16, 2012) (adopting an anti-dumping duty on imports of open mesh fabrics of glass fibers from Malaysia); Press Release, Council of the EU, The 3181st Council meeting Economic and Financial Affairs 20 (Jul. 10, 2012) (repealing anti-dumping measures on imports of plastic bags originating in China and Thailand); Press Release, Council of the EU, The 3180th Council Meeting General Affairs 15 (Jun. 26, 2012) (amending a regulation imposing an anti-dumping duty on imports of steel ropes and cables originating in China and Korea).

¹⁶⁶ Hoffmeister, *supra* note 110, at 93.

¹⁶⁷ See EEC Treaty arts. 111, 113.

¹⁶⁸ TFEU art. 207(2).

¹⁶⁹ TFEU art. 207(3).

¹⁷⁰ TFEU arts. 218(5), (6).

¹⁷¹ TFEU arts. 205, 207(1).

¹⁷² TEU art. 26(2).

¹⁷³ TEU art. 21(3).

D. The European Parliament

1. Composition and Organization

Since 1979, EU citizens are directly represented at Union level in the European Parliament.¹⁷⁴ Members of the European Parliament (MEPs) are elected for a term of five years by direct universal suffrage.¹⁷⁵ At this moment, Parliament counts 754 MEPs.¹⁷⁶ Most of them are affiliated with one of the transnational European Political Groups that structure the parliamentary debate.¹⁷⁷ The largest Groups are the European Peoples Party (i.e. the European Christian Democrats, with 271 MEPs), the Progressive Alliance of Socialists and Democrats (189 MEPs), the Alliance of Liberals and Democrats for Europe (86 MEPs), the Greens/European Free Alliance (59 MEPs), and the European Conservatives and Reformists (52 MEPs).¹⁷⁸ In Strasbourg, the MEPs attend twelve one-week plenary sittings per year.¹⁷⁹ In Brussels, they participate in meetings of the parliamentary Committees and Political Groups, and additional plenary sittings.¹⁸⁰

Parliament's Committee on International Trade (INTA) prepares the positions and decisions on the negotiation and conclusion of trade agreements for adoption in plenary session.¹⁸¹ INTA has overall responsibility for matters relating to the establishment and implementation of the Union's CCP and its external economic relations.¹⁸² Reflecting the makeup of Parliament as a whole, Committees are composed of a more limited number of MEPs who specialize in a particular subject.¹⁸³ As such, INTA has the possibility to enter into in-depth discussions that would not be possible in plenary session.¹⁸⁴ With 31 members and 31 substitute members, INTA is one of Parliament's smaller Committees.¹⁸⁵ During the current parliamentary term, its Chair is Professor Vital Moreira, who is member of the Progressive Alliance of Socialists and Democrats and former Judge of the Portuguese

¹⁷⁴ See TEU art. 10(2). For a general introduction to the European Parliament, see CRAIG & DE BURCA, *supra* note 54, at 51-57; LENAERTS & VAN NUFFEL, *supra* note 54, at 452-473; NUGENT, *supra* note 54, at 179-206; Michael Shackleton, *The European Parliament*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 124-147.

¹⁷⁵ See TEU art. 14(3).

¹⁷⁶ European Parliament, MEPs By Member State and Political Group, <http://www.europarl.europa.eu/meps/en/search.html> (last visited Mar 19, 2013).

¹⁷⁷ See TEU art. 10(4); European Parliament, Rules of Procedure, 7th parliamentary term, Mar. 2011, 2011 O.J. (L 116) 1, [hereinafter EP Rules of Procedure], r. 30-34; NUGENT, *supra* note 54, at 193-198; Tapio Raunio, *Political Interests: the European Parliament's Party Groups*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 338-358.

¹⁷⁸ European Parliament, MEPs By Member State and Political Group, <http://www.europarl.europa.eu/meps/en/search.html> (last visited Mar. 19, 2013).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ EP Rules of Procedure, *supra* note 177, r. 90, Annex VII (III).

¹⁸² *Id.*

¹⁸³ *Id.* r. 186.

¹⁸⁴ EP Rules of Procedure, *supra* note 177, r. 186; <http://www.europarl.europa.eu/committees/en/inta/draft-agendas.html#menuzone> (for the draft agenda of the INTA meetings).

¹⁸⁵ European Parliament, International Trade – Members, <http://www.europarl.europa.eu/committees/en/inta/members.html#menuzone> (last visited Mar. 19, 2013).

Constitutional Court.¹⁸⁶ INTA holds monthly meetings, most of which take one day and a half.¹⁸⁷ Meetings take place in public, with the exception of the *in-camera* briefings by the Commission on ongoing trade negotiations.¹⁸⁸

2. Decision-making

Since the entry into force of the Lisbon Treaty, Parliament's consent is required before the Council of Ministers is able to conclude international agreements covering CCP issues.¹⁸⁹ Parliament's Rules of Procedure prescribe that – once an agreement reaches the plenary and has been discussed on the basis of a report prepared in the responsible Committee – consent is given in a single vote by a majority of the votes cast.¹⁹⁰ No amendments to the text of the agreement are admissible.¹⁹¹

3. European Parliament Responsibilities in Trade Negotiations

Until the entry into force of the Lisbon Treaty, Parliament's formal role in the making of international trade agreements was nil.¹⁹² Neither the EEC's founding Treaty of Rome, nor the subsequent EU Treaties, prescribed the consultation of Parliament before the conclusion of international agreements under the CCP.¹⁹³ A sea change occurred with the entry into force of the Treaty of Lisbon.¹⁹⁴ The currently applicable legal situation is set out in Article 207 TFEU (that is specifically devoted to the CCP) and must be read in conjunction with Article 218 TFEU (that details the EU's wide-ranging procedures for the negotiation and conclusion of international agreements in general).¹⁹⁵ Together, these two Articles include three important references on Parliament's role in the CCP:

¹⁸⁶ European Parliament, Vital Moreira, http://www.europarl.europa.eu/meps/en/96930/Vital_MOREIRA.html.

¹⁸⁷ See <http://www.europarl.europa.eu/committees/en/inta/draft-agendas.html#menuzone> (for the draft agenda of the INTA meetings), *supra* note 184.

¹⁸⁸ *European Parliament: Committees*, THE COMMITTEE ON INTERNATIONAL TRADE NEWS LETTER, <http://www.europarl.europa.eu/committees/en/inta/home.html>.

¹⁸⁹ See *infra* notes 198-205, and the accompanying text.

¹⁹⁰ EP Rules of Procedure, *supra* note 177, r. 90(7).

¹⁹¹ *Id.*

¹⁹² EEC Treaty art. 113(3).

¹⁹³ On the absence of Parliament in the formal process of concluding trade agreements before the Lisbon Treaty, see M. Quintin, *Participation de l'Assemblée parlementaire européenne au déroulement de la procédure de négociation des accords commerciaux*, 11 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 211 (1975); Marc Maresceau, *The Concept "Common Commercial Policy" and the Difficult Road to Maastricht*, in THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 9 (Marc Maresceau ed., 1993); Catherine Flaesch-Mougin, *Le traité de Maastricht et les compétences externes de la Communauté européenne*, 29 CAHIERS DE DROIT EUROPÉEN 383 (1993); Isabelle Bosse-Platière, *Le Parlement européen et les relations extérieures de la Communauté européenne après le Traité de Nice*, 38 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 527 (2002).

¹⁹⁴ Bungenberg, *supra* note 49, at 129-130; CRAIG, *supra* note 9, at 390; EECKHOUT *supra* note 42, at 202-205; Krajewski, *supra* note 49, at 308-309.

¹⁹⁵ TFEU art. 207(3) stipulates that where agreements with one or more third countries or international organisations need to be negotiated and concluded that cover CCP matters, Article 218 shall apply, subject to the special provisions of Article 207.

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

- *The ordinary legislative procedure applies:* Article 207(2) TFEU stipulates that CCP legislation must be adopted in accordance with the ordinary legislative procedure, thus guaranteeing Parliament's right of co-decision.¹⁹⁶ This is in contrast with the pre-Lisbon Treaty era, when CCP legislation was adopted by the Council without Parliament's involvement;¹⁹⁷
- *The consent procedure:* Article 218(6)(a) TFEU makes Parliament's consent obligatory for most important international agreements.¹⁹⁸ Since the entry into force of the Lisbon Treaty, consent is also required for agreements covering fields to which the ordinary legislative procedure applies, thus including agreements under the CCP.¹⁹⁹ As stated above, agreements subject to consent need Parliament's approval (in the form of a simple "yes" or "no" vote) before the Council can take the decision to conclude (or ratify) it.²⁰⁰ Some scholars have argued that Parliament's consent would be required only for those agreements under the CCP needing implementation in EU internal law through the ordinary legislative procedure.²⁰¹ There is, however, no such requirement in the Lisbon Treaty.²⁰² Parliament's Committee on International Trade has correctly concluded that consent is mandatory "as a general rule for all agreements concluded pursuant to the CCP, whether implementing measures are required or not."²⁰³ The Commission has confirmed this reading.²⁰⁴ This is a formal reversal of the Maastricht Treaty's provision explicitly excluding agreements under the CCP, not only from the assent procedure, but also from the non-binding consultation procedure.²⁰⁵

¹⁹⁶ TFEU art. 207(2). The ordinary legislative procedure is defined in TFEU, art. 294. The bottom line of this procedure is that an act must be adopted, on proposal of the European Commission, by the European Parliament, and the Council of Ministers, i.e. Parliament and Council must agree on joint text that they both approve.

¹⁹⁷ See TEC after Nice art. 133(2).

¹⁹⁸ TFEU art. 218(6) stipulates that the Council shall adopt the decision concluding an international agreement after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organizing cooperation procedures; (iv) agreements with important budgetary implications for the Union; and (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. For other international agreements, Parliament must simply be consulted before the conclusion. There is one exception: where agreements relate exclusively to the CFSP, neither consent nor consultation is required.

¹⁹⁹ TFEU art. 218(6)(a)(v).

²⁰⁰ EP Rules of Procedure, *supra* note 177, r. 90(7), 90(9).

²⁰¹ Krajewski, *supra* note 49, at 309-310.

²⁰² TFEU art. 218(6)(a)(v). See also EECKHOUT, *supra* note 42, at 203-204; Dimopoulos, *supra* note 154, at 126-127.

²⁰³ *Opinion of the Committee on International Trade on the Treaty of Lisbon* [hereinafter INTA Opinion on Lisbon Treaty], in European Parliament, Committee on Constitutional Affairs, Report by Richard Corbett & Iñigo Méndez de Vigo on the Treaty of Lisbon, Jan. 29, 2008, A6-0013/2008, at 84, ¶ 3(f).

²⁰⁴ Hearing of Karel De Gucht, Commissioner-designate Trade, EUR. PARL. DOC. PV0112_1 (2010), [hereinafter EP Hearing De Gucht], available at [http://www.europarl.europa.eu/RegData/commissions/inta/proces_verbal/2010/01-12/INTA_PV\(2010\)01-12-1_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/inta/proces_verbal/2010/01-12/INTA_PV(2010)01-12-1_EN.pdf)

²⁰⁵ TEC after Nice art. 300(3).

- *The duty to inform Parliament:* Article 218(10) TFEU holds that “the European Parliament shall be immediately and fully informed at all stages of the procedure for the negotiation of international agreements.”²⁰⁶ For agreements under the CCP, Article 207(3) TFEU reinforces this requirement by underlining that the Commission shall report regularly to Parliament during the negotiations.²⁰⁷ This comes in addition to the Commission’s duty to inform the Member States in the framework of the Council’s Trade Policy Committee.²⁰⁸ Before the Lisbon Treaty, Parliament was also informed on ongoing trade negotiations, but this was the result of voluntary commitments by the Council and Commission.²⁰⁹ The Lisbon Treaty for the first time makes the flow of information to Parliament an obligation anchored in the EU’s primary law.²¹⁰

The Lisbon breakthrough can only be understood against the background of the European Convention of 2002-2003 that prepared the failed Treaty establishing a Constitution for Europe.²¹¹ While previous EU Treaties were negotiated in secret, among diplomats and Heads of State or Government, the Constitutional Treaty (the substance of which was later carried over into the Lisbon Treaty) was prepared in an open Convention.²¹² In addition to representatives of the Heads of State or Government, it was composed of representatives of the national parliaments, the European Parliament, and the European Commission, which stimulated a real exchange of views on CCP reform.²¹³ In the Convention’s Working Group on the Union’s legal personality, a large majority of the members argued that the European Parliament should no longer be denied a role in the approval of commercial agreements.²¹⁴ The Group prudently concluded in favor of extending the consultation procedure to international agreements under the CCP.²¹⁵ Within the Convention’s Working Group on the EU’s external action, several members pleaded to go beyond consultation and in favor of Parliament’s consent on international trade agreements.²¹⁶ In the subsequent stages of the

²⁰⁶ TFEU art. 218(10).

²⁰⁷ TFEU art. 207(3).

²⁰⁸ *Id.*

²⁰⁹ On these commitments, see I. MACLEOD, I.D. HENDRY & STEPHEN HYETT, *THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES* 98-100 (1996); Riccardo Passos, *Mixed Agreements from the Perspective of the European Parliament*, in *MIXED AGREEMENTS REVISITED*, *supra* note 45, at 273-277; Aline De Walsche, *La procédure de conclusion des accords internationaux*, in *COMMENTAIRE J. MÉGRET. LE DROIT DE LA CE ET DE L’UNION EUROPÉENNE. VOL. 12: RELATIONS EXTÉRIEURES* 98-106 (Jean-Victor Louis & Marianne Dony eds., 2d ed. 2005).

