

A guide to EU procedures for the conclusion of international trade agreements

SUMMARY

The European Union (EU) was the world's biggest exporter and importer of goods and services in 2015, representing 32.51 % of global trade in goods and services. The USA and China, meanwhile, accounted for 12.01 % and 10.68 % respectively.

The EU has been negotiating trade agreements since the 1970s, then as the European Communities. Over time it has diversified its trading partners, and is now negotiating trade agreements with partners from every continent. The content of trade agreements has also evolved as EU trade competences have developed. The EU is currently in the process of amending and modernising some of its older trade agreements and is working on some of the most ambitious trade agreements since its inception (such as the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the USA).

The Lisbon Treaty modified both the EU's competences in trade and the procedure for concluding trade agreements, giving a stronger role to the European Parliament. This briefing looks at how trade negotiations are conducted and concluded in the EU, and discusses some of the key issues in the current EU trade policy debate.



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Background

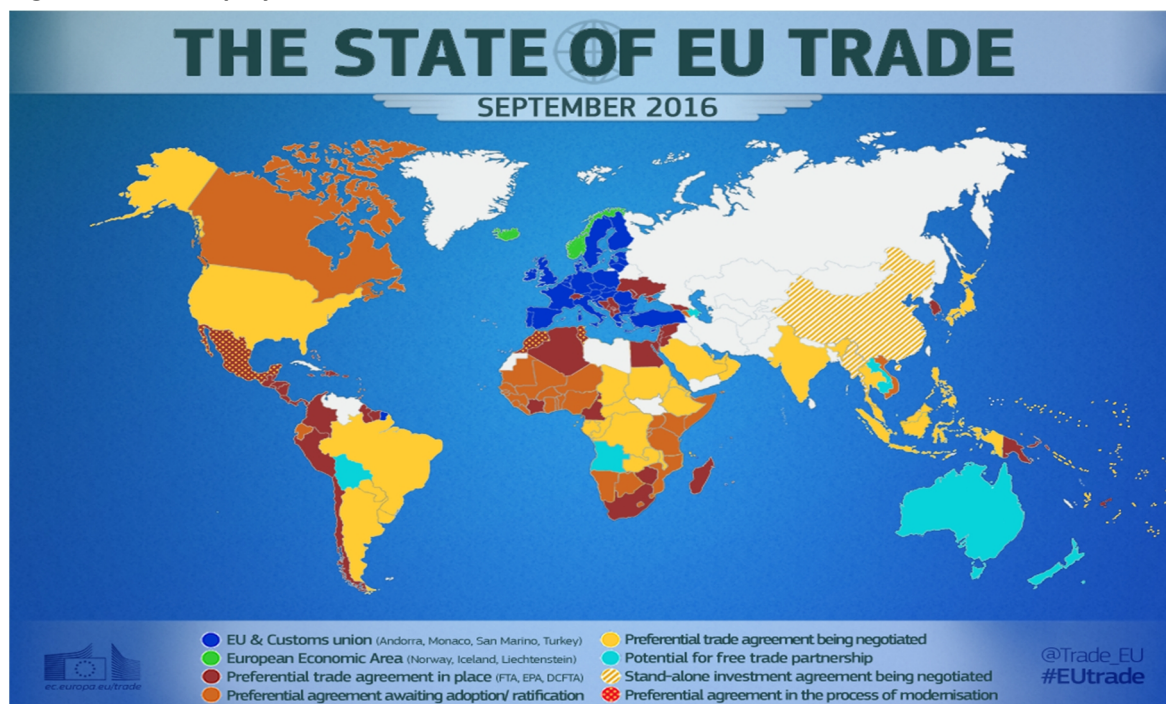
In 2015, the EU-28 was the largest global exporter and importer of goods and services, representing 32.51 % of total world trade in goods and services (Source: World Bank data), while the US and China represented 12.01 % and 10.68 % respectively.

The EU has been negotiating trade agreements since the 1970s, back then as the European Communities. Originally focused on European, African, Caribbean and Pacific (ACP) and Mediterranean trade partners, the EU now negotiates with partners on every continent. From the point of view of substance, the content of trade agreements has evolved, from mainly agreements on trade in goods, instituting free trade areas, to agreements including WTO+ commitments¹ in a wide range of areas (such as services, intellectual property rights, investment and regulatory cooperation). The EU has started a great number of negotiations in order either to modernise older agreements (such as those with Mediterranean countries and with Mexico and Chile), or to negotiate new bilateral agreements with Asian, Oceanic and North American partners, as well as to advance the multilateral trading system (through the Trade in Services Agreement (TiSA) or the Environmental Goods Agreement (EGA) for instance).

