

STUDY

Requested by the INTA committee



# Parliamentary scrutiny of trade policies across the western world



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### ABSTRACT

The Lisbon Treaty increased the European Parliament's powers over EU trade policy. Ten years after its entry into force it is timely to take stock of how the EP has made use of this leverage in shaping the EU's trade negotiations. Such an exercise benefits from a comparison with other well-established parliamentary democracies, particularly the key partners with whom the EU has recently negotiated or has started to negotiate a comprehensive trade agreement.

This study compares parliamentary scrutiny of trade policy in the EU with the United States, Canada and Australia. It concludes that the European Parliament has become powerful and active in trade policy, on a comparable level to the US Congress. Its powers exceed those of other Western democracies, such as Australia and Canada. From the latter the European Parliament may conclude that it is important to codify some of its informal oversight practices, before they may get lost over time again. This may also help to encourage its trading partners to increase their parliamentary involvement during negotiations with the EU. As regards the implementation of trade agreements however, the EU has very few competences in comparison to all other three countries analysed.

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## Executive Summary

Parliaments' role in Western democracies is one of oversight – to ensure that elected representatives oversee the executive's legislative activity. Typically, trade agreements and their oversight have received relatively little public attention, but this has been changing steadily since the proliferation of preferential trade agreements and the rise of highly publicised agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Agreement (TTIP).

The European Parliament (EP) has been pushing for increased competences in law-making since the European Union's conception, and trade policy is no exception. The most recent developments in formal powers were introduced with the Treaty of Lisbon in 2009, which gave the EP a significant increase in powers during international trade negotiations. In addition, it has developed several informal practices of information-sharing during negotiations. All told, therefore, these powers measure up relatively well compared to parliamentary powers in trade in other Western countries.

The EP's powers vary across negotiating stages. Formally, it has the right to be informed at all stages of the mandating and negotiating process, as well as veto power at the ratification stage. This means that while its formal powers are reasonably significant – at least compared to other democracies – they remain quite a blunt tool. However, many informal practices have developed to supplement these formal competences, including writing resolutions, channels of information exchange and the development of technical expertise to participate in discussions of negotiation.

In the United States, it is parliament – Congress – that has constitutional competence over international trade policy. For practical reasons, however, it delegates the power to negotiate (Trade Promotion Authority) to the executive under the 'fast-track' procedure. Under this procedure, Congress' rights are similar to those of the EP: the formal right to be informed and notified of all stages of negotiation, and a simple yes or no vote on the final procedure. However, Congress can also choose to use a lengthier procedure if it is not satisfied with the executive's communication during the negotiations; this gives it the right to make amendments on the implementing bill for the trade agreement, and is a unique power among the parliaments studied here.

The picture for parliamentary involvement is quite different in Canada and Australia, where international treaties were formally a royal prerogative and now fall entirely under the competences of the executive. In Canada, parliament has no formal powers until the implementing stage, where any implementing acts need to pass Parliament; while committees responsible for trade can be briefed during negotiations in response to reports, this is not a formal right. This is also the case in Australia, where Parliament's role only begins during the ratification stage, when the responsible committee holds public hearing and prepares a report recommending either ratification or non-ratification. However, this report is non-binding and occurs after the agreement has been signed, making a suggestion not to ratify an agreement tricky.

Sub-national involvement also varies across these systems. Despite the lack of competences of federal parliament in Canada, sub-federal (provincial) parliaments can play a role. In Quebec, for instance, parliament has the power to ratify international agreements if it considers them important. Moreover, provincial parliaments had a strong role during the negotiation of the Comprehensive Economic and Trade Agreement (CETA), partly because of the EU's insistence on covering government procurement at lower levels of government. In Australia, too, state and territory governments are consulted during trade negotiations and parliaments can be kept informed by national and state ministers; however, due to a lack of expertise at these levels, parliamentary involvement is minimal in all states except for Queensland. In contrast, in the United States, the states may be consulted during trade agreements, but this is not a requirement. In all countries, any implementing bills that fall under sub-federal competences must be implemented at this level; this is similar to – but a weaker power than – mixed agreements in the EU, where

national parliaments have recently become more involved in negotiations and must also ratify the agreement.

In sum, parliamentary involvement at each stage of negotiations ranges from treating Parliament like other stakeholders that must be consulted for transparency (in Canada and Australia), to having official power over trade policy and the right (or possibility) to actively intervene at each stage (in the United States). Comparatively, the EP is not doing so badly, considering that it lacks the constitutional power over trade that is vested in Congress. This is particularly relevant because many of its powers are now legally entrenched, even where backed up by informal practices.

As the recent development of the EP's competences shows, practices for parliamentary scrutiny are in flux. This is most evident in the EU's treaties system, but also occurs in the United States when different measures are included in Trade Promotion Authority bills. In Canada, however, parliament has seen some of its competences eroded since the sixties, indicating that the process is not unidirectional. Both here and in Australia, however, parliament continues to push for increased competences and a change in practices.

The EP's reasonably strong competences mean that it can potentially be a source of institutional learning for other parliaments in trade policymaking, as we observe in the province's increased involvement in CETA negotiations and in the Australian government's increased transparency in the early stages of negotiations with the EU.

In addition to these observations, we develop four recommendations, or areas where there is scope for learning within the EP itself:

1. The EP could solidify some of its informal practices into rules of procedure. As the example of Canada shows, parliamentary involvement can wane when interest subsides. Informal practices developed during CETA and TTIP should thus be codified in order to reduce the risk of backsliding of these powers.
2. Cooperation should be fostered between the Council and the European Parliament on trade policy, particularly to strengthen mutual scrutiny of the Commission e.g. with respect to the monitoring of implementation.
3. Informal practices could be used to develop an intermediate option between approval and veto of ratification, as mock conferences and mark-ups are used in the U.S. Congress. This would allow for potential points of friction to be highlighted and smoothed out in a nuanced way, and reduce the risk of an outright veto.
4. Increasing attention should be devoted to the implementation of EU trade policy. Especially when extensive competencies have been granted to treaty bodies, such scrutiny may be called for.

Scrutiny of trade agreements only becomes more important as they broaden in scope, become more politicised and contentious. These measures would ensure that the EP maintains and continues to develop its oversight of these negotiations into the future.

# 1 Introduction

The most recent developments in the European Parliament's (EP's) formal powers in the EU's Common Commercial Policy (CCP) were introduced with the Treaty of Lisbon in 2009. The EP gained the right to consent to international agreements, the right to be informed about ongoing trade negotiations and co-legislative powers on matters of autonomous trade policy. Alongside these formal powers, the EP – particularly the Committee for International Trade (INTA) – has established several informal practices at each stage of the policy-making cycle. Thanks to these, the EP's leverage during ongoing international trade negotiations and their ratification vastly increased. It put the parliament in a better position to scrutinise negotiations and extend its influence in EU trade policy in general.

Compared to the long period prior to 2009, this formal involvement represents a large step forward. However, it must be remembered that parliamentary involvement in trade negotiations is far from given. Ten years ago, trade negotiations drew relatively little public attention in the EU; today, the broadening scope of preferential trade agreements to include regulatory cooperation and investment agreements has drawn increasing public attention to the process by which they are negotiated. Highly publicised negotiations such as those for the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) in the EU have led to calls for increased transparency and increased legislative scrutiny as one of the ways in which this public concern can be mitigated.

This study compares the formal and informal mechanisms of parliamentary scrutiny of trade policy in the European Union with three other Western democracies: the United States, Canada and Australia. These are all federal states with a democratic parliamentary system, free market economy and active trade policy and are thus considered as a suitable comparison to the EU system. The aim is not only to compare the development and current state of parliamentary scrutiny of trade policy in the four systems – taking stock of the past 10 years – but also to draw some lessons and recommendations for the European Parliament.

The following questions will be addressed:

- What are the formal and informal mechanisms for parliamentary scrutiny at each stage of international trade negotiations (mandating, negotiations, ratification and implementation)?
- What role do parliaments play with regard to other trade policy issues (i.e. autonomous trade measures)?
- What role do sub-federal parliaments (states, provinces) play and how does this compare to parliaments in EU Member States?
- What lessons can the European Parliament draw from these countries?

The study begins with a thorough outline of the EP's formal and informal involvement in EU trade policy. The development of these competences throughout the past decade is outlined with examples from key trade negotiations. The analysis is structured according to the three stages of international negotiations: mandating, negotiation and ratification. Parliamentary involvement in autonomous trade policy is also touched upon.

This is followed by the three comparative studies – the United States, Canada and Australia. The individual chapters start with an overview of formal competences in each stage of trade policy (negotiations and autonomous policy), before illustrating how these are used in practice (and with limited informal examples) in case studies. The case studies chosen for these three countries are the Anti-Counterfeiting Trade Agreement (ACTA), CETA, TTIP and the Trans-Pacific Partnership (TPP). These cases can be considered 'special' cases as they garnered a large amount of public and political attention, were highly controversial and drew attention to Parliamentary involvement in trade in these countries. To assist our comparison,

data has been gathered on parliamentary action in all trade agreements negotiated in the past ten years for the EU, Canada and Australia.<sup>1</sup> In the conclusion we compare each country with the EP, discuss lessons to be learned from these case studies and recommendations for going forward.

In the EU, the Parliament's formal role is restricted to the right to be informed during the mandating stage and the negotiation process, with veto power at the ratification stage. These reasonably strong formal competences are supplemented with a large number of informal practices – resolutions, informal channels of information exchange and the development of technical expertise – to maximise the EP's influence at each stage of negotiations.

The country studies show that parliamentary involvement varies greatly even across these relatively similar cases. Uniquely, U.S. Congress is constitutionally responsible for trade policy and delegates the competence to negotiate to the executive; this means that Congress has relatively strong powers of oversight and the possibility to withdraw this delegation. In Canada and Australia, however, parliamentary scrutiny is less-developed than in the EU, limited to briefings and reporting at the ratification stage. These parliaments have developed limited informal practices and have launched several attempts to increase their competences on trade.

On the whole, this report indicates that the EP's current level of scrutiny of trade policy is reasonably high, and particularly noteworthy are the different informal practices that it has put into place to gain power during stages of negotiations where it lacked formal competences. Generally, the level of parliamentary scrutiny is much higher than in both Canada and Australia, where parliament lacks any real formal role and possesses only the right to be informed during negotiations and/or a weak power of consent post-signature. Even compared to the United States, where Congress has a very strong formal role in trade policy, the EP's role is reasonably strong. This is partly because of the EP's institutional activism and active role in developing informal practices to maximise its power at each stage of negotiation, even where not formally provided for in the Treaties. This also raises the possibility of institutional learning, which we observe in both Canada and Australia, where practices have changed after interaction with the EU.

<sup>1</sup> The U.S. Congress has been excluded from this as the unique constitutional system means that these measures are irrelevant.

## 2 European Parliament

### 2.1 The European Parliament's formal competences on trade policy

The EP has formal competences in two main areas of the EU's Common Commercial Policy (CCP): (1) right-to-information and power of consent with regards to international trade agreements and (2) co-legislative powers under the Ordinary Legislative Procedure (OLP) for defining the framework for implementing the CCP.

#### 2.1.1 International trade agreements

First, as specified in Article 207 of the Lisbon Treaty, the provisions for negotiating and concluding international trade agreements – including the formal competences of the EP – are contained in Article 218 of the Treaty on the Functioning of the EU (TFEU).<sup>2</sup> Based on both treaty articles, this first competency of the EP amounts to (a) the right to be 'immediately and fully informed at all stages of the procedure' (Art. 218(10)) and (b) the power of consent for trade agreements (Art. 218(6)). Before the Lisbon treaty, the provisions in Art. 218 TFEU (ex Art. 228 TEC) explicitly did not apply to trade agreements. Decision-making on international trade agreements was exclusively subject to provisions of Art. 207 TFEU (ex Art. 133 TEC), which did not include a formal right of ratification for the EP. In addition, prior to the Lisbon Treaty, information about ongoing negotiations was exchanged on a voluntary basis between the Commission and Council of Ministers (Council) on the one hand, and the EP on the other. Article 218(10) TFEU has anchored the information flow in the EU's primary law, making it a formal obligation for the Commission to communicate to the EP (Devuyst, 2013). To effectively implement the right to information, the EP had to remind Council and Commission regularly of the new obligation. Substantial support came from the Court of Justice, when it stated in the Mauritius case<sup>3</sup>, which regarded the common foreign and security policy, that if Parliament is not fully informed, it cannot exercise the right of scrutiny.

Trade negotiations officially follow a three-stage procedure at EU level. The first stage is the approval to start negotiations through the Council's adoption of the Commission's negotiating directives. Once the Council adopts these draft negotiating directives (with or without discretionary changes), the Commission can start the negotiations. The external negotiations – where the Commission on behalf of the EU negotiates the terms of the trade agreement with the third country – form the second stage of the procedure, followed by the third and final stage: the ratification of the trade agreement by the EP and Council. The 2010 Framework Agreement determines the specifics of the Commission's formal treaty obligations towards the EP, and hence also contains stipulations about the EP's formal role in EU trade negotiations.

##### (a) Mandate stage

Based on the Lisbon Treaty, the EP has no formal role in the drafting and adoption of a negotiating mandate. The power to authorise trade negotiations thus rests with the Council, and the EP's role begins at the start of the external negotiations (second stage), as the Commission is obliged to report regularly to the EP. However, this information obligation is generally interpreted as applying to the entire negotiation process, 'starting with the Commission's intention to propose the start of negotiations [and] the Commission's recommendation for negotiating directives' (European Commission, 2010, p. 22).

The 2010 Framework Agreement states 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'. While

<sup>2</sup> All references to the TFEU are references to the consolidated version of the *Treaty on the Functioning of the European Union*, as resulting from the amendments introduced by the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009.

<sup>3</sup> EUCJ, Case C-658/11, Judgement 24 June 2014

this does not formally oblige the Commission to provide the actual document to the EP, it does indicate that the Commission must inform the EP of the broad lines of the draft negotiating directives. The Commission can do this by making documents available, providing written summaries or by orally informing the EP's Committee for International Trade (INTA). Similarly, while there is no formal consultation of the EP at this stage, the Commission's operational guidelines indicate that the EP's views should be taken into account in this first stage.<sup>4</sup>

#### (b) Negotiation stage

During the second stage, the negotiation phase, the Commission is obliged to keep the EP immediately and fully informed of the progress of the negotiations (Art. 207(3); Art. 218(10)).<sup>5</sup> The 2010 Framework Agreement specifies that the Commission will meet this obligation by providing the EP with all relevant information that it also provides to the Council, and will do so with adequate time for the EP to express its views and for these to be taken into account. In addition, the Commission is required to 'take due account of Parliament's comments throughout the negotiations' and 'explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not, why' (European Commission, 2010, p. 88-9). However, while the treaty indicates that the Commission conducts negotiations 'in consultation with a special committee appointed by the Council to assist the Commission in this task' (Art. 207(3) TFEU), the Commission is under no formal obligation to consult or take the EP's views into account, and no formal procedure is foreseen in the treaties for the EP to communicate its views to the Commission. This seemingly small detail has rather large implications, as it implies that there is still an implicit hierarchy between the co-legislators.

#### (c) Signing and ratification stage

In the third stage (after the negotiations with the third country are completed) the Council has to adopt the Commission's proposal for a decision to sign the agreement before the agreement can be concluded. As trade policy is now covered by the OLP, the Lisbon Treaty introduced the power of consent for the EP for trade agreements. This means that before the Council can officially decide to conclude the agreement, it first has to send the agreement text to the EP for approval (Art. 218 (6) TFEU). This request for consent will be referred to the INTA Committee, which will then submit its recommendation to approve or reject the agreement to the plenary. The EP will subsequently decide by a simple majority vote in plenary. If the required majority is not obtained, the agreement cannot be concluded. If the Council receives the Parliament's consent, it can proceed with the conclusion of the agreement.

Even though CCP is an exclusive EU competence (Article 351 TFEU), Member States retain authority on certain aspects of trade in services (i.e. cultural and audio-visual services, social, education and health services, and transport) (Article 207 TFEU). If an international agreement covers element of both EU and Member State competence, it becomes a 'mixed agreement'. While the scope for 'mixity' in EU trade agreements has reduced following the delegation of additional competencies to the European Union<sup>6</sup>, many of the new trade agreements encompass a wide array of topics. As such, it can – and increasingly does – occur that certain provisions fall under the Member States' competency. For these agreements, only a slight adaptation of the negotiation procedure is required (Art. 207(5) and Art. 218(8) TFEU), but ratification becomes more complex. Given that they cover both EU and national competencies, mixed agreements can only enter into force after all Member State legislatures have ratified the agreement

<sup>4</sup> It is important to keep in mind that while the draft negotiating directives are a Commission document, the changes to this draft – as contained in the final mandate – are written by the Council. This makes the final, accepted version of the negotiation mandate a Council document, to which the EP does not formally has access without the Council's consent.

<sup>5</sup> For multilateral negotiations, the 2010 Framework Agreement foresees the possibility of the inclusion of an EP delegation as observers during international negotiations (OJ L 304, 20.11.2010). This practice is very rarely used.

<sup>6</sup> Since the Lisbon treaty, the scope of the exclusive competencies of the EU has expanded from trade in goods to encompass trade in services, foreign direct investment and trade related intellectual property rights (Art. 207(1) TFEU).

according to their domestic procedures. The competences of the EP thus remain the same for mixed agreements, but its power of consent is shared by all member states and their parliaments.

Table 1 summarises the EP’s and MS national parliaments’ formal powers in EU trade negotiations.

**Table 1: EP’s formal competences in trade negotiations**

|   | Mandate  | Negotiation | Ratification   | Implementation  |
|---|--|-------------|--|---|
| Federal/EU level                            | Right to be ‘immediately and fully informed of the progress of the negotiations’ (Art. 207; Art. 218 TFEU).<br><br>Formal right to information at all stages of the negotiation (European Commission, 2010).<br><br>No formal consultation rights. |             | Formal veto power (Art. 218(6) TFEU).  | No official powers (limited powers through reporting requirements). |
| Sub-federal/MS level (national parliaments) | No powers at EU level, influence through MS’ national systems.   |             | No powers at EU level, influence through MS’ national systems.<br><br>Mixed agreements: power of ratification depending on national legislation. | Influence through MS’ national systems.                             |

### 2.1.2 Autonomous trade policy

The EP’s formal competencies in EU trade policy extend beyond the negotiation of FTAs. The CCP also covers measures of the so-called autonomous trade policy: decisions taken by the EU without approval by a third country (Adriaensen, 2016). In practice, this second formal competence of the EP amounts to *adopting regulations* with regard to commercial instruments. This includes adopting (a) legislation for the internal decision-making framework for matters of the CCP like trade defence instruments (e.g. anti-dumping provisions, safeguard measures, countervailing duties, Trade Barriers Regulation), (b) legislation to modify autonomous trade measures like trade preferences for developing countries (i.e. the Generalised System of Preferences or GSP), and (c) legislation regarding bilateral safeguard clauses within international trade agreements (i.e. internal processes determining the conditions by which such safeguards can be applied) (Woolcock, 2010). As several legislative dossiers are closely linked to international negotiations, the European Parliament has made active use of such linkages to advance its agenda. The safeguard clause included in the EU-Korea FTA is an example where the EP withheld its consent to the agreement. Also in the Regulation on Conflict Minerals, the EP used their legislative opportunities to help shape the EU’s negotiating position in the OECD.

