EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

Comparative study on access to documents (and confidentiality rules) in international trade negotiations

INTA

EN

2015

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
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STUDY

Comparative study on access to documents (and confidentiality rules) in international trade negotiations

ABSTRACT

It is extremely difficult to strengthen parliamentary oversight of the EU's trade policies without clear and predictable rules and procedures for the EP to access relevant information from the Commission and the Council. This study provides an overview on the rules guaranteeing access to information in international trade negotiations both in the EU and in selected third countries. It evaluates the existing arrangements on access to information by Parliament in view of the provisions included in the Treaty of Lisbon, international norms and agreements, EU case-law, and similar rules, arrangements and practices in a group of national parliaments.

EP/EXPO/B/INTA/FWC/2013-08/Lot7/06
April 2015 - PE 549.033

EN

Policy Department, Directorate-General for External Policies

This paper was requested by the European Parliament's Committee on International Trade.

English-language manuscript was completed on 10 April 2015.

Printed in Belgium.

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This paper will be published on the European Parliament's online database, 'Think tank'.

ISBN(pdf): 978-92-823-6994-4 ISBN(paper): 978-92-823-6993-7

DOI(pdf): 10.2861/846769 DOI(paper): 10.2861/704650

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List of abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AFEPA	Assesoria de Assuntos Federativos e Parlamentares
ATD	Access to documents
CAMEX	Chamber of External Trade
CCP	Common Commercial Policy
CETA	Comprehensive Trade and Economic Agreement
CETS	Council of Europe Convention on Access to Official Documents
CFSP	Common Foreign and Security Policy
CoC	Code of Conduct
COG	Congressional Oversigth Group
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
EaEU	Eurasian Economic Union
ECJ	European Court of Justice
EPAs	Economic Partnership Agreements
EUCI	European Union Classified Information
FA	Framework Agreement
FTAA	Trade Area of the Americas
GICI	Working Group on International Services and Goods Trade
IIA	Inter-institutional Agreements
ITTO	(International Tropical Timber Organisation)
MAI	Multilateral Agreement on Investment
NATO	North Atlantic Treaty Organization
PARLASUL	Mercosur Parliament

SCO	Shanghai Cooperation Organisation
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TFEU	Treaty on the Functioning of the European Union
TISA	Trade in Services Agreement
TPA	Trade Promotion Authority
TPC	Trade Policy Committee
TTIP	Transatlantic Trade and Investment Partnership
TTP	Trans-Pacific Partnership
USTR	United States Trade Representative
WTO	World Trade Organization

Executive summary

1. Information is the oxygen that sustains oversight, control, scrutiny, or any other form of parliamentary involvement in policy-making. Any mandate to control a government's or – regarding the EU's institutions - an executive agents' work is of limited use unless it is accompanied by access to the relevant information. Overall, it is extremely difficult to strengthen parliamentary oversight the EU's trade policies without clear and predictable rules and procedures on access to relevant information from the Commission and the Council. While access to relevant information is fundamental to scrutiny and oversight, the management of this information by parliaments is also crucial to generate an effective policy-control cycle. Accordingly, improved access to classified information by the EP should be accompanied by the development of appropriate procedures for the protection of this information, as well as an ongoing commitment from MEPs to handle classified information in a professional manner.

2. Access to documents (hereinafter ATD) is essential to ensure that parliaments can properly carry out their scrutiny functions. With recent trade negotiations such as TTIP gaining traction in civil society, the quest for more transparency has become a major political issue both in the EU and abroad. The secrecy that traditionally surrounded international trade negotiations is openly challenged by the European Parliament and a growing number of NGOs and pressure groups.

3. Transparency in international trade negotiations has always been a contentious topic, as most international negotiations have always been carried out behind closed doors. Despite an increased number of documents being made available, many parties remain concerned about a lack of transparency. It is therefore of utmost importance to secure a clear presentation of current rules and established practices governing access to sensitive trade documents. Transparency is important for the elected chamber and civil society in EU as well as in third countries.

4. ATD is subject to limitations to protect certain types of information from disclosure. In this context it is important to draw on the lessons learned on the basis of inter- and intra-institutional practice in both national and EU contexts. Case law from the Court of Justice and the General Court assume great importance for the revision of Regulation (EC) No 1049/2001 and a potential revision of the relevant Inter-institutional Agreements (IIAs) and EP's internal rules regarding ATD for its Members and staff. Clearly, the case law of the ECJ is more balanced than the Council is willing to acknowledge. While the judicature guarantees a broad approach when applying the scope of the right of access, it moderates this approach with "general presumptions" (in some sectors), which favor confidentiality and limitations to the right of access to confidential documents. If a document originating from one of the EU institutions is covered by an exception, the institution must explain why access to that document could specifically and effectively undermine the interest protected by the exception. The risk of undermining that interest must be reasonably foreseeable and not purely hypothetical.

5. The constitutional nature of the right of ATD, based on primary law, restricts the room for manoeuvre available to Member States, the Council and the Commission. Since, as was defined by the ECJ, transparency is part of the democratic nature of the Union's institutional system, it seems difficult to stick with such a minimalist approach, both technically and substantively.

6. It is difficult to clearly distinguish the legal framework on ATD by citizens and the rules on access by the EP. While the right to ATD for any natural or legal person is limited by Regulation (EC) No 1049/2001, specific rights for the European Parliament are exclusively based on internal rules of the institutions and inter-institutional agreements.

7. In clear contrast to EU Member States, where comprehensive rules on parliamentary access to documents and the classification of information (that is, limiting and controlling access to it) are based on parliamentary laws or presidential regulations, the EP's access to documents of the Commission and the Council is a matter of non-legislative rules.

8. The normative basis for rules on the EP's access to and handling of documents should primarily draw on the clear-cut principle of democratic theory and practice that applies in the vast majority of democratic systems. If confidential information is beyond the reach of public access, it must be available to parliamentarians (or institutions established by parliaments) scrutinizing those who negotiate trade agreements on behalf of EU citizens. In principle, parliamentary access to classified information implies a privileged access to specific categories of information, which are justifiably exempt from access of the larger public and third parties. The basic foundation for granting parliaments privileged access to such confidential information rests with the logic of parliamentary democracies. In parliamentary democracies, governments are nothing else than the highest aggregate of parliament's majority. Governments obtain delegated power from their parliamentary majority. Rules on governance, including those restricting access to and treatment of documents - produced or owned by governments - are legal expressions of parliaments' willingness to provide the executive with some room of manoeuvre and discretion when interacting with third parties. Rules governing parliamentary access to classified information should therefore be set out in law as the counterweight of general freedom of/access to information laws.

9. The Lisbon Treaty establishes a legally binding obligation for the Commission to keep Parliament regularly informed on on-going negotiations. It also contains legally binding obligation for both the Council and the Commission to inform Parliament immediately and fully at all stages of the procedure. As the ECJ recently ruled on Case C 685/11, "all stages of the procedure" implies "preceding the conclusion of the agreement".

10. While these provisions are incorporated in the 2010 Framework agreement, the IIAs between Council and Parliament are silent on when information should be provided.

11. Part of the EP's critique regarding the secretive nature of international negotiations is targeted at the wrong address. The Commission provides Parliament with extensive information, including restricted and confidential documents, on the basis of the 2010 Framework agreement and subsequent, informal agreements between Committee Chairs and Commissioners. However, the Council, its Presidencies and the Member State governments hide behind the Commission and fail to clarify their responsibility under the terms of Articles 1 and 11 TEU, and Article 15 TFEU.

12. The IIAs that Parliament agreed with the Council on the access to and handling of restricted documents confirm an institutional asymmetry in favor of the Council, as Parliament did not achieve substantial rights with regard to its interpretation of Article 218(10) TFEU.

13. It is essentially due to Parliament's Bureau rules on the treatment of confidential information incorporating the IIA of the EP and the Council that MEPs are not entitled to take hand-written notes when consulting the TTIP texts in Parliament's reading room.

1 Access to information in international public law and practice

In 1946, more than sixty years ago, the United Nations General Assembly recognised that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated".[1] Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights. Since that time more than 80 countries have passed national legislation entrenching the right in domestic law.

According to a Right2Info analysis on the situation as in September 2013, about 95 countries had nationwide laws establishing the right of - and procedures for - the citizens to request and receive government-held information. The first access to documents (ATD) law was enacted by Sweden in 1766, largely motivated by the Riksdag's interest in access to information held by the King. Finland adopted an ATD law in 1951, followed by the United States, which enacted its first law in 1966, and Norway in 1970. The 1974 Watergate scandal provoked the adoption of a Freedom of information law in 1976, and several western democracies followed (France and the Netherlands in 1978, Australia and New Zealand in 1982, Canada in 1983, Columbia and Denmark in 1985, Greece in 1986, Austria in 1987, Italy in 1990). The end of the Cold War and the growth of civil society groups demanding access to information - about the environment, public health impacts of accidents and government policies, draft legislation, maladministration, and corruption - generated a fresh wave of ATD/FOI laws, which peaked in the late 1990s and early 2000s. Between 1992 and 2006, 25 countries in Central and Eastern Europe and the former Soviet Union passed ATD laws. Today some 95 countries have national-level right to information laws or regulations in force, including China, India, and Russia, most countries in Europe and Central Asia, more than half of the countries in Latin America, about a dozen in Asia and the Pacific, 11 countries in Africa, and three in the Middle East. Within Europe, 46 states have specific ATD/FOI laws.

In almost all countries under scrutiny by NGO's such as Right2Info, Freedominfo.org, or AccessInfoEurope, **access to documents is subject to limitations to protect certain types of information** from disclosure. It appears that for most NGO's and freedom of information campaigners these restrictions are seen as **exceptions necessary to protect legitimate interests**. We take Right2Info, Freedominfo.org, Access-info.org, and the Freedom of Information Advocates Network, for which limitations on ATD should comply with a three-part test: "First, there must be a clear and precise **legal foundation for the limitation**. The principle of legality ensures a reasonable expectation of the interpretation of the law, and that the limitation is not a result of discretionary state action. Second, the limitation on the right to information must respond to a **legitimate purpose**."[1] Such legitimate aims can be drawn from the list of the **International Covenant on Civil and Political Rights of 1966[2]: Accordingly, exceptions to ATD are** (i) national security, (ii) public safety, (iii) public order, (iv) the protection of public health or morals, or (v) the protection of the rights of others. Finally, for Right2Info, "the limitation must be **necessary in a democratic society to satisfy a compelling public interest and proportionate to the interest that justifies it**."[3]

1 See: http://www.right2info.org/exceptions-to-access/general-standards.

2 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

3 http://www.right2info.org/exceptions-to-access/general-standards

Refusing ATD should therefore be **proportionate**: The restrictions should be related to a legitimate aim, the public authority that refuses ATD should demonstrate that disclosure of the information threatens substantial harm to the aim, and should demonstrate that the harm to the legitimate interest is greater than the public interest impeded. Moreover any **non-disclosure of a restricted document should be time-limited**, "as any legitimate justifications for the non-disclosure of records become progressively weaker over time. Excessively long classification periods undermine the very essence of the right of access to information. For these reasons, most democratic countries have adopted regimes for the periodic or automatic declassification of reserved information." Finally, those requesting a document should "have a **right to independent and effective oversight** and review of any denials of the right of access to information. The ultimate decision on whether to disclose or withhold information cannot be left to the discretion of the public authorities, but must be subject to independent review by a competent court or tribunal."

These requests are widely **confirmed by the case-law of the European Court of Justice**:[4] If a document originating from one of the EU institutions is covered by an exception, the institution must explain why access to that document could *specifically* and *effectively* undermine the interest protected by the exception.[5] The risk of undermining that interest must be reasonably foreseeable and not purely hypothetical.[6]

To date, the ECJ has acknowledged only very few presumptions against ATD for a set of documents[7] relating to ongoing State Aid review[8] and Merger Control proceedings[9], or Infringement procedures against Member States.[10]

The Council of Europe has affirmed the right of ATD on various occasions and adopted the first international treaty on the right of ATD, the "Council of Europe Convention on Access to Official Documents" (CETS No. 205) in 2008. The most important achievement of the Convention is the recognition of the principle that ATD **is the rule, and its refusal the exception**. The Convention gives "everyone" the right of access to official documents, irrespective of their motives and intentions. It also includes the first widely agreed definition of the notion of "official documents", which means "all information recorded in any form, drawn up or received and held by public authorities" – thus including also information that was not produced by the public authority holding it, and whatever its form or format (written texts, audio or video recording, photographs, emails, information stored in electronic databases). **CETS features a long list of possible limitations** to the right of access in Article 3, including the **protection of national security, defence and international relations, public safety, inspection, control and supervision by public authorities, commercial and other economic interests, and the protection of the environment**. The sentence introducing the list of limitations in Article 3 requires that they "shall be set down precisely in law, be necessary in a

4 See: Case C-506/08 P Sweden v My Travel and Commission [2011] ECR I-6237, para 75; Alemanno/Stefan, Openness at the Court of Justice of the European Union: Toppling a Taboo, Common Market Law Review 51: 97-140, 2014; Alemanno, Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy, (2014) 39 E.L. Rev, 72-90.

5 Sweden and Turco v Council, para 49.

6 Case C-506/08 P Sweden v My Travel and Commission [2011] ECR I-6237, para 76.

7 The judgment in the joined Cases C-514/11 P and C-605/11 P, Liga para a Protecção da Natureza (LPN) and Finland v Commission, clearly points out in its para. 47 that general presumptions are only applicable to a set of documents and not when just one document is concerned.

8 Case C-139/07 P Commission v Technische Glaswerke Ilmenau [2010] ECR I-5885, para 61.

9 Case C-404/10 P Commission v Editions Odile Jacob, para 123; and Case C-477/10 P Commission v Agrofert Holding, para 64.

10 Joined Cases C-514/11 P and C-605/11 P, (LPN) and Finland v Commission, para 65

democratic society and be proportionate to the aim". In order for the Convention to enter into effect, ten ratifications are required. To date seven countries (Bosnia and Herzegovina, Hungary, Lithuania, Montenegro, Norway, Finland and Sweden) had ratified and another seven (Belgium, Estonia, Georgia, Monaco, Slovakia and Slovenia) have signed the Convention but not yet ratified it. This is a disappointing turnout, given that the text voluntarily refrained from being overly ambitious.

1.1 The right of access to documents in the EU

It is difficult to clearly distinguish the legal framework on the access to documents for EU citizens and the rules on access by the EP. While the EU treaties provide legal clarification on ATD by the citizens, specific provisions concerning ATD by the EP (or any other institution) rely on inter-institutional agreements and internal rules of the institutions.

Table 1: Regulatory framework of the right of access to documents

Legal framework	Institutions and bodies covered	Beneficiaries / Addressees Establishing ATD rules…
Arts. 10(3), 11(2), 15(1) TEU + Art. 42 Charter	All institutions of the European Union	For requests of any natural or legal person to the institutions
Regulation (EC) No 1049/2001[11] + (EC) No 1367/2006[12]	EP – Council - Commission – EU Agencies	For requests of any natural or legal person to the institutions
Regulation (EC) No 1367/2006	Court of Auditors – ECB – EIB – ECOSOC – COR - European Ombudsman - European Data Protection Supervisor - ECJ (except for appointment to judicial office)	For requests of any natural or legal person to the institutions
Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy[13]	Council	For requests of the EP towards the Council
Annex II of the Framework Agreement of 20 October 2010 on relations between the European Parliament and the European Commission[14]	EP - Commission	For requests of the EP towards the Commission

11 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJEC L 145/43.

12 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJEC L 264/13.

13 OJ C 298, 30.11.2002, p. 1-3

14 OJ L 304, 20.11.201, p. 56-60

Council Policy on creating EU classified information, Council document No. 10872/11, of 30 May 2011 + Agreement 2011/C 202/05 between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interest of the European Union[15] + Council Decision 2013/488/EU on the security rules for protecting EU classified information[16] + Council document on Exchange of EU classified information (EUCI) with third States and international organisations, Council document 13356/13, 5 September 2013.	Member States – European Council – Council	For requests of any natural or legal person concerning EUCI held by the Council and the Member States
Inter-institutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy.[17]	Council	For requests of the EP towards the Council
Decision of the Bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament.[18]	EP – Council - Commission	For requests of the EP towards the Council and the Commission

1.2 The fundamental right of access to documents

The right of access to documents in the EU is part of a legal context updated by the Treaty of Lisbon. Article 1 TEU echoes the Treaty of Amsterdam by stating that it marks "*a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as* ***openly*** *as possible and as closely as possible to the citizen*". The treaty conveys the specific meaning of this principle in two provisions. According to Article 10(3) TEU '*every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*'. Since the principle of openness is directly linked to the '*democratic life*' of the Union, the EU is - in normative terms - democratic because it is open to its citizens. This idea is confirmed by Article 11(2) TEU that directly addresses the EU institutions, which must maintain "*an* ***open****, transparent and regular* ***dialogue"*** with representative associations and civil society. The Treaty on the Functioning of the European Union (TFEU) reinforces the basis of this principle by setting out the terms for implementation in Article 15(1) TFEU. The '*Union's institutions, bodies, offices and agencies*' shall conduct their work '*as* ***openly as possible***' to ensure and '*to* ***promote good governance***'.

The right to access EU institutional documents is based more politically on the principle of transparency. This was confirmed by the Court of Justice in 2007: its "aim is to **improve the transparency** of the Community decision-making process, since such openness inter alia guarantees

15 OJ C 202/213, 8.7.2011.
16 OJ L 274, 15.10.2013.
17 OJ C 95, 1.4.2014, p. 1-7
18 OJ C 96, 1.4.2014, p.1-51.

that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".[19] As the Court underlines, "the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights".[20] In legal terms, the right to access documents was established on the basis of Article 255 TEC, which gave citizens the right to access the documents of the three main institutions. The Treaty of Lisbon significantly develops the principle of transparency and the right to access documents: T**he Charter of Fundamental Rights** makes this access a **fundamental right**. Article 42 has the heading "***Right of access to documents"***, implying that "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents"*. The explanatory notes of the Charter point out that this Article 42 "*has been taken"* from Article 255 TEC, which provided the basis on which Regulation (EC) 1049/2001 had been adopted, with the Convention wishing to extend its scope. The TFEU itself has also changed the legal environment of the right of access. **This has happened, first and foremost, because the protection desired by Member States regarding the confidentiality of the Council's work disappeared in Article 207(3) TEC**.[21] On the other hand, Article 15(1) TFEU confirmed the requirements for '*good governance*' by providing substance to the principles of openness and transparency. In paragraph 3 the ways of exercising the right of access to documents on a compulsory basis are expressed in far more precise terms than in Article 255 TEC. The Lisbon Treaty therefore mirrors a structural change regarding the value of transparency, access to documents and the exceptions to this right: "on the one hand, the treaty establishes a **real fundamental right** of access to documents and, on the other hand, it **tightly controls** the exceptions to a right whose scope has been generalised. The value added deriving from this for individuals then allows a hierarchy of challenges to be established: **before being an institutional challenge** within the Union, requiring institutions to have the same amount of information when performing their duties, **the access to documents has now become a right of the individual**. This shift completes the structural change initiated by the Union's judicature 20 years ago."[22]

1.3 The right of access to documents of the European Parliament

While the right to ATD for any natural or legal person is limited by Regulation (EC) No 1049/2001, specific rights for the European Parliament are exclusively based on internal rules of the institutions and inter-institutional agreements between the institutions. It is defined as a "process-based approach taken by the Council to rule-making on classified information"[23] in the absence of a clear legal basis in the treaties. In contrast to all EU Member States, where comprehensive rules on parliamentary access to documents and on classifying information (that is, limiting and controlling access to it) are based on parliamentary laws or presidential regulations, the EP's access to documents of the Commission and the Council is a matter of non-legislative rules.

19 See: ECJ, 18 December 2007, Kingdom of Sweden v Commission, C-64/05, ECR I-11389, para. 54.

20 Ibid., paragraph 46; see also ECJ, 17 October 2013, Council v Access Info Europe, C-280/11 P.

21 Article 207(3) TEC read: For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.

22 See: Henri Labayle, Openness, transparency and access to documents and information in the European Union, European Parliament, Policy Dept. C, Note, 2013, p. 11.

23 See: Galloway, p. 675.

The EP's right of access to restricted EU documents is heavily constrained by a set of internal institutional rules and inter-institutional agreements (IIA). "In fact, both the Council and Commission share a common reservation, if not a common hostility towards an open interpretation of Regulation (EC) No 1049/2001. The issue of the exceptions in Article 4 of the Regulation has been the main bone of contention. Whether it concerns documents supporting international negotiations involving the former or those relating to infringement or competition law procedures involving the latter, both institutions have joined forces to curb as far as possible the right of access. It has fallen to the judicature to provide arbitration and define clear-cut rules of behaviour, by balancing the interests in play."[24]

In March 2011, the Member States, meeting within the Council, updated their internal security rules and formalized the system of EUCI. The agreement features the principle of originator control, a four-tier information classification system and the procedures for screening personnel for security clearances. Under the Council's EUCI rules, MEPs have no special treatment over the public: they are not able to challenge the classification of documents nor are they authorized to touch an EUCI document without having obtained a security clearance from their national authorities.

The forwarding of EUCI from the Council and the Commission to the Parliament is ruled by a set of inter-institutional agreements:

- the Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy[25], by which consultation of classified information above "EU Confidential" can only be granted in the Council's premises to the President and Members of a special committee;
- Annex II of the Framework Agreement of 20 October 2010 on relations between the European Parliament and the European Commission[26], provides for access and specific arrangements to preserve the confidentiality of the information. Additional arrangements are to be agreed between the Member of the Commission with responsibility for the policy area involved and the Chair of the parliamentary body/office-holder who submits respective requests;
- the Inter-institutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy.[27]

The internal treatment of confidential information (EUCI) in the European Parliament is governed by the Decision of the Bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament[28], which entered into force on 1 April 2014. The Bureau Decision lays down the EP's minimum security rules for protecting EUCI within its premises. It is equivalent to security rules found in the Council, but more restrictive than the security rules that Parliament has negotiated with the Commission under the terms of the Framework Agreement.