The evolution in the content of trade agreements reflects that of EU competences in trade, but has raised several questions as to whether the more recent agreements fall entirely within EU competence and, consequently, whether ratification at national level is required. Moreover, growing criticism and political debate at national level have raised some procedural issues, such as whether an individual EU Member State can stop EU negotiations, and what happens if one Member State does not ratify a trade agreement.

The procedures for concluding international agreements are mainly set out in Article 218 of the Treaty on the Functioning of the European Union (TFEU). In the case of trade agreements, rules are also to be found in the specific provisions of Article 207 (TFEU) dealing with common commercial policy and any other article mentioned as a legal basis in the Council decisions to sign and to conclude a given trade agreement.

Figure 1: State of play of EU trade relations



Source: European Commission, DG Trade, 2016.

Negotiations



TTIP negotiations: can a single Member State stop the negotiations?

The [negotiating directive](#) establishing the Commission negotiating mandate for TTIP was adopted by the Council on 17 June 2013, launching the negotiations. The EU and the USA concluded the [15th round](#) of negotiations in October 2016.

At the end of August 2016, the [French minister for foreign trade](#) expressed his government's wish to request a halt in the TTIP negotiations at the informal Council meeting of 22-23 September. [Member States are divided](#) on the issue and 12 Member States clearly expressed their opposition to the French proposal. [After the meeting](#) on 23 September, the Slovak Prime Minister declared that the TTIP negotiations would continue but that it was unrealistic to finalise an agreement before the end of US President Barack Obama's term in office.

The Council can withdraw or suspend the negotiating mandate for a trade negotiation but only on the basis of Article 218 TFEU, which requires a qualified majority (see below for details of the Council's voting procedure). In general, the Council always tries to take decisions by consensus (i.e. with the agreement of all parties) if the decision concerns [shared competences](#).

Before negotiations begin, the Commission first holds a public consultation and conducts what is known as a scoping exercise. The scoping exercise is a series of informal dialogues with the other country (or countries, if the agreement is inter-regional) on what could be the broad lines of the content of the negotiations between the parties.

If after the scoping exercise the Commission considers it appropriate to open negotiations on a trade agreement with the country/countries, it then makes recommendations to that end to the Council on the basis of Article 207(3) TFEU. The Council must give a green light to the start of the negotiations by adopting a decision on the basis of Articles 207(3) and 218(2) TFEU. The Council also issues a negotiating mandate detailing the area in which the Commission is authorised to negotiate.

Under Article 207(3) TFEU, the Commission is in charge of conducting negotiations, reporting to the Council's Trade Policy Committee (TPC). The negotiating team is led by a chief negotiator and includes experts covering all the topics of the negotiation. While the Commission's DG Trade takes the lead, experts may come from other DGs within the Commission. Negotiations are conducted in rounds, but meetings and contacts between lead negotiators and experts continue outside these. In its [guide](#) to trade negotiation procedures, the Commission considers the duration of negotiations to be two to three years on average. The negotiations are conducted on the basis of multiple and specific negotiating directives that the Council issues on the basis of Articles 207 and 218 TFEU. These frame the position that the EU must hold during the negotiations. With TTIP, the Commission began publishing the EU's text proposals online; these are the EU's proposals for the drafting of concrete provisions within the various chapters of the agreement. The text proposals that the Commission drafts must be agreed with the Council before they can be tabled for discussions with the other party (parties) to the negotiations.

Often forgotten but fundamental, Article 207(3) makes the Council and Commission jointly responsible for ensuring that the agreement negotiated is compatible with internal EU policies and rules.