Article 207§2 TFEU specifies that ‘[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the *measures defining the framework for implementing* the common commercial policy.’ Both the Council and EP have amendment powers; if the Council and EP do not reach agreement after two readings, a conciliation procedure is started to facilitate the conclusion. In practice, trilogue meetings to reach an early agreement have also become a standard method to align the objectives of the EP and the Council. In trilogues, representatives of the parliamentary committee meet representatives of the responsible working party in the Council (for trade policy, these are the INTA Committee and the Council Working Party on Trade Questions, respectively). The inclusion of the CCP under the OLP thus grants the EP co-decision powers, in contrast to the legislative situation before the Lisbon Treaty, when the Council decided on trade policy legislation alone.

## 2.2 The European Parliament's informal procedures in trade negotiations

### 2.2.1 Mandate stage

As outlined in the previous section, the EP has no formal powers regarding the opening of negotiations. However, based on the provisions in the 2010 Framework Agreement, the EP has developed two procedures to exert some informal influence during the first stage. These are (a) informal information exchange between the INTA Committee, the Commission and Council; and (b) adopting non-binding 'early resolutions' at the start of negotiations to indicate the EP's red lines.

#### (a) Information provision from the Commission and Council

The EP is informed of the content of the draft mandates and changes made to these mandates by the Council through informal exchanges with the European Commission. This information exchange is to happen at the same time as the drafts are proposed to the Council. However, the Commission does not have to provide the written documents to the EP; they can be shared with INTA through oral briefings. The final, accepted mandates are officially Council documents, which the EP cannot access without the Council's consent. In order to gain access to these, the EP has used freedom of information requests, using the regulation regarding public access to documents. This practice was begun in ACTA, and access to documents was increased again during TTIP negotiations: recent practice has been for the Council to make the directives publicly available early on in the negotiations (see case studies below).

The European Commission has validated these procedures by supporting parliamentary and public access to negotiating mandates (Abazi & Adriaensen, 2017). As mentioned, the final texts of negotiating directives are a separate category of (Council) documents, so their distribution is regulated by the Interinstitutional Agreement between the EP and the Council of 12 March 2014. Already agreed in 2012, the Agreement restricts access to documents to security-cleared MEPs and staff, in a secure reading room on the EP's premises.

With the public release of trade negotiating directives (even post-authorisation), the EP has gone beyond the 2014 Interinstitutional Agreement, which only foresees restricted access to a limited group of MEPs. In addition to informal access to the Commission's draft version of the directives in the first stage of negotiations, all MEPs now benefit from the public availability of the Council's final version of the negotiating mandates.

#### (b) Early resolutions

Because the Council's approval of the final mandate is essentially the Commission's authorisation to start negotiations with the third country (and the end of the mandating stage), it is also desirable for the EP to be able to influence the formulation of the negotiating directives themselves. It has done this by adopting 'early resolutions' at the start of negotiations. These have evolved from being used after the opening of negotiations, to before the opening of negotiations and even prior to the mandating stage itself.

The first of this kind of 'early resolutions' was on the EU-South Korea FTA (European Parliament, 2007); however, this was adopted only after the Council had approved the Commission's negotiating mandate. This significantly reduced the EP's influence during the first stage, given that it had no say in the content or timing of the mandate.

The EP has since adopted the practice of adopting its resolutions *before* the Council adopts the negotiating directive, in order to communicate its position earlier on in the process. This was the case in the EU-Japan FTA, where the EP adopted three resolutions prior to the opening of negotiations. Its second resolution requested that the Council not authorise trade negotiations until the EP could write a report stating its position on the proposed mandate (European Parliament, 2012a). The third resolution called on the

Council to authorise the opening of negotiations and provided a series of recommendations about the Commission's draft negotiating directives (European Parliament, 2012b). The Council heeded the EP's request on timing, showing its informal influence. A similar procedure was used in TTIP (see below).

For the recently opened EU-Australia and EU-New Zealand negotiations, the EP went a step further, adopting its first resolution even before the Commission had issued its recommendation for negotiating directives (European Parliament, 2016a). This indicates that the EP is well and truly using its 'early resolutions' as an informal negotiating mandate and to indicate its red lines to the Commission. Through informal practices at this stage, the EP has thus secured both the right to access the draft negotiating directives, and the *de facto* right to deliver its opinion on these.

## 2.2.2 Negotiation stage

During the negotiating stage, the EP has the formal right to be informed by the Commission throughout the process. To implement this, the EP has developed four main procedures to gather information and influence negotiations. The first three relate to information gathering, through internal collaboration with EP support services, written and oral communication with other EU institutions, and cooperation with a wider network. These three activities converge in the practice of issuing resolutions, which give the Commission an idea of the EP's ideas on the state of negotiations and any sticking points there may be.

### (a) Exchange with EP support services

Throughout the EP's 7<sup>th</sup> and 8<sup>th</sup> legislatures (2009-2014 and 2014-2019), intra-EP information exchange on trade negotiations has grown, with INTA relies increasingly on the EP's in-house technical services. This has in turn seen an evolution in the degree and quality of technical expertise and knowledge at both administrator and MEP levels.

The Policy Department of the EP's Directorate-General for External Policies (DG EXPO) now regularly publishes in-depth studies about ongoing trade negotiations, which provide background information on the negotiations to the MEPs working on these dossiers. These were used, for instance, on CETA and the EU-Singapore FTA. INTA members can also request written clarifications and workshops regarding topics related to trade negotiations. Recently, the European Parliament Research Service (EPRS) has also become a source of research and reports on trade policy and negotiations.

INTA has also relied extensively on legal opinions and presentations from the EP's Legal Service, for instance regarding the compatibility of ACTA with the *acquis communautaire*, the procedure for a possible EP intervention in the EU-Singapore negotiations or the legal status of certain instruments, statements and declarations in CETA.

Finally, INTA regularly collaborates with other EP committees through their opinions for INTA reports and resolutions (European Parliament Rules of Procedure, Rule 53). For instance, the INTA Committee received an opinion by the EP's Committee on Civil Liberties, Justice and Home Affairs on the compliance of ACTA with fundamental rights (European Parliament, 2011a).

### (b) Exchange with other EU institutions

The EP has developed a wide range of procedures to facilitate information exchange with other EU institutions. Much of this still depends on the quality of the relationship between DG Trade and INTA. Procedures and practices are constantly being tried and tested; the following is an account of practices for the sharing of written and oral information that have stuck until now.<sup>7</sup>

<sup>7</sup> In the aftermath of the Interinstitutional Agreement on Better Law-Making, discussions are currently ongoing about the systematisation and predictability of inter-institutional information exchange on international negotiations (OJ L 123, 12.5.2016).

The exchange of written information through access to documents (other than negotiating mandates) has mostly taken place between INTA and DG Trade, given the formal requirements for the Commission to keep the EP informed of negotiations. DG Trade regularly provides INTA with documents relating to ongoing negotiations; every document that goes to the Member States in the Council's Trade Policy Committee (TPC) is also shared with INTA. This includes draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement, and the text of the agreement to be initialled. According to the operational guidelines of the Commission, these are accompanied by background information on the negotiations, which may be written reports, internal notes or working papers. Most documents of 'EU Limited' classification are sent via email to the INTA secretariat, which then distributes it to interested MEPs. The smaller number of 'EU Restricted' documents and consolidated negotiating texts are available for consultation in a secure reading room.

In terms of procedures relating to oral communication with the Commission, meetings under the 'umbrella' of the INTA Committee have been central to the implementation of the EP's formal competences in trade policy. In addition to formal written and oral questions to the Commission, the EP has set up several procedures to facilitate communication with DG Trade, which takes place in official INTA meetings, INTA monitoring groups and technical briefings.

Nowadays one of the most politically prominent Committees in the EP, INTA consists of around 40 MEPs and meets once a month for one and a half days. During the monthly committee meetings, INTA members discuss ongoing trade negotiations among themselves, with Commission representatives, and with experts from various backgrounds in public hearings. INTA regularly invites the Chief Negotiator for individual trade agreements or even the Commissioner for Trade to an exchange of views. Because of the overflowing agenda of these monthly meetings, it is impossible to report frequently and extensively on the many negotiations occurring in parallel. To address this limitation, the Commission has sought to inform INTA via informal groups: Monitoring Groups and technical briefings.<sup>8</sup> Outlined below, these have been important both for information exchange and expertise building among MEPs on trade-related matters.

Monitoring Groups were an initiative of the Alliance of Liberals and Democrats for Europe group in June 2011, intended to be a new mechanism to monitor ongoing negotiations for bilateral trade agreements. The groups are geographically divided, and some have been created for specific topics and multilateral negotiations. The Monitoring Groups are headed by one Standing Rapporteur, who is an INTA member nominated by the political group appointed to the dossier based on the *d'Hondt* method. Other political groups can appoint Shadow Standing Rapporteurs by writing to the INTA secretariat. Standing Rapporteurs are responsible for organising and chairing monitoring groups and have access to confidential information from the Council and Commission. Monitoring Groups are a much more flexible format than monthly INTA meetings, and allow for detailed communication and specialisation of MEPs involved in the dossier.

INTA also organises technical briefings with the Commission, usually on MEPs' demand, but sometimes at the request of the Commission itself. These briefings cover specific topics that require more in-depth discussion, and the Commission provides INTA with background information or explains particular technical issues. These meetings are open to MEPs from the relevant Monitoring Group, but attendance is usually lower due to the technical nature of topics. Technical briefings can also be organised when there is no dedicated Monitoring Group for the topic under discussion. Compared to INTA and Monitoring Group meetings, technical briefings are a more one-way communication in the form of a technical presentation from DG Trade, sometimes complemented by a Q&A session.

<sup>8</sup> The informal nature of these meetings results in very little data on their frequency or content: no formal minutes are available, except for an obligation to report on Monitoring Group activities (in very general terms) in INTA meetings.

(c) Exchange with a wider network

Finally, the EP also cooperates closely with third actors in committee hearings, exchanges of views and workshops. INTA can communicate directly with the negotiating partner, for instance by inviting ambassadors to committee hearings (as in the EU-Singapore and EU-Japan FTAs) (European Parliament, 2013; 2018b). MEPs can also attend meetings in the third country, through delegation missions, and can use their own contacts with third-country legislative and executive actors. The EP has also undertaken steps to coordinate with EU national and regional parliaments through inter-parliamentary meetings or informal lunch meetings, like the lunch debate on CETA in November 2016 (European Parliament, 2016b). Finally, INTA also invites civil society representatives, business organisations and independent experts to contribute to public hearings, workshops or debates on trade-related topics or ongoing negotiations.

(d) Resolutions

As in the mandating stage, the EP makes extensive use of resolutions to communicate its position during ongoing trade negotiations and to underline its right to full and immediate information. These can be used to indicate red lines that the Commission should take into account or risk the EP vetoing the agreement. For instance, the EP has issued resolutions on the EU-Vietnam FTA (both during negotiations and after the agreement's conclusion) making its consent conditional upon improvement of human rights provision in the agreement. In an open letter to Commissioner Malmström and the EU High Representative, 32 MEPs explicitly connected the possible ratification of the EU-Vietnam FTA with a request to insist on improvements to the human rights situation in Vietnam (Tremosa, 2018). As the text for the EU-Vietnam FTA is currently undergoing structural changes akin to the EU-Singapore FTA, it remains to be seen whether the EP will follow up on these red lines (European Parliament, 2018a).

In conclusion, the EP has developed several means to gather information about trade agreement and exercise influence during negotiations. First, by optimising in-house collaboration for information distribution and knowledge development, it has enhanced its own capacity. Second, the EP has set up practices to facilitate oral and written information exchange with other EU institutions, particularly the Commission. Third, INTA organises hearings and exchanges of views with its wider network. Finally, the European Parliament uses resolutions and declarations to communicate its position on ongoing trade negotiations.

### 2.2.3 Signing and ratification stage

During the third stage of international negotiations – the ratification of finalised agreements – the EP has not hesitated to leverage its formal veto power. Although it has only rejected an agreement once, in the case of the Anti-Counterfeiting Trade Agreement (ACTA, outlined in the case study below), this has set a precedent for future negotiations, proving that the EP can and will reject an international agreement if its red lines are not taken into account.

The EU-Korea FTA was the first negotiation where the EP used the threat of vetoing the agreement to influence the agreement, before ACTA. Though it was initialled in October 2009, the EU-Korea FTA was only provisionally applied in July 2011, after the EP had agreed to the FTA and the regulation of the EP and Council implementing the bilateral safeguard clause of the agreement had been put into place. While only the Council formally has the right to request provisional application, the EP managed to convince the Commission to request the Council to delay the provisional application of the FTA until the EP had given its consent (Elsig & Dupont, 2012). The EP in this case used its formal power (to define the framework for implementing the common commercial policy, i.e. to include the bilateral safeguard clause) to increase its informal influence on the FTA. At the same time, by connecting the approval of the safeguard clause and the FTA itself, the EP used the threat of formal veto power to obtain a stronger position while negotiating the contents of the safeguard clause during OLP.

Mixed agreements provide a particularly interesting case for ratification. First, it is not always clear during negotiations whether an agreement is mixed or not. The INTA Committee submitted an opinion for the EP's resolution of 12 April 2016 on the Commission's annual report (2012-2013) on subsidiarity and proportionality, where it called for clarity regarding the mixed nature of trade agreements. It referred to the Court of Justice's (CJEU) case on the EU-Singapore FTA and the importance of clarifying competences regarding the Investor-State Dispute Settlement mechanism (ISDS) (European Parliament, 2015a). Although it did not resort to formal instruments, the INTA Committee pushed for splitting the ratification of the EU-Singapore FTA, which did end up happening (Mckenzie & Meissner, 2017), and the same process was started for the EU-Vietnam FTA.

In mixed agreements, domestic ratification procedures within each Member State apply. This means that in certain cases, not only national but also sub-federal parliaments must ratify the agreement. While this is usually rubber-stamping, it can seriously delay the implementation of the trade agreement. The most (in)famous case of parliamentary consent delaying a mixed agreement was during CETA, which is outlined below in the case study. For this reason, the Commission has developed a practice of simultaneously adopting provisional trade agreements which can be directly implemented (without ratification). These provisional agreements are stripped-down versions of the complete agreement which cover only the matters belonging to the EU's exclusive competences.

In sum, the EP's powers in the third stage are relatively straightforward and the EP has, on several occasions, used the threat of a rejection to obtain a favourable outcome. Even though it only has the formal competence to accept or reject the negotiated agreement, it has used the precedent of an earlier rejection (in ACTA) to increase its influence during the earlier stages of negotiations as well. While it can be argued that its inability to amend the agreement constricts the EP's influence in the final stage, the continuous back-and-forth communication between INTA and DG Trade during ongoing negotiations ensures that the EP's main points are – in many cases – already integrated in the final agreement. Table 2 compares the use of some of the EP's main informal instruments for involvement in several major FTA negotiations.

**Table 2: EP involvement in negotiations, comparison across cases**

|  | Korea | Japan | ACTA | TTIP    | CETA | Australia | Singapore | Colombia/<br>Peru |
|--|-------|-------|------|---------|------|-----------|-----------|-------------------|
| Parliamentary questions (written and oral) | 53    | 65    | 85   | 376     | 148  | 14        | 18        | 51                |
| Adopted resolutions and declarations       | 5     | 3     | 5    | 3       | 2    | 2         | 0         | 7                 |
| Hearings                                   | 1     | 1     | 1    | 8       | 1    | 1         | 0         | 4                 |
| Plenary debates                            | 6     | 3     | 1    | 2       | 2    | 2         | 1         | 7                 |
| Ratification                               | yes   | yes   | no   | ongoing | yes  | ongoing   | ongoing   | yes               |

Notes: Author's own calculation based on search results from official European Parliament repositories. Results were limited in time between 2004 and 1 November 2018. The count for resolutions and declarations includes the so-called 'early resolutions', resolutions and declarations issued during ongoing negotiations, and the final resolution for ratification (if applicable).

## 2.2.4 Implementation stage

Once the EP has decided on a piece of legislation or consented to a treaty, ensuring proper implementation is largely conferred to the European Commission or the member states. Parliamentary scrutiny of trade policy implementation differs between autonomous trade policy and international agreements.

### *Autonomous trade policy*

For instruments of autonomous trade policy, implementing powers are commonly delegated to the Commission. Issues that are delegated are generally technical or administrative matters with low political salience, but there are clearly some issues that do warrant parliamentary scrutiny, such as revisions to the list of Generalised Scheme of Preferences (GSP) beneficiaries, or the application of anti-dumping duties.

The powers of the European Parliament in delegated and implementing acts have been well-documented since their introduction with the Treaty of Lisbon (Héritier et. al 2013; Brandsma & Blom-Hansen, 2017). For delegated acts, the EP can object to an act adopted by the Commission within a limited time-frame, and can also revoke delegated powers. For implementing acts, the EP can only raise objections to a decision if it considers the act to be *ultra vires* (beyond the competences of the Commission), but this can be disregarded by the Commission which only needs to motivate its response to the Parliament.

Autonomous trade policy instruments commonly foresee reporting requirements for the Commission. This also provides opportunities for the EP to invite the Commission for a presentation and enables MEPs to raise questions and concerns.

### *International agreements*

Trade agreements increasingly foresee an institutional machinery to oversee implementation of the agreement. Various committees have quasi-legislative powers as they further specify or adjust the commitments contained in their annexes. This has raised the need for proper scrutiny of their work (Allemano, 2015; Weiss, 2018). While the EP's powers have been formally and informally increased at the mandating, negotiating and ratification stage, their role in implementation remains modest. This is most apparent when looking at their formal powers.

For amending and revising international agreement, the Treaties provide two simplified procedures through which the Council can mandate the Commission to take decisions in an agreement's implementing bodies (TFEU Art. 218(7) and (8)). These procedures do not involve the European Parliament and do not even contain the right of objection present in implementing acts. In terms of monitoring implementation, EP observers cannot attend meetings of the implementing bodies: the Framework Agreement enables observer status for meetings of implementing bodies created by multilateral trade agreements, this does not extend to bilateral FTAs (Weiss, 2018: 549). Nonetheless, the EP is entitled to be informed about any positions and decisions taken as part of Art. 218(10) TFEU.