²¹⁰ TFEU arts. 207(3), 218(10).

²¹¹ Youri Devuyt, *The Constitutional and Lisbon Treaties*, in *THE OXFORD HANDBOOK OF THE EUROPEAN UNION* 163-166 (Erik Jones et al. eds., 2012) (for a brief introduction). See also PETER NORMAN, *THE ACCIDENTAL CONSTITUTION. THE MAKING OF EUROPE’S CONSTITUTIONAL TREATY* (2005); GUY MILTON & JACQUES KELLER-NOËLLET WITH AGNIESZKA BARTOL-SAUREL, *THE EUROPEAN CONSTITUTION: ITS ORIGINS, NEGOTIATION AND MEANING* (2005) (for book-length accounts on the Convention).

²¹² Devuyt, *supra* note 211, at 163-164, 172.

²¹³ Niemann, *supra* note 153, at 214-216.

²¹⁴ Chairman of Working Group III on Legal Personality, *Final Rep. of Chairman of Working Group III on Legal Personality to Members of the European Convention*, CONV 305/02 ¶ 45 (Oct. 1, 2002) [hereinafter CONV 305/02].

²¹⁵ *Id.* ¶ 47 at B.9.

²¹⁶ Report from Working Group VII on “External Action” to Members of the European Convention, CONV 459/02, ¶¶ 61, 62 (Dec. 16, 2002).

Convention, this demand became more pronounced. Prominent Convention members – including its Vice-President Giuliano Amato, Elmar Brok (joined by many Convention members of the European Peoples Party), Andrew Duff (joined by many Liberal members), and Linda McAvan and Helle Thorning-Schmidt (joined by several Socialist members) – submitted amendments in this sense.²¹⁷ The European Commission was on the same line.²¹⁸ This resulted in Articles III-315 and III-325 of the Treaty establishing a Constitution for Europe, which, from a substantive point of view, are identical to the currently applicable Articles 207 and 218 TFEU.²¹⁹ The implementation of these new powers by the European Parliament since the entry into force of the Lisbon Treaty will be discussed in Section IV below.

E. The Court of Justice of the European Union

1. Composition and Organization

The Court of Justice of the European Union, based in Luxembourg, is responsible for ensuring that in the interpretation and application of the EU Treaties, the law is observed.²²⁰ It has a three-layered structure.²²¹ The first and highest layer consists of the Court of Justice in the strict sense.²²² It is composed of one Judge from each Member State, but conducts most of its work in chambers of three or five Judges.²²³ In exceptional cases, such as Opinions on international agreements before their conclusion, it may decide to sit in a Grand Chamber of 15 Judges or in full Court.²²⁴ The Court is assisted by nine Advocates-General who have the independent task of making reasoned submissions on the cases before them that

²¹⁷ *Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, Part III of the Constitution, Chapter III – Common Commercial Policy*, THE EUROPEAN CONVENTION (last updated Jul. 28, 2003), <http://european-convention.eu.int/EN/amendments/amendments3dd9.html?content=866&lang=EN>; *Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, Part III of the Constitution, Chapter VI – International Agreements* THE EUROPEAN CONVENTION (last updated Jul. 28, 2003), <http://european-convention.eu.int/EN/amendments/amendmentsec9f.html?content=872&lang=EN>.

²¹⁸ Lamy, *supra* note 8, at 7.

²¹⁹ Treaty Establishing a Constitution for Europe, arts. III (315), III (325), Oct. 29, 2004, 2004 O.J. (C 310) 142, 146.. This Treaty was signed by the Governments of all EU Member States, but failed to enter into force because of the negative referendum results in France and the Netherlands.

²²⁰ TEU art. 19(1). For a general introduction to the Court of Justice of the EU, see CRAIG & DE BURCA, *supra* note 54, at 58-66; LENAERTS & VAN NUFFEL, *supra* note 54, at 523-538; P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 125-175 (10th ed., 2010); NUGENT, *supra* note 54, at 214-225; Niamh Nic Shuibhne, *The Court of Justice of the European Union*, in THE INSTITUTIONS OF THE EUROPEAN UNION, *supra* note 54, at 148-172.

²²¹ *Id.*

²²² *Id.*; TFEU arts. 251-253.

²²³ TFEU art. 251; Protocol No. 3 on the Statute of the Court of Justice of the European Union [hereinafter Statute of the Court], 2010 O.J. (C 83) 210, art. 16; Rules of Procedure of the Court of Justice [hereinafter Court Rules of Procedure], 2012 O.J. (L 265) 1, art. 28.

²²⁴ Statute of the Court, *supra* note 223, art. 16; Court Rules of Procedure, *supra* note 223, art. 27. See Opinion 1/08, 2009 E.C.R. I-11129, *supra* note 44 (for an example of a Grand Chamber procedure); Opinion 1/03, 2006 E.C.R. I-01145 (for an example of a Full Court procedure).

do not bind the Court.²²⁵ In summary format, the Court of Justice has jurisdiction for: (a) preliminary rulings on the interpretation or validity of EU law, following a request for such a ruling by a national court or tribunal; (b) actions brought by an EU institution against an act (or for failure to act) by the European Parliament, the Council, the Commission, or the European Central Bank; (c) actions brought by a Member State against an act (or for failure to act) by the European Parliament and the Council (except Council acts of an executive nature, i.e. measures in respect of State aid, dumping, and implementing powers), and against an act (or for failure to act) by the Commission in case of enhanced cooperation; (d) appeal cases against judgments of the General Court; and (e) Opinions on the compatibility of envisioned international agreements with the EU Treaties before their conclusion.²²⁶

The second layer is called the General Court.²²⁷ It is composed of at least one Judge per Member State and also conducts its work in chambers.²²⁸ The General Court has jurisdiction to hear and determine at first instance: (a) actions brought by natural and legal persons against EU institutions, bodies, agencies and offices; and (b) actions brought by Member States against all acts (or failures to act) by the Commission (with the exception of acts related to enhanced cooperation), against Council acts (or failures to act) of an executive nature, and against acts (or failures to act) by any other EU body, office, or agency.²²⁹ Decisions given by the General Court are subject to a right of appeal to the Court of Justice on points of law only.²³⁰ The General Court also has jurisdiction to hear and determine appeal actions against decisions of the specialized courts.²³¹

The third layer consists of specialized courts that hear and determine at first instance certain specific classes of action.²³² The first and only of such specialized Courts thus far – the European Union Civil Service Tribunal – was established in 2004 to deal with litigation between the EU institutions and their officials.²³³ It is obviously not involved in cases related to the negotiation and conclusion of international trade agreements.²³⁴

The Judges of the Court of Justice, the General Court and the Civil Service Tribunal, as well as the Advocates-General, are appointed by common accord of the Governments of the Member States for a term of six years.²³⁵ The two Courts and the Tribunal each elect a

²²⁵ Council Decision 2013/336, 2013 O.J. (L 179) 92, art. 1 (EU). The number of Advocates-General shall be increased to eleven, with effect from October 2015.

²²⁶ TFEU arts. 218(11), 256; Statute of the Court, *supra* note 223, art. 51. See LENAERTS & VAN NUFFEL, *supra* note 54, at 533 (for a good summary).

²²⁷ TEU art. 19(1); TFEU arts. 254, 256.

²²⁸ TEU art. 19(2); TFEU art. 254; Statute of the Court, *supra* note 223, art. 50.

²²⁹ TFEU art. 256(1); Statute of the Court, *supra* note 223, art. 51. See LENAERTS & VAN NUFFEL, *supra* note 54, at 533; MATHIJSEN, *supra* note 220, at 167-168 (for more comprehensive summaries).

²³⁰ TFEU art. 256(1).

²³¹ TFEU art. 256(2).

²³² TEU art. 19(1); TFEU art. 257.

²³³ Council Decision 2004/752, establishing the European Union Civil Service Tribunal, art. 1, 2004 O.J. (L 333) 7 (EC, Euratom); Statute of the Court, *supra* note 223, Annex I.

²³⁴ See Statute of the Court, *supra* note 223, Annex I, art. 1.

²³⁵ TFEU arts. 253-255; Statute of the Court, *supra* note 223, Annex I, arts. 2-3 (Before the Member States make the appointment, a specialised panel of seven former Judges, members of national supreme courts, and high-level lawyers provides an opinion on candidates' suitability to perform the duties of Judge and Advocate-General).

President for a term of three years, who may be re-appointed.²³⁶ Every three years, the membership of both Courts is partially renewed.²³⁷ Retiring Judges and Advocates-General may be reappointed.²³⁸

2. *Decision-making*

The procedure before the Court consists of two parts: written and oral.²³⁹ The written procedure involves the communication to the parties of applications, statements, defenses, and of the replies.²⁴⁰ The oral procedure includes the hearing by the Court of agents, advisers, lawyers, and experts.²⁴¹

The deliberations of the Court are in closed session.²⁴² In the drafting of a judgment, the key role is performed by the Judge-Rapporteur who is designated by the President as soon as an application initiating proceedings has been lodged.²⁴³ Every Judge taking part in the deliberations gets the opportunity to state his or her opinion and the reasons for it.²⁴⁴ The conclusions reached by the majority of the Judges after final discussion determine the decision of the Court.²⁴⁵ This may require voting.²⁴⁶

The Statute emphasizes that the “deliberations of the Court of Justice shall be and shall remain secret”, implying that the position of the Judges taking part in the deliberations is not made public.²⁴⁷ Judgments state the reasons on which they are based and contain the names of the Judges who took part in the deliberations, but there is no possibility to publish dissenting or separate opinions.²⁴⁸

3. *Court of Justice Responsibilities in Trade Negotiations*

With respect to international trade agreements, judicial review by the Court can be either *ex ante* or *ex post*.²⁴⁹ *Ex ante* review takes the form of an Opinion from the Court of Justice as to whether an agreement envisaged is compatible with the EU Treaties.²⁵⁰ Any Member State, the European Parliament, the Council, or the Commission can request such an Opinion.²⁵¹ Where the Opinion of the Court is adverse, the agreement envisaged may not be

²³⁶ TFEU arts. 253-254; Statute of the Court, *supra* note 223, Annex I, art. 4(1).

²³⁷ TFEU arts. 253-254.

²³⁸ TFEU arts. 253-254; Statute of the Court, *supra* note 223, Annex I, art. 2.

²³⁹ Statute of the Court, *supra* note 223, art. 20; Court Rules of Procedure, *supra* note 223, arts. 53-92.

²⁴⁰ Court Rules of Procedure, *supra* note 223, arts. 43-54.

²⁴¹ *Id.* arts. 57-58.

²⁴² *Id.* art. 32(1).

²⁴³ *Id.* art. 13.

²⁴⁴ *See id.* art. 32(3).

²⁴⁵ *See id.* art. 32(4).

²⁴⁶ *See id.*

²⁴⁷ Statute of the Court, *supra* note 223, art. 35.

²⁴⁸ *Id.* art. 36.

²⁴⁹ CONV 305/02, *supra* note 214 ¶ 44.

²⁵⁰ TFEU art. 218(11); LENAERTS & VAN NUFFEL, *supra* note 54, at 1038-1039.

²⁵¹ TFEU art. 218(11).

concluded unless it is brought in line with the EU Treaties.²⁵² Over the years, the Court has been asked to deliver numerous Opinions on envisaged international agreements.²⁵³ The Court's Rules of Procedure specify that a request for an Opinion may also relate to whether the European Union or any institution of the European Union has the power to enter into that agreement.²⁵⁴ In practice, Opinions have, indeed, served mainly to clarify the division of competences between the EU and its Member States in the conclusion of a specific agreement.²⁵⁵ The Court has rightly been criticized for failing to give the political actors coherent legal guidance in such matters.²⁵⁶ As Professors Takis Tridimas and Piet Eeckhout have correctly concluded, although the Court "has made broad statements of principle, it has been singularly reluctant to draw from them what may seem to be their logical consequences."²⁵⁷

Judicial review *ex ante*, following the conclusion of an international agreement, can either take the form of a preliminary ruling upon the request of a court or tribunal of a Member State or of a review of its legality.²⁵⁸ A review of the legality of the act concluding an international agreement can be brought by a Member State, the European Parliament, the Council, or the Commission "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule relating to their application, or misuse of powers."²⁵⁹ The subject for such action will be the EU act that sought to conclude the agreement, not the agreement itself.²⁶⁰ If the legality review leads the Court to annul the EU act, for instance because it should have been adopted by the Council and not merely by the Commission, the EU is not released from its international obligations towards third parties.²⁶¹

²⁵² *Id.*

²⁵³ Cremona, *supra* note 42, at 219-26 (for a solid overview of the Court's case law on external competence, as developed through a series of Opinions).

²⁵⁴ Court Rules of Procedure, *supra* note 223, art. 196(2).

²⁵⁵ Cremona, *supra* note 42, at 219-26.