The European Parliament's role in negotiations

While the European Parliament has no formal role in starting and conducting trade negotiations, the TFEU imposes a duty of information: the European Parliament must be informed immediately and fully at all stages of the procedures. Moreover, the fact that the European Parliament has to give its consent at the end of the negotiations, has made it necessary to discuss some EU positions in the negotiations with the European Parliament first, in order for the Commission to verify the existence of political support. The Commission therefore reports regularly to both the European Parliament and the TPC. While it has no legal obligation to do so, Parliament will often signal its political position by issuing a resolution. In the past, the European Parliament has adopted resolutions on the opening of negotiations, either prior to or after the issuing of the negotiating mandate. These resolutions give an initial sense of Parliament's political stance on the negotiations, and set out the main concerns that Parliament wants the Commission to include or exclude from the scope of the negotiations (e.g. the resolution adopted on [TTIP in 2013](#)). EP resolutions can be issued during the negotiations in order for Parliament to give the Commission recommendations on the future development of the negotiations (e.g. the resolution adopted on [TTIP in 2015](#)). The Commission is not legally bound to follow the EP's recommendations but given that EP consent is needed to adopt the agreement, it does take them into account when devising the EU positions and discussing them with the Council or the other party.

Ex ante sustainability impact assessments during the negotiations have become the [norm](#) for all major multilateral and bilateral EU trade negotiations since 1999, when the EU began incorporating the concept of sustainable development into the definition and planning of its trade policy. [Sustainability impact assessments](#) (SIAs) comprise a consultation process and analysis by independent organisations (think-tanks or universities) to assess the potential economic, social, human rights and environmental impacts that a trade agreement could have. SIAs are carried out after the scoping exercise, as the latter defines the scope of the negotiations and will indirectly define the SIA's [coverage](#).

When negotiations reach the final stage, i.e. parties have agreed in principle on a single text, the European Parliament and Council are informed and legal scrubbing starts to ensure that the text is legally coherent. Some minor changes may still occur at this stage. Once legal scrubbing is complete, the text is initialled, i.e. the chief negotiators from each party place their initials on every page of the agreement to signify that this is the agreed text. Initialling does not amount to the text being legally binding. In order to enter into force an agreement must be signed and ratified. To start such a procedure, the EU needs to define the legal basis for the trade agreement, which determine who has competence in the EU to ratify the treaty.

EU competences, mixed agreements and the legal basis for Council decisions regarding trade agreements



The various types of EU competence and their implications for trade agreements

The EU is based on the principle of conferral; in other words the EU acts within the limits of the competences conferred upon it by the Treaties. There are different types of competence that can influence the way in which procedures for concluding an agreement unfold. These are: exclusive competences,² shared competences³ and concurrent competences.⁴ Whenever an international agreement includes shared competences or concurrent competences or Member States' competences, then the agreement is said to be 'mixed'. Whenever a trade agreement also contains provisions belonging to shared competences, it is concluded as a mixed agreement. While for agreements falling under exclusive EU competence the EU ratification procedure (explained below) is sufficient to ensure the entry into force of the agreement, mixed agreements must be ratified by EU Member States in accordance with their domestic ratification procedures. Domestic procedures vary from Member State to Member State. In federal Member States, ratification procedures also involve approval by the chamber of the national parliament representing the regions (such as the Bundesrat in Germany) or the approval of the regional and community parliaments (as in the case of Belgium), whenever competences of sub-federal entities are concerned by the agreement. While mixed agreements concluded by the EU and only some EU Member States (called partial or incomplete mixity) do exist, trade agreements concluded as mixed agreements (such as association agreements) require the participation of **all** Member States.

The evolution of trade competences and recent EU trade agreements

The common commercial policy (CCP), which defines EU trade policy, has always been an exclusive competence of the EU, however the content of the CCP has evolved over time. While services and intellectual property rights were originally considered shared competences, the Lisbon Treaty includes all services and commercial aspects of intellectual property rights within the CCP's scope (Article 207(1) TFEU). Article 207(1) TFEU also introduces foreign direct investment to the list of CCP competences. This evolution in the scope of CCP has led the Commission to consider whether it can conclude that some trade agreements focusing on purely commercial matters (including investment provisions) fall under exclusive EU competence. The argument of the Commission is contested by most Member States who consider that those agreements must be concluded as mixed. The main controversy between the Council and the Commission concerns whether investment now falls under exclusive EU competence. On the one hand, Member States consider that CCP covers only foreign direct investment (FDI) and not portfolio investments. However the Commission derives an implicit exclusive competence on portfolio investments from third countries from a rule in the internal market prohibiting the introduction of barriers at Member State level to capital flows and payments from third countries. For that reason the European Commission asked for an opinion of the Court of Justice of the EU (CJEU) to decide on the nature of the EU competence to conclude the EU-Singapore agreement. A hearing has been held and the opinion is expected for [either late 2016 or early 2017](#). The CJEU opinion will formally only affect the EU-Singapore agreement, but could influence the choice of the competence (exclusive or mixed) for other agreements (such as the EU-Vietnam agreement).