Despite this lack of power, the EP remains active in scrutinizing implementation through various monitoring and reporting requirements. In the debates around the adoption of a bilateral safeguard clause in the EU-Korea FTA, a joint declaration was adopted by the Commission and the Parliament committing the Commission to report on Korea's implementation of the non-tariff barrier and sustainable development commitments when requested by the responsible committee. In this sense, the Parliament is 'making for itself a place in the system for implementing the EU-Korea FTA', outside of its formal powers (Brown, 2013). Similar reporting requirements have been included in subsequent agreements. As explained above, these reports can trigger active discussion or inform future revisions of EU trade policy. Beyond self-reporting by the European Commission, the Parliament can also independently monitor an agreement's implementation. A key role is foreseen for the monitoring groups that often continue functioning after the negotiations concluded (Puccio & Roderik, 2019). Implementation reports, legislative own-initiative reports and resolutions can also be used to trigger discussion on an agreement's implementation. These tools are also used in autonomous trade policy.

Finally, the EP does not work alone in its effort to scrutinize the implementation of trade agreements. Some FTA's oblige the partner country to set up Domestic Advisory Groups (DAGs) in which civil society groups are represented, to assess partners' compliance with the obligations under the Trade and Sustainable Development (TSD) chapters. While the DAGs' monitoring tasks were traditionally limited to the TSD chapter, the Commission has agreed to broaden the substantive scope to cover the implementation of the whole agreement in future FTAs (European Commission, 2018). MEPs are also allowed to attend the Commission's Expert Group on the TSD chapter, enabling even further knowledge and information sharing. This is beneficial for scrutiny of implementation, as the most common challenge is the gathering (and sharing) of information.

## 2.3 Case studies

### 2.3.1 Anti-Counterfeiting Trade Agreement (ACTA)

As highlighted above, ACTA was the first – and to date, the only – trade agreement where the EP used its (then new) veto power to reject the agreement. It is thus a true precedent in parliamentary scrutiny of trade policy in the EU and can be seen as a warning for future trade agreements.

During ACTA the EP had very little influence over the mandating stage. The EP adopted its first resolution six months after the authorisation of negotiations by the Council, meaning that they had essentially no influence over the content of the mandate itself. And while the ACTA negotiating directives were the first ones to be made publicly available by the Council thanks to the EP's request for public access to documents, they were released only *after* the EP had vetoed the ACTA ratification.

Despite its delay, the EP used resolutions extensively, issuing a resolution early on in negotiations indicating its red lines for the agreement (European Parliament, 2008). After the entry into force of the Lisbon Treaty – and the new competences it brought for the EP on trade policy – another resolution followed in March 2010 to emphasise the now formal obligation of the Commission to inform the EP of the state of ACTA negotiations, and reiterate that the EP could bring a case before the CJEU if this obligation was not fulfilled (European Parliament, 2010a). This resolution was backed up by a declaration. A third resolution was adopted at the end of 2010, in which the EP conveyed a largely positive view of the consolidated negotiation text it had received from the Commission (European Parliament, 2010b).

The EP also made use of formal instruments – written and oral questions to the Commission – with 85 such questions on ACTA prior to the EP's rejection of the agreement in July 2012. Additionally, informal technical briefings were held with the DG Trade Chief Negotiator throughout the negotiations (European Commission, 2012).

Encouraged by the public outcry at the end of the ACTA negotiations, the EP pressured the Commission into asking for an opinion from the CJEU about ACTA's compliance with the EU Charter of Fundamental Rights. Before the CJEU could publish the opinion, however, the EP – following the recommendation from INTA – voted in plenary to reject the agreement (European Parliament, 2012c). A major part of the reasoning behind the rejection of ACTA was the lack of interinstitutional transparency between the Commission and the EP. This was an important point to underline: by tying its rejection of ACTA to a lack of transparency, the EP set a standard for future negotiations. If it does not receive what it considered to be sufficient information during ongoing negotiations or if its red lines, as set out in resolutions, are not taken into account, then the EP can and will reject a negotiated trade agreement (Ripoll Servent, 2014). This formal veto power in ACTA was used as a rather blunt instrument, with the EP failing to use its informal powers to demand amendments to the agreement or even to influence its implementation. Nonetheless, the EP's rejection of ACTA essentially led to the failure of the agreement overall – this was the trigger that led the US, Canada and Australia, all struggling with their own internal opposition to the agreement, to also abandon the agreement.

### 2.3.2 Comprehensive Economic Trade Agreement (CETA)

Negotiations for the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada began in 2009. While the agreement made headlines after its signature due to problems with the ratification of this mixed agreement, it is important to note that it remained relatively under the radar until 2014.

During CETA, the EP – as usual – made extensive use of the formal instrument of written and oral questions to the Commission; 148 were recorded. The large majority of these were asked after the end of negotiations in August 2014, when the controversy over several points of TTIP had spilled over to CETA.

One of these sticking points was the inclusion of an investment chapter and particularly investor-state dispute settlement (ISDS). For CETA, an investment chapter only came to the negotiating table in 2011 (Council of the EU, 2015). This gave the EP a chance to issue a resolution about this modification to the Commission's initial mandate, as it had not issued a resolution prior to the opening of negotiations in 2009. The EP used its resolution of June 2011, just before the Council authorised the modification to the mandate, to express its dissatisfaction with the Commission for not waiting for Parliament to adopt its resolution on the future EU investment policy in general (European Parliament, 2011b). As a result of EP pressure during 2015, ISDS was changed to the new and (slightly) less contentious Investment Court System (ICS) in the consolidated version of the agreement. A request for an opinion from the CJEU on the compatibility of CETA with the Treaties was submitted in 2016 by 89 MEPs questioning the compatibility of ICS with governments' right to regulate to protect public goals, but this was voted down in plenary. A similar CJEU opinion on the EU-Singapore agreement was at the time pending, but ruled that the agreement would need to be concluded as a mixed agreement.

Attempts to get CETA ratified as a mixed agreement had already begun at the end of negotiations, with the argument that investment provisions in particular fell under member states' competences. In June 2014, 21 chairs of national parliamentary committees signed a letter asking for both CETA and TTIP to be signed as mixed agreements, and several national parliaments voted on resolutions with the same goal (Schöllmann 2016). INTA Committee chair Bernd Lange also called for CETA to be recognised as a mixed agreement. In July 2016 the Commission formally proposed the signature and conclusion of CETA as a mixed agreement – despite its legal opinion that all areas covered by CETA fell under EU competence – to speed up the signature and provisional application of the agreement.

As highlighted above, mixed agreements must be ratified by all Member State parliaments, according to their domestic procedures: in some countries, this implies that sub-federal parliaments must also ratify a trade agreement. In Belgium, this means that regional parliaments of Wallonia, Flanders and Brussels must all agree to the signature and ratification of trade agreements. In October 2016, the Walloon parliament defied pressure to agree to the signature of CETA, blocking the agreement, which led to postponement of the planned EU-Canada summit. Belgium was able to come to an internal compromise after several days of negotiations that included internal bargaining and discussions with EU Institutions. The final compromise, allowing signature by the Council, involved a joint interpretative instrument between the EU and Canada and over 30 statements by Member States, the European Commission and the Council. The agreement was signed on 30 October 2016.

The European Parliament approved CETA on 15 February 2017 with 408 votes to 254. As of September 2017, the agreement has been applied provisionally, meaning that all areas of the agreement falling under EU law are in force. (In CETA, this is essentially all areas of the agreement except for investment.) As part of the agreement between the federal and Walloon governments, Belgium requested an opinion from the CJEU in September 2017 on the compatibility of the ICS with EU law; the court's ruling will be released in early 2019. While 10 countries have reportedly ratified the agreement or are at a late stage of the process, Austria has indicated that it will wait for a positive CJEU opinion before ratification, and Italy has also raised concern about the agreement, particularly provisions on geographical indicators.

While the CETA agreement can be seen to show the potential problems that can arise with the current system of mixed agreements, an alternative interpretation is the increased parliamentary scrutiny that mixed agreements provide for those areas falling under member state competence. They imply that not only the EP, but also national parliaments – and even sub-federal parliaments in some countries – must agree to the treaty before it can be signed and ratified.

### 2.3.3 Transatlantic Trade and Investment Partnership (TTIP)

The Transatlantic Trade and Investment Partnership (TTIP) between the US and EU is undoubtedly the trade agreement that has gathered the most public attention in recent years, given the wide scope of the agreement and the economic size of the partners. Given this level of attention, several new practices developed for parliamentary scrutiny during the negotiations.

Prior to the commencement of negotiations, a practice had been introduced in 2011 whereby some members of INTA could consult the final mandate in a secured reading room (Coremans, 2017). However, the EP – supported by the Commission and the European Ombudsman – continued its requests for the wider and earlier release of negotiating directives for TTIP and other agreements (European Ombudsman, 2014). This paid off: the negotiating directives for TTIP were publicly released in 2014, while negotiations were still ongoing. The EP had already made its position regarding an EU-US FTA clear in a resolution on trade and economic relations with the United States in 2012, while exploratory talks on a possible FTA were taking place (European Parliament, 2012d). It then used early resolutions as in previous agreements, releasing a resolution between the Commission's proposal to the Council to authorise the negotiations (March 2013) and the Council's adoption of the mandate (June 2013). This allowed the EP to ensure that the Council and Commission were aware of its position on the negotiations before authorising their opening.

During TTIP negotiations, a new system was put into place to allow for increased and easier access to documents for MEPs. Rather than email distribution centralised by the INTA secretariat, MEPs could access *EU Limited* documents directly via an online system, with the possibility to print individualised, watermarked copies (Coremans, 2017). This TTIP-specific procedure was seen as a pilot project, but has not been used in any subsequent negotiations (to our knowledge). A smaller number of *EU Restricted* and *consolidated negotiation texts* originating with the Commission were available for consultation in a secure reading room, as determined in the 2010 Framework Agreement.

There was also a high level of information exchange between INTA, the Commission and other parties during TTIP negotiations. 376 oral and written questions to the Commission were logged, most submitted during the negotiations themselves. US representatives and negotiators were invited to speak in INTA meetings and plenary sessions on several occasions, and over the course of negotiations, INTA held eight hearings and two workshops with civil society groups, business organizations and independent experts specifically on TTIP (European Parliament, 2017a; 2017b; see Table 3). The Monitoring Group for the US adopted special procedures for TTIP to allow for highly structured, detailed and frequent information exchange (Coremans & Meissner, 2018). The EP's delegation to the US and the Transatlantic Legislator's Dialogue were used for direct contacts with US Members of Congress (Jančić, 2016). Finally, several exchanges between representatives from national parliaments, the EP and the Commission took place on TTIP, including in the Conference of Parliamentary Committees for Union Affairs (COSAC), and on several occasions in national parliaments as well.

In 2015, the EP issued a resolution on TTIP during the negotiation to reiterate its support for a comprehensive FTA and its red lines (European Parliament, 2015b). During the negotiations, the EP also used more general resolutions following inter-institutional negotiations with the Commission and its assessment of the EU Ombudsman's activities to express its opinion on both the content and transparency of ongoing trade negotiations.

The case of TTIP raises questions around the representation of citizens in the European Parliament. Public opinion was clearly against TTIP, particularly in certain countries (notably Germany and Austria, and this was reflected in several attempts to influence decision making of the EU institutions more directly. A European Citizens' Initiative (ECI) was started – initially rejected by the European Commission on institutional grounds – and several petitions were lodged with EP's Petitions Committee (PETI). When the

Commission changed its position on the ECI and formally registered the initiative, PETI decided to open a debate on petitions relating to EU trade policy, notably TTIP, CETA and the Trade in Services Agreement (TiSA) (Committee on Petitions, 2017). The petitions were then sent to member state parliaments when it was time to ratify the agreements. This does indicate a step forward in terms of the acknowledgement of citizens' opinions; however, the fact that petitions were only discussed at the end of the agreement limits their inclusion in debates during negotiations. However, this is partly due to the Commission's initial decision to disallow the TTIP ECI, implying that for future agreements, petitions may play a greater role throughout the whole process.

TTIP, therefore, did not represent a huge step forward in parliamentary competence in the same way that ACTA did. However, it did represent a large advance in the publication of negotiating texts and an increase in transparency from the Commission's side, which was the culmination of parliamentary efforts for many years. This was helped by the fact that it was the trade agreement with the most public and parliamentary attention of recent years, evidenced by the large number of public hearings and questions centred on TTIP. Negotiations were put on hold in 2016, which was also linked to the change of US administration. Recent proposals to reopen negotiations with the US on a more limited basis may lead to new controversy and dynamics between the EP and the Commission.

**Table 3: Workshops and hearings about TTIP, (co-) organised by INTA**

| Workshop   | Date          | Committee |
|--|---------------|-----------|
| Transatlantic Economic Relations   | 30 May 2012   | INTA      |
| Investor-State Dispute Settlement (ISDS): Provisions in the EU's International Investment Agreements | 1 April 2014  | INTA      |
| Hearing  | Date          | Committee |
| Trade and Economic Relations with the United States  | 14 Oct 2013   | INTA      |
| Employment and social aspects of the Transatlantic Trade and Investment Partnership (TTIP)           | 2 Dec 2014    | INTA-EMPL |
| TTIP: Regulatory Aspects and Investor to State Dispute Settlement and Arbitration                    | 27 Jan 2015   | INTA-JURI |
| Impact of TTIP on ITRE Policy Areas  | 24 Feb 2015   | INTA-ITRE |
| TTIP: Challenges and Opportunities for the Internal Market   | 24 Feb 2015   | INTA-IMCO |
| TTIP: What's in it for Europeans?  | 18 March 2015 | INTA      |
| TTIP: Public Procurement – Challenges and Opportunities for the EU and the US                        | 20 April 2016 | INTA-IMCO |
| EU-US Relations  | 15 May 2018   | AFET-INTA |

Source: European Parliament, 2017d; 2017e. Abbreviations: Committee on International Trade (INTA); Committee on Employment and Social Affairs (EMPL); Committee on Legal Affairs (JURI); Committee on Industry, Research and Energy (ITRE); Committee on Internal Market and Consumer Protection (IMCO); Committee on Foreign Affairs (AFET).

## 3 United States of America

### 3.1 Formal Congressional involvement in trade policy

#### 3.1.1 Congressional powers in the U.S. Constitution

Uniquely out of the four political systems analysed in this report, Congress has the constitutional power to regulate international trade:

*The Congress shall have power (...) to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. (U.S. Const. art 1, § 8)*

This clause both grants Congress – not the executive branch – the power to regulate foreign trade, and submits states' power in this area to those of the U.S. Congress (Brown v. Maryland, 1824; Japan Line Ltd v. County of Los Angeles, 1979). The states' submission to federal laws and treaties is reinforced in Article VI of the U.S. Constitution and has been upheld in case law (Gibbons v. Ogden, 1824). States thus have no formal competence in trade policy in the U.S. although the federal government may consult them whenever issues are on the table that affect their policies significantly.<sup>9</sup> Moreover, the federal government can override – through its right of pre-emption – state laws or acts that contravene the international trade obligations of the United States and can intervene whenever State authorities fail to implement an international obligation enshrined in an international agreement. The informal power of states is discussed below in section 3.1.4.

#### 3.1.2 Trade Promotion Authority

While the Congress is granted constitutional power over international trade, it would be impossible to negotiate with such a large, unwieldy institution. Congress therefore delegates its negotiating powers to the executive branch through “Trade Promotion Authority” (TPA) or “fast-track” procedures. While negotiating powers are delegated to the President, in practice it is the Office of the U.S. Trade Representative (USTR), an agency within the Executive Office of the President, that prepares and conducts negotiations and interacts with Congress on these. TPA serves four main aims: it defines U.S. trade policy priorities and sets negotiating objectives; it ensures that the executive follows these by requiring notification and consultation of Congress; it defines the terms under which the President can enter into trade agreements and when the implementing bills will be approved; and it places limitations on the executive's authority, reinforcing the overall constitutional power of Congress in trade (Fergusson, 2015). The way in which TPA goes about these goals is examined in more detail in the following sections.

TPA is restricted to a certain time period, determined by the Trade Agreements Authority act (currently 19 USC. § 4202, 2015), which contains a sunset clause on its authority and the possibility for its extension within time limits and under certain procedural constraints.<sup>10</sup> Moreover, TPA lays out the conditions under which the President may negotiate trade agreements by defining the negotiating objectives of U.S. trade policy, which can be seen as a general negotiating mandate that Congress defines for the President. Unlike in the EU, these are ‘general’ in the sense that they cover the entire period of TPA rather than being tailored to one specific agreement. When Congress works on a new trade negotiating law the focus is largely on these conditions, which include relatively traditional issues (the reciprocal elimination of tariff and non-tariff barriers on trade in goods) but also newer ones (anti-corruption standards, intellectual property rights

<sup>9</sup> An example is here the involvement of the state insurance regulators in the negotiations between the U.S. and the EU on an insurance agreement between 2012 and 2017. The state regulators were involved through the Federal Insurance Office (FIO), an agency created in 2010 and alongside USTR the negotiator for the U.S. in the talks with the EU.

<sup>10</sup> The current TPA ran until July 1, 2018. As the President requested an extension before April 1, 2018 and neither House adopted an extension disapproval resolution, it has been extended until July 1, 2021.

(IPR), environment and labour conditions). While these are general, they certainly reflect ongoing negotiations: for instance, the 2015 TPA act included several issues that were controversial in TTIP, including measures on geographical indicators, sanitary and phytosanitary (SPS) measures, foreign investment and investor-state dispute settlement, and discouraging boycotts on Israeli goods (Del Monte and Puccio, 2016). Even more specifically, the current TPA act also contains a specific principal negotiating objective with regard to TTIP and the TPP (see 19 USC § 4202(b)(20)(A)). Trade agreements that do not meet these objectives – or which contain provisions other than those changing laws ‘necessary or appropriate’ to implement the law – cannot be adopted under fast-track procedures in Congress, providing a strong incentive for the President to respect the objectives.

Because of the political controversy that surrounds trade liberalisation, granting TPA is far from automatic: several presidents have had to work without it during a substantial part of their terms, including most recently Barack Obama between 2009 and 2015. While trade agreements could still be negotiated during these periods, they were not subject to expedited (‘fast-track’) procedures in Congress. This meant that Congress would be able to amend the implementing bill, threatening the negotiated agreement. The absence of TPA thus does not prevent the negotiation of trade agreements, but may diminish the likelihood of negotiating partners to show their hand in the negotiations or make substantive concessions, if they are unsure that the negotiation will be passed as it stands.