24 See: Labayle, p. 14.
25 OJ C 298, 30.11.2002, p. 1-3
26 OJ L 304, 20.11.201, p. 56-60
27 OJ C 95, 1.4.2014, p. 1-7
28 OJ C 96, 1.4.2014, p.1-51.

Since spring 2014, Parliament (like COREPER representatives of the Member States) is entitled to the so called "consolidated negotiating texts" of the negotiations towards the Transatlantic Trade and Investment Partnership (TTIP) agreement. These texts are accessible both in a secure reading room of the Commission and in the secure reading room of the European Parliament under the respective rules governing the access to and handling of restricted documents. While the modalities for the Commission's reading room are based on Annex II of the Framework Agreement, the practical arrangements for the EP's reading room rely on the Bureau decision of 15 April 2013. Consequently, users of Parliament's reading room are not allowed to take hand-written notes, while visitors in the Commission's reading facility can take hand-written notes on special watermarked paper provided by the Commission and they are allowed to take these notes with them.

1.4 Constraints to the right of access to information and the EU's institutional structure

Information is the oxygen that sustains oversight, control, scrutiny, or any other form of parliamentary involvement in non-legislative policy-making. Any mandate to oversee a government's or – regarding the EU's institutions - an executive agents' work is of limited use unless it is accompanied by access to the relevant information. Overall, it is extremely difficult to strengthen parliamentary oversight of the EU's trade policies without clear and predictable rules and procedures for the EP to access relevant information from these bodies, the Commission and the Council.

While access to relevant information is fundamental to scrutiny and oversight, the management of this information is also crucial to generate an effective policy-control cycle. Accordingly, improved access to classified information by the EP should be accompanied by the development of appropriate procedures for the protection of this information, as well as an ongoing commitment from MEPs to handle classified information in a professional manner.

The debate about the EP's access to classified information has centred on the negotiations regarding the revision of Regulation (EC) No 1049/2001, which focuses on public access to information from EU entities. Former EP rapporteur Michael Cashman opted to include provisions on parliamentary access to information in the broader draft legal framework for public access to EU documents. This approach would have ensured a general framework for the EP's access to classified information from all EU entities and across all policy domains. **It would be preferable to the existing, fragmented framework for parliamentary access to information, which is exclusively based on non-legally binding, inter-institutional agreements across different fields and between different contractual parties.** The creation of clear, comprehensive, cross-political provisions on the EP's access to classified information could help to ensure that these rules have the status of enforceable legislation.

If confidential information is beyond the reach of public access, it must be available to parliamentarians or institutions established by parliaments for scrutinizing those who negotiate bi-, pluri- or multilateral agreements on the EU citizens' behalf. In principle, parliamentary access to classified information implies a privileged access to specific categories of information, which are justifiably exempt from access of the larger public and third parties.

In almost every country analysed in this study, parliaments have privileged access to classified information to oversee governmental activities. This is not only premised on the notion that parliamentarians are elected by a population to hold governments and their agencies to account. **The basic foundation for granting parliaments a privileged access to confidential information rests with the logic of parliamentary democracies. In a parliamentary democracy, government is nothing else than the highest aggregate of parliament's majority. Governments obtain delegated power from their parliamentary majority. Rules on governance, including those on access to and treatment of any kind of document produced or owned by governments are legal expressions of parliaments' willingness to provide the executive with some room of manoeuvre when interacting with third parties.** Therefore, rules governing parliamentary access to classified information are set out in law and are disconnected for general freedom of/access to information laws.

1.5 Case-law on restrictions to access to classified documents

Given that the Regulation 1049 establishes a legal framework for relations between the citizens and the EU institutions, the cases put forward by MEP Sophie In't Veld are symptomatic for the fact that EP representatives have to deprive themselves from their privileged position as elected representatives, before they can question the implementation of Regulation 1049 by the Commission.

Within the EU, the Union's courts have issued around 10 key judgments on the issue of access to documents:

ECJ, 1 July 2008, *Kingdom of Sweden and Turco v* Council, C-39/05 P and 52/05 P

CJEU, 29 June 2010, *Commission v Technische Glaswerke Ilmenau,* C-139/07 P

CJEU, 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P

CJEU, 21 September 2010, *Kingdom of Sweden and ASBL(API)* v Commission, C-514/07 P,

C-528/07 P, C-532/07 P

CJEU, 21 July 2011, *Kingdom of Sweden and MyTravel* v *Commission*, C-506/08 P

CJEU, 21 June 2012, *IFAW v Commission*, C-135/11 P

CJEU, 28 June 2012, *Commission v Odile Jacob*, C-404/10 P

CJEU, 17 October 2013, *Council v Access Info Europe,* C-80/11 P

GC, 19 March 2013, *Sophie In't Veld v. Commission*, T-301/10

CJEU, 24 June 2014, *Parliament v Council, C-658/11*

CJEU, 3 July 2014, *Council* v *in 't Veld,* C-350/12 P

Article 4(1) of Regulation 1049/2001 mentions **two absolute exceptions** to the right of access. They relate to the protection of public interest and respect for privacy that 'would (be) undermine(d)' by

their disclosure. The judgment in the second *Sophie In't Veld*[29] case of 19 March 2013, related to the controversial negotiation of the ACTA agreement. The applicant requested access to around 50 documents relating to ACTA on the basis of Regulation 1049/2001, which the Commission had refused. The Commission typically claimed that unilateral disclosure of these documents would have undermined the **parties' mutual trust** and, therefore, the public interest. The Court believed that "in the context of international negotiation, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. [...] The formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. [...] It is possible that **the disclosure by the European Union, to the public, of its own negotiating positions**, even though the negotiating positions of the other parties remain secret, could, in practice, **have a negative effect** on the negotiating position of the European Union".[30] Moreover, the judge continued, "**unilateral disclosure by one negotiating party of the negotiating position of one or more other parties**, even if this appears anonymous at first sight, **may be likely to seriously undermine**, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the **mutual trust essential to the effectiveness of those negotiations**".[31]

Regarding restrictions to ATD on ongoing negotiations towards international agreements, the recent ECJ Case 350/12 P, *Council* v *in't Veld* rejected the EU Council's bid to shield information from the public about its negotiations with the US over a controversial bank data-sharing pact, ruling that the disclosure of documents would not have undermined the arrangement. The Court sided with Dutch MEP Sophie in't Veld in her long-running claim to force the Council to release a July 2009 opinion of its Legal Service concerning the opening of negotiations over the transatlantic Terrorist Finance Tracking Program. The Council argued that the disclosure of the document would negatively impact the EU's negotiating position and reveal protected legal advice, but the ECJ affirmed that "the mere fact that a document concerns an interest protected by an exception to the right of access […] is not sufficient to justify application of that provision […] **Where the institution concerned refuses access to a document, that institution remains obliged to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical**."[32] Rejecting a general presumption against disclosure for legal advice in international relations, as the Council had argued, the Court confirmed and strengthened the standard set for the institutions to show that disclosure might undermine an interest protected by the exceptions in Art. 4 of Regulation (EC) 1049/2001.[33]

While the ruling on Case 350/12 P only concerns the legal advice relating to an international agreement and its negotiation, but does not apply to negotiating documents or documents relating to negotiating strategy, the recent **Case C-658/11 shows that** even the EU's Common Foreign and Security Policy (CFSP) is not immune to the EP's demands for greater access to restricted documents. The ECJ annulled a Council decision on the signing and conclusion of an agreement between the EU

29 GC, 19 March 2013, Sophie In't Veld v. Commission, T-301/10.
30 See: ECJ, GC, 19 March 2013, Sophie In't Veld v Commission, T 301/10. Paragraph 125.
31 See: T 301/10, Ibid. Paragraph 126
32 Case C-350/12, para. 64
33 Regulation (EC) No. 1049/2011 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to Mauritius, and on the conditions of suspected pirates after transfer. **By failing to inform Parliament the Council had impeded the EP in exercising its "democratic scrutiny"**.[34]

Parliament claimed that it should have given its consent, or should at least have been consulted, before the decision was taken by the Council, and it should have been duly informed throughout the process and following the adoption of the contested decision.

The ECJ ruled that Article 218 TFEU "now lays down a single procedure of general application concerning the negotiation and conclusion of international agreements which the European Union is competent to conclude in the fields of its activity, including the CFSP, except where the Treaties lay down special procedures."[35] While the Court rejected the first plea as unfounded, it confirmed Parliaments claim to be kept "immediately and fully informed" under Article 218(10) TFEU.[36]

According to the ruling, **Article 218(10) TFEU** is an "essential procedural requirement";[37] and the failure to respect the information requirement leads to the nullity of the contested act. In particular, the Court stressed that the **information requirement was necessary "to exercise democratic scrutiny of the European Union's external action** and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement."[38] Moreover, the Court continued that this provision "**is an expression of the democratic principles on which the European Union is founded**", and "the reflection, at EU level, of the fundamental democratic principle that the people [sic] should participate in the exercise of power through the intermediary of a representative assembly".[39] It concluded that "if the Parliament is not immediately and **fully informed at all stages of the procedure** in accordance with Article 218(10) TFEU, **including that preceding the conclusion of the agreement**, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstances, on the Parliament's performance of its duties in relation to the CFSP, and therefore constitutes an infringement of an essential procedural requirement."[40] Based on these findings, the Court concluded that the decision adopting the agreement with Mauritius was to be annulled.

34 Case C-658/11, para. 79.
35 Case C-658/11, para. 52.
36 The Council sent the Parliament the decision concluding the agreement with Mauritius more than three months after its adoption and the signing of the agreement, and 17 days after their publication.
37 Case C-658/11, para. 80.
38 Case C-658/11, para. 79.
39 Case C-658/11, para. 81.
40 Case C-658/11, para. 86.

2 International agreements, the European Parliament, and the politics of accountability

"In respect of the confidentiality of the negotiating mandate, we believe the Commissioner is right to point to the Council of Ministers: it is the Member States - whose decision it was to keep the negotiating mandate out of the public domain—who need to defend that decision, which we judge to be correct. The European Commission cannot be expected to make the case for the TTIP initiative across 28 member states. In our view, EU member states are not bearing their fair share of responsibility for transparency and communication around the project. This may be exacerbated by the fact that although EU trade ministers lead on the initiative, the breadth of the negotiations means that many other national ministries are involved, and - in our experience of the UK - not necessarily seized of the importance of promoting TTIP to the public and other interested parties."[41]

2.1 Failing to scrutinise the Council

Since the early 1980's, the European Parliament pushed for participation in the negotiation and conclusion of international agreements. These requests went hand in hand with Parliament's demand for access to classified information. However, prior to the Lisbon Treaty, the EC Treaty did not require the consultation of Parliament on Common Commercial Policy (CCP) measures and on the conclusion of the EC's bi-, pluri- or multilateral trade agreements.[42] Until December 2009 trade agreements did not require the consent of Parliament unless they fell into one of the conditions set out in ex-Article 300 ECT.[43] In practice, this meant that Parliament did not receive "pure" trade agreements to approve or to reject. The consultation of Parliament according to the procedure set out in ex-Article 300(3), subpar. 1, was rather exceptional, while the assent of Parliament was only required for agreements that established a larger political framework (e.g. association, partnership, or economic partnership agreements). Whenever Parliament sought to finally approve or reject an international agreement, it therefore had to point to ex-Article 300 as the legal basis, and to underline its political, i.e. "trade-plus" or "not-entirely-commercial policy" nature.[44]

41 See: House of Lords, European Union Committee - Fourteenth Report The Transatlantic Trade and Investment Partnership, 6 May 2014.

42 See: Hans-Werner Rengeling, Zu den Befugnissen des Europäischen Parlaments beim Abschluss völkerrechtlicher Verträge im Rahmen der Gemeinschaftsverfassung, in: Ingo von Münch (Hrsg.), Staatsrecht - Völkerrecht - Europarecht. Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981, Berlin, De Gruyter 1981, 877-897.

43 Regarding the autonomous i.e. internal trade measures, ex-Article 133 ECT simply held that "the Commission shall submit proposals to the Council for implementing the common commercial policy". Regarding international trade agreements until December 2009, Parliament's assent was therefore exclusively linked to ex-Article 300, whose par. 3, subpar. 1 held that "the Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3)", while subpar. 2 held that "agreements referred to in Article 310, other agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained".

44 Note that the Commission and the Council disagreed about whether reference to Article 133(3) EC covered all sectors referred to in Article 133 EC (ie. all goods, services and commercial aspects of intellectual property) or only those which fell under Article 133(1) EC (which, as defined by the Court in Opinion 1/94 on the Agreement establishing the World Trade Organisation, (1994), ECR I-5267, included only goods, cross-border services, ie. only Mode 1 of GATS, and measures designed to prevent the import of counterfeit goods, but not other services and other aspects of the commercial aspects of intellectual property).

The only instances when Parliament was involved in the conclusion of such agreements was when the proposal at stake was based on more than one legal basis (e.g., co-decision for acts based on a dual legal basis of ex-Articles 133 ECT and 95 ECT,[45] or assent for agreements which incorporated one of the elements in ex-Article 300(3), subpar. 2 ECT, i.e. when an agreement had budgetary implications, when it lead to establishing a specific institutional framework by organising cooperation procedures, and when they entailed an amendment of an act adopted under the co-decision procedure[46]) or, in exceptional circumstances, when the Council consulted Parliament on a facultative basis.[47] Overall, the views of Parliament were not sought until the Commission had reached a deal with the respective third country and the Council had endorsed it. The options of Parliament to shape the substance of an agreement were almost non-existent.

Not surprisingly, Parliament requested more powers for scrutinising the Commission's and the Council's CCP agenda.[48] To informally develop Parliament's rights of scrutiny in CCP, Council and Parliament first agreed on the so-called **Luns-Westerterp procedures** for association agreements ("Luns")[49] in 1964, and international trade agreements ("Westerterp") in 1973.[50] Both bilateral IIAs were introduced as a weak substitute for giving the EP more substantial rights.[51] The two bipartite IIAs provided for a threefold involvement of Parliament during the negotiation phase of international agreement via

1. plenary debates with the Council before the start of negotiations,
2. permanent contacts between the EC/EU Chief negotiators and Parliament during the negotiations, and
3. **forwarding confidential information to Parliament about the outcome of negotiations, i.e. after the signature of an agreement, but before its final conclusion.**

45 For an example, see Regulation (EC) No 816/2006 of the EP and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems (OJEC L 157, 9.6.2006, 1).

46 For an example, see Council Decision of 28 September 2000 concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (OJEC L 276, 28.10.2000, 44), which was concluded following the assent of Parliament on the basis of Articles 44(2), 47, 55, 57(2), 71, 80(2), 133 and 181 thereof, in conjunction with the second sentence of Article 300(2) and the second subparagraph of Article 300(3) EC. Assent was required due to the establishment of an institutional framework in the agreement.

47 See Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006, 2007/0289 (CNS); (COM(2007) 857 final); and Council Regulation (EC) No 980/2005 of 27 June 2007 applying a scheme of generalised tariff preferences, (OJEC L 169 30.06.2005, 1).

48 For a summary of the EP's call for an extension of its powers see H Krück, 'Zur parlamentarischen Legitimation des Abschlusses völkerrechtlicher Verträge der EG' in R Geiger (ed), Neuere Probleme der parlamentarischen Legitimation im Bereich der Auswärtigen Gewalt (Baden-Baden, Nomos, 2003), 178-82.

49 See Accord Assemblée-Parlement / Conseil sur la négociation des accords d´association ('Procédure Luns'), Procès-Verbal du Conseil des 24/25 février 1964 (I/4/64, 20 mars 1964); doc S 861/63 (ASS 5), page 7; PE doc 30.01.1978, p. 21; P.V. Conseil 24-25 février 1964, p. 26; Conseil docl/4 d/65 (Annex), p. 4 du 14.01.1965.

50 See Endorsement by the Council in favour of the EP, referred to in Resolution on procedures for participation by the EP in the conclusion of trade agreements between the Community and third countries (so called 'Westerterp-procedure'), ABl. 1973 Nr. C 14, 16 v. 27.3.1973; Bull EP 34-1973, 3ff, v. 19.10.1973; Council Note of 16 Oct 1973, R/2641/73 (not published)The contents of the said interinstitutional arrangements is described and analysed by A de Walsche, 'La procé-dure de conclusion des accords internationaux' in M Dony and J-V Louis (eds), Commentaire J. Mégret 12 - Relations extérieures (2nd ed, Université libre de Bruxelles, 2005), 77-110 at 96-106 and I MacLeod, ID Hendry and S Hyett, The External Relations Law of the European Communities (Oxford, Clarendon Press, 1996), 98-100.

51 See EP Report Doc. 1-685/81; text in Quintin, `Participation de l'Assemblée parlementaire européenne au déroulement de la procédure de négociation des accords commerciaux', Revue du Marche Commun (1975) 211.

There was no debate about the nature or classification methods of confidential information that Parliament received from the Council.[52] Neither EP-Council IIAs guaranteed Parliament a right to be continuously informed of the EC's external trade relations. In fact, **the implementation of the agreements remained at the Council's discretion, and Parliament had no power to sanction non-compliance of Council in this regard.** For this reason, the Parliament's former Committee on External Economic Relations (REX) proposed a reform of the procedure that sought to enhance the Commission's responsibility vis-à-vis Parliament throughout the various steps. Member States were highly resistant to **Parliament's attempts**. Their fears were illustrated by a paper of the European Union Committee of the House of Lords, arguing that "this **would risk slowing down and politicising what is already a difficult negotiating process within the Doha Round**. Furthermore, comparisons with the Fast Track authority in the United States highlight the potential danger for the EP to become a lobby for protectionist interests, and thus for anti-liberalisation voices."[53]

2.2 Changing perspectives: Forget the Council to scrutinise the Commission

It was this **resistance by Member States that prompted the EP to relate its requests for systematic, early and comprehensive scrutiny, oversight and participation in CCP towards the Commission**. The 1990 code of conduct established the first inter-institutional rules and was of a rather procedural nature.[54] Building on the 1990 Code of Conduct (CoC) between Parliament and the Commission and the readiness of the Commission to agree on a set of bilateral, political commitments in implementing its responsibility towards Parliament,[55] the **1995 CoC[56] covered for the first time the negotiation of international agreements, thereby perpetuating and enhancing the inter-institutional compromise enshrined in the original *Luns and Westerterp* IIAs, and applying their substantive content to the relationship between Parliament and the Commission**.

When the European **Commission proposed a regulation on security measures applicable to classified information in 1992, Parliament was not in a position to influence the text substantially**. Having only been consulted, it rejected the Commission's proposal in May 1993. The Commission subsequently withdrew this proposal in December 1993, taking the view that it could no longer be justified under the subsidiarity principle. The first post-Maastricht rules on treatment of and access to confidential documents were therefore developed as internal decisions of the Commission in 1994 (Decision C(94)3282) and of the Secretary-General of the Council in 1995.[57] After the entry into

52 Parliament translated these provisions in its Rules of Procedure the EP by providing for a right to suspend the opening of negotiations (ex-Rule 83(2)), to be 'regularly and thoroughly' informed (ex-Rule 83(4)) and to 'adopt recommendations and require that these be taken into account before the conclusion of the international agreement under consideration' (ex-Rule 83(5)). In addition, ex-Rule 83(6) postulated a parliamentary right of consultation or consent at the end of the negotiation phase, before the signature of the agreement. See Daniel Thym, Parliamentary Involvement in European International Relations, WHI - Paper 5-08, Berlin 2008.

53 See: House of Lords, European Union Committee, 'The World Trade Organization: The Hong Kong Ministerial 13th-18th December, 17th session 2005-2006, HL Paper 77, London 2005, 25.

54 See William Nicoll, The 'Code of Conduct' of the Commission towards the European Parliament, in: Journal of Common Market Studies, Vol. 34, No. 2/1996, 275-281.

55 Code de Conduite - Parlement/Commission- amélioration des relations interinstitutionelles, JOCE, 1990 No. C 68, 70.

56 OJ 1995 C 089, 69.

57 See: Council of the European Union (1995) 'Decision No. 24/95 of the Secretary-General of the Council on measures for the protection of classified information applicable to the General Secretariat of the Council', of 30 January,

force of the Maastricht treaty, the EP pushed more intensively for privileged access to classified information. It negotiated the second CoC in 1995 with the Commission.

Under point 3.10, **CoC 1995**, **the Commission agreed that, "in relation to international agreements, including trade agreements, [it] shall inform the competent parliamentary committee, in confidence where necessary, of the draft recommendations relating to the negotiating directives**." Moreover, the Commission consented to "**keep Parliament, through the Parliament committee, regularly and fully informed of the progress of negotiations**." Finally, the Commission committed itself to "facilitate the inclusion of Members of the EP as observers in Community delegations negotiating multilateral agreements, on the understanding that the Members may not take part directly in the negotiating sessions themselves, wherever the Commission alone represents the Community."

Although the Nice Treaty did not substantially change the legal provisions of Parliament's roles and functions regarding international agreements and the CCP, the **2000 Framework Agreement**[58] developed the Parliament-Commission relationship some steps further: First, the scope, timing and frequency of information to be forwarded to Parliament in relation to international agreements was substantially widened ("quickly and fully inform [...] at all stages of the preparation, negotiation and conclusion of international agreements"). **The Commission agreed to forward information at a stage that would allow it "to be able to take due account of the EP's views in so far as possible", and that would allow Parliament "to express its points of view if appropriate."**[59]

The **2005 Framework Agreement (FA)** continued these earlier reassurances on the timely and comprehensive flow of information, including the "**draft negotiating directives, the adopted negotiating directives (and) the subsequent conduct of negotiations**", to allow Parliament "to express its point of view if appropriate" which again shall be taken into account by the Commission "as far as possible".