²⁵⁶ See PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 85 (2006) ("[T]here is something deeply troubling about the lack of clarity and consistency of the line of reasoning followed [by the Court in the landmark case on implied external powers]."). See also David L. Scannell, *Trespassing on Sacred Ground: The Implied External Competence of the European Community*, 4 CAMBRIDGE Y.B. EUR. L. STUD. 343, 345 (2001) ("[T]he language employed by the Court . . . has not been conducive to legal certainty."). In the specific field of the CCP, justified criticism of the Court has focussed mainly on Opinion 1/94, [1994], E.C.R., I-5267, that concerned the scope of the CCP in light of the conclusion of the Uruguay Round of multilateral trade negotiations. See ECKHOUT, *supra* note 42, at 27-34. See generally Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession*, 32 COMMON MKT. L. REV. 763 (1995). See also Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?*, 6 EUR. J. INT'L L. 245 (1995); Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 COMMON MKT. L. REV. 387 (1999).

²⁵⁷ Takis Tridimas & Piet Eeckhout, *The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism*, 14 Y.B. EUR. L. 143, 172 (1994).

²⁵⁸ See TFEU, arts. 267, 263; CONV 305/02, *supra* note 214 ¶ 44; LENAERTS & VAN NUFFEL, *supra* note 54, at 872-873.

²⁵⁹ TFEU art. 263.

²⁶⁰ CONV 305/02, *supra* note 214 ¶ 42; LENAERTS & VAN NUFFEL, *supra* note 54, at 873.

²⁶¹ See Case C-327/91 *France v Comm'n*, 1994 E.C.R. I-3641, ¶¶ 14-16; LENAERTS & VAN NUFFEL, *supra* note 54, at 873.

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

Before the Court, individuals can successfully invoke a provision of a specific international agreement only if this provision has direct effect.²⁶² The Court will assess the “wording and the purpose and nature of the agreement” and conclude on that basis whether “the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.”²⁶³ It must be noted that the Court has excluded direct effect of the WTO Agreement.²⁶⁴ It will review the legality of a Union act against the EU’s obligations under the WTO only (a) where the EU intended to implement a specific WTO rule; and (b) where the EU act expressly refers to a WTO obligation.²⁶⁵

IV. EU PRACTICE IN THE CONDUCT OF TRADE NEGOTIATIONS

The introduction to the EU’s institutional framework in Section III presently allows for a more in-depth discussion of the EU’s conduct in the various stages of the making of an international trade agreement.

A. Requesting the Opening of Negotiations

In accordance with the Community method, the European Commission is formally in charge of requesting authorization to start international trade negotiations.²⁶⁶ When it wants to initiate a negotiation, the Commission is obliged to address the necessary recommendations to the Council of Ministers.²⁶⁷ Without such Commission recommendations, the Council is unable to authorize the opening of negotiations.²⁶⁸

Since the EU’s political institutions are in regular contact about plans for future trade agreements, requests to initiate negotiations do not come as a surprise to the Council.²⁶⁹ Furthermore, before submitting formal recommendations to open negotiations, the Commission will hold a public consultation, conduct an impact assessment, and engage in an informal exploratory dialogue with the third country concerned to identify areas where interests might converge.²⁷⁰

²⁶² LENAERTS & VAN NUFFEL, *supra* note 54, at 864; Marc Maresceau, *Bilateral Agreements concluded by the European Community*, in 309 RECUEIL DES COURS 2004, 125, 262-267 (Hague Acad. of Int’l Law, 2006).

²⁶³ See Case 12/86, *Demirel v. Gmund*, 1987 E.C.R. 3719, para. 14; LENAERTS & VAN NUFFEL, *supra* note 54, at 864.

²⁶⁴ See Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395, ¶¶ 34-52; CRAIG & DE BURCA, *supra* note 54, at 344-350; LENAERTS & VAN NUFFEL, *supra* note 54, at 869-870; Maresceau, *supra* note 262, at 255-262.

²⁶⁵ See CRAIG & DE BURCA, *supra* note 54, at 346; LENAERTS & VAN NUFFEL, *supra* note 54, at 870-871.

²⁶⁶ TFEU, *supra* note 9, art. 207(3).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See European Commission, Factsheet: Trade Negotiations Step by Step 3 (June 2012) [*hereinafter* Trade Negotiations Step by Step] available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf.

²⁷⁰ *Id.*; ECKHOUT, *supra* note 42, at 195; LENAERTS & VAN NUFFEL, *supra* note 54, at 1027.

B. Authorizing the Start of Negotiations

The Council's responsibility to authorize the opening of the negotiations goes hand in hand with its duties to establish negotiating directives and nominate the negotiator.²⁷¹

1. Establishing the Negotiating Directives

The Treaty stipulates that the "Council may address directives to the negotiator."²⁷² They set out the general objectives to be achieved and constitute the Commission's substantive guidelines during the negotiations.²⁷³ Negotiating directives are not legally binding.²⁷⁴ In practice, the Commission presents draft directives to the Council when it submits recommendations to start negotiations.²⁷⁵ Following discussion in the Trade Policy Committee, the Council may approve the directives as proposed or modify their content.²⁷⁶ According to Ambassador Hugo Paemen, the Commission's Chief Negotiator during the Uruguay Round, obtaining negotiating directives that are representative of the common interest is not always evident because the "uppermost concern" of the Member States "is to look after their national interests, in the narrow sense of the term":

Inevitably, [Commission] proposals [for negotiating directives] intended to reflect the collective position – i.e. the Community interest – are amended to take account of disparate national views until, in many cases, all that is left is the "lowest common denominator."²⁷⁷

The European Parliament is not formally involved in the approval of the negotiating directives.²⁷⁸ As is clear from the opinion of Parliament's Committee on International Trade on the Lisbon Treaty cited below, it considers this lack of formal parliamentary involvement in the drafting of the negotiating directives as one of the Treaty's main shortcomings:

[INTA e]xpressly depreciates the fact that the Treaty of Lisbon does not provide Parliament with the right to approve the mandate of the Commission to negotiate a trade agreement and stresses the imbalance – regarding the role and powers of Parliament – between the internal and the external competence in the areas of the CCP.²⁷⁹

²⁷¹ TFEU art. 218(2).

²⁷² *Id.* art. 218(4).

²⁷³ Trade Negotiations Step by Step, *supra* note 269, at 3; EECKHOUT, *supra* note 42, at 197; CRAIG & DE BURCA, *supra* note 54, at 333.

²⁷⁴ *Contra* TFEU art. 288; EECKHOUT, *supra* note 42, at 197.

²⁷⁵ EECKHOUT, *supra* note 42, at 197.

²⁷⁶ *Id.*; WOOLCOCK, *supra* note 119, at 54.

²⁷⁷ HUGO PAEMEN & ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 95 (1995).

²⁷⁸ EECKHOUT, *supra* note 42, at 199; WOOLCOCK, *supra* note 119, at 54.

²⁷⁹ INTA Opinion on Lisbon Treaty, *supra* note 203, ¶ 5.

Already in 1982, Parliament declared that it should have the formal right to deliver an opinion on the negotiating directives.²⁸⁰ Should the Council not be prepared to bring the directives into line with its opinion, Parliament envisaged the opening of a conciliation procedure.²⁸¹ During the European Convention of 2002-2003, the three main political groups (European People's Party, Socialists and Liberals), as well as the Belgian national group, all submitted amendments proposing a compulsory consultation of the European Parliament before the Council would be able to authorize the start of negotiations.²⁸² Some Convention members wanted to go beyond this and tabled an amendment whereby the Commission would negotiate "within the framework of such directives as the Council and European Parliament may issue to it."²⁸³

While these Convention proposals failed, Parliament used the negotiation of the post-Lisbon Framework Agreement between Parliament and Commission of 2010 "as an instrument for the incremental change of the living constitution with a view to ... enhancing its role in international relations."²⁸⁴ Parliament successfully inserted in the Framework Agreement that "when the Commission proposes draft negotiating directives with a view to their adoption by the Council, it shall at the same time present them to Parliament."²⁸⁵ Furthermore, the Commission's information must "be provided to Parliament in sufficient time for it to be able to express its point of view and for the Commission to be able to take Parliament's views as far as possible into account."²⁸⁶ The Council reacted negatively to the Framework Agreement's "parliamentarisation through the backdoor," declaring it had "the effect of modifying the institutional balance set out in the Treaties in force."²⁸⁷

Parliament reminded Commission and Council on several occasions that its views have to be taken into consideration from the moment of deciding on the negotiating directives.²⁸⁸ For example, in its resolution of April 11, 2011, on the EU's international investment policy, Commission and Member States were urged to take Parliament's position fully into account before negotiations on future EU investment agreements would be initiated.²⁸⁹ Explicitly recalling the terms of the Framework Agreement, Parliament

²⁸⁰ See Resolution on the role of the European Parliament in the Negotiation and Ratification of Treaties of Accession and of other Treaties and Agreements between the European Community and Third Countries, 1982 O.J. (C 66) 68,69, ¶. I.A.III.

²⁸¹ *Id.*

²⁸² See Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, Chapter VI, *supra* note 217; See also Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, Chapter III *supra* note 217.

²⁸³ European Convention on Suggestion for Amendment of Article: III-222, available at <http://european-convention.eu.int/docs/treaty/pdf/872/Art%20III%20222%20Voggenhuber%20EN.pdf>

²⁸⁴ Daniel Thyme, *Parliamentary Involvement in European International Relations*, EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS 201, 206 (Marise Cremona & Bruno de Witte eds., 2008).

²⁸⁵ Framework Agreement, European Parliament – European Comm'n, 2010, O.J. (L 304) 61 [*hereinafter* Framework Agreement 2010].

²⁸⁶ *Id.* at 50.

²⁸⁷ Press Release, Council of the European Union, Council Statement on Relations Between the European Parliament and the Commission (Oct. 21, 2010). See also Andreas Maurer et al, *Interinstitutional Agreements in CFSP: Parliamentarisation Through the Backdoor*, 10 EUR. FOREIGN AFF. REV. 175 (2005).

²⁸⁸ See Resolution on New Trade Policy for Europe Under the Europe 2020 Strategy, EUR. PARL. DOC. P7_TA 0412 (Sept. 27, 2011).

²⁸⁹ Resolution on the Future European International Investment Policy, EUR. PARL. DOC. P7_TA 0141 (Apr. 6, 2011).

summoned “the Commission to consult Parliament on draft negotiating mandates in good time to enable it to state its position, which must, in turn be properly taken into account by the Commission and the Council.”²⁹⁰ Parliament’s rapporteur even held the view “that the Commission should not submit its draft negotiating mandate to the Council until the EP has adopted its resolution.”²⁹¹

In a related move, Parliament inserted into its Rules of Procedure that it may ask the Council not to authorize the opening of negotiations until it has stated its position on the proposed negotiating mandate on the basis of a report from the Committee responsible.²⁹² It applied this Rule on June 13, 2012, when adopting a resolution on the possible start of negotiations for a Free Trade Agreement with Japan.²⁹³

Parliament’s request to be involved in the determination of the negotiating directives is the logical corollary of its right of consent.²⁹⁴ While the Lisbon Treaty does not provide an explicit basis for such an early involvement (that goes beyond merely receiving information),²⁹⁵ it is an omission that should be rectified during a future amendment to the EU’s primary law.²⁹⁶

2. *Nominating the Negotiator*

The Treaty stipulates that the Council nominates the Union negotiator, depending on the subject of the agreement envisaged.²⁹⁷ For negotiations in the field of the CCP, the Treaty explicitly states that the Commission conducts international negotiations.²⁹⁸ As a general rule, the Commission also serves as the EU’s negotiator in the other EU policy domains falling within the Union’s exclusive competence and in areas of supporting or shared competence to the extent that the Union has exercised its competence internally.²⁹⁹ This is important since the EU’s international negotiations with third countries often involve trade, in addition to other topics under EU competence.³⁰⁰ Exceptions are agreements relating “exclusively or principally” to the CFSP (where the High Representative of the Union for Foreign Affairs and Security Policy acts as the negotiator) and agreements concerning monetary or foreign exchange regime matters (where the Council decides on the arrangements for the negotiation

²⁹⁰ *Id.*

²⁹¹ *Report on the Future European International Investment Policy*, EUR. PARL. DOC., A7-0070, 13 (2011).

²⁹² EP Rules of Procedure, *supra* note 177, r. 90(2).

²⁹³ *See* Resolution on EU Trade Negotiations with Japan, EUR. PARL. DOC., B7-0297/2012 (June 13, 2012).

²⁹⁴ *See supra* notes 198-205 and the accompanying text.

²⁹⁵ *See supra* notes 276-277 and the accompanying text.

²⁹⁶ *See infra* notes 505-511 and the accompanying text (for a more elaborate discussion on this point).

²⁹⁷ TFEU art. 218(3).

²⁹⁸ TFEU art. 207(3).

²⁹⁹ TEU, *supra* note 9, art. 17(1) (the Commission “shall ensure the Union’s external representation,” with the exception of the CFSP); Council Decision authorizing the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to negotiate, on behalf of the European Union, the provisions of a Framework Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, that fall within the competence of the European Union, Brussels (Nov. 30, 2010) 16964/10 [hereinafter Council Decision Canada], art. 2 (for the limitation to exclusive competences as well as supportive and shared competences that have been exercised internally).

³⁰⁰ Marc Maresceau, *A Typology of Mixed Bilateral Agreements*, in MIXED AGREEMENTS REVISITED, *supra* note 45, at 17-20; Maresceau, *supra* note 262, at 314-422.