The concept of mixity in EU agreements and the choice of legal basis

The decision with respect to the mixed character of an agreement depends on the legal basis given to that agreement, which also defines the main competences involved. When the Commission proposes a Council decision to sign, conclude or provisionally apply a Treaty, it must also propose a legal basis, which will define the nature of the agreement (exclusive or mixed). The legal basis is usually discussed with Member States and it is normally in the Commission's interests to agree with the Member States on this point.

The Council can always modify the Commission proposal in accordance with Article 293(1) TFEU, which requires unanimity. A proposal can remain blocked if the Council decides not to act. This can happen in situations where the Council is divided on the issue of legal basis (i.e. no unanimity is reached to modify the Commission proposal), and it cannot reach a qualified majority (or unanimity, depending on the procedure required by the legal basis in the original proposal) to pass the act as is. In that case, the Commission can modify its proposal at any time in order to unblock the situation (Article 293(2) TFEU).

Understanding the political and legal implications of the legal basis: the case of CETA

There were divergent opinions on whether the Comprehensive Economic and Trade Agreement negotiated between the EU and Canada should be concluded as a mixed agreement. The Commission considered that CETA fell under exclusive EU competence as in the case of the EU-Singapore agreement. The Commission [was reported](#) therefore to favour the idea of submitting a Council decision on CETA as an EU-only agreement with CCP as the sole legal basis. However, after discussing the matter informally with the Member States, the [Commission](#) ultimately decided to submit it as a mixed agreement.

See also: W. Schöllmann, [Is CETA a mixed agreement?](#), EPRS 'at a glance' note, July 2016

Signature and provisional application



Once the Council has adopted the decision to sign the treaty, a date for its signature can be chosen. In practice, for mixed agreements, the EU and the Member States sign the treaty simultaneously. **Signature signals the intention to conclude, it does not conclude the agreement as such.**

The possibility for an international treaty to apply provisionally under EU law is set out under Article 218(5) TFEU, which provides for the Council decision on provisional application to be taken simultaneously with the Council decision to sign the treaty.

In theory, under Article 218(5) TFEU, the decision on provisional application can take place even before the treaty is concluded at EU level, i.e. before the EP gives its consent and the Council adopts the decision to conclude the treaty in accordance with Article 218(6). However, in practice (since the South Korea FTA),⁵ provisional application is enforced only after hearing the European Parliament's position on the agreement or even only after the European Parliament has given its consent to conclusion. Consequently, the Commission normally submits the draft decisions to the Council simultaneously: the draft decision to sign, that to provisionally apply the treaty and one for the conclusion of the treaty.

CETA: provisional application

Provisional application of CETA will be effective from the first day of the month after the parties have notified each other that they have completed the domestic procedures necessary for provisional application. The procedure in the EU is contained in Article 218(5) TFEU. In line with EU practice, the decision on the provisional application of CETA, if adopted by the Council, will be applied [only after the EP](#) has taken a position on the agreement.

The main [discussions](#) in Council concerning the provisional application of CETA focus on its scope. The draft Council decision on [provisional application](#) of CETA, submitted by the Commission, does not refer to any specific provisions, thus provisional application would refer to the whole treaty.

In order to modify the scope of this decision, the Council needs to act by unanimity (pursuant to Article 293(1) TFEU) or has to agree with the Commission that it submit a new proposal for a Council decision. Furthermore, partial provisional application requires the agreement of Canada. Indeed under Article 30(7)(3)(b) CETA, Canada can object to partial provisional application of the treaty and either decide not to allow provisional application of the treaty or to propose unilaterally to exclude equivalent provisions from provisional application.

While a decision on the matter is yet to be reached, a [proposal](#) was circulated in the Council on 5 October 2016. This would exclude, inter alia, part of the investment and financial services chapters. It also requires provisional application of sustainable development chapters, as only provisions falling under EU competences, as these do, can be provisionally applied.

The provisional application of mixed agreements negotiated by the EU takes place, however, before the completion of ratification procedures at the Member State level. This makes sense as the entire rationale of provisional application is to allow for application while waiting for the completion of the ratification procedure. However provisional application under Article 218(5) TFEU can only be granted for provisions relating to EU competence and cannot include Member State competences unless **all** the Member States have agreed to it separately. Decisions on the provisional application of a mixed agreement in its entirety usually include a statement clarifying that Member States have given their agreement with respect to their competences.