Given today's restrictive initiatives of the Council regarding Parliament's access to confidential documents, it is striking that **only the 2005 FA generated a first formal Council reaction expressing its concern "at the fact that several provisions of the new framework agreement seek to bring about, even more markedly than the framework agreement of 2000, a shift in the institutional balance resulting from the Treaties in force"**.[60]

Given that the Commission became more and more dependent on Parliament's powers under the investiture procedure, MEPs directed their attention to this institution to make it fully accountable for **providing information at all stages of a procedure** towards an international agreement. Regarding the EP's relations with the Council, negotiations on parliamentary access to classified

subsequently amended by the Decision of the Secretary-General/High Representative of 27 July 2000 (Official Journal of the European Communities, C 239, 23 August 2000).

58 EP, Rules of Procedure, 15th edition (February 2003), OJEC 2003, L 61, Annex XIII – Framework agreement on relations between the EP and the Commission.

59 Regarding its functional scope, the 2000 FA explicitly covered information about "decisions concerning the provisional application or the suspension of agreements; and the establishment of a common position in a body set up by an agreement based on ex-Article 310 of the EC Treaty." Finally, the provision regarding the inclusion of MEPs as observers in Community delegations negotiating multilateral agreements was widened to cover the regular information of MEPs "on the progress of negotiations during the meetings [...] in order for the Commission to be able to take account of the EP's views."

60 See: Council statement concerning the framework agreement on relations between the EP and the Commission, (OJEC 2005 C 161/1).

information concentrated on the newly established EU framework for Common Foreign and Security Policy. Parliament had to wait until 2002 to negotiate an IIA with the Council to regulate **access to classified information on matters relating to the EU's security and defence policy**.[61] Under this IIA, the EP obtained **oral briefings from the High Representative**. Parliament established a **special committee of five security-cleared MEPs (the chair and certain members of AFET**) who could request access to certain classified documents. While members of this special committee received a privileged channel for obtaining classified information on CFSP and ESDP, these documents were not provided to and stored on EP premises. Instead, **MEPs had to consult them in the Council**.

2.3 SWIFT and the 2010 Framework Agreement

For the Council, the "catalyst for change came with the entry into force of the Lisbon Treaty. This brought the EP significant new powers – most notably in relation to certain categories of international agreements where it now has to be consulted or give its consent. As a result, the Framework agreement negotiated with the Commission in 2010 contained detailed arrangements governing access by the EP to classified information held by the Commission".[62] Parliament effectively rang its alarm bells and rejected the interim agreement on the processing and transfer of financial messaging data from the EU to the United States for the terrorist financing tracking programme. While it defended the rejection by a set of substantive arguments, the issue of document classification also played a prominent role. Hence, the interim agreement contained an annex that was initially classified "EU CONFIDENTIAL" and not forwarded to the EP. This annex was subsequently downgraded to the level 'RESTREINT UE/EU RESTRICTED' and forwarded to the EP on 8 February 2010, just two days ahead of the EP vote.[63]

The Lisbon Treaty provides many substantial changes in the area of CCP and for the related EP's powers and responsibility, when the EU negotiates international agreements with third parties: According to Art. 207(2) TFEU Parliament and Council now act as co-legislators on an equal footing when determining the framework for implementing the CCP. The substance of the CCP is extended and not only covers goods, services, and the commercial aspects of intellectual property, but also foreign direct investment. Parliament's consent is required for the conclusion of all trade agreements. The Treaty also establishes the EP as a co-legislator in the field of economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries (Art. 212 (1)TFEU). **The Treaty establishes a legally binding obligation for the Commission to keep Parliament regularly informed on on-going**

61 European Parliament and Council of the European Union (2002) 'Interinstitutional Agreement between the European Parliament and the Council concerning access by the European Parlia- ment to sensitive information of the Council in the field of security and defence policy'. Official Journal of the European Communities, C 298, 30 November.

62 See: David Galloway, Classifying Secrets in the EU, in: Journal of Common Market Studies, Vol. 52, No 3/2014. p. 679.

63 On 30 November 2009 – the day before the entry into force of the Lisbon Treaty – the Council authorised the Presidency to sign the SWIFT interim agreement. It was only on 25 January 2010, a few days before its provisional entering into force, that the Council forwarded the SWIFT interim agreement to the EP. With a limited timeframe to come up with a report, the LIBE Committee suggested to make full use of the newly gained (post-Lisbon) parliamentary prerogatives and recommended the rejection of the agreement. Parliament strongly criticised the failure to give the Parliament full information, including the opinion of the Council Legal Service, and claimed a breach of the principle of sincere cooperation between institutions as set out in Article 13(2) TEU. On 11 February 2010, Parliament consequently voted to reject the agreement. See Maria Romaniello, The international role of the European Parliament: The SWIFT Affair and the 're-assessed' European institutional balance of power, Perspectives on Federalism, Vol. 5, issue 1, 2013.

negotiations, with the same degree of information that it provides to the special committee appointed by the Council (Trade Policy Committee - TPC).

These changes substantially reinforce the EP's profile as the EU's only directly elected institution that legitimises those parts of the EU's external policy, which are defined as an exclusive competence of the Union.

In its opinion on the Parliament's new role and responsibilities implementing the Treaty of Lisbon, the **Committee for International Trade** initialled its requests for the future organisation of inter-institutional relations in the area of CCP.[64] It called the Commission to inform Parliament on all CCP matters on a par with the special "Committee referred to in Article 207 of the Treaty on the Functioning of the EU (TFEU)". Objecting that the Treaty of Lisbon did not provide Parliament with the right to approve the mandate of the Commission to negotiate a trade agreement, **INTA asked for a compensatory procedure that would entitle Parliament to establish preconditions in order to give its consent, which is required for the conclusion of all trade agreements.** It therefore stressed the need to reinforce the 2005 Framework Agreement, and in particular its paragraph 19. In the same report, **INTA also addressed several demands towards the Council and called** on the European Council, the Council and the Commission **to consider the negotiation of a new Inter-Institutional Agreement** with Parliament in order **to agree on a substantive definition of its involvement in every stage leading to the conclusion of an international agreement**.

Overall, INTA pursued a strategy to widen the scope and content of information as well as to make its digestion more effective. Members therefore underlined the need to agree with the Commission on the set-up of an **inter-institutional database for the inclusion and storage of all information that the Commission transmits to the TPC and all Commission Working or Advisory Groups that are active in the field of the CCP**. In addition, the Committee asked the administrations of both Parliament and the Commission to consider methods for **establishing a reciprocal mechanism for joint forward planning in relation to the CCP**, covering, i.e., positions by the EU member states regarding trade agreements, proceedings in related organisations (WTO, ITTO etc.), monthly meetings of the Committee Coordinators and the Commission's Director General for Trade to update information and policy options, in-camera-briefings by the Commission on ongoing negotiations, regular meetings of the Committee's Chair with the TPC, joint meetings of the Committee's and the Commission's delegation before and during WTO and similar, international meetings.

2.4 Informing Parliament immediately and fully at all stages of the procedure

Of specific importance for Parliament was the Lisbon Treaty's provision in Art. 207(3). Even though, during the negotiations, Parliament is not involved in terms of "consultation"[65], Art. 207(3) must be read in conjunction with the general provision on the negotiation and conclusion of international

[64] Opinion of the Committee on International Trade, 27.5.2008 for the Committee on Constitutional Affairs on Parliament's new role and responsibilities in implementing the Treaty of Lisbon, (2008/2063(INI)), http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2009-0145&language=EN.

[65] It is only the special committee that is formally consulted. Article 207 TFEU provides that 'The Commission shall conduct these negotiations in consultations with the special committee appointed by the Council to assist the Commission in this task…'.

agreements[66], that is to say Art. 218 TFEU. This article does not contain such a specific rule, but a rather more general provision, according to which "***the EP shall be immediately and fully informed at all stages of the procedure***" (paragraph 10).

It follows that the **Lisbon Treaty establishes a legally binding obligation for the Commission to keep Parliament regularly informed on on-going negotiations**, with the same degree of information that it provides to the TPC.**[67]** As the ECJ recently ruled on Case C 685/11, "all stages of the procedure" implies to inform parliament at a stage **"preceding the conclusion of the agreement"**.[68] As all international trade agreements now always require the EP's consent, the role of the TPC as well as the interest of the EP in gathering information about the TPC changed. **Whereas Parliament had focussed on what the 133 Committee *has been* dealing with, it now moved on to a more ex-ante focus on what the TPC *will* deal with.**

For the Parliament, such ex-ante information is essential in order for it to influence the negotiations and to ensure that it makes known its position before the actual conclusion of the negotiations when it can only give or withhold its consent, without being able to amend the content of the agreement. For the Commission, having an early feedback from Parliament is a way of ensuring that at the end of the negotiation procedure the agreement will be agreeable to the Parliament. Building on this analysis, Parliament's negotiation team for the Framework Agreement argued that the risk of Parliament withholding its consent will be minimised if Parliament can closely monitor the negotiations and the Commission has an opportunity to take Parliament's views into consideration throughout the negotiations, before the signing of the agreement. During the negotiations, Parliament therefore sought ensuring that it is well informed about the intention to start negotiations, the negotiating directives and have a detailed understanding of the conduct of the negotiations.

In particular, Parliament requested to be informed on how the Commission intends to take its views into consideration and to be given reasons why some of its requests could not be positively considered during the negotiations.

Given the **Council's firm resistance against Parliament's demands, the provisions regarding international agreements** became the most difficult negotiation item for the 2010 Framework Agreement. In fact, the Council's Legal Service published several thorough legal opinions, stating that the agreement risks modifying the balance between the Institutions at the Council's expense.[69] More specifically, the **Council's Legal Service criticised** Points 9 and 19 to 25, as well as Annex 3, of the agreement: These provisions "*aim to accord the **EP prerogatives which are not provided for in Article 218 TFEU.** More especially, this involves the obligations imposed on the Commission by Annex 3 to take*

66 Which also applies to the negotiation of trade agreements as stated in Article 207 (3), first subparagraph, TFEU and to agreements on economic, financial and technical cooperation.

67 The TPC is key to understand how Member States governments secured for almost 50 years that the Commission can not act alone, without any control by governments of the EU. When the Treaty of Rome entered into force in January 1958, the Committee was set up to implement the transitional provisions of the then Article 111. Since then, it comprises senior officials from the Member States in the field of commercial policy, usually at Director-General level. Its composition remained unchanged when, in February 1959, Article 113 EECT on the principles governing the common commercial policy became applicable. With the launch of the Tokyo Round of trade negotiations in 1973, it became necessary to convene meetings of your Committee more frequently and sometimes at short intervals. This led to the inception of a Committee of deputies.

68 Case C-658/11, para. 86.

69 Opinion of the Council's Legal Service of 4 March 2010, 7149/10 JUR 122 INST 65, and Council's Legal Service opinion of 30 August 2010, 12964/10 JUR 348 INST 302 + REV 1(en).

due account of the Parliament's comments in the entire process of negotiation and to provide it with a whole series of documents (in particular the draft negotiating directives, draft amendments to negotiating directives, draft negotiating texts or any relevant documents received from third parties, subject to the originator's consent) relating to international negotiations. Such obligations, combined with the obligation on the Commission to take account of the EP's views and inform it of the way it has incorporated them in the texts negotiated, are not provided for by the Treaty."

However, the **Commission finally agreed** to the **essential aim of Parliament**, namely **to be fully informed "at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives**" in order to serve the purpose of facilitating Parliament's consent, to give more predictability to the procedure and to avoid non-conclusion of international agreements when the negotiation has already been completed. Parliament convinced the Commission that the Council's critique is isolating parts of Article 218 from the Treaty's overall construction, and therefore, misleading.

Of course, one may share the Council's view that Article 218(7) TFEU gives the possibility to the Council alone, when concluding an agreement, to give authorisation to the Commission. **But the Council's further interpretation of Article 218(7) TFEU misses three important points:** Firstly, the provision states explicitly that it is a derogation, namely to paragraph 218(6) TFEU, and that according to the constant case-law of the Court of Justice, derogations need to be interpreted strictly. Secondly, the authorisation from the Council is only possible if the agreement itself provides that a modification to it might be adopted by simplified procedure or by a body established by the agreement. Therefore, since Parliament is called to give its consent to the agreement itself, it is always up to it's majority whether or not to accept this possibility, taking into account the scope and nature of the agreement in question as well as the Council's strict interpretation of the provision. Thirdly, in any case, the **Council and the Commission remain under the general obligation to inform Parliament.** It is reasonable to expect that both will take into consideration the possible reaction of the latter. To avoid problems at the later stages of a negotiation, this information should be given before the decision is taken by the Commission, in order to fully safeguard the *effet utile* of Article 218(10) TFEU.

Furthermore, the **Council's interpretation of Article 218 TFEU**, forwarded to the Chairman of the Committee on International Trade in a letter on 5 May 2010, raised serious concerns inside Parliament about the Council's readiness to fully implement the Lisbon Treaty. **According to the Council, the Treaties "*do not confer powers of action on the Parliament with respect to the preparation, negotiation and monitoring of trade agreements*."** D. Galloway, a leading official of the Council recently added that the EP's claim to access to documents, even if classified, is legitimate, when it is expected to give its consent or be consulted on an agreement or other act or report. "By contrast", he continued, "when the **EP** is informed in earlier stages of the negotiation of international agreements, it **does not necessarily have to see the text of negotiating directives or draft texts being negotiated".**[70]

Of course, Parliament does not have the power to actively participate in the negotiation of trade agreements. However, this does not mean that Parliament is powerless in this regard: Firstly, Article 207(3) TFEU obliges the Commission to "*report regularly to the (...) EP on the progress of the negotiations*". **Parliament may react at every stage by the political means at its disposal: own initiative reports and resolutions, hearings, oral questions, etc.** It is only natural to expect that

[70] See: Galloway, ibid.

the positions of Parliament will be taken into consideration at the negotiation stage in order to pave the way for the final parliamentary consent of the agreement. For this reason, it is not correct to say that Parliament has no power of action with regard to monitoring the negotiations. In fact, it is this provision together with Article 218(10) TFEU which foresees the full and immediate information of Parliament which aims specifically to fulfil that purpose. These provisions would be empty of substance if one were to hold that Parliament is to be informed, but it does not or should not monitor the negotiations.

Article 218(10) TFEU on the negotiation and conclusion of international agreements provides that: "*The EP shall be immediately and fully informed at all stages of the procedure*". To the EP's understanding, "***all stages of the procedure***" means that full information is required at:

1) the **initial stage of the procedure**:
    a) recommendations submitted by the Commission, or, for agreements that relate exclusively or principally to the Common Foreign and Security Policy, by the High Representative, to the Council;
    b) Council decisions authorising the opening of negotiations and nominating the Union negotiator, together with the directives which the Council may address to the negotiator and any revisions thereof;
    c) designation of a special committee in consultation with which the negotiations must be conducted, where applicable.
2) the **negotiation stage**: all steps of the negotiations up to the initialling of the text of an agreement by the negotiators;
3) the final stage:
    a) signature,
    b) possible provisional application,
    c) conclusion;
4) other stages in the procedure:
    a) suspension of the agreement,
    b) modifications to the agreement when the agreement provides for a simplified procedure, and
    c) the positions to be adopted by the Union in bodies established by the agreements.

The Council and the Commission are responsible for providing such information to Parliament in fulfilling their respective roles in the trade policy cycle. And Parliament is in the position to ask for implementation when they fail to deliver.

According to Article 207(3) TFEU, the Commission is obliged to provide all the information about the negotiations and proposals it makes to the Council concerning recommendations for negotiation, proposal for signature and provisional application, etc. in relation to trade agreements. For other agreements, the Council is responsible for providing all information in the stages of the procedure for which it is authorised by the Treaties, in particular the decision authorising the opening of negotiations, the decision nominating the negotiator and the negotiating directives addressed to the negotiator.

Moreover, Article **218(10) TFEU calls for the "*immediate and full*" information** of Parliament and does not provide for any exception. ***"Full"* information includes all information throughout the procedures covered by Article 218 TFEU**, including mandates and negotiating texts, where they are available. Such information is pertinent, especially since with the coming into force of the Treaty of Lisbon the consent of the EP is required for the conclusion of all international agreements in fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent of the EP is required.

2.5 ACTA and CETA - test cases for implementing the Lisbon Treaty and the Framework Agreement

Further to the adoption of the negotiation mandate by the Council on 14 April 2008, negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) were launched on 3 June 2008. **While the Commission led the negotiations on the general provisions of ACTA, the rotating Presidency of the Council led the negotiations on matters of penal enforcement, based on positions agreed and adopted in COREPER.**

The negotiations were concluded on 15 November 2010 and the agreed text was initialled on 25 November 2011, after 11 rounds of negotiations.[71] ACTA negotiations began prior to the Lisbon Treaty, but were finalised after the treaty's entry into force. **Even prior to the 2010 Framework Agreement, the Commission forwarded the most important draft texts to INTA**. The Commission's Recommendation to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement (ACTA), was classified as "EU Restricted". It dates from 24 October 2007, and INTA received the document on 16 November 2007. A second draft was also classified as "EU Restreint", originated from 26 March 2008, and received at INTA on 27 May 2008.

The most controversial points raised by civil society and many MEPs against ACTA concerned the provisions about large-scale infringements of intellectual property rights and the enforcement of intellectual property rights. Given that penal enforcement was a competence of Member States and subject to the rules of the former EU Treaty's former "Third Pillar", these issues were negotiated by the Council Presidency and not by the Commission. However, **the entire debate about how Parliament and civil society could scrutinize the negotiations concentrated almost exclusively on the Commission**. The governments of France, the Czech Republic, Sweden, Spain, and Belgium run the EU Council Presidency during the ACTA negotiations. **There is no evidence about any parliamentary enquiry vis-à-vis these governments or their respective EU Council Presidencies** concerning the ACTA negotiations. Against this background, it is also surprising that the Commission did not try to relegate parliamentary questions on the most delicate substantive questions regarding ACTA to the Council. Overall, a **good portion of the EP's critique was targeted on the wrong address: The Commission failed to clarify that it could only be held liable for action under its control and authorship, while the Council, its subsequent Presidencies and the Member State governments successfully hid behind the Commission and failed to clarify their responsibility under the terms of Articles 1 and 11 TEU, and Article 15 TFEU.**

[71] See: European Parliament, Legal Opinion, No. SJ-0501/11, 5 October 2011.

Parliament called on various occasions on the Commission to ensure the widest possible access to ACTA documents, notably in its reports of 18 Dec 2008 (Susta Report, P6 TA(2008)0634, paragraphs 14, 28) and 11 March 2009 (Cashman Report, P6 TA(2009)0114), paragraph 26 of which reads: "The Commission should immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available". In addition, MEPs started to consider the substance of the Agreement in November 2009, when MEP Engström put a written question to the Commission regarding the consistency between the ACTA negotiations and then agreed Telecoms Package, namely its provision that no measures restricting end-users' access to the Internet may be taken unless they are appropriate, proportionate and necessary within a democratic society — and never without a prior, fair and impartial procedure that includes the right to be heard and respects the presumption of innocence and the right to privacy.[72] In its Resolution of 9 February 2010 on a Framework Agreement with the Commission (P7 TA(2009)0009) Parliament asked for immediate and full information at every stage of negotiations on international agreements, in particular on trade matters and other negotiations involving the consent procedure, to give full effect to Article 218 TFEU. On 27 January 2010 the Commission gave assurances of its commitment to a reinforced association with Parliament in the terms of this resolution.[73] As the Commission agreed to a reinforced association with Parliament and to inform Parliament immediately and fully at every stage (including the definition of negotiating directives) of negotiations on international agreements, Parliament asked the Commission, how it would honour its commitment to a reinforced association with Parliament with regard to the ACTA negotiations. It also asked when it would grant Parliament access to "all documents relating to ACTA, in particular the Council's negotiation mandate, the minutes of ACTA negotiation meetings, the draft chapters of ACTA and the participants' comments on the draft chapters", and whether the Commission would be ready to give Parliament full access to ACTA documents before the new Framework Agreement comes into effect. Commissioner De Gucht agreed on 31 May 2010[74] with Parliaments' request for making public the draft negotiating text of ACTA. He also pointed out that **the Commission did provide the Parliament, through the International Trade (INTA) Committee, with (a) the Council's negotiating guidelines on ACTA, (b) full reports of negotiating rounds, and (c) in general all relevant documents, originating from DG Trade, that have been shared with the Member States through the Trade Policy Committee.** The Commission sent these documents in accordance with the rules agreed between Commission and Parliament on the handling of confidential documents. Accordingly, the most sensitive documents, such as the negotiating guidelines, were made available to the Chairman and Bureau of the INTA Committee and with the Coordinators of all political groups in the INTA Committee.

Commissioner De Gucht also agreed with Parliament that the best way scrutinize the negotiations would be to read the draft negotiating texts as this would give Parliament a clear picture of where exactly the contracting parties are in those negotiations. However, he also underlined that there is an agreement amongst ACTA parties that the negotiating text can only be made public if all parties agree: "The Commission is in favour of releasing the negotiating documents as soon as possible.

72 See: Written Question by Christian Engström (Verts/ALE) to the Commission, No. E-6094/09, 4 December 2009: ACTA negotiations and Telecoms Package principles.