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

and conclusion).³⁰¹ The Treaty also mentions the possibility of a “negotiating team,” which should logically be composed of both the Commission and the High Representative, i.e. the two actors already mentioned in the same Article 218(3).³⁰² Such a team must be envisaged where a negotiation covers both significant aspects of CFSP and other EU policies (and where neither is purely ancillary to the other).³⁰³

Where negotiations cover national competences, in addition to EU competences (the so-called mixed agreements), the most efficient way forward would be for the Member States to systematically ask the Commission to represent them also for their national competences.³⁰⁴ Still, the Member States frequently prefer to charge the six-monthly Council Presidency with this aspect of the negotiations.³⁰⁵

C. Conducting Negotiations

1. *The Commission as Negotiator*

In the field of the CCP, there is no doubt that it is the Commission conducting the negotiations on behalf of the EU.³⁰⁶ In practice, it will designate a Chief Negotiator, usually an official in its Directorate General for Trade.³⁰⁷ While DG Trade leads the negotiating team, it will draw on expertise from other relevant DGs such as Agriculture and Health and Consumer Protection.³⁰⁸ A representative of the Council Presidency will generally accompany the Commission when it negotiates on behalf of the Member States, for issues that fall within their competences.³⁰⁹ This is not the case, however, for pure trade policy questions, as they are an exclusive EU competence.³¹⁰

The European Parliament is often eager to have a small delegation of MEPs participate as observers during international negotiations.³¹¹ The Framework Agreement

³⁰¹ TFEU, *supra* note 9, art. 218(3), 219(3).

³⁰² See Council Decision Canada, *supra* note 299.

³⁰³ TFEU, *supra* note 9, at 145.

³⁰⁴ See, e.g., Decision of the Representatives of the Governments of the Member States meeting within the Council, authorizing the European Commission to negotiate, on behalf of the Member States, the provisions of a Framework Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, that fall within the competences of the Member States Brussels, Nov. 30, 2010, 17037/10 classified, (but the text is available in document 16161/1/10 REV 1 EXT 1 partially declassified) [hereinafter Canada Decision of the Representatives of the Governments], art. 1 (for an example of the Commission as negotiator on behalf of the Member States).

³⁰⁵ Hoffmeister, *supra* note 110, at 84. See also CRAIG & DE BURCA, *supra* note 54, at 335; Riccardo Gosalbo Bono, *The Organization of the External Relations of the European Union in the Treaty of Lisbon*, THE EUROPEAN UNION’S EXTERNAL RELATIONS A YEAR AFTER LISBON 31-32 (CLEER Working Papers) (Panos Koutrakos ed., 2011); Sieglinde Gstöhl, *EU Multilateral Diplomacy after Lisbon: More Single European Voice in the United Nations?*, in EUROPEAN UNION DIPLOMACY: COHERENCE UNITY, AND EFFECTIVENESS 143, 158 (Dieter Mahncke & Sieglinde Gstöhl eds., 2012) (for elaborate analyses of EU practice).

³⁰⁶ TFEU art. 207(3); ECKHOUT, *supra* note 42, at 197.

³⁰⁷ Trade Negotiations Step by Step, *supra* note 269, at 4.

³⁰⁸ *Id.*

³⁰⁹ See, e.g., Canada Decision of the Representatives of the Governments, *supra* note 304, art. 1A.

³¹⁰ TFEU art. 3(1)(e).

³¹¹ Framework Agreement 2010, *supra* note 285, ¶ 25.

between Parliament and the Commission makes clear that, where the Commission represents the EU in international conferences and multilateral bodies, it should, at Parliament's request, facilitate such observation missions by MEPs.³¹²

2. *The Relationship between Commission and Council during the Negotiations*

The Commission's conduct of the negotiations is subject to two legal constraints relating to the Council.³¹³ First, the Commission is obliged to conduct the negotiations in consultation with the Council's Trade Policy Committee.³¹⁴ As discussed in Section III.C.1, the weekly meetings of the Trade Policy Committee provide the Member States with a regular report on the progress of the negotiations, as explicitly foreseen in the Treaty.³¹⁵ In addition, a practice of consultations on the spot has been established whereby the Commission provides briefings to representatives from the Member States (often diplomats accredited in the country where the negotiations are taking place) before and after negotiating sessions.³¹⁶

Second, the Commission has the obligation to act within the framework of such directives as the Council may issue to it.³¹⁷ The Council may adopt negotiating directives at the time of launching the negotiations or at a later point in time; they may be updated and supplemented at any time during the negotiations.³¹⁸ Thus, the Council authorized the Commission to open the Doha Development Round negotiations during its session in Doha on November 10-14, 2001, "in the framework of the directives which the Council *will* issue to it".³¹⁹ These directives came in the format of successive Council conclusions on June 23, 2003, July 21, 2003, December 8, 2003, July 26, 2004 and October 11, 2004.³²⁰ While some of these directives referred back to earlier conclusions adopted in the framework of other negotiations, they show that the Council was actively following and trying to guide the Commission negotiators.³²¹

In political science, an abundant literature has developed regarding the Commission's degree of autonomy during international trade negotiations.³²² In essence, political scientists tend to interpret the division of labor between the Council and the Commission in trade negotiations as an example of the so-called "principal-agent approach"

³¹² *Id.*

³¹³ Council Legal Service, Opinion ¶ 23 7389/05 JUR 104 (Mar. 17, 2005) ([hereinafter Council Legal Service Note Doha].

³¹⁴ TFEU art. 207(3). *See also supra* notes 114-124 and the accompanying text.

³¹⁵ TFEU art. 207(3).

³¹⁶ WOOLCOCK, *supra* note 119, at 57.

³¹⁷ TFEU art. 207(3).

³¹⁸ Commission Services, Legal Issues Relating to the Negotiations within the Framework of the WTO's Doha Development Agenda 4 SEC (2005) 566 final Apr. 26, 2005 [hereinafter Commission Services Working Paper Doha].

³¹⁹ Council Legal Service Note Doha, *supra* note 313, ¶ 19 (emphasis added).

³²⁰ *Id.* ¶ 24 (chronology until 2005).

³²¹ *Id.*

³²² *See* Chad Damro, *EU Delegation and Agency in International Trade Negotiations: A Cautionary Comparison*, 45 J. COMMON MKT. STUD. 883 (2007); Bart Kerremans, *Proactive Policy Entrepreneur or Risk Minimizer? A Principal-Agent Interpretation of the EU's Role in the WTO*, in *THE EUROPEAN UNION'S ROLES IN INTERNATIONAL POLITICS* 172-188 (Ole Elgström & Michael Smith eds., 2006); *THE EUROPEAN UNION'S FOREIGN ECONOMIC POLICIES: A PRINCIPAL-AGENT PERSPECTIVE* (Andreas Dür & Manfred Elsig eds., 2011).

whereby the Council is considered as the “principal” who delegates powers to its “agent”, the Commission.³²³ The relationship between the agent and the principal, and the former’s desire for autonomy, is well illustrated in the memoirs of former EU Trade Commissioner Peter Mandelson when he recalls his difficult relationship with President Nicolas Sarkozy during the French Presidency of the Council in 2008.³²⁴

Soon after I arrived [at the WTO] in Geneva for what we hoped would be the breakthrough ministerial negotiations in July 2008, I was summoned to Paris to clarify my position to President Sarkozy. This was very awkward. At the time, France had just started its six-month rotating presidency of the EU[’s Council of Ministers], so Sarkozy was in one sense my boss. It was right that I should, at the very least, inform him of what I was doing. But as Trade Commissioner I had negotiating autonomy from the member states, including France, and I did not want to compromise this independence ... Most uncomfortably, I had to tell him that I would not come to Paris if the aim was to bend my negotiating position at his will. After discussions with Commission President Barroso and the equally understanding Angela Merkel, I decided it would be best for me not to go and see Sarkozy.³²⁵

The tension between the Commission as agent and the Council as principal has also resulted in legal controversies between the two institutions.³²⁶ One of the central questions has turned around the argument of the Council Legal Service that prior explicit authorization from the Council is needed before the Commission would be able to engage in partial “pre-legal commitments” with third countries during the negotiations of an overall trade agreement.³²⁷ The main reason for this position is that, where negotiations reach a stage in which parts of an overall agreement are fixed – albeit in the form of not yet legally binding “pre-legal commitments” – the Council would be deprived of any influence in the real decision-making process if the Commission had full autonomy to make such commitments.³²⁸

The Commission was right to reject this reasoning.³²⁹ First, the Council’s interpretation would alter the EU’s inter-institutional balance to the detriment of the Commission’s role as negotiator.³³⁰ As has been underlined by the Court of Justice, with a view of establishing a balance between the institutions, the Treaty “provides that agreements between the [EU] and one or more States are to be negotiated by the Commission and then

³²³ See *supra* note 322.

³²⁴ Lorraine Mallinder, *French President Takes on Mandelson*, EUROPEAN VOICE, Mar. 3, 2008, at 2, available at <http://www.europeanvoice.com/article/imported/french-president-takes-on-mandelson/61521.aspx>.

³²⁵ MANDELSON, *supra* note 84, at 435-436.

³²⁶ See, e.g., Council Legal Service Note Doha, *supra* note 313 (the exchange between Council and Commission); Commission Services Working Paper Doha, *supra* note 318.

³²⁷ Council Legal Service Note Doha, *supra* note 313 ¶ 33; Commission Services Working Paper Doha, *supra* note 318, at 2-3.

³²⁸ Commission Services Working Paper Doha, *supra* note 318, at 3 (recalling the Council’s position).

³²⁹ *Id.* at 5.

³³⁰ *Id.* at 3-4.

concluded by the Council”.³³¹ The notion of a “pre-legal commitment” as invented by the Council Legal Service is not contained in the EU Treaties.³³² Its introduction – with the requirement for a formal Council approval of each commitment made by the Commission in the course of a negotiation – would add a new procedural step into the EU’s procedure of making international agreements, which is not foreseen by the EU Treaties.³³³ It would shift the inter-institutional balance in favor of the Council.³³⁴

Second, the EU Treaties explicitly state that the Council must authorize both the launching and the signing of international agreements.³³⁵ All negotiating steps between the launching of the negotiations and the signing of an agreement are logically the responsibility of the Commission, which “shall conduct the negotiations”, acting within the framework of Council’s negotiating directives and in consultation with the Trade Policy Committee.³³⁶ If the Council itself had to approve any significant “pre-legal commitment” in the course of the negotiations, the specific procedures of Articles 207(3) and 218 TFEU would become largely redundant.³³⁷

Third, the notion of “pre-legal commitments”, each to be formally endorsed by the Council, “would be impossible to apply in practice”.³³⁸ As rightly underlined by the Commission, international negotiations “consist of a series of small steps which successively reduce the number of outstanding controversial issues. Each negotiating session therefore results necessarily in a number of ‘pre-legal commitments’ or understandings ...”.³³⁹ Nevertheless, “it does occur in practice that aspects that were provisionally accepted early in a negotiation are subsequently modified”.³⁴⁰ As negotiations operate under the principle that “nothing is agreed until everything is agreed”, it would hardly be possible to draw the borderline between the “pre-legal commitments” to be approved by the Council and others that would not.³⁴¹ Furthermore, it would turn the EU into an impossible negotiating partner that would constantly need run back to Brussels for formal approval of each step in the negotiations.

3. The Relationship between the Commission and the European Parliament during the Negotiations

The Commission is obliged to report regularly, not only to the Trade Policy Committee, but also to the European Parliament on the progress of international trade negotiations.³⁴² During the European Convention of 2002-2003, Irish MEP John Cushnahan had proposed that the special committee to be consulted by the Commission during the

³³¹ Case C-327/91, *supra* note 261, ¶ 28.

³³² Commission Services Working Paper Doha, *supra* note 318, at 3.

³³³ *Id.*

³³⁴ *Id.* at 4.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² TFEU art. 207(3).

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

negotiations would in the future be composed of an equal number of representatives of the Council and the European Parliament.³⁴³ The idea was unsuccessful.³⁴⁴ In practice, the information exchanges with Parliament take place via its International Trade Committee (INTA).³⁴⁵ In the Framework Agreement between Parliament and Commission of 2010, the Commission's duty of information is specified in the following terms:

In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialing the agreement and the text of the agreement to be initialed. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.³⁴⁶

For example, during the negotiations of the Anti-Counterfeiting Trade Agreement (ACTA) that started in June 2008 and were finalized in November 2010, the Commission shared with Parliament seven successive draft texts of the agreement, three detailed written reports on the negotiation rounds and fourteen notes and internal working papers.³⁴⁷ Furthermore, the Trade Commissioner and senior Commission officials informed Parliament in a series of meetings about the ongoing negotiations during three plenary debates, six Committee meetings and four informal debriefings of negotiating rounds.³⁴⁸ Finally, the Commission replied to 50 Parliamentary questions related to ACTA in 2010 and 2011.³⁴⁹

Such topical briefings and exchanges on specific negotiations, MEPs are supplemented by moments of more horizontal information sharing. Twice a year, INTA holds a *structured dialogue* with the EU Trade Commissioner, with the intention of contributing to setting the Commission's key priorities in international trade matters, including on upcoming trade negotiations.³⁵⁰ About four times a year, INTA also organizes *in-camera* briefings by

³⁴³ See Suggestion for amendment of Art. 33 by John Cushnahan, available at <http://european-convention.eu.int/docs/Treaty/pdf/872/Art33Cushnahan%20EN.pdf>.

³⁴⁴ TFEU arts. 207(3), 218(4).

³⁴⁵ See Framework Agreement 2010, *supra* note 285, ¶ 24. See also *supra* notes 181-188 and the accompanying text (for an introduction to INTA).