Conclusion of trade agreements



For trade agreements, the special procedure under Article 218(6) TFEU is applied. This procedure requires the European Parliament's consent.⁶ Once Parliament has given its consent, the Council can then adopt a decision to conclude the agreement following the procedure and voting rules set out in Article 218(6) and Article 218(8) TFEU respectively. As mentioned above, mixed agreements also require the agreement to be ratified at national level by Member States. In the case of mixed agreements, the treaty enters into force only when the non-EU trade partner, the EU and all Member States have exchanged ratification instruments.

Voting procedure in the Council

Voting procedure in Council under Article 218(8) TFEU

EU-Ukraine Association Agreement: provisional application and ratification procedure

The EU-Ukraine Association Agreement, negotiated between 2007 and 2012, has been [partly provisionally applied](#) since 2014, while the provisional application of the [commercial part of the Association Agreement](#) began on 1 January 2016. The provisional application currently applies only to EU competences. In order to enter fully into force, the EU-Ukraine Association Agreement, being a mixed agreement, requires the ratification procedure to be complete at EU and also at Member State level. At EU level, the EP has given its consent for the Council to conclude the agreement in two different resolutions (one covering [treatment of third-country nationals](#) and [one covering the other provisions](#)). The Council is waiting for the Member States to finalise the ratification process in order to formally adopt its decision on the conclusion of the agreement. All Member States, with the exception of the Netherlands, have ratified the Treaty.

The Netherlands held an advisory referendum on the EU-Ukraine Association Agreement on 6 April 2016, which yielded a negative result (over 61 % of the voters rejected the ratification of the Association Agreement (AA) between the EU and Ukraine, though turnout was low, at only 32 %). The referendum was an advisory referendum and as such has not put an end to the ratification procedure in the Netherlands. However, should the Netherlands notify its intention not to ratify the agreement, this would then signify that the EU-Ukraine Association Agreement could not enter into force in its present form. Under Article 25 of the [Vienna Convention on the Law of Treaties](#), provisional application can only remain pending the entry into force of a treaty. If ratification fails and entry into force of the treaty becomes impossible, provisional application would also have to be lifted. Suspension of the provisional application would have to be carried out in accordance with Article 218(9) TFEU and the notification procedure under Article 486(7) of the EU-Ukraine Association Agreement. As [has been done in the past](#), the Commission could argue on the basis of the duty of cooperation that the provisional application, which concerns EU competences only, should be maintained in order to allow renegotiation and to find a mutually acceptable solution.

The voting rule for Council decisions is contained in Article 218(8) TFEU. It refers to the Council voting procedure throughout the entire process of negotiating and concluding international agreements under Article 218 TFEU. These voting rules therefore apply equally to Council decisions taken pursuant to Article 218(5) TFEU in order to sign and provisionally apply a treaty, and to Council decisions taken pursuant to Article 218(6) TFEU to conclude an agreement. Although in practice the Council tries to take all decisions regarding shared competences on the basis of the ['common accord' of all Member States](#) (i.e. by consensus), the voting procedure under the TFEU does not depend on the nature of the agreement but on the competences and legal basis upon which the agreement is adopted.

Article 218(8) TFEU states that **qualified majority** must be used throughout international agreement negotiation and conclusion procedures. There are some exceptions to this qualified majority rule; these include the following situations or agreements.

- *Fields for which unanimity is required for the adoption of a Union act:* Any measure which requires unanimity for the purpose of EU internal legislation, will also require unanimity for any decisions taken under Article 218 TFEU. In practice, this rule provides for parallel decision-making on external policy and EU internal legislative procedures. This rule on parallelism ensures that the EU internal legislation procedure requiring unanimity for certain measures is not

circumvented by the conclusion of similar measures within an international agreement under Article 218 TFEU.

- *Association agreements*
- *Agreements referred to in Article 212 TFEU* (i.e. economic, financial and technical cooperation arrangements) with states that are candidates for accession
- *Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*⁷

The parallel internal and external decision-making provided for under Article 218(8) TFEU requires analysis of all fields mentioned in the legal basis chosen for the decisions to sign and conclude the agreement in order to understand which voting rule applies.