### 3.1.3 Congressional involvement in trade negotiations

#### (a) Pre-negotiation stage

Before the President can start a negotiation that he wants to be covered by fast track, he must notify Congress of his intention to do so. First, the House Ways and Means Committee and the Senate Finance Committee must be consulted on the nature of the intended agreement, the negotiating objectives that it would achieve and the existing laws that may be affected. Second, the whole Congress must be notified a minimum of 90 days before the start of negotiations. Finally, the two committees must again be consulted.

Two additional committees must also be notified: the House Advisory Group on Negotiations and its counterpart in the Senate (see below). In case one or both of these Groups request a meeting (on the demand of a majority of their members), the President must consult with them before beginning negotiations (see (see 19 USC § 4204(a)(1)). The President must inform the Advisory Groups of the specific negotiating objectives to be achieved with the agreement, the partner(s) in the negotiations, whether the trade agreement modifies an existing agreement, and specific information whenever the intended negotiations cover sensitive products or issues.

#### (b) Negotiation stage

Congress is included in several ways during negotiations. The main bodies involved are the two Advisory Groups on Negotiations (see 19 USC § 4203(c)). These Groups consist respectively of the chairs and the ranking members of the House Ways and Means Committee and the Senate Finance Committee, as well as three additional members from each committee (at least one from the minority). In addition, chairs and ranking members on legislation that is significantly affected by trade negotiations are included as members. These two Advisory Groups must be briefed and consulted with on a regular basis on the status of ongoing trade negotiations and on the U.S. position; the closer a negotiation comes to its conclusion, the more frequent such briefings and consultations must be. In addition, members of these Groups are accredited to participate in formal negotiation sessions and/or conferences. Finally, these Groups’ members and their staff have access to documents pertaining to the negotiations, including classified files, after passing security clearance.

Consultation during negotiations is an important part of TPA, which reflects Congress’s goal of ensuring that trade policy remains under the legislative branch by maintaining the ability to affect trade

negotiations (Fergusson, 2015). More informal methods of involvement during negotiations, which fall outside the scope of TPA, are outlined in section 3.2 below.

(c) Preparation for signature

Requirements for consultation with Congress continue until – and beyond – the agreement is signed. No later than 180 days before the President intends to enter into the trade agreement, a report must be submitted to the House Ways and Means and the Senate Financial Committee. This must include the provisions in existing U.S. trade remedy legislation that would be affected, and how these provisions contribute to the general and principal negotiating objectives listed in the TPA law (see above). At this time, each of the committees can submit a disapproval resolution regarding the report (see ‘Sanctioning measures’ below).<sup>11</sup>

No later than 90 days before the President intends to enter into the trade agreement, the text must be submitted to the U.S. International Trade Commission (USITC)<sup>12</sup>, which is tasked with assessing the agreement within 105 days. This assessment concerns “the likely impact on the U.S. economy as a whole and on specific industry sectors, including the impact the agreement will have on the gross domestic product, exports and imports, aggregate employment and employment opportunities, the production, employment, and competitive position of industries likely to be significantly affected by the agreement, and the interests of the United States consumers” (see 19 USC § 4204(c)(2)). The report has to be made publicly available.

No later than 60 days before the President intends to enter into the trade agreement, the whole text must be made publicly available online. At the same time, the required changes to existing U.S. law are communicated to Congress, followed by a draft statement of the administrative action that the President intends to take to implement the agreement (no later than 30 days before entry into the agreement).

(d) Ratification and implementation

Under TPA the fast-track approval of trade agreements and their implementation is used. This follows a strict timeframe from the moment the implementing bill is introduced in Congress<sup>13</sup> and immediately referred to the appropriate committees (the House Ways and Means Committee, the Senate Financial committee, and others where appropriate). These committees have 45 sitting days to report to their full chambers, which then have 15 sitting days to debate the reports (19 USC § 2191(e)(1)).<sup>14</sup> This debate is protected against filibusters by limiting it to a maximum of 20 hours’ debate in the Senate and to a simple yes or no vote in both Houses. This is a key point for the U.S.’s negotiating partners, as it prevents Congress from unilaterally unravelling a negotiated compromise through amendments. The whole fast-track procedure takes a maximum of 90 sitting days after the implementing bill has been introduced into Congress.

<sup>11</sup> In fact, any Member of Congress can ask for such a resolution but must submit that request to the respective committee of their chamber.

<sup>12</sup> As the USITC’s website indicates, the U.S. International Trade Commission “is an independent quasi-judicial federal agency with broad investigative responsibilities on matters of trade” ([https://www.usitc.gov/press\\_room/about\\_usitc.htm](https://www.usitc.gov/press_room/about_usitc.htm)). Its main role consists of the investigation of trade remedy cases (such as the occurrence of dumping, illegal subsidization by other countries, and the eventual injuries that this may have caused), and the analysis of trade agreements that the President wants to negotiate and/or conclude, this at the service of the President and Congress.

<sup>13</sup> Interestingly, there is no timeframe for the implementing bill to be introduced into Congress; the most extreme delay was for the FTAs with Colombia, Korea and Panama (signed 2006-2007), whose implementing bills were not passed until 2011.

<sup>14</sup> Where the bill is a revenue bill and the Senate must act on a House bill, the Senate Finance Committee has until *either* the 45<sup>th</sup> day after the Senate bill is introduced *or* the 15<sup>th</sup> day after the Senate receives the House bill (whichever is later) to submit its report. If these timeframes are not met, the bill is automatically discharged.

For other implementing legislation, the expedited procedure also applies. Draft bills are submitted by the Administration, accompanied by a Statement of Administration Policy and introduced by the majority and minority leaders in both Houses.<sup>15</sup>

After Congress has approved the implementation legislation and the agreement, and no later than 30 days before the agreement effectively enters into force, the President must notify Congress of the extent to which the other party (or parties) to the agreement have taken necessary measures to be in compliance with the provisions that must be met when the agreement enters into force.

(e) Sanctioning measures

Since the introduction of the fast-track procedure in 1974, all trade agreements except one<sup>16</sup> have been implemented under this procedure. However, Congress has four means to sanction the President if the above requirement for consultation is not met. First – and most extreme – Congress could reject the agreement itself. This is obviously disadvantageous, however, if members of Congress are forced to reject an agreement that they would otherwise have supported; it would also reflect badly on the U.S. as a negotiating partner.

A second tool is the ‘procedural disapproval resolution’, through which Congress can withdraw fast-track authority for a specific agreement if ‘(...) the President has failed or refused to notify or consult’ in accordance with the relevant procedures on that agreement, or if the agreement does not sufficiently move towards the objectives of the TPA (see 19 USC § 4205(b)(1)(B)(i)). For this to happen, both houses must adopt a ‘procedural disapproval resolution’ on the bill within 60 days of each other. In this case, neither house can use the fast-track procedure.

A third option is the consultation and compliance resolution (CCR), which allows each house to withdraw fast-track from an implementing bill individually. This CCR is introduced either into the Senate by the Senate Finance Committee, or into the House by the Ways and Means Committee, if either committee reports unfavourably on the bill or if the USTR fails to consult and notify adequately. The two Houses of Congress take such a decision separately, so it is possible that one House applies fast-track procedures while the other does not.<sup>17</sup> This means that the implementing bill is debated on without time limits as a regular bill, and also subject to amendments in that house.

Finally, either house can adopt a normal resolution finding that the bill is inconsistent with the negotiating objectives laid out in the TPA act. However, the 2015 TPA act does not specify what the effect of such a resolution would be on the implementing bill and whether this would prevent either House using fast-track.

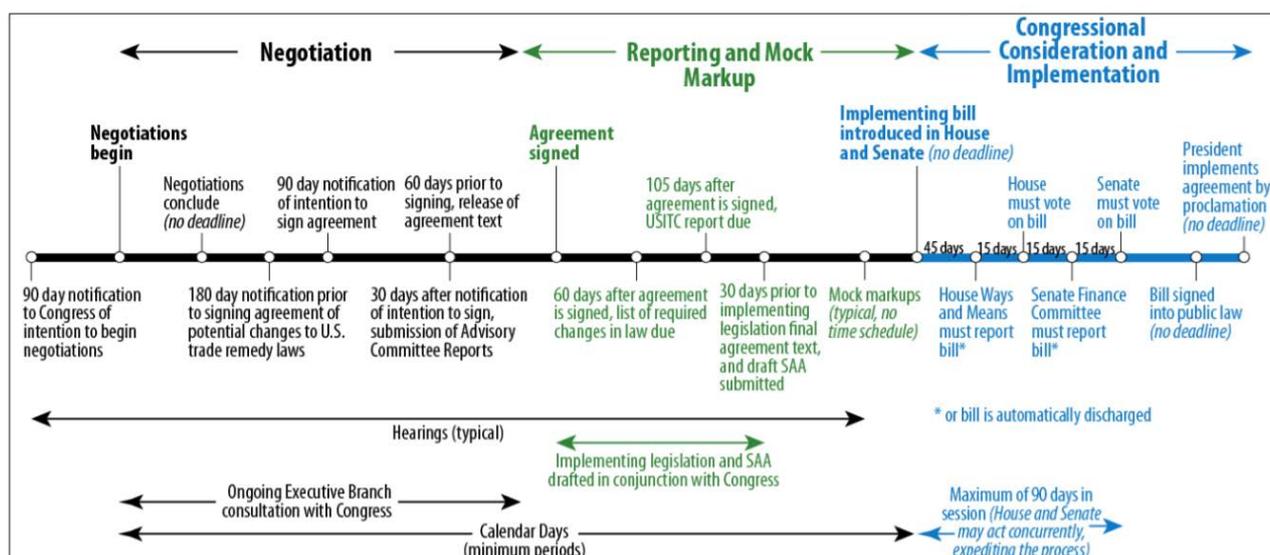
A summary of U.S. Congress’s involvement in each stage of trade negotiations is provided in Figure 1 and Table 4.

<sup>15</sup> This is important because presidential initiatives can only be considered for adoption as legislation in Congress in case Members of Congress act as sponsors of such initiatives. Unlike in several parliaments in Europe, there is no automatic priority for the consideration of governmental drafts in the legislative process in the U.S. Congress.

<sup>16</sup> The 2001 U.S.-Jordan agreement, which was considered uncontroversial due to the low levels of trade between the two countries (Del Monte and Puccio, 2016).

<sup>17</sup> The trade authority legislation contains, indeed, two separate provisions for each chamber. One for the Senate (see 19 USC 4205(b)(3)(B)) and the House of Representatives (see 19 USC 4205(b)(4)(D)).

Figure 1: Timeline of Congressional involvement in trade negotiations



Source: Congressional Research Service, 2015

Table 4: Congress' formal competences in trade negotiations

|                          | Mandate   | Negotiation  | Ratification  | Implementation   |
|--------------------------|---|--|---|--|
| <b>Federal level</b>     | <p>Delegated fast-track authority contains substantive conditions (a kind of general mandate) that all negotiations in that time period must meet.</p> <p>Congress must be notified of intention to start trade negotiations at least 90 days before and informed of objectives, partners and other specific information.</p> | <p>Advisory Groups on Negotiations are briefed and consulted throughout negotiations, have access to documents.</p> <p>President must submit reports on how U.S. law will be affected by the agreement. U.S. International Trade Commission assesses the economic impact of the agreement. Text is made publicly available online.</p> | <p>Fast-track approval: Congressional committees report on the agreement, both Houses have 15 days to debate. Approval through an up-or-down vote.</p> <p>Congress can also choose to use a more length procedure, if it is unsatisfied with the President's communication during negotiations.</p> | <p>Implementation also through fast-track procedure. Draft versions of bills submitted by the Administration and introduced by leaders in both Houses.</p> |
| <b>Sub-federal level</b> | <p>Possible consultation with relevant state authorities</p>  | <p>Possible consultation with relevant state authorities</p>   | <p>None</p>   | <p>State implementation under the federal government's right of pre-emption.</p>   |

### 3.1.4 State involvement in trade policy

Although states have no formal competence in U.S. international trade policy, they have taken an active role in promoting their interests since the 1980s. This occurs through some formal structures, as well as *de facto* procedures and state-led activism. However, the majority of states' involvement in trade policy occurs through the governors' offices (executive), rather than through the legislative.

A couple of formal bodies allow the USTR to officially consult with the states during trade negotiations. The main one is the Intergovernmental Policy Advisory Committee (IGPAC), which is composed of 21 state officials and associate representatives and has as a goal 'to provide general policy advice to the [USTR] on issues involving trade and development that have a significant relationship to the affairs of U.S. state and local governments' (IGPAC, 2018). However, the fact that only some states are represented – and that many members lack expertise or commitment – holds this forum back from being truly representative (Freudlsperger 2017). Formerly, a system called the State Single Point of Contact (SPOC) was used. This entailed a representative for each state, selected by the governor, who became the state's official point of interaction and information exchange with the USTR. However, this system is no longer in use. While states have called for reform and for the creation of a 'Federal-State International Trade Commission' as an official forum for consultation, these have remained unanswered, and complaints continue that the USTR sees consultation as a box-checking exercise and as informing rather than consultation (Kukucha 2015).

Additionally, states can influence trade policy through more informal routes. Forty states are members of the State International Development Organisation (SIDO), which increasingly focuses on trade policy and conveys states' opinions on foreign trade. The U.S. District Export Council (DEC) and regional offices, which help companies to develop their exports and participate in US Commercial Service workshops, include business and public sector representatives and state officials. Moreover, states can affect trade policy through Congressional delegations: for instance, staff members of Congress met with the Maine Citizen Trade Policy Commission in 2008 to discuss state-related trade issues such as procurement and services (Kukucha 2015, p.231). Finally, states can take unilateral action: many states have permanent offices abroad and use these and other networks to promote exports from their industries and agricultural sectors and attract FDI (McMillan 2012, p. 80). However, an ongoing problem for states in all these fora is their lack of expertise: at any given point in time, most states do not have any specialists in trade policy.

In one area of trade agreements – public procurement – US states have somewhat more power than the Constitution grants them. While most fields of trade are subject to pre-emption (so even in policy areas where states usually have competences, federal action can override this) this does not apply to public procurement, which has a 'market participant exception'. Although the federal government could technically restrict states' power in public procurement through free trade agreements, this has never been seriously considered; states thus have the *de facto* right to 'opt-in' to public procurement measures in FTAs through letters to the USTR (Freudlsperger 2017). When this was encroached upon by the federal government in the Chile and Singapore agreements in 2004, states retaliated, with all but 8 subsequently refusing to accede to the procurement measures in the agreements with Peru in 2009 and Panama and Colombia in 2012. In most states, the competence to accede to public procurement measures in trade agreements lies with the state governor's office; however, certain states (Hawaii, Maryland, Minnesota and Rhode Island) have explicitly given this competence to state legislatures due to public pressure and calls for democratic legitimacy.

While the above bodies are all for the state executive, certain state legislatures have also taken active measures to play a greater role in trade policy. Some have tabled bills calling for the creation of 'citizen commissions, legislative ratification of international trade agreements and the removal of presidential fast-track authority', despite their lack of formal power over these (Kukucha 2015, p. 232). Many of these bills do not make it out of committee, but some have led to action. Four states have – or have had – citizen trade policy commissions, which allow members of the public to voice their opinion on trade agreements (McMillan 2012, p. 152). Other controversial measures taken by states include unilateral measures by Massachusetts restricting procurement from companies doing business in Burma, or Illinois divesting pension funds from companies doing business in Sudan. While this sort of legislative boycott of a foreign country has been done before by the US – such as during apartheid in South Africa – these made intergovernmental relations within the US tense when states created laws unilaterally.

Although these are many ways in which states can be consulted or push to take part in trade policy, their lack of formal competence means that their inclusion in trade often relies on the federal government consulting with them or the state developing enough resourcefulness and expertise to participate itself. States are often treated as just another interest group in Washington, rather than institutions in their own right (McMillan 2012, p. 191). One substantive barrier to their participation is that states are often stuck between promoting their own exports and protecting their state industries – which can be competing goals. They are thus often torn between promoting free trade agreements and arguing for higher tariffs for their states' industries or agricultural products, to create and sustain jobs in their states. There are also suggestions that states tend to be more vulnerable to interest group lobbying on foreign trade, given their lack of own expertise and experience in the issue (McMillan 2012, p. 111). This means that states can find it difficult to know what to actually support if they do participate in discussions about trade, or can be torn between the interests of their citizens and their industries. For these structural and substantive reasons, therefore, state involvement in trade in the US can be limited.

### 3.1.5 Autonomous trade policy

As stated above, under the U.S. Constitution, Congress has official competence over all matters related to international trade. However, in addition to delegating negotiating powers, Congress has delegated the majority of autonomous trade competences to the executive branch. These fall into two main types: unilateral trade defence measures, and export controls.

Congress has delegated unilateral trade measures to the President, although the exact procedure depends on the action being taken (Cimino-Isaacs, 2018). There are three main types used:

1. Section 232 of the Trade Expansion Act, 1962: this is a “national security clause”, allowing the President to place restrictions on imports that “threaten or impair the national security”. This can be accompanied by a report of the Commerce Department’s Bureau of Industry and Security. This measure has only very rarely been used, but the most recent example is President Trump’s tariffs on steel and aluminium imports in March 2018.
2. Section 301 of the Trade Act, 1974: this allows the U.S. to enforce its rights under trade agreements or respond to unfair barriers to U.S. exports. The U.S. Trade Representatives determines the offending actions or policies and must negotiate a settlement with the trading partner. If the disagreement falls under the WTO or a preferential trade agreement, formal dispute settlement mechanisms must be used.
3. Section 337 of the Tariff Act, 1930: this prohibits unfair acts or methods of competition in imports in the U.S. It is very commonly used for IPR enforcement. The U.S International Trade Commission (ITC) is responsible for these investigations and can issue an exclusion order/cease-and-desist order, dependent on presidential disapproval.

These unilateral (Presidential) actions can be – and have been – challenged in court by importers. However, the Supreme Court has generally upheld Congress’s delegation as long as the President acts as the “agent” of the legislative department and plays no law-making role – in other words, if the President simply carries out Congress’s will and “intelligible principle” as expressed in the delegating document (Devereaux Lewis, 2016). Congress can also withdraw these powers from the President if they believe that the President is misusing or misinterpreting them.

The second group of autonomous trade measures are export controls (CRS, 2018). Again, Congress has delegated these powers to the executive branch through the Export Controls Act of 2018, the Arms Export Control Act and the International Emergency Economic Powers Act. As their names suggest, these acts aim to control exports of arms and dual-use items. Despite the delegation, Congress still plays a role in some of this legislation. The Arms Export Control Act requires Congressional consideration of certain foreign defence sales proposed by the President, including the sale of major military equipment or services.

Congress must be notified at least 30 days before the sale, and may pass a law modifying or banning the proposed sale. Under Section 38(f) of the Arms Export Control Act, the President must also notify Congress of any items to be removed from the U.S. Munitions List (arms and munitions banned for export) at least 30 days prior to the change, including a description of the new controls on the item.