³⁴⁶ Framework Agreement 2010, *supra* note 285, Annex III(5).

³⁴⁷ Commission, Transparency of ACTA negotiations, Brussels (Feb. 13, 2012), 1-2.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Calculation by the author on the basis of the monthly *INTA Newsletter* that details the work achieved during each INTA meeting.

the Commission's Director General for Trade during which MEPs are informed on the state of play of bilateral and multilateral trade negotiations.³⁵¹

It must be noted that Commission information on ongoing negotiations, when it is of a classified nature, is accessible only by a limited number of designated MEPs, in accordance with the detailed provisions on the treatment of confidential information that are annexed to the Framework Agreement.³⁵² Thus, in the case of the ACTA negotiations, the Commission shared classified documents only with the INTA Chair and Vice-Chairs, the INTA rapporteur on ACTA, and the INTA coordinators of the political groups.³⁵³

4. The Relationship between the Council and the European Parliament during the Negotiations

What Parliament has insisted on receiving from the Council is access to the adopted negotiating directives.³⁵⁴ In a letter of December 3, 2010, the Chair of the Committee of Permanent Representatives informed the Chair of Parliament's Committee on Foreign Affairs that access to adopted negotiating directives would be possible only in a secure room on the Council premises, whereby the documents themselves remained in the possession of the Council.³⁵⁵ As in the case of the Commission, access was limited to the responsible Committee Chair, the coordinators of the political groups and the relevant rapporteur.³⁵⁶ The fact that MEPs needed to go to the Council building to read the negotiating directives was unacceptable for Parliament.³⁵⁷ The Council, however, insisted that before any more flexible consultation procedures could be put in place, Parliament needed to adopt internal rules for the handling of classified documents, in line with Council's security requirements.³⁵⁸ This resulted, in 2011, in a Decision of Parliament's Bureau concerning the rules governing the treatment of confidential information in the European Parliament.³⁵⁹ That Decision, in turn, opened the way for the adoption, in 2012, of "an Interinstitutional Agreement between Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council (on matters other than those in the area of the Common Foreign and Security Policy)."³⁶⁰ The Interinstitutional Agreement

³⁵¹ Commission, *supra* note 347, at 1-2.

³⁵² Framework Agreement 2010, *supra* note 285, ¶ 24, Annex II.

³⁵³ Commission, *supra* note 347, at 2.

³⁵⁴ Riccardo Passos, *The European Union's External Relations a Year after Lisbon: A First Evaluation from the European Parliament*, in *THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON* 49, 52-53 (Panos Koutrakos ed., 2011).

³⁵⁵ European Parliament Council, Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council Concerning Access by the European Parliament to Sensitive Information of the Council in the Field of Security and Defense Policy, Annex, 2002 O.J. (C 298) 1 [hereinafter European Parliament Council Interinstitutional Agreement of 20 November 2002] (Council applied rules from this Agreement to oblige a consultation in a secure room on the Council's premises).

³⁵⁶ *See id.*

³⁵⁷ Passos, *supra* note 354, at 52.

³⁵⁸ *Id.* at 52-53.

³⁵⁹ European Parliament, Decision of the Bureau of 6 June 2011 Concerning the Rules Governing the Treatment of Confidential Information in the European Parliament, 2011 O.J. (C 190) 2.

³⁶⁰ Gerald Häfner, Comm'n on Constitutional Affairs, European Parliament, Draft Report 2012/2069(ACI), Annex (June 5, 2012).

applies explicitly to negotiating directives for international agreements.³⁶¹ It allows the Council to forward the requested documents to Parliament where they may be consulted by the relevant security-cleared MEPs in a secure reading room.³⁶²

5. *The European Parliament and the Substance of the Negotiations*

For the European Parliament, the Lisbon Treaty provisions on informing it at all stages during an international negotiation only make sense if the MEPs use this information to weigh on the substance of the process.³⁶³ In the words of MEP Jeanine Hennis-Plasschaert:

The *ratio legis* of such a duty to inform is not to allow Parliament passively to take note of the actions of the other institutions, but to afford it the opportunity of bringing some influence to bear on the Commission and the Council as regards the content of the agreement, in order to facilitate its consent on the final text.³⁶⁴

To exercise an influence on important trade negotiations, INTA has developed a tradition of drafting own initiative reports indicating its priorities well before the end of the negotiations.³⁶⁵ This is in accordance with Parliament's Rules of Procedure, which specify that at any stage of the negotiations, Parliament may on the basis of a report from the Committee responsible adopt recommendations and require them to be taken into account before the conclusion of the international agreement under consideration.³⁶⁶ On the substance, Parliament's reports and resolutions are traditionally supportive of multilateral and bilateral market opening initiatives, but also make a strong point of underlining that trade agreements should help advance human rights and social and environmental standards by incorporating binding clauses on these issues.³⁶⁷ An example is Parliament's resolution of March 24, 2011, on relations with the Gulf Cooperation Council, which included the following paragraph:

[Parliament] recalls that, under the Lisbon Treaty, international trade policy is one of the EU's foreign policy tools and that as such, for the Union, respect for democratic principles and fundamental human rights, together with the social and environmental dimensions, are absolutely essential in all its international agreements; calls, therefore, for any future

³⁶¹ *Id.* art. 1(c).

³⁶² *See id.* arts. 4-6.

³⁶³ Committee on Civil Liberties, Justice and Home Affairs, European Parliament, Recommendation (05305/1/2010REV – C7-0004/2010 – 2009/0190(NLE) (Feb. 5, 2010) (by Jeanine Hennis-Plasschaert) 10 [hereinafter Report Hennis-Plasschaert].

³⁶⁴ *Id.*

³⁶⁵ Passos, *supra* note 45, at 285-286; Villalta Puig & Al-Haddab, *supra* note 49, at 299-300.

³⁶⁶ EP Rules of Procedure, *supra* note 177, r. 90(4).

³⁶⁷ *See* Resolution of 27 September 2011 *supra* note 288, ¶¶.5-9; European Parliament, Resolution, Nov. 25, 2010 (2009/2219(INI)); INTA Opinion on Lisbon Treaty, *supra* note 203, ¶.6 (for Parliament's principles regarding the link between trade agreements and human rights, environmental and social protection clauses).

free trade agreement to include an effective and enforceable human rights clause.³⁶⁸

It should be noted that Parliament's repeated calls for binding clauses on human rights and social and environmental protection in the EU's international trade agreements have not remained dead letter.³⁶⁹ For example, in the case of the Free Trade Agreement with Korea, Parliament not only obtained the effective inclusion of labor and environmental standards in Chapter 13, it also successfully insisted on a formal Commission commitment to monitor and report on their implementation, with the help of an advisory group of representatives from business, trade unions and civil society.³⁷⁰ Similarly, Parliament's preoccupation for the safeguarding of human rights, enhancing trade unionists' rights and protecting the environment in the context of the Free Trade Agreement with Colombia and Peru, also prompted it to propose a concrete follow-up mechanism.³⁷¹

D. Initialing, Signing and Provisionally Applying International Trade Agreements

1. Initialing

Once the substantive negotiations are at their end and a text has been put on paper, lawyers will review the draft in all its details.³⁷² This can take from three to nine months.³⁷³ Thereafter, the Chief Negotiators can initial the text.³⁷⁴ In EU practice, the decision to initial trade agreements is the responsibility of the Commission, acting in consultation with the Trade Policy Committee and INTA.³⁷⁵ The legal value of initialing is that it establishes the text of the agreement as authentic and definitive.³⁷⁶

2. Determining the Legal Basis of the Agreement

Council decisions authorizing the signing and conclusion of international agreements must mention the legal basis that allows the EU to act.³⁷⁷ Commission and Council agree that the EU's legal basis can only be determined between the initialing and the signing of the international agreement, on the basis of the precise contents of the final text.³⁷⁸

³⁶⁸ European Parliament, Resolution on European Union Relations with the Gulf Cooperation Council, Mar. 24, 2011, 2012 O.J. (C247E) 1, ¶ 39.

³⁶⁹ See *infra* notes 370-372 and the accompanying text.

³⁷⁰ European Parliament, Resolution, Dec. 13, 2007, 2007 O.J. (C323 E/521), ¶ 12; Committee on International Trade, European Parliament, Report, Feb. 9, 2011, (08505/2010 – C7-0320/2010 – 2010/0075(NLE)) (by Robert Sturdy) 10; European Parliament, Resolution, Feb. 17, 2011, 2012 O.J. (C 188E) 94, Annex I: Commission Statement.

³⁷¹ European Parliament, Resolution, June 13, 2012, 2012/2628(RSP), ¶ 22.

³⁷² Trade Negotiations Step by Step, *supra* note 269, at 5.

³⁷³ *Id.*

³⁷⁴ *Id.*; LENAERTS & VAN NUFFEL, *supra* note 54, at 1029.

³⁷⁵ Commission Services Working Paper Doha, *supra* note 318 at 2.

³⁷⁶ Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1968), art. 10.

³⁷⁷ Maresceau, *supra* note 262, at 154.

³⁷⁸ Commission Services Working Paper Doha, *supra* note 318 at 2.

Strangely, Parliament's Rules of Procedure stipulate that the Committee responsible shall ascertain and verify the chosen legal basis for an international agreement at the time when the negotiations are scheduled to start.³⁷⁹ This rule should be changed and brought into conformity with legal practice.

The actual determination of the legal basis of an international agreement is a complicated matter.³⁸⁰ In summary format, the main principles – established by the Court's case law – are the following:

- The choice of the legal basis for a measure, such as a Council Decision to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure;³⁸¹
- An EU act falls within the exclusive competence of the CCP only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned;³⁸²
- If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component;³⁸³
- With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases.³⁸⁴
- The Court initially held that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other.³⁸⁵ It seems, however, that the Court has recently adopted a more flexible attitude and that multiple legal bases, providing for different Council voting rules, can under certain conditions be accepted, with the consequence that the more heavy unanimity requirement prevails over qualified majority voting.³⁸⁶

As underlined by Advocate General Juliane Kokott, the “choice of the correct legal basis is of considerable practical and institutional, indeed constitutional importance. It determines not only the legislative procedure applicable (rights of the Parliament to participate, unanimity or qualified majority in the Council) but also whether the [EU]'s competence to legislate and conclude an international agreement is exclusive or is to be shared with the Member

³⁷⁹ EP Rules of Procedure, *supra* note 177, r. 90(3), 37.

³⁸⁰ See Maresceau, *supra* note 262, at 154-185.

³⁸¹ *European Parliament v. Council of the European Union*, 2008 (Court of Justice of the European Communities); Opinion 2/00, 2001 E.C.R. I-9713, *supra* note 23, para. 5..

³⁸² Case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA v. Ministero delle Politiche Agricole e Forestali*, [2005] E.C.R. I-03785, ¶ 75.

³⁸³ Case C-155/07, *Parliament v. Council*, [2008] I-08103, ¶ 35; Opinion 2/00, 2001 E.C.R. I-9713, *supra* note 23, para. 23.

³⁸⁴ Case C-155/07, *Parliament v. Council*, [2008] I-08103, ¶ 36; Opinion 2/00, 2001 E.C.R. I-9713, *supra* note 23, para. 23.

³⁸⁵ *Id.* ¶ 37.

³⁸⁶ *Id.* ¶ 69.

States".³⁸⁷ For specific and sectoral trade agreements that are clearly confined to the CCP, the EU's exclusive competence is beyond any doubt.³⁸⁸ The situation is more complex for broader trade agreements, such as the Free Trade Agreement with Korea, which not only cover questions within the CCP sphere, but also other EU policy fields and even areas covered by Member State competences.³⁸⁹ Such mixed agreements (partly covering Member State competences, in addition to EU competences) also need to be signed and concluded by each of the Member States separately.³⁹⁰

Since the Lisbon Treaty, the EU's primary law makes clear that the EU has the exclusive competence for the conclusion of an international agreement in one of the following conditions: (a) when such an agreement concerns policy areas that are defined as EU exclusive (internally); (b) when the conclusion of such an agreement is provided for in a legislative act of the Union; (c) when the conclusion of international agreement is necessary to enable the Union to exercise its internal competence; or (d) in so far as the conclusion of an agreement may affect the EU's common rules or alter their scope.³⁹¹

However, in many cases, the Treaties foresee in explicit external competences that are not of an exclusive EU nature (and, thus, they do not automatically exclude a direct involvement of the Member States in the conclusion of agreements covering those competences).³⁹² Prominent examples – frequently going together with trade agreements – are development cooperation that is a special parallel shared competence (whereby the exercise of the EU's competence does not result in Member States being prevented from exercising theirs, and whereby the Treaty specifies that international agreements between the EU and third parties shall be without prejudice to the Member States' competence to negotiate and conclude international agreements) and environmental protection (which is an ordinary shared competence whereby EU action pre-empts the Member States from acting in the same area, but whereby the Treaty also specifies that international agreements between the EU and third parties shall be without prejudice to the Member States' competence to negotiate and conclude international agreements).³⁹³

In other areas where the EU's competence is shared with the Member States, the primary law is silent about the external dimension.³⁹⁴ This is, for example the case of social policy which is an area often linked to trade agreements, especially since the European

³⁸⁷ *Commission v. Council*, 2005 (Opinion of Advocate General Kokott); *Commission v. Parliament and Council*, 2005 (Opinion of Advocate General Kokott); *Commission v. European Parliament and Council of the European Union*, 2006, E.C.R.