73 See: 23 February 2010, E-0726/10.WRITTEN QUESTION by Carl Schlyter (Verts/ALE) , Eva Lichtenberger (Verts/ALE) , Christian Engström (Verts/ALE) , Niccolò Rinaldi (ALDE) , Daniel Caspary (PPE) , Syed Kamall (ECR) , David Martin (S&D) , Helmut Scholz (GUE/NGL) , Bernd Lange (S&D) and Robert Sturdy (ECR) to the Commission Subject: Anti-Counterfeiting Trade Agreement (ACTA).

74 See: 31 May 2010, E-0726/2010, Answer given by Mr De Gucht on behalf of the Commission.

However, a few ACTA negotiating parties remain opposed to early release. I strongly disagree with their approach but I cannot unilaterally breach a confidentiality commitment. My credibility as a negotiator is at stake."[75]

ACTA also showed how Council and Member States effectively hid behind the Commission. Council Presidency was always present, when INTA, LIBE, or JURI discussed ACTA with the Commission. But there was not a single case of Council intervention vis-à-vis the Committees to clarify that MEPs' attacks against the Commission were misleading. This kind of deliberate diffusion of accountability is always likely to continue, if and when international agreements affect policies which do not fall within the exclusive competence of the EU. The "broader" an international agreement is in terms of the functional scope addressed, and the more "mixed competencies" are concerned, the stronger will Member States and the EU Presidency act as a separate negotiating team on which the Commission and the EP have no special influence.

Parliament had to wait until early 2011 to move onto a test of its interpretation of Article 218(10) TFEU and the related provisions of the Framework Agreement. In February 2011, the INTA Committee received from the Commission three draft recommendations on the modification of the negotiating directives for negotiations on agreements with Canada, India and Singapore in order to authorise the Commission to negotiate on investment. The **Commission classified these drafts in accordance with Article 4 of Regulation 1049/2001. Paper copies of the draft mandates were transmitted to the INTA Secretariat in order to make them available to the Chair, Vice-Chairs, Coordinators and the relevant Rapporteurs only.**

Point 23 of the Framework agreement states that "Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, *including the definition of negotiating directives*", while Point 24 stipulates that such **information "*shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account*"**. In relation to this general commitment of the Commission, point 2 of Annex III to the FA further clarifies that "*when the Commission proposes draft negotiating directives with a view to their adaptation by the Council, it shall at the same time present them to the Parliament*".

Already in February 2010, the INTA Chair asked from Commissioner De Gucht a commitment by the Commission to agree on reinforced association of Parliament at the stage of defining the negotiation directives in such a way as to give full effect to Articles 207 and 218 TFEU, while respecting each institution's role and complying in full with new procedures and rules for safeguarding of necessary confidentiality. Anticipating the debates that would rise about FDI in international trade, the INTA Chair sent, in September 2010 another request to De Gucht, asking from the Commission:

- to send to the Parliament as soon as possible all draft proposals for any mandate on investment before sending it to the Council for approval, arguing inter alia that "*if Parliament's opinion is not taken into account before the mandate is adopted by the Member States, Parliament would be effectively excluded from any substantial discussion on the Commission's priorities and the way it conducts future EU investment policy*", and

[75] See: European Parliament: Answer given by Karel de Gucht, Commissioner for Trade, Tuesday, 9 March 2010, Debate on the Anti-Counterfeiting Trade Agreement (ACTA), CRE 09/03/2010 - 15.

- that no negotiations on investment are undertaken with any partner countries prior to the adoption by the Parliament of its own initiative report on the Communication of the Commission on the future investment policy.

In his response of October 2010, Commissioner De Gucht did not answer INTA's request to be consulted on the drafts before they are finalised and sent to Council, nor to the request to wait until the INTA Committee adopts its initiative report on the future investment policy before proposing draft mandates to the Council to negotiate investment chapters with Canada, India and Singapore. It was only in December 2010, when the acting Director-General of DG TRADE informed the INTA Chair that the Commission was about to adopt "*a Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada, the Free Trade Agreement with India and the Free Trade Agreement with Singapore, in order to authorise the Commission to negotiate, on behalf of the Union, on investment*", and that "*the recommendations will be transmitted to the Parliament at the same time as they will be submitted to the Council*". However, for technical reasons, the Commission delayed the transmission of the CETA draft, while the other two drafts were transmitted to Parliament without delays.

2.6 Squaring the circle: Expressing Parliament's views on the basis of confidential documents

Given that the draft negotiating directives are classified as *restricted or confidential* documents, the question arises about the most appropriate ways for expressing Parliament's "point of view" without challenging its agreement with the Commission on the treatment of this kind of documents. If Parliament wishes to make specific comments on issues that would otherwise be not known to the public (e.g. on specific items being included in or excluded from the draft negotiation mandate), it addresses its concerns in closed meetings or by means of confidential letters between the Committee Chair and the Commissioner. To give the Commission an opportunity to provide further information regarding the draft negotiating directives to Parliament, both institutions hold "in camera" exchanges of views. To validate its demands for early and full information at the earlier stages of negotiations on international trade agreements, INTA created the position of Standing Rapporteurs (and respective group shadows) for negotiations on international agreements and of Monitoring Groups for negotiations on international agreements. Without prejudice to the responsibilities of the INTA Committee, Standing Rapporteurs take care of considering and reporting on any document or information regarding the negotiations for an international agreement for which they are appointed, which the Commission, the Council or another third party transmits to the European Parliament. They may call for specific meetings (briefings, debriefings etc.) with the representatives of the negotiation team(s) for the negotiations for which they are appointed, chair INTA's Monitoring Groups on negotiations for an international agreement, and have access to confidential information. Whenever a document is classified by the Council or the Commission and access to this document is restricted, the Chair requests the document's originator to include the Standing Rapporteur to the group of Members of the European Parliament that should be granted access to the document. Monitoring Groups for negotiations on international agreements are set up by the Coordinators. They are composed by the Standing Rapporteur responsible for the respective agreement or negotiation, and the respective Standing Shadow Rapporteurs. In principle, all other Members of Parliament may attend the meetings. Within the limits set by Parliament's Rules of Procedure, and without taking prejudice on the competences and functioning of the INTA Committee, Monitoring Groups shall prepare and coordinate parliamentary proceedings by contributing to the drafting of reports,

drafting resolutions, drafting oral questions, drafting other documents that directly relate to the agreements or negotiations for which they are appointed.

These parliamentary arrangements are not meant to overload and artificially complicate the negotiation and conclusion of international agreements. Instead, they are to ensure that Parliament, being the representative body of all the EU citizens, does not merely passively take note of the actions of the other institutions, but is afforded the opportunity to bring some influence to bear on the Commission and the Council, in order to facilitate its consent on the final text of the international agreement.

Concerning Members' access to confidential negotiating documents, i.e. draft texts of the agreement with notes on conflicting positions or alternative text proposals, the standard options such as ATD only at “in camera” meetings have proven to be inadequate for the purposes of trade documents, mainly because of the obligation to keep Parliament at equal footing with information given to Member States through the Trade Policy Committee (TPC). Therefore successive Trade Commissioners and INTA Chairs used the possibility provided under point 3.2.4 of Annex II of the Framework Agreement to agree on “other equivalent arrangements”, which have on one hand ensured confidentiality of information but on the other hand gradually provided increased access to confidential negotiating documents for selected MEPs.

Against this background, it is surprising how much criticism about the alleged secrecy of the negotiations towards TTIP remains present in the EP. Hence, the Commission has provided all relevant information on TTIP negotiations to the Parliament. Further to the 2010 FA, the Commission sent to INTA all the documents provided to the EU Council's Trade Policy Committee. Personal (watermarked) copies of documents classified as “EU Restricted” are given to INTA Chair, INTA Vice-Chairs, INTA Coordinators, and relevant INTA Rapporteurs, while “EU Limite” documents are circulated by e-mail to all INTA Members (full and substitute) under the understanding that they should not communicate them widely. In addition there are also special arrangements for wider access to documents concerning the negotiations for TTIP: Personal (watermarked) copies of “EU Restricted” TTIP documents (except for those covered by point (3) below) can be also given to INTA's Shadow-Rapporteurs for US. At the Commission’s discretion and thus on a case-by-case basis personal (watermarked) copies of some “EU Restricted” TTIP documents are sent to the Chair and the Rapporteur other relevant committees "insofar as all or part of their content falls within the remit of that committee". Regarding the so-called “consolidated TTIP documents”, Parliament and the Commission agreed that the same Members who can access other “EU Restricted” TTIP documents (INTA Chair, INTA Vice-Chairs, INTA Coordinators, INTA Rapporteur for US, INTA Shadow-Rapporteurs for US, as well as the Chair and Rapporteur of other relevant committees as long as the documents concern their competence) can access them in a secure reading room. The Commission also sent the respective "EU Restricted" documents to the INTA Chairman, the Vice-Chairs, the Groups coordinators, the Standing Rapporteur and the standing shadow-Rapporteurs. Finally, the Commission informs all political groups through the INTA Monitoring group on TTIP.

Following discussions between INTA Chair Lange and Commissioner Malmström in November 2014, the Commission agreed to extend the access to the consolidated TTIP texts as follows:

1. Access to electronic copies marked as "EU Limited" (for internal use only; not to be shared outside the institution): all 41 full members of INTA and all 41 substitute INTA members, all Chairs and TTIP rapporteurs of the 11 associated committees (AFET, AGRI, CULT, ECON, ENVI, EMPL, IMCO, ITRE, JURI, LIBE, TRAN), the Chair of the US-Delegation and the three Members of the Transatlantic Legislators Dialogue.

2. Access to personalised print paper copies marked as "EU Restraint" (lowest category of confidential documents): all Group Coordinators, the Chair and the Vice Chairs of INTA, all Chairs and Rapporteurs of the 11 associated committees for those documents that fall in their remit, the Chair of the US-Delegation and the three Members of the Transatlantic Legislators Dialogue.

3. Access to "confidential documents" in a secure Reading Room in the EP are the same as above for documents marked "restraint".

Since 2014 thus, the Commission provides both the EP and the COREPER representatives of the Council with the "consolidated negotiations documents". **It should be underlined that it is essentially due to Parliament's Bureau rules on the treatment of confidential information, which incorporates the IIA of the EP and the Council concerning the forwarding and handling by the EP of classified information held by the Council, that MEPs are not entitled to take hand-written notes when consulting the TTIP texts in Parliament's reading room.** Select MEPs have retained access to EU negotiation and EU/US consolidated texts. This access allows for restricted oversight to Commission objectives in TTIP. Representatives of the Member States receive similar treatment by the Commission. MEP Hautala argued that the restrictions governing the rules on access to these documents "prohibit governments and MEPs from initiating a detailed analysis of the agreement with their advisors and colleagues, as sharing information with third parties is strictly forbidden. And yet, these consolidated negotiating texts are the heart of the negotiations."[76]

Indeed, one could argue that **the arrangements do not respect the requirements of Article 218(10) TFEU as well as the provisions of the Framework agreement**: Article 218(10) provides for information of "the Parliament." There is no legal basis to be found in the treaties that allows, provides for or even forces the discrimination of MEPs. Hence, Article 6 of Annex III of the Framework agreements holds that "in the case of international agreements the conclusion of which does not require Parliament's consent, the Commission shall ensure **that Parliament is immediately and fully informed, by providing information covering at least the draft negotiating directives, the adopted negotiating directives, the subsequent conduct of negotiations and the conclusion of the negotiations**." However, Article 24 of the Framework Agreement holds that "the information referred to in point 23 […] shall**, as a general rule,** be provided **to Parliament** through the **responsible** parliamentary committee and, where appropriate, at a plenary sitting. **In duly justified cases, it shall be provided to more than one parliamentary committee.**" Moreover, Article 1.4 of Annex II of the agreements explicitly establishes a discriminatory provision for MEPs, since confidential information from the Commission can only be requested by "the President of Parliament, the **chairs** of the parliamentary committees concerned, the Bureau and the Conference of Presidents, **and the head of Parliament's delegation included in the Union delegation at an international conference."** Overall, Article 218(10) TFEU and the provisions of the Framework agreement are inconsistent with regard to the question, whether ATD and access to EUCI can be limited to selected MEPs. **In our opinion, treaty text outvotes inter-institutional agreements and internal rules of the institutions.** Given the harsh criticism by MEPs regarding the secretive nature of negotiations for international agreements, **there is little ground to hope that parliamentary "ownership" with TTIP and similar agreements will increase as long as the asymmetric distribution of information remains standard practice.**

[76] See Heidi Hautala: Lack of transparency in TTIP - a case for the ECJ? Reading Room arrangement may contradict the EU Treaties, 14 July 2014. http://ttip2015.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html.

This practice is based on Parliament's commitment to ensure a degree of confidentiality by having developed basic principles, minimum standards of security and appropriate procedures for the treatment by the European Parliament of confidential, including classified, information with the decision of its **Bureau** of 15 April 2013 concerning the rules governing the treatment of confidential information by the EP. By adopting these **rules, Parliament accepted to strictly follow Council rules and bought into language that the Council originally adopted from NATO towards CFSP and ESDP**. According to these rules, MEPs may consult classified information up to and including the level "EU Restricted" without security clearance. But where the information concerned is classified at the level "EU Confidential", access is granted only to those MEPs who have been explicitly authorised by the President or after having signed a solemn declaration of non-disclosure of the content of that information to third persons, of compliance with the obligation to protect information classified at the level "EU Confidential" and of acknowledgement of the consequences of any failure to do so. Moreover, where the information concerned is classified at the level "EU Secret" or "EU Top Secret", access is only granted to those MEPs who are authorised by the President after they have been security-cleared, or a notification has been received from a competent national authority that the MEPs concerned are duly authorised by virtue of their functions in accordance with national law. During the consultation process of these documents, "contact with the exterior (including by means of telephones or other technological devices), the taking of notes and the photocopying or photographing of the confidential information consulted shall be prohibited."

3 Parliamentary scrutiny and oversight in international trade policy outside the EU

While international agreements and international trade policy create a multi-level system for policy-making, national unilateral modes of scrutiny and influence remain the bedrock of parliaments' efforts to exercise influence over trade policy. A stocktaking of national modes of influence and scrutiny indicates a wide range of channels through which parliaments can affect trade policy as well as a broad overlap between parliaments in the instruments used. This is indicated in the below Table „National Parliamentary Tools of Scrutiny". It shows considerable variation between parliaments in terms of the impact of these rights and powers, where they exist.

Table 2:
Scope, Impact and Practice of National Parliamentary Tools of Scrutiny and Influence in Trade Policy

	Mandate negotiators/ shape negotiators' guidelines	Hearings/ Investigations/ Questions/ Debates	Consultation by the executive	Observer Status / Participation in Negotiations	Ratification / Approval of agreements	Disseminate information and opinion
US	~ (F/I-Pr)	+ (F-Pr/D/Po)	+ (F-Pr/D/Po)		+ (F-Po)	~
Aust	- (I-Pr)	~ (F-Pr/D/Po)	~ (F/I-D)		~ (F-Po)	+
Russ.	- (I-Pr)	- (F-Pr/D/Po)				~
Switz.	~ (F-Pr)	+ (F-Pr/D/Po)	+ (F-Pr/D)		~ (F-Po)	-
India	○	- (F-Po)	○		~ (F-Po)	-
Braz.		- (F/I)		~ (F-D)	~ (F-Po)	+

+/-/~/○: Strong / Weak / Moderate / Extremely Limited or Non-existent

F/ I: Formal / Informal right or power

Pr/ D/ Po: Pre- / During / Post- negotiations

Apart from their relative impact on trade negotiations, modes of influence, scrutiny, and oversight can be disaggregated according to a number of specific features. One concerns their position in the trade negotiation process: *Ex ante* modes of influence cover parliaments' capacity to shape negotiators' specific guidelines or even to mandate negotiators. *During* negotiations, some parliaments enjoy rights of consultation, or even observer status. *Ex post* modes of influence, meanwhile, include the power to approve and ratify international agreements, as well as to translate them into national legislation. However, simply because such modes of influence are located at the end of the trade negotiation process does not infer that they are irrelevant at earlier stages, since governments will be aware of the need to clear future parliamentary hurdles throughout the course of negotiations.

Parliaments also differ with regard to the formality of their powers. Those parliaments with few formal and direct powers to influence trade policy are nevertheless able to organise debates or disseminate information in order to put pressure on the government. Others exert informal influence through

their links with the governing party. **Moreover, parliaments in the US, Australia[77], or Switzerland gain informal influence over trade policies by coupling outcomes of trade negotiations with the use of their formal powers in other areas: Parliament enjoying robust powers in another area of policy-making use the threat of blocking government action in that sphere to promote its preferences in trade policy. Significantly, these kinds of linkages can be used to (formally) change the relationship between executive and legislature in trade policy.**

Political systems differ with regard to the established relationships between government and parliament, party systems and the ideological spectrum mirrored by parties and other societal groups. These differences help to explain variation in the means and effectiveness with which scrutiny is carried out. The detailed country studies below thus look at the internal organisation of parliaments, as well as at the roles, functions, styles of parliamentary democracy in the different national settings: **The nature of parliaments' plenary-committee relationships reflect variations in government-parliament relations. The types of executive-legislative relations and the subsequent differences in type and structure of parliamentarism vary between floor-centred 'talking parliaments' and committee-centred 'working parliaments'.[78]**

Two basic findings stand out as particularly important: First, the quality of national parliaments' involvement in scrutinising trade policy cannot be reduced to categorisations concerning regime type - authoritarian vs. democratic system, or type of democracy – presidential vs. parliamentary system of government. Nevertheless, it is notable that the performance of national parliaments in shaping international trade policy is better developed in political systems where power is divided between many actors and levels. With regard to the authoritarian-democratic dichotomy we conclude that democratic systems have the slightly better record. Hence, parliamentary systems do clearly outperform presidential-authoritarian systems in respect to the quality of parliamentary scrutiny and their involvement in trade regime building on a global scale. Presidential systems such as Russia and Brazil have stricter mechanisms to centralise and control parliaments' collective involvement in trade negotiations.

The findings of the country studies can be synthesised according to three indicators - scope of information, timing and management of scrutiny, impact of scrutiny - , as well as with reference to the background factors – parliaments' working style, executive-legislative relations, basic orientation towards scrutiny - which may shed light on the former. These elements are tabulated below and then taken up individually in the following paragraphs.

[77] See: Carolyn Adams: Freedom of Information and Parliamentary Departments, Australian Journal of Public Administration, vol. 73, no. 1/2014, pp. 67–78; Madelaine Chiam: The Parliament of Australia, in: Andreas Maurer (ed.): The Role of Parliaments in Scrutinising and Influencing Trade Policy - A Comparative Analysis, European Parliament, DG for External Policies of the Union – Directorate B – Policy Department -PE 370-166v01-00, Brussels 2005.

[78] See: Lijphart, A (1999) Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries, New Haven and London: Yale University Press.

Table 3: Key features for the role of parliaments in international trade policy

Countries	Basic indicators			Procedural indicators of national parliamentary participation		
	Parliament's working style	Executive-Legislature relations	Basic orientation of scrutiny	Scope of information	Timing and management of scrutiny	Impact of scrutiny on government's policy
USA	Com+Pro+Ind	Leg	Ins	+	+	+
Australia	Com+Rea+Ind	Exe	Ins-Sup	-	-	-
Russia	Sel+Rea+Dep	Exe	Sup-Ins	-	-	-
Switzerland	Com+Pro+Ind	Leg	Ins	+	+	+
India	Sel+Rea+Dep	Leg-Exe	Sup	-	-	-
Brazil	Sel+Rea+Dep	Exe	Sup-Ins	~	-	~

Com: Comprehensive
Sel: Selective attitude towards incoming documents in international trade policy;
Pro: Proactive and anticipative
Rea: Reactive and accidental style of participation in policy-making;
Ind: Parliament acting independently
Dep: Dependant on the Government in policy-making;
Leg: Legislative autonomy
Exe: Executive dominance in policy-making;
Sup: Orientation towards supportive scrutiny
Ins: Orientation towards formulating and/or voting instructions.

+ good; - poor; ~ moderate

We identify some convergence in organisational adaptation of parliaments - i.e. the establishment of specific bodies within parliaments that deal with the incoming documentation of the international trade agreements processes - even if this is heavily dependent upon existent national constitutional structures, and there is strong variation in the *degree* of change. **The greatest degree of internal institutional adaptation occurs amongst those parliaments that enjoy a strong position in the legislature-executive relationship.** Nevertheless, parliaments in weak positions *vis-à-vis* the executive may be discouraged from making internal changes because of the strong influence of the executive over working methods (Russia), or where any interference in the executive's foreign and trade policy competences is seen as detrimental to the national interest (India).

The more a national system displays a close unity between majority party and government, the less its parliament tends to be directly and independently engaged in scrutiny (e.g. Russia). Parliamentary scrutiny is then a matter of passive participation and getting or remaining involved without developing a systematic stance of "checks and balances" vis-à-vis the government. In political systems where government cannot rely on a large majority in parliament and the executive-legislative relations are characterised by consensual bargaining (e.g. Switzerland), opposition parties and their parliamentary groups appear less inclined to blindly follow the Government's politics as "supportive scrutinisers".

In most countries, international trade policy is treated as a constituent part of foreign policy, and thus as the traditional preserve of the executive. In some though, **the conceptual and structural links between international trade policy and internal economic and fiscal policy are clearer, and the**

Parliament enjoys relatively large influence (US). Other parliaments enjoy an important role in the more domestic aspects of international trade policy - for example in setting tariffs on imports -, despite their marginalisation in most other parts of it. We also note that parliaments' strength *vis-à-vis* the government often varies, depending on the stage of the negotiation processes: most obviously, some parliaments enjoy a strong position when it comes to translating international agreements into national legislation (Australia).