The trade legal basis under Article 207 TFEU and its voting procedure

The relevant rules for common commercial policy agreements and measures always include Article 207(4) TFEU (in addition to other legal bases, such as the transport legal basis in CETA). Article 207(4) TFEU normally requires qualified majority but it specifies that the Council must take its decision by unanimity for the following measures.

- ***In the field of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules:*** this is another formulation of the parallelism between internal and external decision-making procedures in order to avoid circumvention of unanimity in the internal rules via external relations agreements. However, the impact of this provision may be rather limited. There are few internal legal bases requiring unanimity in these fields. Article 118 TFEU requires unanimity **only** for regulations establishing language arrangements for European intellectual property rights, whereas qualified majority remains the rule under the same Article 118 TFEU for measures establishing the creation of measures for the 'uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements'.⁸ Other internal market provisions requiring unanimity include: Article 113 TFEU on tax harmonisation, Article 115 TFEU on approximation of laws and Article 64(2) TFEU on the introduction of restrictions to capital movements.⁹ If the agreement in question incorporates provisions covering one of these types of measure then unanimity will be required.
- ***Unanimity is also required for EU actions in the field of trade in cultural and audiovisual services where there is a risk of prejudicing the Union's cultural diversity.*** Again this provision has a rather limited impact on the conclusion of trade agreements. Unanimity only applies if there are measures related to **trade** in cultural and audiovisual services and where there is risk of prejudicing the Union's cultural diversity. The EU has sometimes omitted the field of cultural and audiovisual services from negotiations in its entirety (*exception culturelle*) as is the case for TTIP (where the audiovisual sector is excluded from the negotiating mandate). Other agreements include a protocol on cultural cooperation aiming for instance to implement, in the context of those agreements, the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Still, even in those agreements where provision is made for cultural cooperation, cultural and audiovisual services are carved out from the services commitments or are included in specific reservations so that there can be no risk of prejudicing cultural diversity.

- **Unanimity is also required for EU actions in the field of trade in social, education and health services where there is a serious risk of disturbing the organisation of these services at national level.** These social, education and health services are subject to several reservations in the Treaties so as to prevent trade agreement commitments from having any negative impact on them.

Main references

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Hillion, Christophe, Koutrakos, Panos, [Mixed Agreements Revisited](#), Hart Publishing, 2010

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Endnotes

¹ WTO+ commitments are commitments in trade agreements that go beyond those made at the WTO. In some literature a distinction is made between commitments in trade agreements that extend liberalisation commitments already existing at WTO level (WTO+) and commitments that deal with issues not covered by WTO law (WTO extra). See: H. Horn, P. C. Mavroidis and A. Sapir, 'EU and US Preferential Trade Agreements', in *Preferential Trade Agreements: A Law and Economics Analysis*, Kyle W. Bagwell, Petros C. Mavroidis (eds), Cambridge University Press, 2011.

² Exclusive competences of the EU signify a complete transfer of competences from the Member States to the EU; the existence of an EU exclusive competence means that Member States cannot act on their own unless an EU regulation allows for Member State actions.

³ Shared competences are competences that fall within the remit of both the EU and the Member States. EU action in these competences pre-empts any action on the part of the Member States, in other words, Member States cannot act unilaterally if action is being undertaken at EU level.

⁴ Concurrent competences are EU competences to support, coordinate or supplement Member States' action; these EU competences co-exist with Member States' competences.

⁵ Youri Devuyst, 'The European Parliament and International Trade Agreements: Practice after the Lisbon Treaty', in *The European Union in the World: Essays in honour of Marc Maresceau*, I. Govaere, E. Lannon, P. Elseweghe and S. Adam (eds), Martinus Nijhoff Publisher, 2014.

⁶ Parliament gives its consent in accordance with Rules 108 and 99 of its [Rules of Procedure](#).

⁷ The Court of Justice of the European Union issued an [opinion](#) in 2014 on the draft agreement for EU accession to the ECHR, considering it not in line with EU law.

⁸ On the relevance or not of this provision to the decision-making procedure under Article 218(8) TFEU, see C. Pitschas, 'Economic Partnership Agreement and EU trade policy: objectives, competences, and implementation', in J. Drexler, *EU bilateral trade agreements and intellectual property for the better or worse*, H. Grosse, R. Khan, S. Nadde-Phlix (eds) Springer, 2013, p. 222.

⁹ See also: Panos Koutrakos, *EU International Relations Law*, Hart Publishing, 2015, p. 135.

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