³⁸⁸ Council Decision on the Conclusion of the Agreement between the European Union and the Government of the Russian Federation on Trade, OJ L 199/3 (2012); Council Decision on the Conclusion of the Agreement in the form of an Exchange of Letters between the European Union and the Argentine Republic pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union, OJ L 30/11 (2011).

³⁸⁹ Council Decision 2011/265/EU, *supra* note 13, ch.1, at 8.

³⁹⁰ *See supra* notes 44–47.

³⁹¹ Council Notice on consolidated version of the Treaty on European Union, OJ C 2010/C (2010); *see* CRAIG, *supra* note 9, at 163–167; EECKHOUT, *supra* note 42, at 112–113; LENAERTS & VAN NUFFEL, *supra* note 54, at 124–126 (for insightful comments).

³⁹² Govaere, *supra* note 42, at 466–470; Cremona, *supra* note 42, at 251–253.

³⁹³ Council Notice on consolidated version of the Treaty on European Union, OJ C 2010/C (2010).

³⁹⁴ EECKHOUT, *supra* note 42, at 120–124.

Parliament is insisting on linking free trade to the protection of labor rights.³⁹⁵ To the degree that the internal competence in these fields has not been exercised yet or leaves flexibility to the Member States, international agreements are likely to need the involvement of the Member States in the signing and ratification.³⁹⁶ In this sense, it is most likely that the new generation of free trade agreements that the EU is currently negotiating will, like the Free Trade Agreement with Korea, be concluded as mixed agreements.³⁹⁷

Furthermore, when trade agreements also cover the special area of the CFSP, they risk being sucked into the “specific rules and procedures” governing this field, with a greatly diminished role for the European Parliament, the Commission and the Court of Justice.³⁹⁸ In such a case, Parliament does not even need to be consulted before the conclusion.³⁹⁹ As Professors Inge Govaere and Peter Van Elsuwege have shown, the Treaty of Lisbon has unfortunately not facilitated the demarcation between CFSP and other EU policies such as the CCP.⁴⁰⁰ On the contrary, the new Article 40 TEU (modifying ex-Article 47 in the pre-Lisbon Treaty TEU) implies that the institutions must not only see to it that the CFSP does not encroach on other external competences, but also *vice versa*.⁴⁰¹ In addition, the High Representative for the EU’s Foreign Policy and Security Policy having one leg in the Council (as Chair of the Foreign Affairs configuration) and one in the Commission (as Vice-President for External Relations), there is a diminishing likelihood that the Commission will stand up for the old Community *acquis* against Council’s temptations to broaden the scope of the CFSP.⁴⁰²

As argued by Professor Govaere, it is Parliament that should be counted on to “jealously guard its newly acquired decision-making role to all EU external action other than CFSP” and act as the guardian of other external action when opposed to the CFSP as legal basis.⁴⁰³ This seems a realistic perspective. Already in its first opinion on the Treaty of Lisbon, INTA underlined that there was a need of “ensur[ing] that the intergovernmental logic of CFSP does not contaminate the CCP”.⁴⁰⁴ Parliament has, moreover, shown a concrete willingness in defending its views on the legal basis of the EU’s external relations actions before the Court.⁴⁰⁵ In this context, it is interesting to note a judgment of the General Court of May 4, 2012, in the case brought by Dutch Liberal MEP Sophia in ’t Veld to obtain access to

³⁹⁵ *Id.* at 152-153. See also notes 367-369 and the accompanying text.

³⁹⁶ Cremona, *supra* note 42, at 244-251; Opinion 2/91, [1993] E.C.R. I-01061, para. 21 (for the landmark case in this respect).

³⁹⁷ Bungenberg, *supra* note 49, at 133; Villalta Puig & Al-Haddab, *supra* note 49, at 298-299.

³⁹⁸ See TEU art. 24(2).

³⁹⁹ See TFEU art. 218(6).

⁴⁰⁰ See Peter Van Elsuwege, *EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency*, 47 COMMON MKT. L. REV. 987, 987-1019 (2010).

⁴⁰¹ See TEU art. 40.

⁴⁰² See *id.* arts. 18(3), 18(4); Inge Govaere, *Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon*, 13 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 107-108 (2010-2011).

⁴⁰³ Inge Govaere, *Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon*, 13 CAMBRIDGE Y.B. EUR L. STUD. 107-108 (2010-2011); Peter-Christian Müller-Graff, *The Common Commercial Policy Enhanced by the Reform Treaty of Lisbon?* in LAW AND PRACTICE OF EU EXTERNAL RELATIONS 199 (Alan Dashwood & Marc Maresceau eds., 2008).

⁴⁰⁴ INTA Opinion on Lisbon Treaty, *supra* note 203, ¶ 9.

⁴⁰⁵ Govaere, *supra* note 402, at 107-109 (and cases referred to therein).

an internal opinion of the Council's Legal Service regarding the legal basis of an international agreement.⁴⁰⁶ In light of the rules on public access to EU documents, the General Court held that the Council could not deny access to the paragraphs of the Legal Service opinion dealing with the choice of the legal basis.⁴⁰⁷ As this choice must rest on objective factors and does not fall within the discretion of an institution, the Court stated that "the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorizing the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined".⁴⁰⁸ On July 24, 2012, the Council decided to lodge an appeal against this judgment.⁴⁰⁹ In 't Veld's case is pertinent since Council cannot refuse Parliament access to of (parts of) documents that would be available to the general public. If upheld by the Court of Justice, the judgment of the General Court might result in a systematic request by Parliament to be informed on Council's internal considerations (including the opinion of its Legal Service) when selecting the legal basis for an international agreement. This would only be to the benefit of transparency.

3. *Signing and Provisionally Applying*

On proposal of the Commission, it is for the Council of Ministers to decide whether or not the EU will formally sign the agreement resulting from the negotiations.⁴¹⁰ According to the traditional formula in such Council Decisions, the President of the Council is authorized to designate the person(s) empowered to sign the Agreement on behalf of the Union subject to its conclusion.⁴¹¹ While this is not spelled out in the primary law, it would seem within the spirit of the Treaties for trade agreements – as well as other agreements concluded under EU competences – to be signed by a Commission representative on behalf of the EU.⁴¹² Agreements dealing primarily with the CFSP should be the only exception to this rule and be signed by the High Representative.⁴¹³

The signature indicates a political intention to move towards the agreement's ratification, but it does not mean that the agreement's provisions are legally binding for the signatory party.⁴¹⁴ According to the Vienna Convention on the Law of Treaties, a signing

⁴⁰⁶ See Sophie in 't Veld's Case, *supra* note 156.

⁴⁰⁷ *Id.* ¶¶ 46-58, 123.

⁴⁰⁸ *Id.* ¶¶ 49-50.

⁴⁰⁹ Case C-350/12 P, *Council v. in 't Veld* (case in progress).

⁴¹⁰ TFEU art. 218(5).

⁴¹¹ See, e.g., Council Decision of 14 December 2011 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Government of the Russian Federation on trade in parts and components of motor vehicles between the European Union and the Russian Federation 2012 O.J. (L 57) 14, art. 2; Council Decision 2011/265/EU, *supra* note 13, art. 2, at 2.

⁴¹² TEU art. 17(1); TFEU art. 207(3).

⁴¹³ TEU art. 17(1), 18; TFEU art. 218(3).

⁴¹⁴ See Vienna Convention art. 12 (Unless the agreement provides that the consent of the parties to be bound is expressed by the signature, in accordance with the Convention); EECKHOUT, *supra* note 42, at 200-201; LENAERTS & VAN NUFFEL, *supra* note 54, at 1029.

party is, however, obliged to refrain from acts that would defeat the object and purpose of the agreement.⁴¹⁵

When deciding in favor of signing, the Council may also adopt a decision on the agreement's provisional application before entry into force.⁴¹⁶ Such a provisional application is particularly relevant with respect to bilateral mixed agreements that need the ratification of all Member States, and thus require years before they can enter into force.⁴¹⁷ Parliament's Rules of Procedure specify that where the Commission informs the Council of its intention to propose the provisional application of an international agreement, it should simultaneously notify Parliament.⁴¹⁸ Following a debate, Parliament may issue recommendations on the matter.⁴¹⁹

Since the decision on provisional application normally occurs at the moment of the signing of the agreement – and thus before its formal ratification and Parliament's official consent – the issue is particularly sensitive to Parliament.⁴²⁰ On January 12, 2010, during Parliament's hearing of Karel De Gucht as the Commissioner-designate for Trade, he was asked to ensure that there would be no provisional application of the Free Trade Agreement with Korea until Parliament had given its consent to it.⁴²¹ De Gucht expressed his understanding "that early application before the European Parliament has given its assent causes a political problem".⁴²² In a subsequent debate on the same Agreement, he gave Parliament the requested assurance:

[I am] not going to make a proposal for an early, provisional application unless Parliament has itself pronounced on the agreement, whether as formal ratification by Parliament or by some other procedure that we can establish between the INTA Committee and the Commission ... in any case, Parliament will have the opportunity to give its political judgment on the agreement before any proposals for early application are put forward.⁴²³

Commissioner De Gucht's statement was interpreted as a major victory for Parliament.⁴²⁴ In technical terms, the solution was the following: The Council's Decision of September 16, 2010, on the signing and provisional application of the Agreement stipulated was formulated so that the effective date of provisional application would be coordinated with the date of the entry into force of the Regulation of the European Parliament and of the Council

⁴¹⁵ TEU art. 18.

⁴¹⁶ See TFEU art. 218(5); see also, e.g., *supra* note 409.

⁴¹⁷ See *supra* note 46 and the accompanying text.

⁴¹⁸ EP Rules of Procedure, *supra* note 177, r. 91.

⁴¹⁹ *Id.*

⁴²⁰ See TFEU art. 218(5), (6).

⁴²¹ EP Hearing De Gucht, *supra* note 204, at 7.

⁴²² *Id.* at 8.

⁴²³ Remarks of Mr. De Gucht, EUR. PARL. DEB. (19) 177 (Feb. 10, 2010).

⁴²⁴ Sébastien Falletti, *Trade: Parliament Put on an Equal Footing with Council*, EUROPOLITICS, Dec. 3, 2010, at 16.

implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.⁴²⁵ Thus, while the Agreement was signed on October 6, 2010, the provisional application entered into force only on July 1, 2011, after Parliament's simultaneous vote on the Regulation implementing the safeguard clause and consent.⁴²⁶ Parliament's success in the case of the Free Trade Agreement with Korea has prompted it into making similar requests during other negotiations. Thus, in its resolution of May 11, 2011, on the ongoing negotiations of the EU-India Free Trade Agreement, Parliament again called on the Commission and the Council not to propose any provisional application of the agreement before the EP has given its consent.⁴²⁷

E. Concluding Trade Agreements and Parliament's Consent Practice

Following the signature, the Council is in charge of adopting another decision regarding the ratification of the agreement, which the EU Treaties confusingly call the "conclusion".⁴²⁸ In some cases, the Council takes both decisions on the signing and the conclusion at the same time.⁴²⁹ Through the ratification, the EU formally expresses its consent to be bound by the agreement in question.⁴³⁰

Before the Council can conclude an agreement, the European Parliament must in most cases provide its consent.⁴³¹ This is notably the case for international trade agreements.⁴³² The Treaty prescribes that the Council requests Parliament's consent after the signing, but before the conclusion of the agreement.⁴³³ Parliament's Rules of Procedure, however, provide that a draft agreement should be submitted for consent, when the negotiations are completed, but before any agreement is signed.⁴³⁴ Parliament's Rules should be brought in line with the text of the Treaty. Before the vote on the consent is taken, Parliament may seek an Opinion from the Court of Justice on the compatibility of an

⁴²⁵ Council Decision 2011/265/EU, *supra* note 13, art. 3.2, at 11.. See generally Hoffmeister, *supra* note 110, at 92-93 (on the politics behind this deal).

⁴²⁶ European Parliament, Legislative Resolution of 17 February 2011 on the proposal for a regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement (COM(2010)0049 – C7-0025/2010 – 2010/0032(COD)), 2012 O.J. (C 188E) 93; European Parliament, Legislative resolution of 17 February 2011 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (08505/2010 – C7-0320/2010 – 2010/0075(NLE)), 2012 O.J. (C 188E) 113.

⁴²⁷ European Parliament, Resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations (P7_TA-PROV(2011)0224), 2012 O.J. (C 377 E/03), ¶ 36.

⁴²⁸ TFEU art. 218(6).

⁴²⁹ EECKHOUT, *supra* note 42, at 201. Council Decisions on the simultaneous signing and conclusion are often taken for agreements in the CFSP field. For examples, see Council Decision 2011/318/CFSP of 31 March 2011 on the signing and conclusion of the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, 2011 O.J. (L 143) 1; Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, 2011 O.J. (L 254) 1.

⁴³⁰ Vienna Convention art. 14; TFEU art. 216(2).

⁴³¹ TFEU art. 218(6).

⁴³² See *supra* notes 198-205 and the accompanying text.

⁴³³ TFEU art. 218(6).

⁴³⁴ EP Rules of Procedure, *supra* note 177, r. 5.