It was noted above that parliaments may use their relative strength in some areas to gain informal powers in others. It was also suggested that parliaments might be able to exploit their relative strengths in order to formally alter the legislature-executive relationship in the international trade policy context. However, the country studies show no evidence of this occurring in a fashion comparable to the EU context where the EP has made extensive use of its relative strength in legislation and budgetary policy. Some alteration in the executive-legislature relationship in the countries under consideration has of course occurred. For the most part this has been due to the aim of achieving efficiency in negotiations - a goal which has favoured the executive (US).

Parliaments have created specific bodies, which are entitled to sift documents, to elaborate reports and to prepare resolutions for the plenary. In this regard, **the activity of parliamentary committees varies depending on the general orientation of parliaments' work and the intra-parliamentary focus on committee-work.** Compared to governments' ministerial administrations, parliamentarians need to allot their capacities to several agendas. Members of trade committees are not re-elected for focusing their campaign towards the handling of international trade policy: despite the intrusion of trade issues into central national competencies they are still considered to be international issues of less salience. In addition - and partly for the same reason - the Parliaments' agendas remain oriented towards national debates.

Information is the ultimate basis for participating in public policy-making. The fact that parliaments focus primarily upon the national level can prove detrimental to the exercise of their legislative role; yet the self-made loss of original legislative powers in the upstream process of international trade policy-making may be compensated for by an increase in their control function vis-à-vis their governments.[79] Nevertheless, **given the fact that parliaments have largely failed to break away from the national level in their scrutiny efforts, the scope of parliamentary participation remains disproportionately dependent upon the degree to which documents are forwarded to parliaments by their governments.**

Parliamentary involvement in international trade policy is a product of efficient procedures. Parliaments are confronted with the growing diversity of inter-institutional deliberation and decision-making processes at the governmental/ministerial level. **Only the US Congress and the Swiss Parliament are able to run with their governments effectively. These two parliaments not only have access to the overall amount of incoming draft documents, but manage to oblige their governments to provide comprehensive explanatory information in order to facilitate the sifting of documents between MPs and committees**. None of the other national parliaments examined are able to keep up with the frequency and speed of intergovernmental negotiations and the relevant intra-governmental decision-making. The consideration of the different steps in the negotiations cycle also generates different time constraints for parliamentarians and their

[79] See: Schüttemeyer, S (1979) 'Funktionsverluste des Bundestages durch die europäische Integration?' Zeitschrift für Parlamentsfragen, 2, p. 261.

committees. If parliaments anticipate trade agreement politics, the real scrutiny process starts earlier and the involved committees must therefore meet more frequently.

Finally, **the impact of parliamentary scrutiny differs between those parliaments (US, Switzerland) which enjoy a formal power through which they can (seek to) shape negotiators' guidelines, and parliaments with extremely limited - or no - formal or informal means of effectively influencing their government's standpoint (Russia, Brazil)**. It is important to note that some parliaments do enjoy formal powers - or potential channels of informal influence - in this area, which for complex reasons they do not take advantage of (India).

It might be assumed that *ex ante* tools of scrutiny and influence would have the greatest impact on government policy and action: by influencing governments at the earliest possible stage, parliaments are unlikely to be presented with a *fait accompli* at the end of negotiations, which does not match their preferences. Seen in this light, formal *ex ante* measures might be expected to deliver the best results. Nevertheless, robust *ex post* means of influence, particularly in the US, can be used informally to exert pressure on the government from the inception of the negotiation process through to its conclusion.

3.1 The US Congress and trade policy

The construction of the United States as a federal state and a presidential democracy with an intricate system of "checks and balances" gives the legislative body, the US Congress, a strong constitutional role in foreign and trade policy.

In **foreign policy**, Article 2 Section 2 USC attributes to the President the power to "make treaties" and to negotiate with foreign countries in general. **Every treaty signed by the President has to be submitted to the Senate for approval, requiring a majority of two thirds of its members**.

Trade policy, however, is governed by different constitutional principles. In Article 1, Section 8, the Constitution maintains the **power of Congress "to regulate commerce with foreign nations",** and to **"lay […] duties, imposts and excises**", along with its power of taxation and budgetary appropriation. Unlike treaties with other nations, trade agreements, therefore, fall into the category of so-called executive agreements. For executive agreements to become national law, they have to be approved, like any budgetary or tax legislation, by a simple majority vote in both Chambers of Congress.

3.1.1 Parliamentary procedure

As trade policy evolved, the normal procedure in Congress became increasingly unwieldy. If they were to make binding concessions of their own, other countries had to be sure that an agreement made with the US executive could not be re-opened and changed in the ratification process. Starting in 1973[80], Congress therefore voted to grant the President, within certain time limits, the authority to negotiate trade agreements with foreign nations, renouncing its power to amend those agreements when submitted by the President. In short, under this "fast track authority, currently known as "Trade Promotion Authority" (TPA), **Congress can only approve or reject trade agreements as submitted**. Through TPA Congress grants the President authority to enter into reciprocal trade agreements, and

[80] A somewhat similar concept, had already been in use since the Reciprocal Trade Agreements Act of 1934, when Congress first delegated authority to the President to negotiate tariff agreements for specific time periods.

to have their implementing bills considered under expedited legislative procedures, provided the President observes certain statutory obligations. In the 1990s President Clinton failed twice to win approval for renewing fast track trade authority after it had expired on April 16, 1994, immediately following the signing of the WTO Marrakesh Agreement. To establish a fall-back position with regard to what it considered a potential infringement on US sovereignty, US membership in the WTO, Congress reserved itself a special power: every five years, upon request of any one of its members, Congress will have to decide whether United States membership in the WTO is still in the national interest. Approval can (only) be withdrawn by a joint congressional resolution.[81]

To enable the US administration to negotiate in the Doha Development Round, Congress granted a first TPA to the executive from July 1, 2003 to July 1, 2005 as part of the Trade Act of 2002. It was agreed that a further two year extension of TPA would be automatically granted unless either Chamber of Congress objected before July 1, 2005. On July 30, 2013, President Obama first publicly requested that Congress reauthorize TPA and he reiterated his request for TPA in his January 20, 2015, State of the Union address. Legislation to renew TPA - the Bipartisan Congressional Trade Priorities Act of 2014 -was introduced in the 113th Congress (H.R. 3830) (S. 1900), but it was not acted upon. TPA renewal is likely to become more pressing in the 114th Congress, given that current trade negotiations on the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TISA) are in progress.

Granting TPA does not mean, though, that Congress does not take an active part in the negotiation process for trade agreements.[82] On the contrary, the executive **must consult with Congress before, during and after trade negotiations** and must inform Congress of his intention to enter into negotiations at least 90 days in advance. Throughout the negotiations, the President must consult with the Ways and Means, and Agriculture Committees, and with the **Congressional Oversight Group**. At the end of the negotiation process, the President is required to notify Congress formally of the upcoming signing of a trade agreement. After the President submits an implementing bill to Congress, Congress is given 90 days to take action on the trade agreement with a "yes or no" vote. Floor debate is limited to 20 hours in each Chamber.

With the Trade Act 2002, the negotiation procedure between the executive and the legislature has become more formally institutionalised. Congress generally defines trade negotiation objectives in TPA legislation which the Administration is expected to honour, if it expects trade agreement implementing legislation to be considered under expedited rules. For this reason, trade negotiating objectives stand at the centre of the congressional debate on TPA.[83]

However, Congress is not necessarily directly involved in every step of the negotiations. Rather, it gives the executive guidelines for negotiating trade agreements to stress what kind of an agreement would be acceptable. Congress included an escape-clause in the Trade Policy Act

81 The second such request since the WTO was established was submitted to (and struck down) by the House of Representatives on June 9, 2005 by a vote of 86 - 338.

82 Under TPA, reciprocal FTAs and multilateral trade agreements that go beyond tariff reductions are treated as congressional-executive agreements, which require the approval of both houses of Congress. Such approval expresses Congress's consent to bind the United States to the commitments of the agreement under international law. This type of agreement is distinguished from both an executive agreement, requiring only presidential action, and a treaty, requiring a two-thirds vote of the Senate. Because reciprocal trade agreements typically result in tariff rate (revenue) changes, the House of Representatives is necessarily involved. See Shapiro, Hal S.: Fast Track: A Legal, Historical, and Political Analysis, Ardsley: Transnational Publishers, 2006.

83 Detailed language may be found in P.L. 107-210, Section 2102; 116 STAT. 994.

of 2002 according to which TPA would be withdrawn if both Houses decide, within 60 days of each other, that the Administration has failed to consult with Congress on relevant matters.

Regarding the executive branch, trade negotiations are carried out by the United States Trade Representative (USTR)[84] which is responsible for trade policy formulation and negotiations. It works closely with Congress, and submits an annual report on foreign barriers to trade to Congress under the Omnibus Trade and Competitiveness Act of 1988. The Department of Commerce (DOC) is the second agency that deals primarily with trade, both domestic and foreign. The DOC handles the operational side of trade policy: it assists US States, communities, and companies in international trade.

Congressional trade legislation is prepared in a number of committees and subcommittees of the Senate and the House of Representatives.

3.1.2 Congressional working methods

Congress is an active player in foreign policy and international trade policy through the **monitoring of the activities of the Administration**. This is mostly done through **committee hearings and investigations**, which may be on any topic under a committee's jurisdiction. Congressional committee **hearings are generally public**. Civil society and experts from business groups and other organisations are often invited to give written und spoken testimony in congressional hearings.[85] The influence of interest groups on American politics and Congress in general, is an intensely debated issue. **Interest groups serve as agenda-setters, mobilise support or pressure against legislative action, give expertise in hearings and may also monitor the implementation process**.

Senators and Congressmen rely only to a small extent on the campaign support offered by their party. The more important source of support is the influence of special interest groups among their constituencies. Since trade policy usually stimulates a lot of intervention by special interest groups, it is relatively difficult for the Government to garner the necessary parliamentary support during its negotiating process.

Normally, bills - which are the most important form of legislative action - or amendments to bills can be introduced by any member of Congress and are referred to the appropriate standing committee, where they are deliberated. During the course of deliberation the committee usually refers the bill to one of its subcommittees, which may hold hearings, listen to expert testimony and amend the proposed legislation before referring it to the full committee for its consideration. The full committee may accept the recommendation of the subcommittee or hold its own hearings and prepare its own amendment. TPA rules give Congress a limited time-frame to decide on a bill for implementing a trade agreement, normally 90 days after submission of a ratification bill.

[84] The office of the USTR was established in 1963 (from 1963 until 1979 it was called "Office of the Special Trade Representative (STR).

[85] The private sector advisory system was established by Congress in 1974 to ensure that U.S. trade policy and negotiations benefit from, and reflect, a broad array of private sector U.S. interests. It consists of 28 committees and over 700 advisors, coordinated by the Office of the United States Trade Representative. The USTR also chairs the interagency trade coordinating structure to coordinate U.S. government positions on international trade issues.

3.1.3 Consultation and access to confidential documents

It is unclear how much authority the Legislative Branch has to constrain the Executive Branch's power in this area.[86] Nevertheless, **Congress has successfully directed the President to establish procedures governing the access to classified material and has formulated the classification procedures**.[87] These include the establishment of uniform procedures for, *inter alia*, background checks, denial of access to classified information, and notice of such denial. According to current standards, the President, Vice President, agency heads, and any other officials so designated by the President may classify information upon a determination that the unauthorized disclosure of such information could reasonably be expected to damage national security.[88] Such information must be owned by, produced by, or under the control of the federal government, and must concern military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources/methods, and cryptology; foreign relations and activities of the US; scientific, technological, or economic matters relating to national security; federal programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of national security systems; or weapons of mass destruction.[89]

Information is classified as "Top Secret" if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security. The standard for "Secret" information is set at "serious damage" to national security, while for "confidential" information the standard is "damage" to national security. Significantly, for each level, the original classifying officer must identify or describe the specific danger potentially presented by the information's disclosure.[90] **Access to classified information is generally limited to those who demonstrate their eligibility to the relevant agency head, sign a nondisclosure agreement, and have a need to know the information**.[91] The need-to-know requirement can be waived, however, for former Presidents and Vice Presidents, historical researchers, and former policy-making officials who were appointed by the President or Vice President.[92] The information being accessed may not be removed from the controlling agency's premises without permission. Each agency is required to establish systems for controlling the distribution of classified information.[93]

TPA is extended to the President provided he or his designee regularly consults with Congress. This requirement includes the **Congressional Oversight Group (COG), created in the Trade Act of 2002, whose members are accredited as official advisors to the trade negotiation delegations**. Notification and consultation requirements have been revised in each renewal of authority. Most of

86 See: Brooks, Nathan: The Protection of Classified Information: The Legal Framework, RS21900, Updated August 5, 2004; Kaiser, Frederick M.: Protection of Classified Information by Congress: Practices and Proposals, Congressional Research Service, August 31, 2011, Doc. No. 7-5700. Kaiser, Frederick M./Oleszek, Walter J./Tatelman, Todd B.: Congressional Oversight Manual; Kosar, Kevin R.: Security Classified and Controlled Information: History, Status, and Emerging Management Issues, CRS Report RL33494; and Elsea, Jennifer K.: The Protection of Classified Information: The Legal Framework, CRS Report RS21900.

87 50 USC, § 435(a).

88 Executive Order No. 12,958 (as amended by Executive Order No. 13,292 (2003)), § 1.1. The unauthorized disclosure of foreign government information is presumed to damage national security. Id. at 1.1(b).

89 Id. at § 1.4. In addition, when classified information which is incorporated, paraphrased, restated, or generated in a new form, that new form must be classified at the same level as the original. Id. at §§ 2.1 - 2.2.

19 Id. at § 1.5.

91 Id. at § 4.1.

92 Id. at § 4.4.

93 Id. at § 4.2.

these requirements are found in Section 2104 of the TPA statute. First, the President must conduct certain notifications and consultations **before negotiations begin** that include

1. notifying Congress in writing of his intention to enter into negotiations at least 90 calendar days prior to commencing negotiations;
2. consulting with the House Ways and Means, Senate Finance, other relevant committees, and the COG on the nature of the negotiations; and
3. providing special consultations on agriculture, import sensitive agricultural products, fishing and textile industries tariffs, and other issues.

The President must also conduct specific notifications and consultations **before (and after) agreements are signed**. The congressional consultation process forms an integral part of TPA. It reflects Congress's ongoing interest in ensuring that trade policy remains under the purview of the legislative branch by establishing in law opportunities to affect the nature and direction of trade negotiations. The effectiveness of the consultation process, however, is subject to debate. When the Government Accountability Office (GAO) evaluated this process, it found that from 2002 to 2007, the USTR had conducted "extensive" consultations with Members and staff of Congress on all FTAs under TPA.[94] However, many congressional staff indicated that despite the high quality of information and frequency of meetings with USTR officials, **they often did not allow for sufficient time to provide input into the negotiation process, were often cast more as briefings than consultations (implying an exchange of views), and did not always include last minute changes to draft FTA texts**. In short, staff expressed concern that the consultation process did not satisfy many in Congress and may need to be amended to allow for greater and earlier congressional input into the drafting of FTAs.[95] Similar concerns have been raised in the 112th Congress over the TPP negotiations.

The **US position on transparency is best understood in the context of the Clinton Administration's experience negotiating with the OECD in the late 1990s on the Multilateral Agreement on Investment (MAI).** When the MAI's draft first became public in 1997 there was a concerted effort by multiple NGOs, consumer groups and self-styled "watchdogs" in the US to derail the agreement. This outcry was ultimately successful, resulting in the US reneging on their support for the agreement by mid- 1998. Yet, rather than disbanding after their success earlier in the year, this anti-MAI coalition remained loosely connected and again consolidated their efforts in September 1998 to defeat the Clinton Administration's effort to secure Trade Promotion Authority (then known as "Fast Track" Authority). For US trade policy, this failure to secure TPA resulted in an 8-year lull in the trade agenda (from 1994, when it first expired, to 2002 when it was again ratified). Politicians on both sides of the aisle ascribed the failure of the MAI to too much transparency and there was a subsequent consensus that emerged that the transparency of the MAI process mobilized opposing groups to such an extent that they united in opposition to not only that cause, but the subsequent TPA debate. As a result, there has been bipartisan tolerance for increased secrecy at USTR during the negotiating process ever since. The executive and legislative branch both believe that the best policy for passing trade agreements is to draw as little attention to them as possible, and they both believe that the more limited the transparency the better.

94 United States Government Accountability Office Report to the Chairman; Committee on Finance; International Trade: An Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority; GAO-08-59; November 2007, pp. 29 and 41-42.

95 Ibid., pp. 29 and 43-46.

Given these experiences, **there is only little chance that the US will consider increased transparency in the TTIP negotiations until a new TPA bill has been ratified by Congress**. Since the last Senate elections, US trade policy is caught in a trap. Both the TPP and TTIP negotiations are relatively advanced, yet Congress has to grant the Obama Administration TPA needed to enforce either agreement. Curiously, this is because the Administration ran in to opposition from their own party, which until the November 2014 elections controlled the US Senate and thus the ability to obstruct the Administration's trade agenda. However, following those elections, Republicans have now taken control of both the House and Senate and have indicated that trade is one of the areas they are enthusiastic about bipartisan cooperation. One of the co-authors of the TPA bill that was introduced in January 2014 is now the Chairman of the committee of jurisdiction, which is good news for TPA supporters. However, there are several other priorities for Congress before they get to a TPA vote. Optimists are predicting a largely partisan passage of TPA in mid-2015. USTR will certainly make note of the ombudsman's opinion, but increased transparency is unlikely to emerge until TPA is passed. The odds of its passage have increased dramatically, but public transparency is a secondary priority for the US.

3.2 The case of Brazil

Trade policy-making in Brazil is as complex, dynamic, and highly sensitive to timing and politics. The current procedure concerning trade negotiations dates back to the first government of Fernando Henrique Cardoso's (FHC) and was promoted by the creation of inter-ministerial commissions to negotiate for the Common Market of the South (Mercosul). It coincided with the launch of the Free Trade Area of the Americas (FTAA) negotiations and the implementation of the agreements of the then newly-founded World Trade Organisation (WTO). Trade negotiation decision-making remains sectoral and informal, although involving a limited number of civil society stakeholders. Nevertheless, decision-making concerning trade remains highly centralised with the executive branch.

There is **no tradition or routine practice of parliamentary engagement in scrutinising or overseeing government's trade policy**. Both Houses of Congress are called upon to **approve final proposals emerging from negotiation processes**. The Congress has very rarely manifested interest in trade policy-making, even though trade has been growing in importance and scope, engaging more government ministries and agencies than ever before.

The trade regime currently in place is continuously adjusted and reflects the relative novelty of democracy and liberalisation in the country. This new paradigm for Brazilian society has boosted the enthusiasm of some civil society groups to participate in the trade policy-making process Leading the Government to organise its dialogue with the private sector and other stakeholders. However, the process continues to be accessible only for those closest to the position-building process, promoting informality and unpredictability. **It is widely acknowledged that scrutiny and influence over trade policy negotiations in Brazil are very rarely developed through parliamentary bodies; moreover, the representation of the various business sectors and civil society groups is not part of a formally institutionalised process**.

3.2.1 Parliamentary body

The framework for the development of current Brazilian foreign policy and, thus, also trade policy, is the 1988 Constitution with its amendments. The President of the Republic enjoys the sole competence to conduct relations with other States[96] and negotiates international treaties.[97] Among the most relevant obligations of the legislative branch in matters concerning foreign policy is the ratification of international agreements that are negotiated and concluded by the executive power.[98]

The parliamentary bodies with formal competences in the area of trade are the upper house (Federal Senate) and the lower house (Chamber of Deputies). Three permanent committees have been created under the aegis of the lower house to deal with some matters related to international trade. This is the *Commission on Economic Development, Industry and Trade* (CDEIC)[99], the *Commission on Science, Technology, Communication and Informatics* (CCTCI)[100] and the *Commission on External Relations and National Defence* (CREDN)[101]. While CDEIC focuses on issues directly affecting international economic relations, CCTCI concentrates on innovative cooperation and CREDN has a broader scope with a strong leaning towards national defence issues and international relations in general. In addition, the upper house has its own permanent *Committee on External Relations and National Defence*. In contrast to its counterpart in the lower house, this committee deals with the whole range of international relations albeit with a leaning towards defence issues as their main subjects.[102]

To deal with issues specific to the **Common Market of the South (Mercosul), a Joint Parliamentary Committee was created in 1994. It has been replaced by the Mercosur Parliament (PARLASUL) in 2006, which is composed of parliamentarians of the five full members of the regional group.[103]** Until 2015, the new proportional system in PARLASUL shall be implemented, increasing the number of Brazilian MPs from 37 to 75.[104] The competences of PARLASUL range from representing the peoples of Mercosur - mirrored through its right to issue own-initiative resolutions - to information gathering from other Mercosur institutions, which have to answer Parliament within 180 days. However, PARLASUL's legislative functions are of minor importance.[105] Resolutions are not binding for the member states of Mercosul and PARLASUL has no power to approve or reject treaties between Mercosul and third countries or organizations. Nevertheless, PARLASUL's right to request information from the executive Mercosur institutions provides MPs with the possibility to gather information about ongoing negotiation processes before agreements or treaties are signed.

96 Constitution, Art. 84, VII
97 Constitution, Art. 84, VIII
98 Constitution, Art. 49, I
99 Internal Regulations of the Chamber of Deputies, Art. 32, VI, a)
100 Internal Regulations of the Chamber of Deputies, Art. 32, III, a)
101 Internal Regulations of the Chamber of Deputies, Art. 32, XV, a)
102 Internal Regulations of the Senate, Art. 103, I
103 Dri, Clarissa: "At What Point does a Legislature Become Institutionalized? The Mercosur Parliament's Path", Brazilian Political Science Review. Vol. 3, No. 2, 2009.
104 Lucci, Juan José: "MERCOSUR Parliament: Institutional weakness and political stalemate. Analysis of six years after its formation." Journal of Art and Humanities, Vol. 2, No. 3, 2013.
105 Dri, Clarissa: "At What Point does a Legislature Become Institutionalized? The Mercosur Parliament's Path." Brazilian Political Science Review. Vol. 3, No. 2, 2009.