## 3.2 Informal Congressional involvement

In addition to the formal competences and procedures outlined in TPA, Congress follows other procedures during trade negotiations that have become part of the informal process of trade agreements in the U.S. These occur both during negotiations and at the end of the process.

During ongoing negotiations, congressional hearings are held on a regular basis to get information and explanations on ongoing negotiations from the Administration. Hearings are held particularly in the Subcommittee on Trade in the House Ways and Means Committee and by the Senate Finance Committee. The frequency of these hearings generally depends on the level of Congressional concern and the sensitivity of negotiations, as they serve to avoid problems at a later stage of the negotiations.

Individual members of Congress are also able to weigh in on negotiations and indicate ahead of time which particular issues will trigger their support or opposition once the agreement comes to the up-or-down vote in Congress. A typical way for this to happen is by sending letters signed by a large number of members to the USTR and/or President throughout negotiations, or for members of Congress in leadership positions to be vocal about their opinion. Of course, this means that these 'key' members are often the target of lobbying from industry or other stakeholders, with the potential to shift policy in favour of different groups. Research has shown that it can be easier to target a wide range of members of Congress than MEPs, both because of a higher level of accountability to their constituents and because of the more flexible nature of policymaking in the US – however, this may have changed with the expansion of the OLP since the Lisbon Treaty (Mahoney, 2008, p. 113). Nonetheless, the influence of this lobbying is difficult to quantify, as even industries face different costs and benefits: Trump's 2017 announcement of his 'Buy America' plan for steel led to praise from the US steel industry, but counter-lobbying from oil companies and pipeline constructors.

Some informal practices are only used after the agreement is signed. First, the Administration submits an unofficial draft of the implementing bill to Congress so that it can review the trade agreement prior to the introduction of the implementing bill. This is done first in hearings in the House Ways and Means Committee and the Senate Finance Committee, which then conduct an unofficial ('informal') mark-up. If the two houses do not agree on the result of the final draft bill, they conduct a 'mock conference' to reconcile the differences. This has no real legal standing, but acts as a test run of the bill itself. The process gives committee members the chance to raise any concerns they may have or suggest changes they would like to see made. While the agreement has already been signed at this point, this can signal to the Administration points that may need to be clarified in the implementing bill (without changing the content of the trade agreement itself). Although the administration is not obliged to make these changes, failure to do so in the past (as in the case of the U.S. – Oman FTA) has led to calls for better consultation of Congress (Fergusson, 2015).

Second, Congress has at times urged for clarifications or additions to a concluded trade agreement using side agreements or side letters. Side agreements were used notably in NAFTA on the environment and labour, but it is legally unclear whether these are subject to fast-track procedures or not. Side letters are usually between the top trade negotiators from each country; they accompany the agreement but do not modify it and are signed by all parties to the agreement. However, their legal enforceability is also unclear and as yet untested.

Third, informal agreements between executive negotiators and members of Congress have been used to address issues raised in the informal mark-ups, often relating to special concerns or interests. For instance,

in the Dominican Republic-Central America-United States FTA, President Bush made informal accommodations for labour, sugar and textile interests to ensure passage through the Senate (Hornbeck, 2005).

Finally, if Congress does not manage to get the result that it wanted using the formal and informal modes of communication throughout and after negotiations, then the option becomes “renegotiation” of certain points of the agreement. This is obviously not ideal, given that it requires returning to the negotiating table and getting the partner on board with the changes as well, and risks undermining the US’s legitimacy as a negotiating partner. For this reason, side agreements are widely used to circumvent the need for a proper renegotiation.

The way in which US Congress uses its formal and informal powers is demonstrated in the case studies underneath: TTP, TTIP and ACTA.

### 3.3 Case studies

#### 3.3.1 Trans Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP)

The two recent case studies examined here – the Trans-Pacific Partnership (TPP)<sup>18</sup> and the Transatlantic Trade and Investment Partnership (TTIP) highlight some of the more informal means of involvement and the limits to Congressional involvement during negotiations, despite Congress’s extensive formal competences. Given their temporal and substantive similarities, the two agreements are discussed here together.

While Congress is highly involved in the delegation or mandating stage and the post-negotiating stage, it can still struggle to gain influence during negotiations themselves. Congress aims to weigh in on the agenda, determine on which issues the USTR will make concessions, and affect the amount of time spent on defensive and offensive U.S. interests. Formal requirements for consultation are high, and hearings took place throughout the TPP and TTIP negotiations. As Congressional concerns rose, the USTR became more prepared to increase the frequency of these hearings and briefings to avoid problems later down the line. Nonetheless, there have been repeated complaints from members of Congress that while this information was high quality and meetings frequent, there was often the feeling that these were briefings rather than consultations (i.e. no exchange of views) and that last-minute changes to texts were not always included (GAO 2007). These complaints continued throughout TPP and TTIP negotiations: in 2012, 131 House Democrats complained about the ‘needless secrecy and over-classification of documents’ (Inside U.S. Trade, June 29, 2012). Concerns about Congressional access to TTIP negotiating documents were also raised by Republican members<sup>19</sup> despite USTR Michael Froman’s assurance in 2014 that any member of Congress could access negotiating texts (Froman, 2014).

The 2015 TPA bill addressed these concerns, taking five important steps towards increased transparency that directly affected the ongoing TPP and TTIP negotiations. First, it allowed members of Congress to view the negotiating texts in a Congressional security office without an appointment and without the presence of a USTR official. Second, while consulting the texts, Members could be accompanied by one of their staff members – not just staff members of the House Ways and Means Committee or the Senate Finance Committee. Third, these texts included the positions and demands of the TPP partners, rather than

<sup>18</sup> Negotiations for the Trans-Pacific Partnership (TPP) began in 2010 and were concluded five years later in 2015. The TPP was heralded as a ‘landmark’ free trade agreement in both coverage (12 countries) and scope. It was signed by all countries, but the U.S. withdrew from the agreement after the election of President Trump.

<sup>19</sup> Letter from members of Congress, November 12, 2013. Retrieved from: <https://www.citizen.org/sites/default/files/joyce-fast-track-letter.pdf>

bracketed texts with anonymized negotiating alternatives. Fourth, the USTR provided summaries of the different TPP chapters to “assist Members of Congress in navigating the negotiating text” (Inside U.S. Trade, March 20, 2015). Fifth, classified briefings were provided by USTR on the negotiations about sensitive topics (Inside U.S. Trade, March 27, 2015).<sup>20</sup>

Many individual members of Congress also weighed in on the negotiations. During TPP negotiations, for example, currency manipulations proved to be a consequential issue. In June 2013, 230 members of the House of Representatives sent a letter to President Obama asking for a provision to be included in the text; this exceeded the 218 members required for a majority in that house. In September of the same year, 57 of the 100 Senators did the same. In addition to these letters, the Congressional Auto Caucus (a sort of working group) and Senator Orrin Hatch (Republican, ranking member and later chairman of the Senate Finance Committee) were particularly vocal in their support. Congressional pressure on the issue remained strong throughout the negotiations, resulting in what Bergsten and Schott (2016) have called “an important distinction in trade policy”: the inclusion of a Declaration that covers currency manipulation and that is – despite being a Declaration – covered by TPP’s dispute settlement procedures.<sup>21</sup>

In TTIP, too, broadly signed Congressional demands were used as a way of gaining influence during negotiations. Although the Obama Administration preferred to keep regulation of the financial services sector out of the agreement, Congress was divided on the issue. Particular fears were that the measures could become a backdoor for the weakening of the Dodd-Frank Law on financial regulation after the 2008 Financial Crisis. In December 2014, a group of Members sent a letter to the Administration warning against including any provisions that could limit Congress’s ability to act against another financial crisis.<sup>22</sup> The EU’s geographical indicators for animal products were also controversial: 55 of the 100 Senators signed a letter against them in March 2014, and by April 67 had expressed their opposition to GIs in dairy or meat products, or both (Inside U.S. Trade, March 14 and April 25, 2014). Congress also opposed or was divided on EU regulation on pesticides and food additives, protection of religious freedoms in EU member states and – like in the European Parliament itself – the exclusion of ISDS from TTIP.

Given these substantive advances in Congressional involvement in the negotiations, it seems that Congressional pressure resulted in the executive responding to its demands, some of which were even strategically used in negotiations. Ultimately, however, not all Congressional demands were taken onboard, in many cases because of resistance from external partners, but sometimes because the U.S. administration opposed them. In the case of TPP, renegotiation was necessary to allow the agreement to pass Congress.<sup>23</sup> Almost immediately after the Obama Administration released the negotiated text of the TPP agreement on November 5, 2015, the debate about renegotiation began. This was largely framed as a range of “fixes” that should be made to the agreement, also affected by the upcoming presidential and congressional elections of 2016. Six days after the release, Senate Finance Committee Orrin Hatch called for a renegotiation of the length of the biologics exclusion provisions; other “fixes” included financial services provisions and to the labour consistency plan negotiated with Vietnam. The debate rapidly shifted to how these concerns could be addressed. The Obama Administration – and the majority of negotiating

<sup>20</sup> Note however, that this commitment did not end Congressional complaints about the lack of transparency. Noteworthy in this regard, was Democratic Ohio Sen. Sherrod Brown’s claim at an April 2015 Senate Finance Committee hearing that USTR’s consultations with Congress were “pathetically inadequate”. He particularly complained that USTR was “dragging its feet” on the promised classified briefings (see Inside U.S. Trade, April 24, 2015). His complaints not only applied to TPP, but also to TTIP. In the same sense, one of his colleagues in the House – Lloyd Doggett (D-TX) – called USTR to be “at least as forthcoming as the European Commission” (see Inside U.S. Trade, October 30, 2015).

<sup>21</sup> Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries, retrieved from : [https://www.treasury.gov/initiatives/Documents/TPP\\_Currency\\_November%202015.pdf](https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf)

<sup>22</sup> Retrieved from : [https://democrats-financialservices.house.gov/uploadedfiles/2014.12.01\\_house\\_letter\\_to\\_administration\\_on\\_financial\\_services\\_in\\_ttip.pdf](https://democrats-financialservices.house.gov/uploadedfiles/2014.12.01_house_letter_to_administration_on_financial_services_in_ttip.pdf)

<sup>23</sup> Given the blockage of TTIP-negotiations after Donald Trump’s election as U.S. President, this was not renegotiated, although talks of the possibility of resuming negotiations started mid-2018.

partners – opposed the reopening of the text of the agreement, so a range of fixes through side-letters were being proposed. Further compromises were reached, for instance by including financial services through alternative pathways. Ultimately, however, TPP became stuck during the presidential elections due to Hillary Clinton’s opposition and Donald Trump’s promise to undo the agreement on his first day of presidency, met with the Presidential Memorandum of January 23, 2017.

### 3.3.2 Anti-Counterfeiting Trade Agreement (ACTA)

When ACTA negotiations began in October 2007, the USTR did not have fast-track authority as the TPA had expired in July of that year. The USTR explained that it planned to negotiate ACTA as a ‘sole executive agreement’ – an agreement requiring only the presidents’ approval. This procedure is usually used only for insignificant issues or in urgent situations, and while its limits have never been fully specified, it seems they should be based on either the president’s constitutional powers or historical usage (Goldsmith and Lessig, 2010). Given that IPR – as well as international agreements – are a congressional competence (U.S. Const, § 8), this raised concerns among legal scholars about the constitutionality of the ongoing negotiations, particularly given the secrecy under which ACTA was negotiated (Kaminski, 2012). Nonetheless, the USTR maintained that ACTA was consistent with U.S. law and would not require implementing legislation, and that Congress would be involved in overseeing the agreement’s legislation (Ilias, 2012).

As ACTA was not negotiated as an international agreement, TPA requirements for notification and consultation described above did not apply. In October 2011, Senator Wyden wrote to President Obama raising questions about the constitutionality of the negotiating process;<sup>24</sup> in the December 2011 reply, USTR highlighted that ACTA was the result of ‘close collaboration’ with Congress, including meetings and conference calls on the topic.<sup>25</sup> This meant that Congress essentially had (minimal) oversight during the procedure and would also during implementation. As a result of Congressional and civil society’s concerns, the USTR’s public transparency also increased as negotiations advanced: during early rounds no negotiating texts were accessible; in November 2009 they released a summary of key discussion points; in April 2010 a draft text; in October 2010 a consolidated text; in November 2010 a finalised text and in May 2011 the final, legally verified text (Ilias, 2012). Not content with the response, however, in March 2012 Senator Wyden submitted files for an amendment to the JOBS act (in Congress at the time) that would prevent the President from ratifying ACTA without the “formal and express approval of Congress”.<sup>26</sup> However, these amendments were not introduced due to lack of time.

The CRS’s report on ACTA in July 2012 ended with numerous questions for Congress to consider, including what Congress’s role would be and whether activity would extend further than oversight (Ilias, 2012, p. 23). Ultimately, however, the EU rejection of ACTA in July 2012, concerns from international civil society and the delays in ratification in other countries meant that ACTA remained unratified by the United States, which shifted its focus to IPR enforcement regulations in TPP (Inside U.S. Trade, July 13, 2012).

<sup>24</sup> Retrieved from:

<https://www.wyden.senate.gov/imo/media/doc/Wyden%20Letter%20to%20Obama%20ACTA%20Oct%202011.pdf>

<sup>25</sup> Retrieved from: <http://infojustice.org/wp-content/uploads/2012/01/Kirk-12072011.pdf>

<sup>26</sup> Retrieved from <http://infojustice.org/wp-content/uploads/2012/03/Wyden-ACTA-Amendment.pdf>. A second amendment was also proposed that required the USTR to make its position in TPP public.

## 4 Canada

Canada has a bicameral political system with a lower chamber (House of Commons) and an upper (Senate). For the period under scrutiny (2008-2018) there have been three significant political parties. The Conservatives and Liberals have provided the government leaders for the Harper and Trudeau governments respectively, and jointly represent about two-thirds of the house. Both parties support free trade, actively pushing the government to work on a more offensive trade agenda and providing the majority for all implementing bills and reports adopted by the House. The New Democratic Party, currently holding 44 of the 338 seats, has a more social-democratic leaning and is often responsible for providing a dissenting or more critical voice alongside the sovereignist Bloc Québécois. The Senate plays a secondary role and acts as a check to the lower house; it has also been reformed under the Trudeau government so that the largest block of MPs becomes unaligned and non-partisan. Future appointments are to strengthen the role of the Senate as a non-partisan body of experts.

Canada is also a federal system where competences on trade and international treaty-making are located at the federal level. The provinces govern the municipalities, can make their own taxation and procurement decisions and hold power over several areas, including hospitals and education. There are also several competences that are shared between levels, such as agriculture.

### 4.1 Formal parliamentary involvement in trade policy

International negotiations on trade in Canada largely follow the Westminster system. The constitution itself is not explicit on the division of competences and procedures to follow for the handling of external affairs in general and trade negotiations in particular (Friesen, 1994, p.1429; Harrington, 2005). As a remnant from its colonial history, relations with foreign countries are a royal prerogative that are exercised in Canada by the Governor General (Dupras, 1993). In line with this tradition, the extent to which parliament can scrutinise trade negotiations is fairly limited.

#### 4.1.1 Trade negotiations

**First stage: Mandating.** The opening of negotiations is decided within the executive and does not require parliamentary authorisation. The responsible ministry, currently Global Affairs Canada, is required to draft a 'Memorandum to Cabinet' which ensures full executive support. In drafting this negotiating mandate, the executive commonly consults with societal stakeholders and business groups.

**Second stage: Negotiating.** During negotiations, there are no obligations for the negotiator to report to Parliament. MPs must rely on general parliamentary mechanisms such as committee hearings, studies and reports to rectify this lack of information. Most parliamentary oversight takes place within committee structures. The Standing Committee on International Trade (CIIT) in the House of Commons and the Standing Committee on International Affairs and International Trade (AEFA) in the Senate are tasked to conduct studies by the plenary, for instance when discussing implementation acts. However, they can also initiate their own studies when and how they see fit (Standing Order 108(2)). In the context of such a study they invite several witnesses, including sectoral organisations, civil society, academics and the negotiators themselves. The number of witnesses for these studies can range from a handful to over a hundred (as was the case for TPP).

These studies can – but do not have to – feed into a report for which the Committee, pursuant to Standing Order 109, can request the government to table a comprehensive response. The two Committees can also request a briefing meeting. Such meetings have been organised in the context of NAFTA renegotiations, as well as to debate the import duties on steel and aluminium proposed and put in place by the Trump administration. While these enable some degree of oversight, they are distinct from the regular, routine briefings that take place in the INTA committee as they are infrequent and not backed by a formal reporting

obligation as the case in the EU. Additionally, Parliament relies on traditional tools of parliamentary scrutiny through plenary debates and parliamentary questions.

Beyond these instruments, the Canadian parliamentary system also enables petitions by concerned citizens. Five native Canadians can open an electronic petition, provided it is endorsed by a member of parliament. If the petition gathers 500 signatures, the government must respond to the enquiry within 45 calendar days. Since its launch in April 2016, eleven petitions were started relating to international trade, and five have received a government response.

**Stage three: ratification and implementation.** Parliament does not have ratification power compared to the formal rights of the US Congress and EP. Following the signature of the agreement, the government may table the signed agreement in the House of Commons along with a memorandum of understanding outlining the main commitments under the agreement and the rationale for its intended ratification. The House then has 21 sitting days to formulate a (non-binding) recommendation. This policy was introduced during the Harper government in 2008. Initial analysis of the current arrangement is ambivalent: while the policy is an improvement over the past, the instrument is optional, comes too late in the negotiating process, fails to foster active debate or scrutiny and appears to be executed rather whimsically (Danesi, 2014).

Parliament can play a role in implementation. In Canada, international treaties have no direct effect in law, even when government has formally ratified the treaty: international commitments must be written into national law. This is done through an Implementation Act, which follows the standard legislative procedure, with both houses discussing the proposal. As legislative competences are divided between the federal level and the provinces, treaties covering sub-national competences are to be implemented by provincial legislators. The scope of the Implementation Act is quite limited, in the sense that it pertains only to those aspects of the agreement requiring amendments to domestic law. These implementing acts rarely face difficulties in Parliament. However, in one case, the Senate refused to pass the Implementation Act for the proposed Canada-US FTA, which only passed after elections were called and the governing party changed (Barnett, 2008).

#### 4.1.2 Sub-national involvement in trade negotiations

As the trade agenda has grown in scope and depth, it is only natural that it has gradually encroached on competences held by the provinces, and calls for their involvement in trade negotiations have become steadily more pronounced. From ad-hoc consultations in the GATT negotiations in the seventies, to more structured dialogue in the NAFTA negotiations, sub-national territories can now voice their concerns through the C-Trade committee system for international trade (Kukucha, 2003, pp. 64-67). This committee – the Federal/Provincial/Territorial Committee on Trade – meets four times a year and allows officials to share information and documents on trade negotiations, with subnational representatives encouraged to share feedback on draft documents.