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

international agreement with the Treaties.⁴³⁵ In such a case, the vote on the consent is adjourned until the Court has delivered its opinion.⁴³⁶ It should be noted that – in the case of ACTA where the Commission had asked for a Court Opinion – Parliament did not want to wait with its vote until the Opinion was delivered.⁴³⁷ Parliament gives its consent in a single “yes” or “no” vote by a majority of the votes cast.⁴³⁸ If Parliament declines to consent to an international agreement, its President informs the Council that the agreement in question cannot be concluded.⁴³⁹

The table below provides an overview of the consent resolutions on international agreements adopted since the entry into force of the Treaty of Lisbon.⁴⁴⁰ After the transition year of 2010, Parliament arrived at 50 consent resolutions in 2011 and 34 in 2012.⁴⁴¹ Both in 2011 and 2012, trade policy was the domain with the highest number of international agreements requiring consent.⁴⁴² This included consent resolutions on high profile agreements such as the Free Trade Agreement with Korea as well as a host of relatively technical and sectoral agreements.⁴⁴³

Table 1: Parliament’s consent practice regarding international agreements after the entry into force of the Lisbon Treaty

Field of EU competence	2010	2011	2012
Trade		18	20
Fisheries	2	5	3
Air traffic		11	1
Justice & home affairs	7	7	3
Other EU competences	6	9	7
Total	15	50	34

Source: calculation by the author on the basis of Parliament’s texts adopted.

In the period before the entry into force of the Lisbon Treaty, Parliament had already made use of its more limited assent powers (which did not explicitly cover CCP

⁴³⁵ TFEU art. 218(11); EP Rules of Procedure, *supra* note 177, r. 6.

⁴³⁶ EP Rules of Procedure, *supra* note 177, r. 6.

⁴³⁷ European Parliament, Legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (12195/2011 – C7-0027/2012 – 2011/0167(NLE)) [hereinafter ACTA].

⁴³⁸ EP Rules of Procedure, *supra* note 177, r. 7.

⁴³⁹ *Id.* r. 9.

⁴⁴⁰ See European Parliament, *Plenary Setting Search*, <http://www.europarl.europa.eu/plenary/en/texts-adopted.html?action=3&tabActiv=tabResult#sidesForm> (for the listing of the relevant resolutions).

⁴⁴¹ See *infra* Table 1.

⁴⁴² *Id.*

⁴⁴³ See *supra* note 440.

agreements) as a means to exercise pressure on the partner countries in specific human rights matters.⁴⁴⁴ With the entry into force of the Lisbon Treaty, Parliament immediately made clear that it would use its new powers in full, even if it meant objecting to the result of several years of negotiation.⁴⁴⁵ On February 11, 2010, it decided not to give its consent to the conclusion of the Agreement on the processing and transfer of financial messaging data from the EU to the United States for purposes of the Terrorist Finance Tracking Program.⁴⁴⁶ Parliament feared the proposed text risked compromising European legal requirements for the fair, proportionate and lawful processing of personal information.⁴⁴⁷ Two years later, on July 4, 2012, Parliament rejected ACTA, thus for the first time declining consent in the specific CCP domain.⁴⁴⁸ Once again, fundamental rights were at the core of Parliament's concerns.⁴⁴⁹ It was of the opinion that ACTA's intended benefits were far outweighed by the potential threats to civil liberties.⁴⁵⁰

In addition to its role as guardian of the EU's fundamental rights, Parliament has also fulfilled the useful role of ensuring the legal purity of the Council's conclusion decisions.⁴⁵¹ On June 4, 2012, INTA Chairman Vital Moreira addressed a letter on this question to the Council's President-in-Office and the Trade Commissioner.⁴⁵² He underlined that "the scope of the Council decisions on the conclusion of international agreements should be limited according to their objective and that "it is not legally or politically appropriate for a Council Decision to include provisions that go beyond [such] objectives".⁴⁵³ He emphasized in particular "such Council Decisions cannot include provisions on the implementation of the respective international agreements, which should be subject to a co-decided legislative act".⁴⁵⁴ In an interesting passage, underscoring the importance of this issue for the inter-institutional balance, Chairman Moreira wrote as follows:

By inserting such [implementing] provisions in the Council Decision concluding an agreement, the Council would be circumventing the due legislative procedure, depriving the Commission of its power of initiative and depriving Parliament of its powers as the co-legislator. Under such implementing provisions in a proposal for a Council Decisions, which

⁴⁴⁴ See LENAERTS & VAN NUFFEL, *supra* note 54, at 1035. See, e.g. Passos, *supra* note 209, at 280-281.

⁴⁴⁵ See *infra* notes 446-450 and the accompanying text.

⁴⁴⁶ European Parliament, Resolution on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)), 2010 O.J. (C 341E) 100 (Feb. 11, 2010).

⁴⁴⁷ Report Hennis-Plasschaert, *supra* note 363, at 8.

⁴⁴⁸ ACTA, *supra* note 437.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ See *infra* notes 452-458.

⁴⁵² Letter from Professor Vital Moreira, Chairman of the Committee on International Trade of the European Parliament, to Ms Pia Olsen Dyhr, Minister for Trade and Investment of Denmark and Mr Karel De Gucht, Commissioner for Trade, Council doc. 12377/12, 3-4 (Jul. 10, 2012).

⁴⁵³ *Id.* at 4.

⁴⁵⁴ *Id.*

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS

cannot be changed by Parliament, the powers of the Parliament as the co-legislator are not respected.⁴⁵⁵

In other words, INTA “insisted that the constitutional framework must be respected and the inter-institutional balance maintained”.⁴⁵⁶ One month later, the Council effectively agreed to submit revised requests for consent, with modified drafts of Council Decisions to Parliament.⁴⁵⁷ In the modified drafts, implementing provisions were deleted and the Council indicated its readiness to consider favorably their inclusion in a Regulation to be adopted under the ordinary legislative procedure.⁴⁵⁸

As has been pointed out before, agreements concluded by the EU are binding upon the Union’s institutions and on the Member States.⁴⁵⁹ In the EU’s hierarchy of norms, international agreements must be situated between the EU’s primary law (the Treaties) and the EU’s secondary legislation.⁴⁶⁰ In the words of Judge Allan Rosas of the European Court of Justice, this “is now a matter of settled case law: the Court has applied this view both to hold that international agreements have primacy over acts of secondary law and to annul decisions to conclude international agreements on the grounds that they violate primary law.”⁴⁶¹ Council Decisions authorizing the signing and the conclusion of an agreement are both published in the EU’s Official Journal, together with the agreement in question.⁴⁶² Following the completion of the ratification process, the Official Journal will in most cases also publish a notice indicating when an agreement has effectively entered into force.⁴⁶³

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ Council of the Eur. Union, Draft Council Decision on the Conclusion of the Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the administration of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union and the Protocol between the Eur. Union and the Government of the Russian Federation on technical modalities pursuant to that Agreement - Revised request by the Council for the consent of the European Parliament - Draft letter to the Chairman of INTA, 12233/12 (Jul. 6, 2012); Council of the Eur. Union, Draft Council Decision on the conclusion of the Trade Agreement between the Eur. Union and its Member States, of the one part, and Colombia and Peru, of the other part - Revised request by the Council for the consent of the European Parliament - Draft letter to the Chairman of INTA, 12234/12 (Jul. 6, 2012); Council of the Eur. Union, Proposal for a Council Decision on the conclusion of the Agreement establishing an Association between the Eur. Union and its Member States, on the one hand, and Central America on the other - Request by the Council for the consent of the European Parliament - Draft letter to the INTA Chairman, 12242/12 (Jul. 6, 2012).

⁴⁵⁸ See text accompanying note 457.

⁴⁵⁹ TFEU art. 216(2).

⁴⁶⁰ ALLAN ROSAS & LORNA ARMATI, EU CONSTITUTIONAL LAW 48 (2010).

⁴⁶¹ *Id.*

⁴⁶² See generally EUR-LEX, http://eurlex.europa.eu/Result.do?arg0=Agreement&arg1=Conclusion&arg2=&titre=titre&chlang=en&RechType=RECH_mot&Submit=Search (Listing of the publication in the O.J. of Council Decisions authorising the conclusion of international agreements).

⁴⁶³ See, e.g., *infra* note 468.

V. THE FUTURE OF THE EU'S INSTITUTIONAL BALANCE IN THE CONDUCT OF TRADE NEGOTIATIONS

A. The European Council's Ambitions in EU Trade Policy Formulation

The current institutional balance on the making of international trade agreements is likely to be affected by the intention of the European Council to involve itself increasingly in trade policy questions.⁴⁶⁴ Except for a few grand statements, the European Council (i.e. the summits at the level of the Heads of State or Government) has been a rather absent player in trade policy questions until now.⁴⁶⁵ European Council President Herman Van Rompuy wants to change this.⁴⁶⁶ In September 2012, he publicly declared that he would "like to devote more time to trade ... as a tool to help restore growth and create jobs in Europe".⁴⁶⁷ In this context, he underlined that "the European Council must continue to support ongoing and upcoming FTA negotiations".⁴⁶⁸

As long as the European Council limits itself to making broad strategic statements, it remains within its role and can play a positive role in stimulating the EU's international trade relations. It should not, however, venture into the concrete process of negotiating trade agreements. The current dynamics of the EU's trade policy, working according to the Community method, stands in sharp contrast with the European Council's intergovernmental politics whereby the general interest is often lost in a bargaining process that focuses on national interests.⁴⁶⁹ The main shortcomings of the European Council's decision-making process are the following:

- (a) It lacks a common starting point for the discussions and, therefore, it requires a considerable time to reconcile the various national viewpoints (in contrast with trade policy debates in the Council of Ministers that take place on the basis of Commission proposals);⁴⁷⁰
- (b) It is subject to veto-rights due to its consensus decision-taking (in contrast with the qualified majority principle in the Council of Ministers);⁴⁷¹ and
- (c) It often looks like a "tapestry market" (whereby Heads of State or Government link and exchange compensations on unrelated issues) in a "decision-making culture" close to that of "horse-trading".⁴⁷²

⁴⁶⁴ Herman Van Rompuy, Speech at the Annual Conference of EU Heads of Delegation (Sep. 5, 2012) in EUCO 158/12 at 5.

⁴⁶⁵ See *supra* notes 64-78 and the accompanying text.

⁴⁶⁶ Van Rompuy, *supra* note 464, at 5.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ It is in this sense that Guy Verhofstadt, former Belgian Prime Minister and current leader of the Liberal Group in the European Parliament, has labeled the European Council a "syndicate of national interests." See Remarks of Guy Verhofstadt, EUR. PARL. DEB. (CRE 20100519) 7-8 (May 19, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20100519&secondRef=TOC&language=en>.

⁴⁷⁰ Devuyt, *supra* note 73, at 342-343.

⁴⁷¹ *Id.* at 346.

⁴⁷² FREDERIC EGGERMONT, THE CHANGING ROLE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION: CONSEQUENCES FOR THE EUROPEAN INTEGRATION PROCESS (2012). See Remarks of Carl Haglund, EUR. PARL. DEB. (CRE 20101215) 19-20 (Dec. 15, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=->

In this sense, trade policy would be very badly served if it were to end up as a bargaining item on the European Council table. As explained by the great European federalist Altiero Spinelli, the essential tasks of the European Council should be giving policy directions and developing cooperation in areas that go beyond the EU's present competences and ensuring the transfer of new competences to the EU institutions whenever this is required.⁴⁷³ As trade policy has already been conferred to the EU as an exclusive competence, the involvement of the European Council in this policy field unnecessary and might well undermine the existing interplay between the institutions.⁴⁷⁴ For example, in policy areas handled at European Council level, the Council of Ministers has generally taken a step back, letting the Heads of State or Government settle difficult questions.⁴⁷⁵ Because of the reasons mentioned above, this has not been to the benefit of the quality and speed of decision-making.⁴⁷⁶ In other words, the European Council should as much as possible stay out of the concrete trade policy-making process.

B. The European Parliament's Growing Role in Trade Policy Formulation

1. *Arguments against the Involvement of Parliament*

A second major factor affecting the institutional balance is the growing role of the European Parliament in the making of international trade agreements.⁴⁷⁷ Some well-known legal scholars have made highly skeptical remarks on the political and institutional consequences of a further "parliamentarization" of the conduct of EU international agreement making.⁴⁷⁸ Because there is no automatic party-political support in the European Parliament for the international actions of the Commission (as negotiator) and the Council (as shaper of the negotiating directives), Professor Marc Maresceau expressed the fear that possible parliamentary objections and delays risk endangering the much-needed credibility of the EU in international relations.⁴⁷⁹ He concluded that the "European Parliament should not become 'superman' in the conduct of external relations of the E[U]".⁴⁸⁰ Professor Joseph Weiler added further arguments in the same vein:

//EP//NONSGML+CRE+20101215+SIT+DOC+PDF+V0//EN&language=EN. See also Remarks of Carl Haglund, EUR. PARL. DEB. (CRE 20101215) 18-19 (Apr. 5, 2011), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20110405+SIT+DOC+PDF+V0//EN&language=EN>.

⁴⁷³ ALTIERO SPINELLI, *THE EUROPEAN ADVENTURE* 169, 176-177 (1972).

⁴⁷⁴ See TFEU art. 207. Article 207 does not provide for a role of the European Council in the negotiation of international trade agreements. See *id.* The institutional interplay provided for by Article 207 should not be disrupted.

⁴⁷⁵ See Emmanuel Mouron-Druol, *The Victory of the Intergovernmental Method? The Emergence of the European Council in the Community's Institutional Set-up (1974-1977)*, in *THE ROAD EUROPE TRAVELLED ALONG: THE EVOLUTION OF THE EEC/EU INSTITUTIONS AND POLICIES* 30-31 (Daniela Preda & Daniele Pasquinucci eds., 2010). See also MAURICE COUVE DE MURVILLE, *LE MONDE EN FACE* 124 (1989).