3.2.2 Parliamentary mandate, and parliamentary procedures[106]

The Federal Senate and the Chamber of Deputies hold the competence of ratifying international agreements concluded by the executive power.[107] **However, members of both houses of Congress remain detached from the negotiation of international trade affairs.** Although international affairs in general and international trade issues specifically, have gained salience with the recent process of commercial liberalisation, interest remains very low when compared to other issues of the domestic agenda. Members of both houses **essentially serve to ratify multilateral, regional or bilateral agreements that have been negotiated and developed through the Common Market Council of Mercosul or by the executive's Chamber of External Trade (CAMEX)**.

Trade negotiations and decision-making are concentrated in the executive branch, namely with the Chamber of External Trade (CAMEX) or, alternatively, at Mercosur-level with its Common Market Council and the Common Market Group.[108] CAMEX brings together the Minister of Development, Industry and External Commerce (President of CAMEX), the Minister of the Presidency of the Republic and Head of Staff, the Minister of Finance, the Minister of External Affairs, the Minister of Agriculture, and the Minister of Economy.[109] It is assisted by an Executive Management Committee, which prepares the final decision-making by the ministers composing CAMEX. **Ministers currently composing CAMEX are very active, effectively deciding upon the issues at stake and maintaining a strong personal relationship with the President of the Republic**. In this way, trade policy's strategic orientation is developed within CAMEX.

Within the first term of the presidency of Luiz Inácio Lula da Silva, a new inter-institutional body called AFEPA (short for Assesoria de Assuntos Federativos e Parlamentares) was established. **This body operates under the authority of the Minister of Foreign Affairs. Its main task is to act as a channel for information exchange between the Executive and the parliamentary bodies prior to the ratification process.[110] However, the limited availability of information about ongoing international trade negotiations restricts the control, scrutiny and participation of members of Congress**. There is no habit or obligation of the executive to forward documentation concerning future policy-making for parliamentary scrutiny. In fact, what is considered as the main information instrument to map ongoing multilateral trade negotiations (including those in the WTO) is produced outside Brazil, by the Permanent Brazilian Representation in Geneva, and is called *Carta de Genebra* (Letter from Geneva).

3.2.3 Parliamentary working methods

The Senate can promote public hearings, call ministries and other agents of the executive branch to channel information on its activities, ask for interventions and evidence from citizens, and scrutinise

106 Institutional structure of the process of approval of international agreements/treaties: Presidential message is sent for the consideration of the Chamber of Deputies → The approval has to be initially made by the CREDN. Then it is sent to the plenary of the Chamber of Deputies → After approval in the Chamber, it is sent to the Federal Senate, which has to approve it in the CREDN and in Senate's plenary → The President of National Congress issues a Legislative Decree → The President of the Republic can ratify and it becomes national legislation.

107 Constitution, Art. 49, I

108 As Brazil is a full member of Mercosul, Free Trade Agreements with other associations or countries can only be negotiated on Mercosul-level

109 CAMEX "Conselho de Ministros da Câmara de Comércio Exterior." http://goo.gl/rEU6C7. February 2, 2015.

110 Rodrigues Falk, Lana: "Diplomacia federativa e participação no Brasil." Séminario Brasileiro de Estudos Estratégicos Internacionais. 2013.

and control governmental policies within the limits set by its formal competences.[111] The Chamber of Deputies enjoys the same formal competences as the Senate. In addition, the Chamber seems to act more proactively with regard to the participation of civil society.[112] **Despite these possibilities, external trade policy is an issue rarely dealt with within the Senate and the Chamber. Neither House plays a significant role in scrutinising trade negotiations and trade policy.**

Established procedures for consultation with civil society on trade policy issues are organised by the executive and not by the legislative branch. It is based on a structure that dates back to the mid-1990s, when the Ministry of External Relations created the National FTAA (Free Trade Area of the Americas) Secretariat, called SENALCA,[113] with the aim of bringing together representatives from other ministries as well as *guests* from civil society. A similar construct was put in place for the Mercosul – EU negotiations – SENEUROPA,[114] and for WTO related matters – the Interministerial Working Group on International Services and Goods Trade (GICI). Mercosul has its own formal consultative process to engage civil society, undertaken by its Economic and Social Consultative Forum. The agenda for consultations to the negotiation process is entirely set by government representatives, in particular, by the coordinators of the Ministry of External Relations. It is largely determined by the priorities of the negotiations, as defined by the Ministry itself.

Other relevant and representative civil society external bodies are sector-specific and sometimes even activity- or geography-specific within one sector. Not surprisingly, the agricultural sector is well organised manages to influence the government's positions in trade negotiations effectively. It has organised itself beyond various umbrella and sectoral organisations, and sponsored the creation of a research institute fully devoted to international trade negotiations. Due to the lack of a formally institutionalised and transparent consultation process, "forum-shopping" or "ministry" or "agency-shopping" are the most frequently used strategies. Civil society interest groups usually relate directly with the agencies or members of government that concern their sector or business the most.

3.3 The case of the Russian Federation

The Russian Parliament, known as the Federal Assembly (*Federal'noe sobranie*), is a bicameral structure, consisting of the State Duma and the Federation Council. Within the State Duma exist 30 specialised committees on varied subjects, the most relevant of which for the present study being the International Affairs Committee, the CIS and Eurasian Integration Committee.[115] The Federation Council is the Parliament's upper house, to which representatives are appointed. Two representatives from each federal subject are selected for the Federation Council.[116] The Federation Council has created ten committees, the most important of which for the present study is the International Affairs Committee.[117] The Parliament functions as the primary legislative organ of the Russian Federation,[118] its houses share the right to initiate the legislative process with the executive and subnational legislative organs of federal subjects.[119] **Although the Federal Assembly is defined as one of the**

111 Internal Regulations of the Senate, Art. 90, I-IV
112 Internal Regulations of the Chambers of Deputies, Art. 17, VI
113 Decree No. 4732/03. June 10, 2003.
114 Ibid.
115 Ibid.
116 Constitution, Article 95, paragraph 2
117 Regulations of the Federation Council, Article 30, paragraph 1
118 Constitution, Article 94
119 Constitution, Article 104, paragraph 1

organs able to exercise 'state power,' the Constitution, federal laws and its own regulations restrict its powers and area of jurisdiction.[120] On the whole, the Federal Assembly is the country's federal-level legislative body functioning within the context of a strong executive, over which it retains some control, at least theoretically.

As an example of the Russian Federation's particularly strong executive, the President's office has the ability to issue edicts (*ukaz*), which enter into force immediately on Russian territory and, therefore, can function indistinguishably from laws.[121] Edicts are faster than the usual legislative process and therefore useful in times of crisis. However, since the constitution allows for their almost unfettered use, edicts could potentially undermine the division of powers between the executive and the legislative branches of the government.

3.3.1 Legislative and scrutiny procedures

The Federal Assembly's primary function is as the Russian Federation's law-making organ, and it has the right to initiate the legislative process by submitting a bill. Once submitted, the bill must pass through three hearings in the State Duma,[122] review by the Federation Council and, finally, approval from the President. During this first step, a bill requires a majority of votes from State Duma deputies, after which it must be transferred within a period of five days to the Federation Council for review.[123] If the bill either acquires over half of the Council's votes or does not receive a review from the Council within a 14-day period, it is submitted within five days for the President's signature.[124] Should the Federation Council reject the bill, the two houses can establish a review commission to reach an agreement, or, if the State Duma wishes to push the bill through in its original form, the bill needs two thirds of the deputies' votes to receive automatic approval from the Federation Council.[125] Federation Council review and approval are, however, obligatory for the ratification of or withdrawal from any international trade agreements.[126]

The Constitution accords the State Duma the ability to exert control over the executive through its right to submit a motion of no confidence in the Government and the right to impeach the President.[127] **However, Parliament's ability to hold the government accountable through possible motions of no confidence faces serious limitations since only the President can choose to dissolve the government, regardless of the Duma's motions of no confidence[128] rendering application of this control mechanism largely ineffective and even ill-advised from a political point of view, as the Duma itself could risk dissolution**.[129]

The President is not politically accountable to the Duma, but can in exceptional circumstances be removed from office by it. The impeachment process is, however, exceptionally long and involves four government bodies: the State Duma, the Federation Council, the Constitutional Court and the Supreme Court. Even though the President is defined as the principal decision-maker in establishing

120 Constitution, Article 11
121 Constitution, Article 90
122 Regulations of the State Duma, Article 116, paragraph 1
123 Constitution, Article 105, paragraphs 2 & 3
124 Constitution, Article 105, paragraph 2 – 4; Constitution, Article 107, paragraph 1
125 Constitution, Article 105, paragraph 4 & 5
126 Constitution, Article 106
127 Ibid.
128 Constitution, Article 117
129 Gudev, P. A.: «Государственная Дума в политической сфере РФ» ["The State Duma in the political sphere of the Russian Federation"]. 2001. <http://www.hist.msu.ru/Science/Conf/lomweb01/gudev.htm>

the direction of the country's internal and foreign affairs,[130] the Duma has issued statements concerning on contentious internal and external policy issues, which do not officially fall within its purview. In 2000, for example, the Duma published a decree on state policy towards Russian citizens in Latvia,[131] and in 2007 it issued statement to Prime Minister Mikhail Fradkov concerning the Russian meat industry.[132] This sort of decree constitutes an area of, as of yet, unchecked influence outside of the Parliament's constitutionally delineated jurisdiction.

3.3.2 Access to information on international trade agreements

Federal law defines four categories of information based on the legality of or procedure for its dissemination. These are (1) freely disseminated information, (2) information, granted on request provided the participating parties agree to its dissemination, (3) information, which, according to federal laws, is subject to review or dissemination, and (4) information, the dissemination of which is limited or forbidden in the Russian Federation.[133]

State secrets, a subset of the fourth category of information, are subject to further classifications according to a three-tier system: "of particular importance" (*osoboy vazhnosti*) – analogous to 'top secret' in other countries –, "absolutely secret" (*sovershenno sekretno*) – analogous to 'secret' –, and "secret" (*sekretno*) – analogous to 'confidential'[134]. **State secrets are classified at the discretion of the government into one of these categories in accordance with the supposed threat posed by the release of the information.**[135] In the sphere of economics, science and technology, only information with military applications can be defined as state secrets.[136] **In external political and economic activities, on the other hand, the definition is broader, and any information deemed a potential threat to Russian security if released too early could be subject to state secret protection**.[137] Conversely, information concerning a number of diverse subjects, such as Russian demographics, cannot become classified as state secrets.[138]

Negotiations leading to international trade agreements could thus potentially be classified as a more protected form of information or even as state secrets if the government deems the information to be a threat if released prior to the conclusion of the treaty. The procedure for classification of state secrets is quite broad and can be initiated by all major government bodies: Both houses of the Federal Assembly share the right to classify documents as state secrets with the President, the Government and, in certain cases, other state bodies and judiciaries at both the federal and regional levels.[139]

130 Constitution, Article 86
131 State Duma Decree N 237-III GD, 5 April 2000, "In relation to state policy of discrimination against Russian compatriots in the Latvian Republic"
132 State Duma Decree N 4632-4 GD, 25 May 2007, "To Russian Federation Prime Minister M. E. Fradkov on the obligation to take supplementary measures to support the meat industry and meat products in Russia"
133 Federal Law N 143-F3, 27 July 2006 (ed. 21 July 2014), "On information, information technologies and the protection of information", Article 4, paragraph 3
134 Law N 5485-1, 21 July 1993, "On state secrets", Article 8
135 Ibid.
136 Law N 5485-1, 21 July 1993, "On state secrets", Article 5, paragraph 2
137 Law N 5485-1, 21 July 1993, "On state secrets", Article 5, paragraph 3
138 Law N 5485-1, 21 July 1993, "On state secrets", Article 7
139 Law N 5485-1, 21 July 1993, "On state secrets", Article 4

3.3.3 International trade agreements, negotiations procedure and access to documents

The Parliament plays a fundamental role in the later stages of international treaty negotiations, but its access to information concerning on-going negotiations remains limited. In the standard procedure of international treaty negotiations as defined by the Constitution and relevant federal laws, the President maintains the prerogative to initiate talks.[140] Although the negotiations may begin without the Parliament's knowledge, the Ministry of Foreign Affairs must inform the Federal Assembly of any international treaties concluded in the name of the Russian Federation.[141] Furthermore, the Parliament can address the executive and request access information concerning negotiations that are currently underway.[142]

The **Federation Council includes the right to request and receive information to perform its duties to the best of its ability as part of its definition of the status afforded to its members[143] but there does not appear to be a legal requirement that the executive satisfy the Parliament's request for information**. As for state secrets, government bodies – including the Parliament – may request access to classified documents provided that measures are taken for the information's protection and that the heads of the particular bodies are held personally accountable for non-compliance with rules on restricting the dissemination of the protected information.[144] **In the end, however, the responsible government bodies grant government officials, including members of Parliament, access to state secrets on a purely voluntary basis.**[145] The government body in charge of the state secret defines the conditions in which the government official may access the requested information.[146] The procedure of accessing state secrets is therefore somewhat simplified for members of Parliament, but clearance is still only granted on a voluntary basis.

Throughout the later stages of the negotiations, the Parliament is privy to more information. Once the treaty has been concluded, it cannot enter into force without successful ratification of the treaty's text in the form of a federal law approved by both the State Duma and the Federation Council, which retains the right to review.[147] The proposal for ratification from the government must contain a certified copy of the treaty's text, the possible results of the international agreement and a preliminary evaluation of the economic, financial and other consequences for the Russian Federation.[148] The State Duma then proceeds to discuss the proposed treaty through either its Committee for International Affairs or its Committee for CIS Affairs depending on the foreign state parties in question.[149] These Committees may request additional information from the relevant

140 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Article 11, paragraphs 1 & 2

141 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Article 7, paragraph 1

142 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Article 7, paragraph 2

143 Federation Council Regulations, Article 4, article 9

144 Law N 5485-1, 21 July 1993, "On state secrets", Article 16

145 Law N 5485-1, 21 July 1993, "On state secrets", Article 21

146 Law N 5485-1, 21 July 1993, "On state secrets", Article 25

147 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Articles 14 & 16; Constitution, Article 106, (r)

148 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Article 16, paragraph 4

149 State Duma Regulations, Article 190

executive bodies during their review of the text.[150] Upon successful ratification of the treaty by both houses of the Federal Assembly, the treaty enters into force, after which its text must be published and made freely accessible in the Bulletin of International Treaties on the Official Internet-Portal of Legal Information (www.pravo.gov.ru).[151]

In practice, the executive and legislative branches have followed the established procedure. When the Russian Federation became a member of the **Shanghai Cooperation Organisation (SCO)** and the **Eurasian Economic Union (EaEU),** the Federal Assembly fulfilled its assigned role by ratifying the organisations' founding documents, which had been previously signed, as per procedure, by the President. Russia's adhesion to the SCO was ratified by the State Duma on 14 May 2003 and quickly approved by the Federation Council on 28 May before receiving presidential assent early in June.[152] The State Duma confirmed Russia's membership to the EaEU on 26 September 2014; the Federation Council and the President followed suit on 1 and 3 October 2014 respectively.[153]

3.3.4 Citizens involvement

Although individuals who are not directly involved in trade negotiations do not have direct access to updates on their development, Russian legislation defines channels through which concerned citizens can access information on future trade agreements of the Russian Federation. If an individual entrepreneur believes his or her economic interests will be affected by proposed changes in Russia's external economic activities he or she may submit a request for a consultation with the relevant body of the executive to learn more about expected consequences of the changes.[154] The executive may refuse consultations if (1) information cannot be released until the project has entered into force, and the early release of information to a private citizen could prevent the project from reaching its objectives; or (2) the consultation could cause a delay to the adoption of the project as law, thereby hampering the external economic activities of the Russian Federation.[155] This does however not apply to the conclusion of international trade agreements, so requests from individual entrepreneurs for consultations about international treaties of this kind cannot be rejected on these grounds.[156] Despite these stipulations, there are no clear requirements that the consultation must take place if requested nor is there a clear definition of what constitutes 'an individual whose economic interests would be affected' by an international treaty. Stronger requirements govern the release of information within a reasonable period of time concerning external trade activities to Russian individuals as well as foreign nationals who participate in Russian foreign trade.[157]

Russian individuals have the inviolable right to any information from government bodies about activities that could potentially affect their rights and freedoms.[158] Theoretically, Russian citizens

150 Ibid.
151 Federal Law N 101-F3, 15 July 1995 (ed. 12 March 2014), "On international treaties of the Russian Federation, Article 30, article 2
152 Federal Law N 66-F3, 6 June 2003, "On the ratification of the Shanghai Cooperation Organisation's Charter"
153 Federal Law N 279-F3, 3 October 2014, "On the ratification of the treaty of the Eurasian Economic Union"
154 Federal Law 163-F3, 21 November 2003, "On the fundamentals of state regulation of external economic activities", Article 15, paragraph 1
155 Federal Law 163-F3, 21 November 2003, "On the fundamentals of state regulation of external economic activities", Article 15, paragraph 4
156 Federal Law 163-F3, 21 November 2003, "On the fundamentals of state regulation of external economic activities", Article 15, paragraph 7
157 Federal Law 163-F3, 21 November 2003, "On the fundamentals of state regulation of external economic activities", Article 47, paragraph 3
158 Federal Law 143-F3, 27 July 2006 (ed. 21 July 2014), "On information, information technologies and the protection of information", Article 8, paragraph 2

should have access to information concerning all activities of government bodies and how funds are allocated from the budget with the exception of state secrets.[159] Although trade agreement negotiations are unlikely to be classified as state secrets, there is no law specifically preventing them from being defined as such. Citizens have the right to submit requests for the declassification of information, which the relevant government body must review within a 3-month period.[160] As mentioned in reference to Parliament, clearance to state secrets is only granted on a voluntary basis by the relevant authorities and, as such, there is no guarantee that access to the requested information will be permitted.

3.4 The Indian parliament and trade negotiations

India is a sovereign, socialist, secular, democratic republic with a Parliamentary system of government. It consists of twenty-nine states and seven union territories. The Constitution of India provides for a bicameral Parliament consisting of the President and two houses – Council of States (Rajya Sabha) and House of People (Lok Sabha).[161]

The Constitution of India provides for a quasi-federal governance structure with a clear demarcation of responsibility between the central and the state governments. The central government has exclusive power to legislate on items which are covered in the Union List (100 items), while state government have exclusive power to legislate on items in the State List (61 items). The concurrent list consists of 52 items where both central and state governments have joint jurisdiction. **Treaties and agreements (including the multilateral, bilateral and regional trade agreements) with foreign countries, and implementation of treaties, agreements and conventions are under the Union List and the central government has the exclusive power to legislate on the same**. Approval of the Cabinet Ministers is required to sign trade agreements and **there is no constitutional requirement to discuss trade agreements in the Parliament or to take its approval**.

3.4.1 Parliamentary bodies

The President of India, *inter alia,* summons and prorogues the two Houses of Parliament from time to time and possesses the power to dissolve the Lok Sabha. The President's assent is essential for a bill to become and Act, and he/she can promulgate Ordinances having the same force and effect as laws passed by Parliament when the Parliament is not in session.

The Parliament of India has the cardinal functions of legislation, overseeing of administration, passing of budget and discussion of national policy among others. It also has the power to initiate amendments to the Constitution. Every Bill has to be passed by both the Houses of Parliament and assented to by the President before it becomes law. As per the Seventh Schedule of the Constitution, even in normal times, the Parliament can assume legislative power which is exclusively reserved for the states under State List. It has overriding powers during emergency.

The Union Council of Ministers is collectively responsible to the Lok Sabha, which also has supremacy in financial matters. Rajya Sabha has a special role in enabling Parliament to legislate on subject in the State List. Generally, there are three sessions of the Parliament: (a) Budget Session (February-May); (b) Monsoon Session (July-August) and (c) Winter Session (November-December). If any legislation has to

159 Federal Law 143-F3, 27 July 2006 (ed. 21 July 2014), "On information, information technologies and the protection of information", Article 8, paragraph 3.3

160 Federal Law 143-F3, 27 July 2006 (ed. 21 July 2014), "On information, information technologies and the protection of information", Article 15

161 For details see http://parliamentofindia.nic.in.

be done urgently an ordinance can be promulgated by the President when the Parliament is not in session.

One of the ways in which Parliament can get information on negotiations on international and/or trade agreements is through asking questions. The "Question Hour" is generally the first hour of a sitting session of the India's Lok Sabha devoted to questions that Members of Parliament raise about any aspect of administrative activity. The concerned Minister is obliged to answer to the Parliament, either orally or in writing, depending on the type of question raised. Questions are one of the ways Parliament can hold the Executive accountable. There are two main types of question - starred and non-starred.[162] Starred Questions expect an oral answer, and the member is allowed to ask a supplementary question, with the permission of the Speaker, after the reply is obtained from the Minister concerned. Non-starred questions expect a written reply. After the reply has been provided, no supplementary question can be asked. A notice period is to be given to the minister to reply to a question. In the past both starred and non-starred questions on bilateral trade agreements with different countries have been raised in the Parliament. All Parliamentary questions are made public and can be viewed from the websites of Rajya Sabha and Lok Sabha. The Parliament proceedings are telecasted through dedicated television channels and are available in the websites of the two Houses of Parliament.