In the determination of the negotiating mandate the committee can be consulted but this is not obligatory. During the negotiations, the government can -and usually does- actively consult with the provinces as they are in part responsible for the proper implementation of parts of the treaties (see below).

The only sub-national parliament with power at the ratification stage is the National Assembly of Québec, which votes on ratification for agreements that are considered important. Between 2002 and 2016, twenty-seven international treaties required such parliamentary approval (Turp, 2016). However, if the National Assembly of Québec rejects an international trade agreement, the agreement is not annulled; rather, the parts touching on provincial competences are not applicable within Québec.

While the federal level ultimately negotiates, ratifies and is bound by the treaties, this does not automatically apply to the provinces. Since the *Labour conventions* case from 1937 the powers of provinces

over the implementation of international treaties has become quite a stable judicial principle, despite being increasingly under pressure (De Beer, 2014).

Table 5 provides an overview of formal mechanisms of parliamentary oversight in Canada.

**Table 5: Canadian Parliament's formal competences in trade negotiations**

|                   | Mandate   | Negotiation  | Ratification   | Implementation  |
|-------------------|---|--|--|---|
| Federal level     | Parliament not involved. Commonly CIIT does a scoping exercise shortly after the launch of negotiations | No official powers. Briefings in committee as part of a study or in response to reports. | No role. Optional tabling policy which provides a 21-day period for debate | Any implementing Act must pass Parliament.                                  |
| Sub-federal level | No role<br><br>Except for CETA governments consulted through C Trade committee                          | Governments can take part in negotiations<br><br>Parliaments not involved                | No role except Quebec parliament has power to ratify                       | Implementing Acts pertain to the aspects falling under provincial authority |

### 4.1.3 Autonomous trade policy

The Canadian parliament can adopt measures of autonomous trade policy in much the same way as is the case in the European Union. For several of these policies, the implementing powers granted to the executive through the Customs Act, Tariff Act and the Investment Canada Act are quite extensive. When revisions occur to instruments of autonomous trade policy, it is often as part of a larger package. The Canadian's General Preferential Tariff (the equivalent of the EU's GSP) was amended last time as part of the Economic Action Plan 2013 Act No. 1. This was a package of over thirty different acts. As it was the programme's first revision since 1974, a standalone bill may have attracted more extensive debate. Similarly, the Investment Act (an equivalent to the investment screening regulation proposed by the Commission) was revised the Economic Action Plan 2013 Act No. 2.

The Canadian Parliament is also responsible for adopting and adjusting the legislative framework through which trade defense instruments are applied. The Special Import Measures Act (SIMA) lays down the procedures and criteria by which the Canadian government can decide on the existence of trade-distorting measures and the appropriate level of countervailing duties. The methodology was most recently updated through an Omnibus Act tabled by the Ministry of Finance in 2016. In the actual adoption of trade defense measures no active role is foreseen for the parliament. A two-step procedure is applied. The first stage concerns the investigation into whether dumping or subsidizing has occurred. This is the responsibility of the Canada Border Services Agency. The second stage consists of an economic study by the Canadian International Trade Tribunal to assess whether the dumping or subsidizing is causing injury. If the tribunal confirms that damage has been done, it can establish countermeasures.

## 4.2 Attempts to restore parliamentary scrutiny

From the 1920s until the late 60s, parliamentary approval of important treaties was standard; however, this ended during the Cold War. Furthermore, this decline in parliamentary oversight has been accompanied by a lowering of the reporting requirements of the government to the parliament. From 1909 onwards, the Canadian government had to provide an annual report, but this policy was abolished when the foreign affairs department reorganised in 1995 (Harrington, 2005, pp. 480-482). In other words, Canada has seen a backwards step in parliamentary oversight in trade policy.

It should thus not come as a surprise that proposals for a reinstatement of parliamentary approval prior to ratification have surfaced time and again. Between 1999 and 2004 the Bloc Québécois sponsored several bills to this end; however, only two of these proceeded to a second reading before being defeated in the House of Commons.<sup>27</sup> Neither of these reached the committee stage. More recently, MP Peter Julian (NDP) proposed Bill C-358, the *Fair, Democratic and Sustainable Trade Treaties Act* in 2017, which called for the adoption of a resolution in the House and the Senate prior to the agreement's ratification. Much like the previous proposals, this bill hails from the opposition, and given the limited movement on the proposal since it was introduced, it seems likely to fall victim to the same party dynamics.

Calls for greater consultation and reporting through parliamentary committees have re-emerged in recent debates, and these do not always stem from the opposition. The Senate's 2017 report *Free Trade Agreements: A Tool for Economic Prosperity* gave the following recommendation:

*"That, in order to enable parliamentarians to serve as effective legislators in relation to international trade agreements, the Government of Canada report throughout the negotiation process to the Standing Senate Committee on Foreign Affairs and International Trade, and the House of Commons Standing Committee on International Trade. Reports to these parliamentary committees should occur on a quarterly basis, and should provide information on negotiating mandates and progress made during negotiations. When required, sensitive information should be disclosed to these committees with strict adherence to in camera rules."* (AEFA, 2017, p. 34. emphasis added)

Several witnesses cited in this report, including officials from the European Parliament, drew a comparison between Canada and the EU to support such a recommendation. In its response, the Government listed the various means through which Parliament can scrutinise negotiations and voice its concerns, arguing that these allowed for "a robust review" by Parliament and that the current system "provide[s] flexibility, allowing negotiators and senior officials to provide updates as required, reflective of the varied pace of negotiations" (Minister of International Trade, 2017). There has been no further follow-up on this recommendation, as MPs did not further press the Minister on this issue in his appearances before the committee.

Many of the current calls for greater oversight relate to the transparency with which negotiations are conducted. The relevant legislation, the *Access to Information Act*, had not been amended since 1982, making Canada a laggard in international terms (Hazel & Worthy, 2010, p. 358). In the context of trade negotiations, the issue has been raised by opposition MPs during the first WTO ministerial conferences (Bergeron, 2004) and recently in dissenting reports on CETA and TPP negotiations (CIIT, 2012, p. 47; 2014, p. 53). The Trudeau government, while supportive of TPP negotiations, criticised the Harper government on their closed nature and made a campaign promise to improve the transparency of international negotiations.<sup>28</sup> Nonetheless, while the current government has introduced a new Bill to amend the Access to Information Act, the proposal has stalled and received critique for its lack of ambition. According to the latest reports, 34% of requests for information were rejected as they relate to the international affairs and defence of Canada, with NAFTA renegotiations as a key concern (Privy Council, 2018).

Broadly, much of the recent debate in Canada on democratic checks, accountability and transparency has focused on the process of consultations with stakeholders (see also Al Attar & Clouthier, 2015; Marceddu, 2018). The number of recommendations in parliamentary reports about the government's consulting practices far outnumber the calls to strengthen parliamentary scrutiny. Beyond calling upon the government to consult as widely and inclusively as possible, the parliament itself has expanded the

<sup>27</sup> These were Bill C-214, *An Act to Provide for the Participation of the House of Commons When Treaties Are Concluded*, which received support from all but the Liberal Party resulting in a defeat by a vote of 110-151; and Bill C-260 which was introduced in 2004 and defeated in second reading 54 against 216.

<sup>28</sup> <https://www.liberal.ca/statement-by-liberal-party-of-canada-leader-justin-trudeau-on-the-trans-pacific-partnership/>

number of witnesses it hears. CIIT studies and reports have also multiplied significantly in the last two parliamentary terms, leading to critique from the NDP that the government should refrain from “using committees as their tools for conducting government consultations (CIIT, 2017, p. 107). This is also a concern of capacity, as the numerous consultations during TPP negotiations stretched committee resources thin.

In sum, the current system is to a large extent reliant on goodwill from the government to report on ongoing negotiations (including using the optional tabling system) and to take parliaments’ concerns or recommendations into account. With only few institutional checks, the Canadian parliament can easily be bypassed, and the revisions proposed over the last decade, while sometimes well received, have fallen victim to opposition-government party dynamics.

## 4.3 Case-studies

### 4.3.1 Anti-Counterfeiting Trade Agreement

The House of Commons was barely active on ACTA itself. The Standing Committee on Canadian Heritage (CHPC) issued a study in which it scrutinised both CETA and ACTA (CHPC, 2011). This, however, took place after negotiations had concluded and only called upon 6 witnesses.

Neither the Committee on International Trade (CIIT) nor the Committee on Industry, Technology and Science (INDU) issued a study or report on the ACTA negotiations. No debates or studies could be found on the negotiating mandate or during negotiations. Within the plenary there was an exchange of opinions in 2009 between MP Charlie Angus (NDP) and then-minister of Industry Tony Clement. The Senate was equally silent on ACTA. However, this does not mean that there was no parliamentary scrutiny of ACTA. For Canada to comply with the agreement, it had to implement two bills to bring national legislation in line with their international commitments on (digital) copyright regulations and IPR enforcement. These two bills were subject to heavy parliamentary scrutiny.

On copyright, a first proposal was launched in 2005 in Bill C-60. It did not pass through the legislative procedure, as the government failed to survive a vote of no confidence later that year. The next two proposals on the topic, Bills C-61 and C-32, did not receive Royal Assent before the parliament went into prorogation. However, a separate sub-committee was created to scrutinise the proposal for C-32, and heard 124 witnesses. The compatibility of this bill with commitments under ACTA was actively discussed in these sessions. Ultimately, this bill was reintroduced in 2011 once the Harper government had an absolute majority; the proposed legislation (Bill C-11) was almost identical to C-32 and received Royal Assent in 2012 despite opposition from all other parties and amidst public protest.

A similar process took place on the domestic bill on measures to combat counterfeit goods. The Standing Committee on Industry, Science and Technology (INDU) adopted a report in 2007 highlighting the severity of IPR violations and the need to draft adequate legislation (INDU, 2007). The first bill to combat counterfeit goods was introduced in 2013 (Bill C-56). At this point, the EP had already rejected ACTA and it appeared that the agreement was dead. Yet, the possibility that this bill could reintroduce ACTA “through the backdoor” was a particular concern voiced shortly after its introduction by MP Charmaine Borg (NDP) during Question Time. Then-Minister for Industry, Christian Paradis, did not provide a straight answer to her question nor clarify whether the Canadian Government intended to ratify ACTA (House of Commons, March 4, 2013). Critics also complained about the selection of witnesses to be heard by these committees, which was perceived as biased towards industry (Thibodeau, 2013, p. 19). Ultimately, the Canadian Parliament adopted a reintroduced legislation later that year as the parliament entered its second session (Bill C-8).

Throughout the discussion of these bills, public commentators, expert witnesses and the opposition party NDP regularly drew parallels between IPR commitments under ACTA, CETA and TPP and the proposed copyright regulations. Thus, while ACTA itself did not receive extensive scrutiny in parliament, the national regulatory proposals serving a similar effect were subject to more active debate. The linkage between national and international commitments was, however, only rarely made in parliament. To some extent, parallels can be drawn with the US where attention to the domestic legislative implications of IPR and copyright regulations also drew greater public and parliamentary attention than ACTA itself.

### 4.3.2 Comprehensive Economic Trade Agreement

Most parliamentary work on CETA took place within the House of Representatives. The importance of the CETA negotiations is apparent from the extensive involvement of multiple committees. Besides the three studies and reports elaborated in the committee on international trade (CIIT), both the Standing Committee on Agriculture and Agri-Food (AGRI, 2014) and the Standing Committee on Canadian heritage (CHPC, 2011) created a report on the negotiations.

No parliamentary activity could be detected before the formal launch of the negotiations. By contrast, the EU's insistence on covering government procurement at all levels of government meant that sub-national governments were more actively consulted at all stages of the negotiations, including the drafting of the negotiating mandate.

Scrutiny of the negotiation process started when the first negotiating rounds were held, through a fact-finding mission by the CIIT. Between June 2010 and February 2011, twenty-two witnesses were heard including several European organisations when a delegation of committee members visited the EU. The committee convened in the whole to discuss the negotiations on December 4, 2010. The report mostly provided background on the negotiating partner and touched upon several negotiating issues.

Shortly after the first report was presented in the House, the first petitions by concerned citizens also emerged in the House. The CIIT continued its scrutiny as several witnesses were heard for a follow-up study that resulting in a second report published in 2012. While covering several negotiating topics in greater detail, the resulting recommendations were quite supportive of the negotiating process. Finally, a third report emerged in 2014 which -substantively- covered much of the same sectors but provided more direction in identifying defensive and offensive interests.

Plenary debates were organised mostly in response to the reports created in the different committees' work, to discuss the Implementation Act for the agreement and address an opposition motion focusing on the impact of the agreement on Fisheries.

The provision of information to provinces is different to that to the federal legislature. As stated by the chief negotiator on CETA:

*[W]e had briefing sessions with the provinces before every negotiating session so that they could understand what would be expected and what our strategy was. [...] On many issues we would take them into the room and have a debate on what Canada's position should be. When we first went to Brussels, there were up to 60 provincial and territorial representatives who came with us... We met them individually if they had one-on-one concerns. Over time, and bear in mind this has been more than four years, we've developed a very cohesive and constructive team..."* (Chief negotiator Verheul, November 7, 2013)

In a first report of the Canadian House of representatives on CETA, the involvement of the territories in the C Trade committee was compared to the workings of the Trade Policy Committee (CIIT, 2012). The CETA negotiations were, however, quite exceptional as the provinces took a seat at the negotiating table. While the federal negotiators led the discussions, provincial representatives could pass on instructions or pause the negotiations in case internal deliberation or clarification was due (Paquin, 2013). This mode of

negotiation, however, has not been used in other negotiations and it is unclear whether CETA will prove a unique experience or a step towards further institutionalisation of the role of provinces in Canadian treaty-making (Paquin, 2017).

Following the end of the negotiations the Canadian government already ratified the agreement and introduced the implementation bill (C-30) before tabling the agreement and providing a memorandum of understanding. Something which drew criticism from the main opposition party NDP. While the adoption was accompanied with another series of extensive hearings in the House and Senate committees, the implementation bill was adopted by the house and senate with few amendments.

### 4.3.3 Trans-Pacific Partnership

Canada joined the TPP initiative in 2012, four years after the negotiations started. Parliamentary attention to the negotiations, however, traces back to 2010 when -during question time- MPs inquired into the implications of Canada not being part of the TPP negotiations.

In November 2011, a motion tabled in the Committee for Trade requested the government to brief the committee about Canada's efforts to be accepted as a participant in these negotiations. While the motion was denied, it already signalled the sensitivity of potential negotiations. When Canada ultimately gained the support of the other TPP partners to join the negotiations in 2012, the opposition parties repeatedly raised questions regarding the compromises the government had to make to secure such support.

Despite these concerns, no government mandate was discussed in committee. Still, through committee hearings on CETA and other trade negotiations running in tandem, witnesses had an opportunity to already pitch their offensive and defensive interests for the TPP.

During the negotiations, the House launched two studies entitled 'Benefits for Canada of the Transpacific Partnership' in May 2013 and March 2014. Neither study resulted in a report tabled for government response. Within the Senate, a report was created in 2015 focusing on ASEAN on the back of hearing ninety witnesses. The report did not focus in detail on the TPP negotiations but expressed clear support for the TPP initiative.

Following the end of the negotiations on TPP in 2015, the trade committee in the House of Commons organised a public consultation on the agreement. Close to 50.000 emails and letters were received, as well as 199 briefs. Moreover, in a deviation from standard practices, the committee invited next to expert witnesses also concerned citizens to appear before them in their individual capacity. A total of 415 witnesses (among which 103 individuals) were heard between February 2016 and March 2017 (CIIT, 2017). As part of their study, the committee visited the different provinces and held public hearings on location. However, before the completion of the study, the US had already pulled out of the agreement.

The revisions introduced by the CPTPP called for a follow-up study to discuss its differences with its heavily studied predecessor. Considering that the revisions to the treaty largely concerned the removal of several offensive interests made by the US, it does not necessarily come as a surprise that fewer witnesses were heard and no report was issued. In May 2018, the CPTPP treaty was tabled in the House of Commons for 21 consecutive sitting days.

The implementation act (Bill C-79) sailed through both houses with exceptional speed. The government repeatedly asked for a swift ratification in order to be amongst the first six countries to ratify the agreement (the countries is the minimum for the agreement to enter into force). Members of Parliament voted 236 to 44 in favour and within a week the Senate approved the bill in three sittings. The speedy process was regretted by Senators but was deemed necessary in order to reap the desired first-mover advantages. The chair of the Senate, Raynel Andreychuk complained: "Here we are again being told by the government to move quickly in such a way that perhaps we would have taken other options." (AEFA, 24<sup>th</sup> October 2018).

## 5 Australia

### 5.1 Formal parliamentary involvement in trade policy

Australia is a federation composed of six states and two territories. At the federal level it is a bicameral system, with a lower house (the House of Representatives) and an upper house (the Senate). The two main parties in Australia are the Liberal/National coalition (centre-right) and the Labor Party (ALP, centre-left), which make up 97% of the House of Representatives and 77% of the Senate. Both parties are broadly pro-free trade, so trade agreements have been usually easy to pass; however, the Labor Party has begun to take a more critical stance towards modern trade agreements, as outlined below. The third-largest party is the Australian Greens, which takes an anti-free trade stance without exception, but has a clear minority in Parliament (1 seat in the House of Representatives and 9 in the Senate).

While the parliament resembles the US system in structure, Senators are elected directly through proportional representation, meaning that the governing party rarely has a majority in the Senate. Moreover, the parliament's function much more closely resembles the Westminster system, with the Prime Minister obliged to resign or call an immediate election if the House of Representatives passes a vote of no confidence in their administration (Bach, 2003).

#### 5.1.1 Trade negotiations

Formally, treaty-making is an Australian federal executive competence (Australian Constitution § 61). This means that all decisions about negotiation – including determining the objectives, negotiating positions and scope of agreements, as well as the final decision on signature and ratification – are taken at Ministerial or Cabinet levels. However, according to the Constitution (§ 51 (xxix)), the power to *implement* treaties with regard to 'external affairs' is a legislative one. The High Court has established that this gives the Parliament power to legislate to implement sections of a ratified treaty into domestic law (Senate Standing Committee on Legal and Constitutional Affairs. 1995).