⁴⁷⁶ Devuyst, *supra* note 73, at 345.

⁴⁷⁷ See *supra* text accompanying notes 192-210..

⁴⁷⁸ Maresceau, *supra* note 262, at 228.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

[Parliament's] involvement [in the negotiation and conclusion of international agreements] may not necessarily contribute to the effectiveness of the negotiations. It may further hem in the Commission ..., produce delays and compromise negotiation tactics and overall confidentiality. Its involvement may weaken the clarity of the Mandate of which the Council is typically the author, further compromising the effectiveness of the Commission qua negotiator having to answer two masters ...⁴⁸¹

In addition, Professor Weiler underlined the institutional point that Parliament – as the institution that needs to give its consent at the end of the negotiations – should not be involved in the process of making the agreement:

[A]part from the negotiation effectiveness there is a deeper concern... [namely] the need for the body that scrutinized not to be involved in the matter that comes up for scrutiny. On the factory floor, the quality controller should not be the same worker who assembled the component ... If Parliament were involved in the negotiations, would it not be all the more difficult to engage in independent scrutiny which at least may be argued is what the Treaty intended?⁴⁸²

2. The Constitutional Necessity of a Greater Role for Parliament in Trade Policy Formulation

The concerns, as formulated by Professors Maresceau and Weiler, merit serious consideration. As a starting point, it must be noted that the increasing involvement of the European Parliament in the making of international agreements is not the result of a mere coincidence of temporary political factors, but the logical reflection of the basic principle that the functioning of the Union is founded on representative democracy, whereby the citizens are directly represented at Union level in the European Parliament.⁴⁸³ In this context, Parliament's involvement in the conclusion of agreements in the field of trade policy became a necessity for three reasons. First, the Lisbon Treaty enlarged the scope of the CCP to the full range of trade in services (except for transport), the commercial aspects of intellectual property and foreign direct investment, in addition trade in goods.⁴⁸⁴ Furthermore, the CCP was confirmed as an exclusive EU competence.⁴⁸⁵ As a result, national parliaments will no longer be involved in the ratification of pure EU agreements in the enlarged CCP sphere.⁴⁸⁶

⁴⁸¹ Joseph Weiler, *Dispatch from the Euro Titanic: And the Orchestra Played On*, EJIL: TALK! (Feb. 2, 2011) <http://www.ejiltalk.org/dispatch-from-the-euro-titanic-and-the-orchestra-played-on-ejil-editorial/> (blog of the European Journal of International Law).

⁴⁸² *Id.*

⁴⁸³ TEU art. 10(1), (2).

⁴⁸⁴ See TFEU art. 207(1).

⁴⁸⁵ See *id.* art. 3(1)(e). See also Villalta Puig & Al-Haddab, *supra* note 49, at 300.

⁴⁸⁶ See generally TFEU Title I. Only mixed agreements, involving competences of the Member States, are subject to the ratification according to the national constitutional requirements, most often including the approval of the national parliament.

To ensure the democratic legitimacy of such agreements, the enhanced role of the European Parliament became indispensable.

Second, the Lisbon Treaty extended the Council's possibility to decide by qualified majority voting on CCP matters, with only limited exceptions.⁴⁸⁷ This has decreased the veto power of individual Member States in the Council and, indirectly, also decreased the ability of national parliaments to steer the process of making and blocking international trade agreements via their country's representatives in the Council.⁴⁸⁸ This is one of the reasons why many constitutional scholars have argued that qualified majority voting in the Council, if it is not accompanied by the right of co-decision for the European Parliament, would lead "to a structural gap of parliamentary control".⁴⁸⁹

Third, the Lisbon Treaty made clear that the CCP – like the other EU activities on the international scene – needs to be conducted in the context of the general principles and objectives on the Union's external action.⁴⁹⁰ These include support for democracy, the rule of law, human rights and the principles of international law, peace and conflict prevention, sustainable economic, social and environmental development of developing countries, and stronger multilateral cooperation.⁴⁹¹ In a democratic Union, the weighting of the various policy objectives directing the CCP should be the subject of an open political debate, for which the European Parliament is the appropriate forum. As EU Trade Commissioner Karel De Gucht stated during his confirmation hearing:

trade policy is, to be sure, an essential lever in our economic policy, but it remains in the service of our society's wider objectives, such as respect for social rights, good governance and the protection of the environment. It is therefore by nature a political instrument, on which the voice – by definition a political voice – of Parliament must make itself heard more clearly.⁴⁹²

⁴⁸⁷ See TFEU art. 207(4).

⁴⁸⁸ See *id.* During international negotiations, national parliaments can try to steer the process only via their national governments. See *id.* To the degree that the national governments are no longer able to block a negotiation upon the request of their national parliaments, the influence of the national parliaments is diminished. See *id.*

⁴⁸⁹ See Michael Nentwich & Gerda Falkner, *The Treaty of Amsterdam: Towards a New Institutional Balance*, EUROPEAN INTEGRATION ONLINE PAPERS (Aug. 25, 1997), <http://eiop.or.at/eiop/pdf/1997-015.pdf>. See also *Adapting the Institutions to Make a Success of Enlargement: Contribution to Preparations for the Inter-Governmental Conference on Institutional Issues*, at 7, COM (1999) 592 final (Dec. 2, 1999) ("any extension of the scope of qualified- majority voting must be combined with the co-decision procedure of the European Parliament"); Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MARKET STUD. 544-545 (2006) ("Increasing the powers of the European Parliament has certainly improved the legitimacy of policy outcomes in precisely those areas where the indirect control of governments over outcomes has been weakened by the move to qualified majority voting and the delegation of significant agenda-setting power to the Commission.").

⁴⁹⁰ TFEU art. 205, 207(1).

⁴⁹¹ TEU art. 21.

⁴⁹² EP Hearing De Gucht, *supra* note 204, at 7.

3. *The Added Value of Parliament's Increasing Involvement in Trade Policy Formulation: a Summary of the Practice*

The next question is whether the practical objections articulated by Professors Maresceau and Weiler have overshadowed the possible added value of Parliament's involvement in the making of trade agreements. This has not been the case. Parliament's actions have contributed in a positive manner to the following legal and institutional evolutions:

- (a) A much greater attention to the consequences of international agreements for fundamental rights and civil liberties, as well as on social and environmental protection, with Parliament acting as an effective guardian in this respect;⁴⁹³
- (b) An increasing openness in the complex discussion on the legal basis of international agreements (especially if the Court of Justice confirms the *in 't Veld* judgment of the General Court);⁴⁹⁴
- (c) A more careful use of the provisional application of important trade agreements, involving some form of agreement from Parliament;⁴⁹⁵
- (d) A greater scrutiny of the purity of Council decisions concluding agreements, eliminating those elements that should be the subject of a proper legislative procedure;⁴⁹⁶ and
- (e) The creation of more systematic monitoring mechanisms to follow-up on the operational effects of trade agreements.⁴⁹⁷

In addition, it must be noted that Parliament has withheld consent in only two out of the 99 agreements that came before it between January 2010 and December 2012.⁴⁹⁸ In both cases, the absence of consent was well motivated on grounds of the protection of fundamental rights and civil liberties.⁴⁹⁹ Because of Parliament's open debate practice, each of the elements above will also enhance the transparency in the preparation, negotiation, conclusion and implementation of EU trade agreements in general.⁵⁰⁰ In this sense, Stephen Woolcock's prediction, when the Lisbon Treaty entered into force, that Parliament's increased powers over the EU's trade policy would go "a considerable way to filling the democratic deficit that previously existed" in this field seems to have been confirmed.⁵⁰¹

4. *The need for Parliament's involvement in determining the EU's negotiating directives*

As a logical corollary of the consent requirement, Parliament has insisted on being involved in determining the EU's negotiating directives. Professor Weiler's concern in this

⁴⁹³ See *supra* text accompanying notes 367-369, 446-450.

⁴⁹⁴ See *supra* text accompanying notes 403-409.

⁴⁹⁵ See *supra* text accompanying notes 410-427.

⁴⁹⁶ See *supra* text accompanying notes 451-458.

⁴⁹⁷ See *supra* text accompanying notes 369-371.

⁴⁹⁸ See *supra* text accompanying notes 440-450.

⁴⁹⁹ See *id.*

⁵⁰⁰ See EP Rules of Procedure, *supra* note 177, r.180-182.

⁵⁰¹ Woolcock, *supra* note 143, at 14.

context, that by co-opting itself into the negotiating game Parliament would weaken its independent scrutiny ability, seems to be based on a fundamental misunderstanding of Parliament's role.⁵⁰² Unlike the Court of Justice or the Court of Auditors, Parliament is not an independent judicial or control body charged with verifying respect for a specific number of legal and procedural requirements.⁵⁰³ It is a political institution composed of representatives of the Union's citizens who are organized in Political Party Groups to influence to course of the EU's policy.⁵⁰⁴

Professor Weiler is correct when he underlines that an increasing involvement of Parliament in determining the negotiating directives might pose problems for the Commission who would then be facing two masters (Council and Parliament).⁵⁰⁵ However, the Commission is already in this position since Parliament must in any case give its consent to the final outcome of the international trade negotiations.⁵⁰⁶ By refusing consent to ACTA and to the Agreement with the United States on the processing and transfer of financial messaging data, Parliament has given the clear signal that its opinions, expressed at the start and in the course of the negotiations, should be taken seriously to avoid a negative result at the end.⁵⁰⁷ While the Lisbon Treaty does not provide an explicit basis for such an early involvement (that goes beyond merely receiving information), it is an omission that should be rectified during a future amendment to the EU's primary law. In the meantime, the institutions should take the initiative and establish a standard inter-institutional procedure that allows Parliament to systematically comment on draft negotiating directives.⁵⁰⁸ Essential in this context is that such a new inter-institutional arrangement fully includes the Council (contrary to what happened when the Framework Agreement of 2010 was concluded).⁵⁰⁹ The arrangement should particularly define the procedure to be followed in case of conflicts between the positions of Parliament and Council.⁵¹⁰ Already in 1982, Parliament had proposed to establish a conciliation procedure in such cases.⁵¹¹ Council and Commission both have a strong interest in providing Parliament with a role at the moment of defining the EU's negotiating objectives

⁵⁰² See Weiler, *supra* note 481, at 3.

⁵⁰³ Throughout the EU Treaties, consent is used as an instrument to obtain Parliament's political approval. It is not seen as an instrument for ex-post independent control. See, e.g., TEU art. 7(2) (breach by a Member State of EU fundamental values); TEU art. 14 (composition Parliament); TEU art. 48(3) (not convening a Convention for Treaty revision); TEU art. 49 (admission of a new Member State); TEU art. 50 (withdrawal of a Member State); TFEU art. 312(2) (adoption of the multiannual financial framework); TFEU art. 329(1) (authorization of enhanced cooperation). See also TEU (comparing the strict requirement for independence in the performance of the duties of the members of the Court of Justice and the Court of Auditors, with the political role description of the European Parliament); TEU art. 14 (Parliament); TEU art. 19 (Court of Justice); TFEU arts. 223-234 (Parliament); TFEU arts. 251-281 (Court of Justice); TFEU arts. 285-287 (Court of Auditors). See generally TEU (for examples of the foreseen consent requirements).

⁵⁰⁴ See TEU art. 14(2); See also TFEU art. 224; EP Rules of Procedure, *supra* note 177, r.30-34.

⁵⁰⁵ Weiler, *supra* note 481, at 3.

⁵⁰⁶ TFEU art. 218(6).

⁵⁰⁷ See *supra* notes 445-450 and accompanying text.

⁵⁰⁸ See Anne Pollet-Fort, *Implications of the Lisbon Treaty on EU External Trade Policy*, EU CENTRE IN SINGAPORE BACKGROUND BRIEF 15 (2010/2).

⁵⁰⁹ See *supra* notes 284-287 and the accompanying text.

⁵¹⁰ See Pollet-Fort, *supra* note 508, at 15.

⁵¹¹ See *supra* notes 280-281 and the accompanying text.

and in working out consensual arrangements for joint action since neither of them is served by blockages at the moment of the conclusion of agreements.⁵¹²

VI. CONCLUSION

While the EU and its Member States are struggling to find an adequate answer to the Euro Area crisis, there are no such signs of disarray in the making of the EU's international trade policy. The CCP is an area of exclusive EU competence, where the Treaties have established a functioning balance between the institutions defending the EU's general interest (the Commission), representing the Member States (the Council of Ministers) and the citizens (the European Parliament) and ensuring respect for the rule of law (the Court of Justice). The successful interplay between these institutions – along the lines of the Community method – has allowed the EU to become a major player in international trade diplomacy that is currently pursuing an offensive policy of negotiating and concluding free trade agreements with partner countries worldwide. Since the entry into force of the Lisbon Treaty, the main change in the EU's trade formulation process has been the enhanced role of the European Parliament. Rather than looking upon the European Parliament's active involvement in the making of international trade agreements as a factor of uncertainty and instability, it should be welcomed and further developed as indicated in the previous Section of this article. Parliament has not only brought a much needed element of democratization and open political debate in EU trade policy making, it has – in practice – delivered ample proof of its added value, notably by reinforcing the preservation of fundamental rights during the negotiations.

⁵¹² See, e.g., Passos, *supra* note 354, at 51-52.