A substantial part of the business of the Parliament takes place through the ***Parliamentary Committees***. The Parliamentary Committees are of two kinds: *Ad hoc* Committees and the Standing Committees.[163] *Ad hoc* Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report. Each House of Parliament has Standing Committees such as the Business Advisory Committee or the Committee on Petitions. There is another class of Committees which act as Parliament's 'Watch Dogs' over the executive. These are the Committees on Subordinate Legislation, the Committee on Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertakings and Departmentally Related Standing Committees (DRSCs). When a Bill comes up before a House for general discussion, the House may refer it to a Select Committee of the House or a Joint Committee of the two Houses. In case the motion adopted is for reference of the Bill to a Joint Committee, the decision is conveyed to the other House requesting them to nominate members of the other House to serve on the Committee. Amendments can be made by members of the Committee, which can also take evidence of associations, public bodies or experts who are interested in the Bill. After the Bill has been considered the Committee submits its report to the House. Members who do not agree with the majority report may append their minutes of dissent to the report.

Another way in which the Parliament exercises its control over the executive is through its control of finance. In 1993, Standing Committees were constituted for different Departments of the government to examine demands for grants and ensure greater financial accountability. They play a key role in fund allocation to different government departments including the Department of Commerce which is the nodal government department for trade agreements. Additionally, ***Parliamentary Forums*** can be constituted on various issues such as global warming and climate change to sensitise the members about the key areas of concerns, to provide platform for member interactions and to prepare a data base and knowledge sharing, among others. The Parliamentary

162 http://rajyasabha.nic.in/rsnew/rs_rule/rules_pro.pdf and http://parliamentofindia.nic.in/ls/rules/rules.html

163 For details see http://rajyasabha.nic.in/rsnew/rs_rule/rules_pro.pdf

Forum does not encroach upon or interfere with the jurisdiction of the Department related Standing Committees or concerned ministries/departments.

3.4.2 Trade negotiations and the role of the parliament

The Department of Commerce under the Ministry of Trade and Industry is the nodal ministry for trade negotiations. The basic role of the department is to regulate, develop and promote international trade and commerce. It is also responsible for creating an enabling environment and infrastructure for accelerated growth of international trade. The Trade Policy Division is the key agency for trade agreements – multilateral, regional and bilateral. The decision to enter into a trade agreement comes from the Ministry of External Affairs or the Prime Minister's office. This is often followed by establishment of a joint study group constituting senior government officials and research partners of India and the country/region with which it enters into a trade agreement. For example, in the case of the trade agreement with the EU, in September 2005, a High-Level Trade Group (HLTG) was established at 6th EU–India Summit to explore ways to deepen and widen the bilateral trade and investment relationship.[164] Prior to negotiations with key trading partners such as the EU, the Department of Commerce had sponsored some studies to academic think-tanks. The Department also engages the industry through industry associations such as the CII (Confederation of Indian Industry) and FICCI (Federation of Indian Chambers of Commerce and Industry) for stakeholder consultations. However, most of the study reports are kept confidential. Only selected joint study reports are made public and often only selected participants are invited to stakeholder's consultation. For example, foreign embassies and foreign companies may not be invited to such consultation.

Concerning ATD, the Right to Information Act (RTI Act) was passed by Parliament on 11 May 2005 and it came into effect on 12 October 2005. Under this law all government bodies or government funded agencies have to designate a Public Information Officer (PIO) which has to ensure that information requested is disclosed to the petitioner within 30 days or within 48 hours in case of information concerning the life or liberty of a person. Since 2005, social activists, civil society organizations, and ordinary citizens have effectively used the Act to tackle corruption and bring greater transparency and accountability in the government. However, the Act has certain weaknesses that hamper effective implementation. **The law does not allow disclosure of information that affects national security, defense, and other matters that are deemed of national interest**. Moreover, the number of requests are large and often beyond the capacity of the officers to respond, slowing down the response. The Ministry of Commerce and Industry has an RTI cell where officers are designated to respond to questions of free trade agreements, including the India-EU BTIA.[165] However, certain requests for information related to foreign affairs or trade negotiations, have not been answered.[166] Activists have argued that although India is negotiating trade agreements with the EU hardly any information is there on the website of the Department of Commerce. [167]

The Department may release press notes from time to time to update about the trade negotiations, and generally releases a press note once trade negotiations are concluded. The Department of Commerce and trade agreements are extensively covered in media, which provides an informal

164 For details see Wouters, J. et al (2014) "Some Critical Issues in the EU-India Free Trade Agreement Negotiations" European Law Journal, Vol 20, No. 6. November 2014, pp 848-869.

165 For details see http://commerce.nic.in/aboutus/right_to_info/rticpiolist.pdf

166 For details see Daruwalam M and V. Nayak (February, 2013) "India's Engagement with Free Trade Agreements (FTAs): Challenges and Opportunities"; http://www.right2info.org/resources/publications/publications/chri_-india2019s-engagement-with-free-trade-agreements

167 http://comments.gmane.org/gmane.law.india.rti/2976

channel for sharing of trade agreement related information. However, there can be concerns about the authenticity of the information.

Under Articles 73 of the Constitution of India, the power to enter into trade agreements is vested with the Union Executive/Cabinet. T**here is no constitutional provision requiring the Union Executive/Cabinet to place an agreement or treaty before Parliament for approval.** The Constitution vested in Parliament the power to make laws for the purpose of giving effect to agreements and treaties. However, although Parliament can enact laws to give effect to treaties domestically and make laws to give effect to agreements and treaties irrespective of the scheme of distribution of legislative powers under Article 246 **there is no constitutional requirement for the Union Executive to seek Parliament's approval before signing, ratifying or enforcing any treaty or agreement. Nor has Parliament enacted any law as to the procedure that the Union Executive/Cabinet must observe while entering into or enforcing treaties.**[168]

The Parliamentary Standing Committee of Commerce considers the demand for grant of the Department of Commerce and examines bills related to Department of Commerce. This committee can seek information from the Department of Commerce on trade agreements. However, the Department of Commerce can refuse to share information during the process of negotiations on grounds of confidentiality. However, in practice it is difficult as the Department of Commerce's grants/funding is approved by the Parliamentary Standing Committee of Commerce.

Overall, the Parliament can get information on trade agreements and their respective negotiations by raising questions during Question Hour and through the Parliament Standing Committee. In April 2013, the Parliamentary Standing Committee of Commerce cautioned the government against rushing into trade agreement without taking the Committee's views. This occurred as the then Commerce Minister Anand Sharma was due to meet the EU Trade Commissioner, and the alarm received wide spread media coverage.[169] While the Committee was reviewing all trade agreements the timing seems to have adversely impacted the India-EU negotiations, which failed to gain momentum since then. The then Chairman of the Parliamentary Committee on Commerce opined that FTAs under negotiations such as India-EU FTA should pass Parliament's scrutiny since these agreements have deep implications on farmers, dairy workers, local industries and on intellectual property protection and government procurement, among others. The Committee invited views from non-governmental stakeholders.[170] Some of the submissions to the committee are available in the public domain.[171] However, like most other committee reports, the report of the Parliament Stating Committee itself is not available in the public domain.

168 For details see Daruwalam M and V. Nayak (February, 2013) "India's Engagement with Free Trade Agreements (FTAs): Challenges and Opportunities"; http://www.right2info.org/resources/publications/publications/chri_-india2019s-engagement-with-free-trade-agreements

169 For example see http://www.thehindu.com/business/Economy/house-panel-asks-pm-to-defer-signing-of-indiaeu-fta/article4606855.ece; http://profit.ndtv.com/news/economy/article-parliamentary-panel-cautions-government-against-rushing-into-free-trade-agreement-with-eu-320811

170 http://pib.nic.in/newsite/erelease.aspx?relid=91372

171 http://www.cuts-citee.org/pdf/CUTS-Submission_to_Parliamentary_Standing_Committee_on_Commerce_for_Indias_Engagement_with_Free_Trade_Agreements.pdf

4 EU national parliaments and access to documents

Information is the ultimate basis for participating in public policy-making. The scope of parliamentary participation largely results from the extent of documents forwarded to parliaments by their governments. Earlier studies[172] explored the extent to which national parliaments receive draft proposals for legislative acts and other EU acts, i.e. white and green papers, recommendations, declarations, documents produced by COREPER, the Council working groups, the European Parliament and its committees etc. The supply with information is relatively comprehensive in Denmark, Finland, Germany, the Netherlands, Austria, Sweden, the three Baltic Republics and the United Kingdom. These parliaments do not only have access to the overall amount of incoming documents from the European Commission, the Council, the EP and the other EU institutions, but succeeded to bound their governments to provide comprehensive explanatory information. These focused government 'interpretations' of EU information are of high political relevance, since they allow MP not only to discuss raw documents as such, but also their government's perspective on a given issue. Explanatory information orients national debates with regard to the issue of competencies (BE, DE, AT) and the respect of the subsidiarity principle (DK, DE, FR), the financial implications of a proposed act (DE, DK, NL, SE, SF, UK), the state of the art on a given policy issue as well as the - perceived - progress of negotiations (DK, DE, FR, SE, UK).

Table 4: Evolution of supplementary information practices from Maastricht to Nice

	1992/1993		1997/1999		2003	
	Initial	**Continuous**	**Initial**	**Continuous**	**Initial**	**Continuous**
BE	0	0	2	Unchanged	2	1
DK	2	3	Unchanged	Unchanged	Unchanged	Unchanged
DE	2	3	Unchanged	Unchanged	Unchanged	Unchanged
ES	0	1	2	Unchanged	2	1
FR	1	0	3	3	3	3
GR	0	0	Unchanged	Unchanged	1	Unchanged
IT	1	1	Unchanged	Unchanged	1	Unchanged
IRL	1	0	2	Unchanged	2	Unchanged
LUX	0	On demand	2	Unchanged	2	Unchanged
NL	3	2	Unchanged	Unchanged	Unchanged	Unchanged
AT	n.a.	n.a.	2	2	3	3
PT	0	0	Unchanged	Unchanged	1	Unchanged
SE	n.a.	n.a.	2	1	3	2
SF	n.a.	n.a.	3	3	Unchanged	Unchanged
UK	3	2	Unchanged	3	Unchanged	Unchanged

Legend for initial phases of the EU's policy cycles ('Initial'):
0 : No supplementing information,

[172] See: Andreas Maurer/Wolfgang Wessels (eds.): National Parliaments on their Ways to Europe: Losers or Latecomers?, Baden-Baden, Nomos 2001.

1: Some supplementing information like summaries of the draft:
2: document summaries, agendas and minutes of Council of Ministers,
3: substantial supplementing information like financial forecasts, analyses on constitutional implications, subsidiarity/environmental impact assessment/social affairs forecast sheets etc.

Legend for the decision-making phase of the EU's policy cycles: ('Continuous'):
0 : No information at all;
1: Short hand information about the envisaged dates of the decision-making process;
2: Commented information about the stance of other EU actors in the decision-making process;
3: Complete and timely information about each stage in the decision-making process;
On demand: New information on the decision-making process only on specific demand by MP or committees.

A continuing source of dissatisfaction of national parliaments is the fact that relatively new - post-SEA - policy fields and new modes of governance[173] evade parliamentary guidance or control.[174] Some of these fields have evolved recently, i.e. foreign and defence policy and common security, justice and home affairs, economic and monetary policy in the context of the EMU, the Euro 15-nucleus' policies within the framework of the growth and stability pact and the so-called 'open method of co-ordination' (OMC) policies. The recent tendency to replace the Community method became obvious with the heads of state and governments' decisions on ESDP, the Lisbon process and the G 5 initiatives in the field of police cooperation, where the intergovernmental dimension in steering the Union had been strengthened, as expressed most clearly in the emphasis given to the role of the European Council. **The serious limits, as regards transparency, 'traceability' and 'monitorability', of the Council's activities, are merely touched upon in the Treaties.**[175] The scope of information in these areas remains particularly low in the Southern and some of the Eastern European parliaments. While conquering ground in the classic areas of EU policy-making, national parliaments lost influence in other 'vital' policy areas: **National parliamentary involvement in CFSP/CSDP as well as in the area of international agreements largely depends on the willingness of governments to keep their legislatures informed. It is not unusual for parliaments to be made aware of international agreements only at the time of their presentation to the legislature for ratification.** Traditional domestic scrutiny procedures for EU legislation do not automatically apply.

In the United States, Congress is charged with overseeing matters relating to national security conducted by the government. This can occur because **in the American system, the Executive – the Office of the President – is constitutionally separate from Congress and, through its system of checks and balances, Congress actively participates in and oversees these matters**.

Where the Executive is fused with the legislature, this degree of oversight and active involvement does not exist. Instead Cabinets are charged with the administration of government, and the latter possess this authority because they hold the confidence or majority support of the respective parliaments. In such a system of responsible parliamentary government,

173 See: Wallace, Helen: 'Analysing and Explaining Policies', in: Wallace, Helen/Wallace, William (eds.): Policy-Making in the European Union, Fourth edition, Oxford, 2000, pp. 65-81; Kohler-Koch, Beate: 'The Evolution and Transformation of European Governance', in: Kohler-Koch, Beate/Eising, Rainer (eds.): The Transformation of Governance in the European Union, London/New York 1999, pp. 14-35; Wessels, Wolfgang/Linsenmann, Ingo: 'EMU's impact on national institutions: Fusion towards a Gouverance économique or fragmentation?', in: Dyson, Kenneth (eds.): European States and the Euro: Playing the semi-serinity game, Oxford 2001.

174 See also the European Commission's White Paper on European Governance, COM(2001) 428, 27. July 2001, pp. 21-22.

175 See: Maurer, Andreas: Parlamentarische Demokratie in der Europäischen Union. Der Beitrag des Europäischen Parlaments und der nationalen Parlamente, Baden-Baden, Nomos 2002, pp. 345-361.

parliaments review and scrutinize matters conducted by the government. As a rule, the review occurs after an action has been made whereas oversight necessitates ongoing involvement.

Contributions provided by national parliaments to the 17th bi-annual COSAC report of 2012 allow observing a trend on the categories[176] of documents that governments transmit to their corresponding assemblies: **The lower the security classification of a document, the higher the number of national parliaments that are sent the document by their Government. The more a national system displays a close unity between majority party and government, the less its parliament tends to be directly and independently engaged in scrutiny**. Parliamentary scrutiny is then a matter of passive participation and getting or remaining involved without developing a systematic ex-ante scrutiny of government. In political systems where the government cannot rely on a large majority in parliament and the executive-legislative relations are thus characterised by consensual bargaining, opposition parties and their parliamentary groups appear less inclined to follow the Government's politics as 'supportive scrutinisers'.

National parliamentary scrutiny of EU trade policy and bi-, pluri- or multilateral agreements concluded between the EU and third countries or organisations is constrained by several factors: **First, the Common Commercial Policy belongs to the EU's exclusive competences. Concomitantly, national parliaments cannot execute their scrutiny rights that they usually enjoy under Article 5 TEU. Moreover, given that the EU's exclusive competences in the area of Trade exist since the entry into force of the Rome Treaties (1958), most national parliaments - as most national governments - do not foresee any specific institutional substructure for dealing with European trade policy**.

National Parliaments' access to and effective use of EU confidential information is heavily constraint by the intergovernmental agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union (2011/C 202/05) of 4 May 2011. Accordingly (Article 4), both parliaments and governments must comply with certain principles:

- EUCI shall not be downgraded or declassified without the prior written consent of the originator,
- EUCI shall not be used for purposes other than those established by the originator,
- EUCI shall not be disclosed to any third State or international organisation without the prior written consent of the originator.
- As a fundamental rule (Article 5), access to classified information is granted on the basis of the need-to-know principle, and access to EUCI bearing the classification marking "EU Confidential" is granted only to individuals who hold an appropriate security clearance or who are otherwise duly authorised by virtue of their functions in accordance with national laws and regulations.

According to the 2012 COSAC report, all national parliaments receive "Limité" documents. 17 Parliaments/Chambers receive "EU Restricted" documents and seven receive "EU Confidential" documents. Moreover, the Austrian *Nationalrat* and *Bundesrat* receive "EU Secret" and "Top Secret"

176 See "Handling of documents internal to the Council" http://register.consilium.europa.eu/pdf/en/11/st11/st11336.en11.pdf 5 See appendix for full information on replies giving the response of each Parliament/Chamber (Q7, page 4). 6 See full response in the Annex to Bi-annual Report for more details.

documents, while the Swedish *Riksdag* is guaranteed full access under law to all official documents when it demands them from the Government, or a Government authority/agency.[6] However, the Swedish Parliament clarifies that in practice the Government rarely sends any documents with a classification above "EU Restricted".[177]

Regarding the Austrian case, the recent EU Information Law of 1 January 2012[178] complements existing obligations of the Austrian Government to inform Parliament on EU matters. The Law provides for simplified access to EU documents by making available the Council's extranet to the Parliament, enhancing the Parliament's scrutiny possibilities by establishing or formalising measures such as asking the Government to give "information on future EU projects" on a half-yearly basis. In its reply to the COSAC questionnaire, the Austrian Parliament noted that it receives additional documents from the Government such as reports on meetings of Council formations as well as on meetings of its preparatory bodies. While public documents are made available on the internet to the public, documents that are classified "Limité" and above remain on the Parliament's intranet section. The detailed rules for granting access to EUCI documents, which entered into force in January 2015, provide for a more nuanced evaluation: "Non-public information" of the Nationalrat is accessible to its Members, to designated parliamentary group officials and employees of the Parliamentary Administration "to such extent as is necessary for the performance of their official duties." The inspection and distribution of classified information is subject to the following rules: Classified information of level 1 ("**EU Restricted**") may be accessed by Members of the National Council and by persons designated by the parliamentary groups. Classified information of level 2 ("**EU Confidential**") **shall be communicated to the members of the President's Conference and to the parliamentary group officials**. Level-2 information is also open to inspection in the Parliamentary Administration by Members of the National Council. Classified information of level 3 ("**EU Secret**") **is only communicated to the members of the President's Conference. In addition, such information is accessible for inspection in the Parliamentary Administration by persons designated by the parliamentary groups**. Classified information of level 4 ("EU Top Secret") may only be accessed by the members of the President's Conference. The President shall inform them of the receipt of such information. Regarding the handling of classified information at Committee level, **classified information of level 2 is distributed to the committee members, while classified information of level 3 or 4 is distributed only during the committee's sitting**. Any further use may be ordered by the President after consultation with the President's Conference. The same rules apply for EU documents that are placed on the agenda of the responsible Main Committee: Classified information of levels 1 and 2 is distributed to the members of the Main Committee, while **classified information of levels 3 and 4 may be distributed only during its sitting and for not longer than the duration of the sitting.**

The Lithuanian Committee on European Affairs or any specialised committee may request additional information or information necessary for deliberation from governmental bodies. The Italian *Senato della Repubblica* may request a Government report on the status of negotiations, the impact on Italian legislation and opinions provided by any advisors. The Lithuanian *Seimas* has full access to the government managed EU Information System (LINESIS). LINESIS offers the possibility to search, download and print EU documents and find any related additional information. MPs and

177 Federal Act on the Information Rules of the National and Federal Councils (Information Rules Act), Promulgation: Federal Law Gazette I No. 102/2014.

178 German text of Law":http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20007573.

parliamentary staff are given free access to the entire government database. Accordingly, The Lithuanian *Seimas* has access to all EU "public", "Limité", "EU Restricted" and "EU Confidential" documents, COREPER and Council working group documents as well as to briefing documents and/or instructions for government attachés in Brussels. Both Czech Chambers have access to the Government database which includes the following categories of EU documents: "public", "Limité" and "EU Restricted" as well as to instructions government attachés in the Council working groups and COREPER, to the mandates for the deliberation in the Council meetings as well as to the negotiation results."

Overall, **18 out of 40** national Parliaments/Chambers are offered **access to specific government databases** containing relevant EU information and documents. The French *Sénat* claims to have access to two databases, one containing diplomatic telegrams and the other EU working documents and proposals. The German *Bundestag* and *Bundesrat* have access to the Government database that contains all Council documents. The Latvian government database has a semi-restricted access for the Latvian *Saeima, since the* "documents are organised according to relevant Councils of Ministers and documents from the European Council and COREPER meetings have separate sections [...]. There are also sections devoted to written procedure and Council decisions". The Belgian *Chambre des représentants* has access to a database that "contains documents of specific interest to the Belgian authorities in the framework of transposition of EU legislation." In addition, some Parliaments/Chambers operate **internal databases** to manage EU information sent from the Government (SLO, IT, BG, UK, PL, HU). In 17 Parliaments/Chambers **access to government databases is limited to** access to public documents. 13 Parliaments/Chambers have access to "**Limité documents"**, three Parliaments/Chambers have access to "EU Restricted" and two Parliaments/Chambers have access to "EU Confidential documents". 13 Parliaments/Chambers have a limited **access to the latest COREPER documents** and latest **Council working group documents** and five have access to internal **briefing documents and/or instructions for government attachés** through that database.

Both Czech Chambers have access to the Government database which includes the following categories of EU documents: "public", "Limité" and "EU Restricted" as well as to instructions government attachés in the Council working groups and COREPER, to the mandates for the deliberation in the Council meetings as well as to the negotiation results."

Out of the 18 Parliaments/Chambers that have access to their Government database, only three Parliaments/Chambers make the **information contained in the database available to the public (**BG, UK *Lords,* SLO). In four Parliaments/Chambers, public access is restricted while 11 Parliaments/Chambers do not grant the public access to their Government/Parliament interfaces. The Estonian database is available to the public but some documents are restricted to some viewers, and access to such documents is checked via the electronic ID card identification. Those Parliaments/Chambers who have unrestricted access to the Government database can mostly only access EU public documents (UK *Lords*) or public and "Limité" documents (e.g. Italian *Camera dei Deputati*, BG, and DE).