Despite this, formalised structures of parliamentary involvement have been set up in Australia through policy and administrative measures (Tasmanian Government, 2014). However, Parliament's competences only begin *after* the signature of a trade agreement. After signing a treaty, the Government tables it in both Houses of Parliament for at least 15 sitting days (2-3 months) before taking any binding action (ratification). The Government tables the treaty alongside a National Interest Analysis (NIA), written by the Department of Foreign Affairs and Trade (DFAT), which explains the reasons why Australia should be party to the treaty; the economic, social and cultural effects of the treaty; obligations for Australia and direct economic costs; how it will be implemented; and information on the consultation that took place during negotiations.

These tabled treaties are considered by the Joint Standing Committee on Treaties (JSCOT). First created in 1996, it is re-established each parliamentary term by a resolution of appointment which also defines its remit and mandate. Its 32 members come from both the House of Representatives (lower house) and the Senate (upper house), from a mix of the government party, opposition and independent or minority parties. JSCOT is split into four sub-committees for different sorts of international treaties, and these are assisted by the secretary and Secretariat staff. JSCOT has the power to convene public hearings; conduct inquiries into matters referred to them by a Minister or by one of the Houses of Parliament (or own-initiative inquiries into Government reports) and ask for written submissions or public hearings.

Once a treaty is tabled in Parliament, JSCOT will call for these public hearings and consultations with stakeholders, interest groups and civil society, state and territory representatives and interested members of the public. On the basis of this and its own analysis of the agreement text, it assesses the treaty and writes its recommendations, which it reports back to the Parliament. Recommendations can include points about the negotiation process, specific items of the agreement that it suggests should be reviewed in the coming years, and end with either a recommendation to ratify or not to ratify the agreement. Because

JSCOT contains members from both Houses of Parliament, the government of the day (with the majority in the House of Representatives) will also have a majority of members in JSCOT; this means that the committee very rarely suggests non-ratification even if alternate, critical submissions are received. Indeed, in practice JSCOT has only recommended non-ratification once, in the case of ACTA.<sup>29</sup> The report is sent to the Government, which then responds to JSCOT's recommendations by accepting or refusing them.

Generally there are at least some questions about a trade agreement in Parliament after the presentation of the JSCOT report, although these are often only very few (see comparative table below). An example in which there was extensive debate post-signature but prior to ratification was the China-Australia FTA (ChAFTA), where there were concerns about a memorandum of understanding on temporary workers in the agreement, namely that temporary Chinese workers would be treated equally to other workers on temporary visas (Armstrong, 2017). The Australian Council of Trade Unions ran a highly public campaign, including phone calls and door-knocking, to raise awareness of these concerns, and the Labor Party (at the time the opposition) took their side. This led to a lot of parliamentary discussion about the labour provisions in the agreement: ChAFTA saw the most questions of any of the trade agreements in the period under study (45 questions over 27 sitting days). Eventually extra safeguards for Australian workers were added to the agreement. However, this was only so easily possible because the provisions were part of a memorandum of understanding; such changes would have been more difficult, if not impossible, if they had been in the treaty text itself.

The Australian Parliament has no formal right to information during negotiations; access to draft treaty texts varies agreement by agreement, but common practice for major trade agreements is that access is restricted to cabinet ministers and involved public servants (Senate Foreign Affairs, Defence and Trade References Committee, 2015). Nonetheless, federal and state and territory parliaments can technically get involved earlier in the negotiation process as they are briefed on the proceedings by federal ministers; they also occasionally have the opportunity to ask ministers questions about ongoing trade negotiations during parliamentary session. In practice, however, very few trade agreements have reached a high enough level of salience to be discussed properly in parliament; the exceptions to this are ChAFTA, described above, and the TPP, discussed in detail below. Moreover, without the resources to follow negotiations it is difficult for MPs to really understand the extent of negotiations and thus to scrutinise properly (JSCOT, 2006).

All multilateral and WTO negotiations follow the same process, inasmuch as they require Australia to sign an international treaty. Extra reviews or reports can be undertaken by the Senate Standing Committee on Foreign Affairs, Defence and Trade if requested by the Senate.

The table below shows federal parliamentary involvement in each of the trade agreements signed from 2009-2018. Two things are clear from the table: first, that the majority of agreements attract relatively little parliamentary attention in terms of questions and statements (the exceptions being ChAFTA and the TPP); second, the only agreement where JSCOT did *not* recommend ratification was ACTA.

<sup>29</sup> During negotiations for ChAFTA some issues which may have led to a recommendation of non-ratification were smoothed out prior to JSCOT's report (see below).

**Table 6: Parliamentary involvement in agreements signed by Australia (2009-2018)**

|  | ACTA<br>(2011) | Malay-<br>sia<br>(2012) | Korea<br>(2014) | Japan<br>(2014) | China<br>(2015) | Singa-<br>pore<br>third<br>review<br>(2016) | TPP<br>(2016)     | PACER<br>Plus<br>(2017) | TPP-11<br>(2018) | Peru<br>(2018) |
|--|----------------|-------------------------|-----------------|-----------------|-----------------|---|-------------------|-------------------------|------------------|----------------|
| Recommended ratification                     |                | x                       | x               | x               | x               | x   | x                 | x                       | x                | x              |
| Parliamentary (oral) questions <sup>30</sup> | 0              | 0                       | 5               | 1               | 45              | 2   | 23 <sup>31</sup>  | 0                       | 7                | 1              |
| Statements by MPs                            | 0              | 0                       | 1               | 1               | 4               | 0   | 4                 | 0                       | 0                | 0              |
| Individual days where questions were asked   | 0              | 0                       | 4               | 1               | 27              | 2   | 11                | 0                       | 6                | 1              |
| Written submissions to JSCOT                 | 25             | 11                      | 78              | 34              | 91              | 19  | 266 <sup>32</sup> | 13                      | 69               | 10             |
| Days of hearings                             | 3              | 1                       | 4               | 2               | 7               | 2   | 6                 | 2                       | 4                | 1              |
| Witnesses at hearings <sup>33</sup>          | 18             | 2                       | 20              | 8               | 46              | 4   | 37                | 9                       | 21               | 4              |

Source: Australian Parliament, Hansard and JSCOT reports.

### 5.1.2 Sub-national involvement in trade negotiations

Given that much of the work of implementing trade agreements often falls on the shoulders of Australian state and territory governments – and the fact that trade negotiations can affect regionally sensitive industries – there has been much made of their involvement in trade negotiations (JSCOT, 2006). All state and territory governments are members of the Standing Committee on Treaties of the Commonwealth, States and Territories (SCOT), which is used to consult with state and territory governments throughout negotiations. SCOT meets twice a year and discusses a schedule of ongoing treaty actions; state and territory representatives can also ask for written briefings on specific treaties. SCOT is officially the secretariat of the Treaties Council, composed of the prime minister, premiers and chief ministers of states and territories, as well as the Commonwealth Minister for Foreign Affairs. In principle, this council can meet once a year alongside SCOT in order to consider treaties under negotiation; however, it has been convened by the federal government only once, in 1997.

While sub-national involvement is therefore formally provided for, SCOT involves only state and territory governments, and not parliaments. Moreover, the procedure has been criticised as being a ‘box-checking exercise’ and equating the presentation of a schedule with proper consultation (JSCOT, 2006). Additionally, information is shared through formal or informal meetings between federal and state government

<sup>30</sup> Written questions (Questions with Notice) are deleted between each parliament and therefore cannot be accessed for most of the trade agreements.

<sup>31</sup> NB: the TPP was the only trade agreement where parliamentary questions took place *prior* to the signature of the agreement.

<sup>32</sup> Plus 3000+ emails submitted from online platforms.

<sup>33</sup> Witnesses as individuals were counted separately; institutional representatives were counted as a group per institution and per day.

ministers, or direct correspondence between federal ministers and their sub-national counterparts; however, this tends to be ad-hoc and inconsistent (JSCOT, 2006, p. 65).

In terms of parliamentary involvement of the states and territories, this remains limited to the late stages of the negotiations. When JSCOT receives a signed agreement and the Government’s NIA, they pass them onto both sub-national governments *and* the presiding officers of state and territory parliaments. However, most of the states and territory parliaments have no procedure for dealing with these and lack the expertise and resources to participate fully in the consultation. The exception to this is Queensland: since 2001 this state has developed procedures to table treaty actions and the NIA in the parliament within ten days of receiving them from JSCOT, allowing them to develop more detailed responses to JSCOT’s consultation.

A summary of formal parliamentary competences in trade negotiations is found in Table 7.

**Table 7: Australian Parliament’s formal competence in trade negotiations**

|                          | Mandate stage   | Negotiation stage   | Ratification stage  | Implementation stage  |
|--------------------------|---|---|---|---|
| <b>Federal level</b>     | Parliament informed through contact with ministers.   | No official powers. Questions during Parliamentary sessions. Access to information varies case by case (no right to information). | JSCOT prepares report and holds public hearing before ratification.<br><br>JSCOT has the right to suggest non-ratification of the agreement, but reports are non-binding. | Any implementing bills (tariff and customs adjustments) must pass Parliament.   |
| <b>Sub-federal level</b> | Parliaments informed through SCOT contacts (usually). | Can be informed by state government ministers.  | State parliaments are contacted by JSCOT and have the right to respond with information/positions (in practice only QLD does this – lack of expertise).                   | Any implementing bills that are under State and Territory competences (transport, public procurement...) must pass parliaments. |

### 5.1.3 Autonomous trade policy

Trade measures that do not fall under the scope of international negotiations are overseen by other parliamentary committees. There are three committees other than JSCOT that deal with trade-related issues: the Joint Standing Committee on Trade and Investment Growth; the Joint Standing Committee on Foreign Affairs, Defence and Trade (which has a trade sub-committee); and the Senate Standing Committee on Foreign Affairs, Defence and Trade. These committees conduct inquiries into legislation or other matters referred to them by the Senate (in the case of the Senate committee) or by either house (in the case of joint committees). These can include implementing bills for changes in tariffs; bills related to ISDS or fair trade; or more general inquiries into Australia’s commercial relationship with other countries or regions. The committees can ask for public submissions and organize (public) hearings to prepare for their report, inviting submissions from expert witnesses and interested members of the public. Only three trade-related bills (apart from implementing measures for tariff amendments) have been proposed in recent years. Two of these were private members’ bills that did not pass the House of Representatives (the Trade and Foreign Investment (Protecting the Public Interest) Bill and the Fair Trade (Protecting Workers) Bill in 2014). The third was the Fair Go for Australians in Trade Bill 2018, introduced by labour and which is discussed in the TPP case study below.

The Australian Parliament is not involved in the adoption of trade defense measures. Anti-dumping actions and countervailing measures are investigated by the Australian Anti-Dumping Commission, which reports to the Minister for Industry, Innovation and Science.<sup>34</sup> Safeguard measures to protect from imports that threaten a domestic industry are implemented by the Australian Government after a full inquiry by the Productivity Commission. Where provisions exist in an existing free trade agreement, these are followed (DFAT, 2018). Similarly to in the EU, however, the Australian Parliament *is* responsible for adopting the legislative frameworks for these day-to-day decisions. The most recent decision was a 2017 update of the methodology for determining anti-dumping measures (Customs Amendment (Anti-Dumping Measures) Bill 2017).

## 5.2 Attempts to increase parliamentary scrutiny

It is clear from the above that federal and sub-federal parliaments in Australia have relatively few competences in trade policy. Certain sections of Parliament have been pushing for increased powers of scrutiny since the first review in 1996, and some changes have been implemented; however, while many reports suggest major changes, these fall by the wayside or are ignored by the Government (JSCOT, 2016a).

The Senate Legal and Constitutional References Committee's 1995 *Trick or Treaty* report paved the way for government reforms in 1996, which aimed for more transparency in the treaty-making process. This included the formation of the treaties Council, JSCOT and SCOT. Contrary to the report's recommendations, however, these were not implemented through legislation but rather through administrative measures. Other reports in the early 2000s also highlighted the need for improved parliamentary scrutiny of trade agreements (Senate Foreign Affairs, Defence and Trade References Committee, 2003).

In 2002 two small but reasonably significant changes took place: NIAs and treaty texts for treaties with major political or economic significance began being tabled for 20 days instead of 15, and were required to be accompanied by background reports. Other changes since 2008 include a mechanism for minor treaty actions to be sent to JSCOT without requiring tabling (if the committee agrees) and a requirement for NIAs to include an attachment explaining the consultation that took place during negotiation.

Further reforms have been suggested at several points: in its inquiry into the General Agreement on Trade in Services and the Australia-US Free Trade Agreement in 2003, the Senate Foreign Affairs, Defence and Trade References Committee voiced concern about the lack of consultation and parliamentary scrutiny *prior* to signature. It restated some of the suggestions in *Trick or Treaty?* and provided specific recommendations about changing the Australian system to provide for parliamentary approval of the proposed negotiations before they start (i.e. mandate approval) and for veto power of the final, negotiated agreement and implementing legislation. The government rejected this in a lengthy response, arguing that this would be 'unworkable' and 'would undermine the Executive's constitutional authority to sign treaties' (Australian Government, 2016). In 2012 Independent Senator Bob Katter MP tabled a proposal for a bill that would give Parliament veto powers over treaty agreements (the *Treaties Ratification Bill 2012*). However, this was rejected by Parliament, mostly due to its over-simplicity and lack of measures for sensitive or complex treaty agreements.

<sup>34</sup> Accessible at <https://www.adcommission.gov.au/>

In 2015 the Senate Foreign Affairs, Defence and Trade References Committee ran another inquiry into parliamentary scrutiny of treaties titled *Blind Agreement*, partially prompted by the conclusion of the China-Australia FTA (CHAFTA) and in the midst of the highly controversial Trans-Pacific Partnership (TPP) (Senate Foreign Affairs, Defence and Trade References Committee, 2015). The report held some scathing criticism of the current procedure of consent:

*It is counter-intuitive for complex trade agreements which are years in the making to be negotiated in secret, subject to stakeholder and parliamentary scrutiny for a few short months with no realistic capacity for text to be changed, and then for implementing legislation to be rushed through parliament unamended. This comes very close to making a mockery of the process and of parliament's involvement. (p. ix)*

The report also encouraged JSCOT to engage in more oversight of trade negotiations by Australia; encouraged earlier access to negotiating texts by parliamentarians and other stakeholders; suggested that trade agreements be subject to an independent impact analysis and that a model agreement be developed dealing with complex issues such as copyright, IPR and investor-state dispute settlement. The government rejected all ten of the Committee's recommendations.

In addition to parliamentary reports, other independent agencies have also called for reform to the current system. A 2010 report by the Productivity Commission (the independent research and advisory body for the Australian Government on social, economic and environmental issues) highlighted the need for change based on the wide scope of 'third wave' trade agreements, which deal with issues that are constitutional parliamentary competences (Productivity Commission, 2010). Recent editions of the Productivity Commission's annual Trade and Assistance Review have also included scathing criticism of the process and the content of recently negotiated trade agreements.

Partially due to the lack of progress, some informal practices have developed: for example, during the TPP negotiations, MPs were granted access to negotiating texts on the condition that they signed confidentiality agreements. However, this was more due to government concessions than true informal procedures where both houses worked together (Senate Foreign Affairs, Defence and Trade References Committee, 2015).

After this summary of past attempts to reform the system of parliamentary scrutiny in Australia, it bears asking why each of these attempts since the 1990s has been unsuccessful. This is partly due to the problem of continuity in party goals, and the fact that once a political party is elected to power, it is reluctant to lose the power that it now has as an executive. This is especially because of Australia's two-party system; parties tend to be in favour of reform when in opposition but change their mind once elected into office. Partisan politics may also have some role in this, given that the Liberal-National coalition has been in power for 16 of the past 22 years. However, it is clear that the government has generally been against increasing oversight: during JSCOT's hearing to write the 2015 *Blind Agreement* report, the only stakeholder giving evidence that was in favour of keeping the status quo was DFAT – in other words, the executive agency in charge of trade. The government has also rejected all suggestions to involve any other independent agencies, such as the Productivity Commission, in the impact assessment procedure for trade agreements, despite suggestions from Labor to include independent assessment of these. Recent developments and proposals by Labor are outlined below in the TPP case study.

## 5.3 Case studies

### 5.3.1 Anti-Counterfeiting Trade Agreement (ACTA)

Negotiations for the Anti-Counterfeiting Trade Agreement were concluded in October 2010 and signed in 2011; the draft text was tabled in Parliament alongside the national interest analysis (NIA) in November 2011, and the JSCOT report was released in June 2012.

The JSCOT report, based on evidence from public submissions and from three days of public hearing in Canberra, criticised ACTA on three main fronts: the lack of supporting evidence for the government's NIA; the vague definitions of many of the terms in ACTA and the criminal sentences; and the lack of transparency in the negotiations. Such secrecy led the JSCOT report to suggest that DFAT may want to 'introduce an increased level of consultation for those treaties that attract a higher level of public interest' (p. 54); however, this was not included in their final recommendations.

There were no mentions of ACTA during any parliamentary session or debate, except for the presentation of JSCOT's report. This is not unusual – of the ten agreements signed between 2009 and 2018, only four faced more than two questions in Parliament, and only one (the TPP) was discussed prior to signature. What was surprising was the strength with which the JSCOT report condemned ACTA: their Report 126 was the only report so far not to recommend (immediate) ratification of the agreement. Rather, the unanimous report recommended that 'a future Joint Standing Committee on Treaties have regard to events related to ACTA in other relevant jurisdictions including the European Union and the United States' when considering whether or not to ratify the agreement (JSCOT 2011, p. 60). The Government's response to the report appeared to agree at least partially with everything mentioned in the JSCOT report, but this was criticised as misunderstanding the severity of the report (Parliament of Australia, 2012).

In sum, ACTA was the only example so far of JSCOT using its power to *not* recommend ratification of a trade agreement. This was due partly to the high level of public interest, but also due to the problems with ratification by other signatories to the agreement.

### 5.3.2 Trans-Pacific Partnership (TPP)

Negotiations for the Trans-Pacific Partnership (TPP) began in 2010 and were concluded five years later in 2015. The TPP was heralded as a 'landmark' free trade agreement in both coverage (12 countries<sup>35</sup>) and scope. While it was signed by all countries, ratification was delayed by the 2016 US Presidential elections; after the United States withdrew, a new slightly amended agreement was drawn up between the remaining 11 countries (the Comprehensive and Progressive Trans-Pacific Partnership, CPTPP).

In contrast to ACTA, the TPP was subject to much broader and more lively debate in Parliament *prior* to ratification. In fact, it is the only trade agreement studied here that was questioned during negotiation and not only after signature.<sup>36</sup> This was at least in part due to public opposition to the agreement, which was helped by the opposition to TTIP in the EU (and can be broadly seen as reasonably similar in scope and intensity). During negotiations, the TPP also saw the first use of an informal practice whereby MPs were allowed access to negotiation texts after signing confidentiality agreements.

The JSCOT report – published in 2016, after it became clear that the chances of the TPP coming into effect were slim – showed this sensitivity to the public opinion of the trade agreement. It highlights in its introduction that 'while the Committee finds the TPP to be in Australia's national interest, [we] are aware that there is much work to do to ensure that the Australian public is also convinced of this' (JSCOT 2016b, p. v). During the period for public submissions, JSCOT received over 15 000 emails from the websites

<sup>35</sup> Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

<sup>36</sup> Excluding questions about the *potential* for a trade agreement with certain countries (i.e. questions prior to the commencement of negotiations).

SumofUs.org and GetUp.org.au, opposing ratification of the TPP. The most voiced concerns included ISDS and transparency. The report outlines several suggestions for making the negotiating process more transparent and increasing public engagement with the agreement. The committee refers to both the US system of having security-cleared advisers and the EU procedure during TTIP of releasing initial position papers and meeting reports, as well as publishing the final agreement before signature (JSCOT 2016b, p. 42).

In attachment to the JSCOT report were additional comments by Labor MPs and Senators in the Committee, highlighting their additional concerns about ratification (including those that were not included in the report itself), as well as a dissenting report from the Greens highlighting their opposition to the ratification of the TPP. These two annexes highlight one issue with the committee approach to parliamentary scrutiny: because the majority of members are government members, they usually recommend ratification (Senate Foreign Affairs, Defence and Trade References Committee, 2015, p. 32). This can also explain why, despite strong debate within Parliament and public opinion against it, JSCOT ultimately recommended ratification of the TPP.

After the withdrawal of the US, the reincarnated CPTPP also faced scrutiny and opposition from within Parliament. JSCOT conducted a second inquiry in 2018, given the amount of research that had been done on the TPP since its 2016 report and the significantly different economic impact of an agreement without the US. Labor – the opposition party at the time – were initially against the agreement; however, after in-party negotiations, the Shadow Minister for Trade Jason Clare MP (ALP) was able to convince them to support it. This was to avoid a pro- and anti-free trade split within the party while in opposition; however, they did leave open the possibility to re-legislate trade deals if elected into government, as Jacinda Ardern has recently done in New Zealand.

As part of the lead-up to the campaign for the 2019 Federal elections, the Labor party has promised to take measures to change the way agreements are negotiated and have introduced a first bill into Parliament along these lines. The *Fair Go for Australians in Trade Bill 2018*, introduced in October 2018, proposes preventing the government from signing any trade agreements that waive labour market testing, include ISDS, require privatisation of public services and place other restrictions on domestic laws. It would also require agreements to be independently analysed and the impact assessment to be produced *before* signature, as well as allowing ‘accredited advisors’ from civil society, unions and industry to access draft negotiation texts. Finally, the bill proposes increasing the role of JSCOT before, during and after negotiations. The bill was read a second time in November 2018 and will be debated at the beginning of the new parliamentary year (2019). For the European Parliament, it is worth monitoring this legislation: if it does pass into law – even with amendments – it will significantly change both the potential content of and the procedure for negotiating a future EU-Australia deal.

TPP may therefore be the tipping point for parliamentary scrutiny in Australia – like TTIP in the EU, it gathered a high amount of public attention and was a high-stakes deal, even in its reincarnated CPTPP form without the US. Whether change does happen, however, remains to be seen.

## 6 Comparative overview

For its comparative dimension the study has focused in particular on international trade negotiations as this concerns the crux of trade policy initiatives and attracts most public and parliamentary attention. In the concluding section we aim to draw systematic comparison by focusing on the three stages we identified earlier.

Table 8 provides a comparison of formal parliamentary competences at each stage of international negotiations, ordered by the level of competence in each system at each stage. However, as discussed below, these are supplemented by certain informal practices.

**Table 8: Comparison of formal parliamentary competences**

|  | Mandate stage  | Negotiation stage  | Ratification stage   | Implementation stage  |
|--|--|--|--|---|
| <p><b>More power</b></p>  | <p><b>U.S.:</b> Delegated fast track authority contains substantive conditions (general mandate) for all negotiations. Congress must be notified of intention to start negotiations at least 90 days beforehand.</p> | <p><b>U.S.:</b> Advisory Groups on Negotiations are briefed and have access to documents. U.S. International Trade Commission assesses the economic impact of the agreement. Text is made publicly available online.</p> | <p><b>U.S. (fast-track)/EU:</b> Veto power for the agreement (no amendments). U.S. procedure has strict time limits. Congress can also choose to cancel fast-track and use a lengthier procedure (in which case amendments are allowed).</p> | <p><b>U.S.:</b> Implementation through fast-track procedure, implementing act must pass both houses. (Amendments possible if not under fast-track.)</p> |
|  | <p><b>EU:</b> Right to be 'immediately and fully informed of the progress of negotiations (Art. 207; Art. 218 TFEU)</p>  | <p><b>EU:</b> Right to be 'immediately and fully informed of the progress of negotiations (Art. 207; Art. 218 TFEU)</p>  | <p><b>Australia:</b> JSCOT holds public hearings and prepares its report before ratification. Recommendations are non-binding.</p>   | <p><b>Australia/Canada:</b> Implementing acts must pass both houses.</p>  |
|  | <p><b>Canada:</b> No official powers. CIIT commonly does a scoping exercise after launch of negotiations.</p>  | <p><b>Australia/Canada:</b> No official powers. Scrutiny takes place through committee briefings, parliamentary questions and reports.</p>   | <p><b>Canada:</b> No official powers. Optional tabling by the government, providing a 21-day period for debate.</p>  | <p><b>EU:</b> No formal powers to scrutinise implementation.</p>  |
| <p><b>Less power</b></p>   | <p><b>Australia:</b> No official powers. Parliament can be informed through ministerial contacts.</p>  |  |  |   |

## 6.1 Mandating stage

Formal parliamentary powers in the mandating stage vary from none to significant. All parliaments in this study have the right to be informed at this stage: in the United States, as in the EU, the executive must notify Congress of its intention to start new trade negotiations under the fast-track procedure. In Australia, parliament is informed of the start of negotiations through contacts with government ministers; however, this communication is generally seen as a box-checking exercise. In both Australia and Canada, all substantial decisions – including determining negotiating objectives, positions and agreements' scope – are taken by the executive.

As in the EU, none of the parliaments here have the power to write or contribute to the mandate for specific negotiations. However, in the United States Congress does essentially set the general negotiating objectives for all trade negotiations under TPA. It also has the possibility to set more specific objectives for ongoing trade agreements at the time that the TPA bill is written (as was the case for TPP and TTIP in the TPA-2015). However, under TPA-2015 Congress does not have the authority to prevent the President from starting trade negotiations if they disapprove. The EP, meanwhile, makes up for its lack of formal powers during this stage through informal mechanisms: first, they are informed of the content of the draft mandates through informal exchanges with the Commission; second, they use early resolutions to (informally) influence the formulation of these directives, although these are often used after the official start of negotiations.

## 6.2 Negotiating stage

During negotiations, U.S. Congress has the most active formal role; however, the EP uses informal practices to increase its actual participation, thereby putting their actions on a similar level. Parliaments in Canada and Australia, on the other hand, both have no formal role in negotiations; however, Canadian Parliament also exploits its powers to be informed at this stage.

In the United States, as in the EP, the executive is required to keep Congress informed of the development of negotiations. This happens through specialised committees (the Advisory Groups on Negotiations) which are briefed on a regular basis; in the U.S., members of these committees also have access to classified documents. There are highly specific rules regarding the type and timing of information provision by the USTR to Congress: information about the potential changes to U.S. trade remedy laws 180 days prior to signature; notification of signature 90 days before the intended signature; and release the agreement text and submit Advisory Committee reports 60 days prior to signature. Such strict formal rules are non-existent in the other three systems studied here. In addition, letters sent by Congress to the administration are regularly used to draw attention to red lines or points of contention before the agreement is finalised.

In Canada and Australia, in contrast, parliaments have no formal role at this stage and no formal right to information. Formal methods for scrutiny are standard parliamentary questions and committee meetings. However, the Canadian parliament has developed one way to maximising its scrutiny during this stage. Through its use of own-initiative studies and witnesses (including negotiators) in the course of ongoing negotiations, it can effectively compel negotiators to keep it informed of the negotiations' progress.

Similarly, while the EP's formal powers are lower than those in the U.S., informal communication inside the EP (between committees and EP technical support services), between institutions and between the EP, national parliaments and external stakeholders have increased its influence at this stage. Like in the U.S., this continuous exchange between DG Trade and the INTA committee lowers the risk of an EP veto at the end of negotiations by ensuring that the main points are already integrated in the final agreement.

## 6.3 Ratification and implementation

Parliamentary competences at the signing and ratification stage, again, differ greatly: while parliaments in Canada and Australia have only a (non-binding) right to consent to ratification – and even this is optional in Canada – the European Parliament has veto power and the US Congress's powers extend even further. Under the fast-track procedure, Congress has no amendment power and can only vote the implementing bill for an agreement up or down. However, if it feels that it has been inadequately consulted, it can use one of its formal sanctioning measures to withdraw fast-track, thus allowing amendments to an already negotiated agreement. To avoid this, a particularly innovative practice in the United States is the use of mark-ups and a mock conference to debate and 'test' the implementing bill and essentially ensure that any points of friction are smoothed out prior to the bill's official presentation. This power extends further than the EP's non-binding resolutions and use of veto power as a blunt instrument.

Common to all countries' parliaments was the use of studies, reports and public hearings both during negotiations and prior to ratification. At the ratification stage, this is most common in Canada and Australia. In Australia, the government is required to table the signed treaty, and JSCOT holds public hearings before writing its non-binding recommendations. The same practice exists in Canada, but is an optional procedure that the government can choose to use.

Finally, while the EU has very limited powers in implementing trade negotiations, implementing bills must pass both houses of parliament in all the other cases. However, in Canada and Australia these implementing bills are usually passed with no amendments. In the U.S., the fast-track procedure may be used for the implementing bill, unless Congress has already withdrawn fast-track, in which case amendments are possible.

In sum, parliamentary involvement at each stage of negotiations ranges from treating Parliament like one of any other stakeholders that must be consulted for transparency (in Canada and Australia), to having official power over trade policy and the right (or possibility) to actively intervene at each stage (in the United States). The European Parliament's formal powers fall somewhere in the middle, but are supplemented by their extensive use of informal mechanisms.

## 7 Concluding observations and recommendations

Certainly, the European Parliament has gained new powers in the Lisbon Treaty. Yet, our analysis suggests that one of the main factors contributing to their current role in EU trade policy is their active leveraging of this power in all stages of the policy cycle. Through a comparison with other Western democracies, additional findings have emerged that may help to contextualise and solidify the role of the European Parliament in the EU's trade negotiations. From the above analysis we would like to provide three observations and four recommendations:

### **First observation: The European Parliament already enjoys considerable powers in trade policy making.**

While the countries based on the Westminster system wield some power through their ability to influence implementing acts, limited access to information during the negotiations and the absence of mandating or ratification powers severely limit their influence on trade policy. In contrast, the European Parliament does have such powers, many of which are anchored in treaties and formal rules of procedure. This makes it one of the more powerful actors among modern democracies. The US Congress can be situated at the other end of the extreme as it has similar monitoring mechanisms during the negotiation as well as the power of consent and even amendment powers. However, the practice of relying on fast track authority for ratifying agreements brings its power more in line with those of the EP. Informal practices in place when drafting the negotiating mandate have also further aligned the EP's powers with the practice in the US.

### **Second observation: Practices of parliamentary scrutiny are in continuous flux and often require 'institutional activism'.**

The European Parliament's recent history shows how it has leveraged its formal powers to obtain further influence in trade negotiations. This has required active and creative use of its constitutional rights to obtain informal influence in the mandating stage and to be kept informed before, during and after negotiations. The Canadian experience shows, by contrast, that the path towards parliamentary empowerment is not unidirectional, and it is also possible for parliamentary competences to decline. Yet, also in this case we observed the importance of the active use of such powers to determine the extent of oversight. The Canadian parliament's elaborate use of witnesses, including speakers from the government's negotiating team, enables a steady flow of information despite the lack of reporting requirement. Similarly, while the fast track procedure places both strict timing and limitations on Congress by excluding amendments on implementing bills, it has developed informal procedures including mark-up implementing bills and mock conferences to leverage its influence at this stage.

However, what is also apparent from failed attempts at reform in Australia and Canada was the ease by which such initiatives fall victim to partisan politics. By contrast, the European Parliament does not have a government to support and, as a result, is more independent and unified in its pursuit of scrutiny powers in trade negotiations. Extending this line of reasoning, it may prove in the long term that attempts to politicise the European Commission could compromise the EP's ability to further its powers through informal practices and procedures.

### **Third observation: The parliamentary dimension of public diplomacy enables benchmarking and international learning.**

Developments in Canada and Australia indicate that the EU actually has some sway over negotiating partners' oversight mechanisms when negotiating. In Canada, we saw the role and involvement of the provinces in trade negotiations greatly expanded in response to demands of the European Union. We also noticed references to EU parliamentary practices as a benchmark or source of inspiration when recommending the government to increase its reporting efforts. Fact-finding missions and the use of EU witnesses promoted such opportunities for mutual learning. Similarly, in Australia several transparency

measures are being adopted in line with European practices in the context of the early-stage AUS-EU negotiations. Already DFAT has published the Australian negotiating objectives, aims and approach on a publicly accessible website, the first time that this has happened. More generally, the importance of international negotiating platforms for parliamentary learning was succinctly stated by Canadian MP Stéphane Bergeron: “If there is one positive aspect to parliamentarians’ participation in international conferences [...], it is that we can learn from our respective experiences. Indeed, we learned a few things from our meetings [...] with European parliamentarians” (Bergeron, 2003:4-5).

Comparison with parliamentary practices in Australia, Canada & the US also enable us to point at areas where there is perhaps further scope for learning in the European Parliament. From our research, we have singled out four recommendations.

**First recommendation: Solidify informal practices into commonly agreed rules of procedures.**

In Canada, parliamentary powers have diminished since the sixties. While several good practices have resurfaced in the face of (highly) politicised negotiations, history shows they can easily wane when interest subside. In the EU, we also noted that the EP expanded or created new practices in the wake of the CETA and TTIP negotiations, but many of these procedures are based on informal processes. It is important to cement and institutionalise the procedural powers, as the possibility that powers gravitate back towards the executive in the future cannot be ruled out. What diminishes this risk in the EU is the quasi-constitutional basis on which many of these informal procedures rely.

**Second recommendation: Foster cooperation between the Council and the EP on trade policy.**

The three cases compared in this study are all bicameral systems. Even though the balance of power between both chambers often favours the lower house, the relation between both houses is generally amicable and focuses on the (joint) scrutiny of the executive. The dynamics between Council and EP in international negotiations seems to be distinct from what we observe in other parliamentary systems. In line with existing research on the staggered evolution of the EU’s system towards ‘traditional’ bicameralism (Roederer-Rynning, 2018), several tensions between Council and EP in trade policy remain that can impede (constructive) scrutiny of EU trade policy. Even in light of the negotiating experiences obtained through the Ordinary Legislative Procedure, a ‘shared community’ of scrutinisers has not emerged. Obviously, cooperation is most desirable in stages where the Parliament holds no (formal) powers. This applies particularly to the revising and amending of bilateral trade agreements where the Parliament only has a right to be informed (see also recommendation 4). While the Parliament can still leverage its potential veto during the mandating stage, this is not the case for decisions during the agreement’s implementation.<sup>37</sup>

Alternatively, cooperation is also desirable where there is a high need for (expert) information. This applies for example to the implementation and evaluation of trade policy. Such cooperation can take the form of representation in expert committees such as the expert committee on trade and sustainable development.

**Third recommendation: Provide for an intermediate option between the outright rejection or approval of a trade agreement submitted by the Commission for approval.**

Outright rejection of a concluded agreement is a nuclear option with high political consequences. It would be good to provide an opportunity for the European Parliament to provide a final warning before the agreement is signed, or before it is tabled for ratification. One way to do so would be through an informal vote before the agreement is signed, much like the mock conferences held by US Congress as an informal

<sup>37</sup> Still, one can argue that cooperation between Council and EP is also desirable during the mandating stage. The current practice whereby both institutions adopt quasi-independently a separate set of negotiating guidelines contains the possibility that the Commission may receive contradicting instructions. This inevitably complicates external and internal negotiations.

means to identify potential sticking points within the implementing bill. In contrast to introducing formal amendment powers - which would require revision of the Treaties - introducing an informal procedure would not undermine the credibility of the Commission to act as an external negotiator, but rather act as an additional safeguard to involuntary defection by reducing the risk of an EP veto (Coremans & Kerremans, 2017).

This is not so different from the European Parliament's current system of releasing resolutions throughout the negotiations, including in the final stages. It is clear that the EP has nuanced its use of (the threat of) veto power since the ACTA rejection in 2011. In the case of CETA, for instance, the Commission revised the ISDS system on Parliament's request after signature during the legal scrubbing of the agreement. This quasi-amendment meant that the EP accepted the revised agreement. However, this procedure was unorthodox and not necessarily reproducible in future agreements. While the mock mark-up is similar to the current procedure, it would constitute a separate, informal stage that would take place on a draft text submitted to the European Parliament (and perhaps the Council), ideally prior to the signature of the agreement. This would serve as a more official 'final' debate in the INTA Committee and Parliament and ensure that rigorous debate and parliamentary oversight occurs equally for agreements that are not as salient or controversial as CETA or ACTA.

An even more ambitious change would involve a mock-conference between the Parliament and the Council, similar to the procedure in the US if the Senate and the House end up with different versions of the draft bill. This would tie in with the recommendation below about strengthening ties between the Council as an upper house and the European Parliament as a lower one. However, this would require significant changes in interinstitutional relations and informal agreements, along the lines of the framework agreement of 2010.

#### **Fourth recommendation: Ensure parliamentary scrutiny of the implementation of EU trade policy**

The implementation of Trade agreements has become an issue of increasing importance for the European Parliament (Puccio & Harte, 2019: 394). This is not only reflected in the reporting requirements but also through the increasing use of implementation reports and the work of the monitoring groups.

Still, contrary to the other countries in our study, the European Parliament cannot decide on an implementation act that transposes the international commitments into European law.<sup>38</sup> This limits their potential powers once an agreement has been consented to. Such limitation concerns most prominently oversight on the committees established by a bilateral trade agreement. These treaty bodies hold the power to revise and amend the agreement. While their powers are potentially far-reaching (Alemanno, 2015), the possibility for the Commission to sideline the European Parliament in this process can be problematic. As long as treaty revisions are not on the horizon, it may therefore be desirable for the parliament to cooperate with the Council who still holds power in this area (see Weiss, 2018; for a more detailed discussion).

<sup>38</sup> The exception perhaps being the safeguard clauses in most recent free trade agreements

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