The **relatively large number of national parliaments that receive confidential documents of the Council prompted the General Secretary of the Council to issue a rather alarming notice on 20 May 2014 in which he reminded Member States delegations about the restrictions regarding**

access to classified information agreed upon themselves.[179] According to the replies send to the Council, 20 Member State governments provide access to "Limité" (i.e. non public) documents to their national or other parliaments via Extranet-L; a further three provide access to certain "Limité" documents without specifying the rationale behind. Specific agreements between governments and parliaments ensure that such documents will not be made public. **In 14 Member States national and other (regional) parliaments are granted access to documents classified "EU Restricted".** Access is in many cases subject to a variety of conditions and controls to ensure that the requirements of the Council security rules are met. Nine Member States grant national or other (regional) parliaments access to documents classified "EU Confidential", subject to very stringent conditions or controls to ensure that the requirements of the Council security rules are met.

179 See Council of the EU, Doc. No. 9699/14, Survey on the distribution of Council documents to national Parliaments in Member States.

Table 5: Access to documents (by Parliament/Chamber) - situation of 2015

Key: Sent by Govt. – documents sent to Parliaments/Chambers by the Government;
Database – access to documents through a Government database;
Both – documents sent by the Government and accessed through a Government database.
[1] – documents sent automatically by the Government;
[2] – documents have to be requested by the Parliament/Chamber;
[3] – some documents are sent and others have to be requested.

	Public	Limité	EU Restricted	EU Confidential	EU Secret	EU Top secret	COREPER	Council WG	Briefings
AU Nationalrat + Bundesrat[3]	Both	Both	Sent by Govt.	Sent by Govt.	Sent by Govt.	Sent by Govt.	Both	Both	
BE Chambre des représentants	Sent by Govt.	Sent by Govt.	Sent by Govt.						
BE Sénat	Sent by Govt.						Sent by Govt.		
BG Narodno Sabranie[3]	Both	Sent by Govt.					Sent by Govt.	Sent by Govt.	
CR Sabor	Both	Sent by Govt.					Sent by Govt.		
CY Vouli ton Antiprosopon[2]	Sent by Govt.	Sent by Govt.							
CZ Poslanecká sněmovna[3]	Both	Both	Sent by Govt.				Both	Both	Both
CZ Senát[3]	Both	Both	Sent by Govt.				Both	Both	Database
DE Bundestag[1]	Both	Both	Sent by Govt.				Database	Database	Sent by Govt.
DE Bundesrat[1]	Both	Both	Sent by Govt.				Both	Both	Sent by Govt.
DK Folketing[3]	Sent by Govt.	Sent by Govt.	Sent by Govt.						
EE Riigikogu[3]	Both	Both					Database	Database	Sent by Govt.
EL Vouli ton Ellinon[2]	Sent by Govt.	Sent by Govt.							Sent by Govt.
ES Cortes Generales[3]	Sent by Govt.	Sent by Govt.	Sent by Govt.				Sent by Govt.	Sent by Govt.	Sent by Govt.
FI Eduskunta[3]	Sent by Govt.	Sent by Govt.	Sent by Govt.	Sent by Govt.			Sent by Govt.	Sent by Govt.	
FR Assemblée nationale [1]	Both	Both	Both	Sent by Govt.			Both	Both	Sent by Govt.
FR Sénat[1]	Both	Both	Both	Both			Both	Both	Both

HU Országgyűlés[3]	Sent by Govt.	Sent by Govt.					Sent by Govt.	Sent by Govt.	
IE Houses of the Oireachtas	Sent by Govt.								Sent by Govt.
IT Camera dei Deputati[3]	Both	Both					Both	Both	
IT Senato della Repubblica[3]	Both	Both					Both	Both	
LT Seimas[1]	Both	Both	Both	Both			Database	Database	Database
LU Chambre des Députés[3]	Sent by Govt.								
LV Saeima[3]	Database	Database					Database	Database	Database
MT Kamra tad-Deputati[1]	Sent by Govt.								
NL Tweede Kamer[3]	Sent by Govt.								
NL Eerste Kamer[3]	Sent by Govt.								
PL Sejm[3]									
PL Senat[3]									
PT Assembleia da República[3]	Sent by Govt.	Sent by Govt.					Sent by Govt.	Sent by Govt.	
RO Camera Deputaţilor[2]	Both							Sent by Govt.	Sent by Govt.
RO Senatul[3]	Sent by Govt.						Sent by Govt.		
SE Riksdag[3]	Sent by Govt.	Sent by Govt.	Sent by Govt.	Sent by Govt.			Sent by Govt.	Sent by Govt.	
SK Národná rada[3]	Sent by Govt.	Sent by Govt.	Sent by Govt.	Sent by Govt.			Sent by Govt.	Sent by Govt.	Sent by Govt.
SL Državni zbor[1]	Both	Sent by Govt.	Sent by Govt.						
SL Državni svet[3]	Sent by Govt.						Sent by Govt.		
UK House of Commons[3]	Sent by Govt.	Sent by Govt.							
UK House of Lords [1]	Both	Sent by Govt.							Sent by Govt.

5 Conclusions and recommendations

Access to documents is subject to limitations to protect certain types of information from disclosure. The lessons learned on the basis of inter- and intra-institutional practice in both national and EU contexts, along with case law from the Court of Justice and the General Court assume great importance for the revision of Regulation (EC) No 1049/2001 as well as for a potential revision of the relevant IIA and EP's internal rules regarding ATD for its Members and staff. Clearly, the case law of the ECJ is more balanced than the Council is willing to acknowledge. If the judicature guarantees a broad approach when applying the scope of the right of access, it moderates this approach by highlighting a set of "general presumptions" in some sectors, which favor confidentiality and limitations on the right of access to confidential documents. The ECJ has clearly ruled: **If a document originating from one of the EU institutions is covered by an exception, the institution must explain why access to that document could *specifically* and *effectively* undermine the interest protected by the exception.**[180] The risk of undermining that interest must be reasonably foreseeable and not purely hypothetical.[181] The constitutional nature of the right of ATD, based on primary law, restricts the room for manoeuvre available to Member States, the Council and the Commission. Since, as was defined by the ECJ, transparency is part of the democratic nature of the Union's institutional system, it seems difficult to stick with such a minimalist approach, both technically and substantively.

It is difficult to clearly distinguish the legal framework on ATD by citizens and the rules on access by the EP. **While the right to ATD for any natural or legal person is limited by Regulation (EC) No 1049/2001, specific rights for the European Parliament are exclusively based on internal rules of the institutions and inter-institutional agreements between the institutions**. In clear contrast to all EU Member States, where comprehensive rules on parliamentary access to documents and on classifying information (that is, limiting and controlling access to it) are based on parliamentary laws or presidential regulations, the EP's access to documents of the Commission and the Council is a matter of non-legislative rules. Former EP rapporteur Michael Cashman opted to **include provisions on parliamentary access to information in the broader draft legal framework for public access to EU documents. This approach would have ensured a general framework for the EP's access to classified information from all EU entities and across all policy domains**. This would be preferable to the existing, fragmented framework for parliamentary access to information, which is exclusively based on non-legally binding, inter-institutional agreements across different fields and between different contractual parties. The **creation of clear, comprehensive, cross-political provisions on the EP's access to classified information could help to ensure that these rules have the status of enforceable legislation**. Moreover, the inclusion of specific provisions on EP rules for ATD **is likely to generate more legitimacy and "ownership" within the EP, since they would be subject to the ordinary legislative procedure**.

The major, normative basis for such provisions should draw on the clear-cut principle of democratic theory and practice in the vast majority of democratic systems: **If confidential information is beyond the reach of public access, it must be available to parliamentarians or institutions established by parliaments for scrutinizing those who negotiate bi-, pluri- or multilateral agreements on the EU citizens' behalf. In principle, parliamentary access to classified information implies a privileged access to specific categories of information, which are**

180 Sweden and Turco v Council, para 49.
181 Case C-506/08 P Sweden v My Travel and Commission [2011] ECR I-6237, para 76.

justifiably exempt from access of the larger public and third parties. The basic foundation for granting parliaments a privileged access to confidential information rests with the logic of parliamentary democracies. In parliamentary democracies, governments are nothing else than the highest aggregate of parliament's majority. Governments obtain delegated power from their parliamentary majority. Rules on governance, including those on the restricted access to and treatment of restricted documents produced or owned by governments are legal expressions of parliaments' willingness to provide the executive(s) with some room of manoeuvre and discretion when interacting with third parties. Rules governing parliamentary access to classified information should therefore be set out in law as the counterweight of general freedom of/access to information laws.

The EP's right of consent on international agreements does not correlate with a right to be actively involved in the determination of the negotiating directives.[182] The Lisbon Treaty does not provide an explicit basis for such an involvement of Parliament. As the Council, the Commission and the Member States risk to get served by systematic blockages at the moment of the conclusion of agreements, they should take the initiative and establish a standard procedure – preferably in line with the arrangements agreed under the 2010 Framework agreement - that allows Parliament to systematically comment on draft negotiating directives before their definitive adoption.

The Lisbon Treaty establishes a **legally binding obligation** for the Commission to **keep Parliament regularly informed on on-going negotiations**, and a legally binding obligation for both the Council and the Commission to **inform Parliament immediately and fully at all stages of the procedure.** As the ECJ recently ruled on Case C 685/11, "all stages of the procedure" implies to inform Parliament at stages "preceding the conclusion of the agreement".[183] While these provisions are incorporated in the 2010 Framework agreement, the **IIAs between Council and Parliament are silent about the timing of Parliament's information. Parts of the EP's critique regarding the secretive nature of negotiations towards international agreements are targeted on the wrong address. While the Commission provides Parliament with extensive information, including restricted and confidential documents, on the basis of the 2010 Framework agreement and subsequent, informal agreements between Committee Chairs and Commissioners, the Commission systematically fails to clarify that it could only be held liable for action under its control and authorship. The Council, its Presidencies and the Member State governments successfully hide behind the Commission and fail to clarify their responsibility under the terms of Articles 1 and 11 TEU, and Article 15 TFEU.** Parliament's approach to concentrate on the Commission as source, originator, or sender of information is understandable, since the Treaties establish a dependency of the Commission on Parliament's confidence. The Framework agreements are an expression of this linkage, as the Commission agrees to important commitments towards Parliament, and Parliament agrees on a series of self-constraints with regard to the handling of restricted information of the Commission. **In contrast, the IIAs that Parliament agreed with the Council on the access to and handling of restricted documents confirm an institutional asymmetry in favor of the Council, as**

182 For the opposite argument see A. Maurer, Parlamente in der EU, UTB, Stuttgart 2012, pp. 73-76; R. Passos, 'The European Union's external relations a year after Lisbon: a first evaluation from the European Parliament', in: P. Koutrakos (ed.), *The European Union's External Relations a Year After Lisbon*, The Hague: Centre for the law of EU external relations, Working paper (3), 2011, pp. 51–52; and Y. Devuyst, 'The European Parliament and international trade agreements. Practice after the Lisbon Treaty', in I. Govaere/E. Lannon/P. Van Elsuwege/S. Adam (eds), The European Union in the World, Essays in Honour of Marc Maresceau, The Hague, Brill 2013, p. 177.

183 Case C-658/11, para. 86.

Parliament did not achieve substantial rights with regard to its interpretation of Article 218(10) TFEU. Parliament should therefore continue to challenge the Council's restrictive attitude and policy vis-à-vis Parliament. Of course, it is rather unlikely that the Council will suddenly overturn its criticism on the Framework agreement's interpretation of Article 218(10) TFEU. Nevertheless, Parliament could build on its ultimate power to confirm or reject international agreements, and try to agree with the Council on a compromise position.

The Commission provides both the EP and the COREPER representatives of the Council with the "consolidated negotiations documents". **It should be underlined that it is essentially due to Parliament's Bureau rules on the treatment of confidential information that MEPs are not entitled to take hand-written notes when consulting the TTIP texts in Parliament's reading room**. Indeed, one could argue that the arrangements do not respect the requirements of Article 218(10) TFEU or the provisions of the Framework agreement: Article 218(10) provides for information to "the Parliament." There is no legal basis to be found in the treaties that allows, provides for or even forces discrimination between MEPs. However, Article 24 of the Framework Agreement holds that "the information referred to in point 23 […] shall, as a general rule, be provided to Parliament through the responsible parliamentary committee and, where appropriate, at a plenary sitting. In duly justified cases, it shall be provided to more than one parliamentary committee." Moreover, Article 1.4 of Annex II of the agreements explicitly establishes a discriminatory provision for MEPs, since confidential information from the Commission can only be requested by "the President of Parliament, the chairs of the parliamentary committees concerned, the Bureau and the Conference of Presidents, and the head of Parliament's delegation included in the Union delegation at an international conference." Overall, Article 218(10) TFEU and the provisions of the Framework agreement are inconsistent with regard to the question, whether ATD and access to EUCI can be limited to selected MEPs. In our opinion the treaty text outvotes inter-institutional agreements and internal rules of the institutions. **Parliament might therefore consider amending Article 10(4) of the Bureau decision in order to distinguish between consulting documents from the Council in Parliament's reading room (in which case hand-written notes would not be allowed) and documents originating from the Commission (in which case hand-written notes would be allowed).** The alternative option to refer to Article 3.2.4 of Annex II of the Framework agreement – which allows the set-up of "equivalent arrangements agreed between the institutions – might be easier to achieve. But this option risks deepening the distance and feeling of heteronomy by many MEPs, which are not Members of a given Committee.

References

Adams, C., (2014), Freedom of Information and Parliamentary Departments, Australian Journal of Public Administration, vol. 73, no. 1/2014, pp. 67–78;

Agrawal, A (2005), 'The Indian Parliament'. In: Kapur, D and Metha, P (eds.) Public Institutions in India. Performance and Design, New Delhi, Oxford: Oxford University Press.

Alemanno, A. (2014), Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy, (2014) 39 E.L. Rev, 72-90.

Alemanno, A./Stefan, O. (2014), Openness at the Court of Justice of the European Union: Toppling a Taboo, Common Market Law Review 51: 97-140, 2014.

Appadorai, A (1981) The Domestic Roots of India's Foreign Policy, 1947–1972, Delhi: OUP.

Bacchus, J (2004) 'A Few Thoughts on Legitimacy, Democracy, and the WTO', Journal of International Economic Law, 3, 667-673.

Bergman, T (1997) 'National parliaments and EU Affairs Committees: Notes on Empirical Variation and Competing Explanations', Journal of European Public Policy, 3, 373-87.

Brainard, L and Shapiro, H (2001) 'Fast Track Trade Promotion Authority', Brookings Institutions Policy Brief, No. 91, Dec 2001.

Brooks, N. (2004), The Protection of Classified Information: The Legal Framework, RS21900, Updated August 5, 2004.

Chambers, S. (2004) 'Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation'. Journal of Political Philosophy, Vol. 12, No. 4, pp. 389–410.

Charlesworth, H, Chiam, M, Hovell, D and George Williams (2003) 'Deep Anxieties: Australia and the International Legal Order', Sydney Law Review, 25, 423.

Chiam, M. (2005), The Parliament of Australia, in: Andreas Maurer (ed.): The Role of Parliaments in Scrutinising and Influencing Trade Policy - A Comparative Analysis, European Parliament, DG for External Policies of the Union – Directorate B – Policy Department -PE 370-166v01-00, Brussels 2005.

Congressional Research Service (2005), „Trade Issues in the 109th Congress: Policy Challenges and Opportunities", CRS Report to Congress, March 24, 2005.

Curtin, D. (2011), 'Top Secret Europe'. Inaugural lecture on appointment to the chair of Professor of European Law at the University of Amsterdam, 20 October. Available at: «http://dare.uva.nl/document/355707».

Curtin, D. (2013) 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' Common Market Law Review, Vol. 50, No. 2, pp. 423–58.

Curtin, D. (2014) 'Challenging Executive Dominance in European Democracy'. Modern Law Review, Vol. 77, No. 1, pp. 1–24.

Curtin, D. (2014), 'Overseeing Secrets in the EU: New Frontiers, Old Challenges'. JCMS, Vol. 52, No. 3, pp. 684–700.

De Goede, M. (2011), 'The Swift Affair and the Global Politics of European Security'. JCMS, Vol. 50. No. 2, pp. 214–30.

de Walsche, A. (2005), 'La procédure de conclusion des accords internationaux' in M Dony and J-V Louis (eds), Commentaire J. Mégret 12 - Relations extérieures (2nd ed, Université libre de Bruxelles, 2005), 77-110.

Destler, I.M. (2005), American Trade Politics, Institute for International Economics, Washington, DC: 1995, most recent print 2005.

Devuyst, Y. (2013), 'The European Parliament and international trade agreements. Practice after the Lisbon Treaty', in I. Govaere/E. Lannon/P. Van Elsuwege/S. Adam (eds), The European Union in the World, Essays in Honour of Marc Maresceau, The Hague, Brill 2013, pp. 172-189.

Dri, C. (2009), At What Point does a Legislature Become Institutionalized? The Mercosur Parliament's Path", Brazilian Political Science Review. Vol. 3, No. 2, 2009.

Elsea, J.K. (2007), The Protection of Classified Information: The Legal Framework, CRS Report RS21900.

Galloway, D. (2014), Classifying Secrets in the EU, in: Journal of Common Market Studies, Vol. 52, No 3/2014. pp. 668-683.

Ghoshal, B (1996), 'Linkage between Domestic Politics and Foreign Policy. The Case of India'. In: Diplomacy and Domestic Politics in South Asia, New Delhi: Konark.

Goitein, E. and Shapiro, D. (2011) Reducing Overclassification through Accountability (New York: Brennan Center for Justice). Available at: «http://www.brennancenter.org/publication/reducing-overclassification-through-accountability».

Grimmett, R (1999), 'Foreign Policy Roles of the President and Congress', CRS Report to Congress, 1 June 1999.

Heremans, T. (2011) Public Access to Documents: Jurisprudence between Principle and Practice (Brussels: Egmont Institute). Available at: «http://www.egmontinstitute.be/papers/11/eur/ EPB4.pdf».

Inter-Parliamentary Union (2005), 'Parliamentary Involvement in International Affairs', report to the Second World Conference of Speakers of Parliaments, New York, 7-9 September 2005

Kaiser, F.M. (2011), Protection of Classified Information by Congress: Practices and Proposals, Congressional Research Service, August 31, 2011, Doc. No. 7-5700.

Kaiser, Frederick M./Oleszek, Walter J./Tatelman, Todd B.: Congressional Oversight Manual;

Kapur, D and Metha, P (2002), 'The Indian Parliament as an Institution of Accountability, Report prepared for the IPU, May 2002' p. 51, http://www.wcfia.harvard.edu/faculty/dkapur/images/dk_indian_parliament.pdf.

Kitrosser, H. (2007) 'Secrecy and Separated Powers: Executive Privilege Revisited'. Iowa Law Review, Vol. 92, pp. 489–543.

Kosar, K.R.: Security Classified and Controlled Information: History, Status, and Emerging Management Issues, CRS Report RL33494;

Krück, H. (2003), 'Zur parlamentarischen Legitimation des Abschlusses völkerrechtlicher Verträge der EG' in R Geiger (ed), Neuere Probleme der parlamentarischen Legitimation im Bereich der Auswärtigen Gewalt (Baden-Baden, Nomos, 2003), 178-82.

Labayle, H. (2013), Openness, transparency and access to documents and information in the European Union, European Parliament, Policy Dept. C, Note, 2013, p. 11.

Lijphart, A (1999) Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries, New Haven and London: Yale University Press.

Lucci, J. (2013), "MERCOSUR Parliament: Institutional weakness and political stalemate. Analysis of six years after its formation." Journal of Art and Humanities, Vol. 2, No. 3, 2013.

Maurer, A. (2001), 'National Parliaments in the European Architecture: From Latecomers' Adaptation towards Permanent Institutional Change?' pp.25-78. In: Maurer, A and Wessels, W (Eds.): National Parliaments on their Ways to Europe: Losers or Latecomers?, Baden-Baden: Nomos.

Maurer, A. (2002), Parlamentarische Demokratie in der Europäischen Union. Der Beitrag des Europäischen Parlaments und der Parlamente der Mitgliedstaaten, Baden-Baden, Nomos.

Maurer, A. (2012), Parlamente in der EU, UTB, Stuttgart 2012.

Nicoll, W. (1996), The 'Code of Conduct' of the Commission towards the European Parliament, in: Journal of Common Market Studies, Vol. 34, No. 2/1996, 275-281.

Passos, R. (2013), 'The European Union's external relations a year after Lisbon: a first evaluation from the European Parliament', in: P. Koutrakos (ed.), *The European Union's External Relations a Year After Lisbon*, The Hague: Centre for the law of EU external relations, Working paper (3), 2011.

Puntscher Riekmann, S. (2007) 'The Cocoon of Power: Democratic Implications of Inter- Institutional Agreements'. European Law Journal, Vol. 13, No. 1, pp. 4–19.

Rengeling, H.-W. (1981), Zu den Befugnissen des Europäischen Parlaments beim Abschluss völkerrechtlicher Verträge im Rahmen der Gemeinschaftsverfassung, in: Ingo von Münch (Hrsg.), Staatsrecht - Völkerrecht - Europarecht. Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981, Berlin, De Gruyter 1981, 877-897.

Roberts, A. (2004) 'National Security and Open Government'. Georgetown Public Policy Review, Vol. 9, No. 2, pp. 69–86.

Romaniello, M. (2013), The international role of the European Parliament: The SWIFT Affair and the 're-assessed' European institutional balance of power, Perspectives on Federalism, Vol. 5, issue 1, 2013.

Rosén, G. (2011) 'Can You Keep a Secret? How the European Parliament got Access to Sensitive Documents in the Area of Security and Defence'. RECON Working Paper 22. Available at: «http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers2011.html».

Shapiro, H.S. (2006): Fast Track: A Legal, Historical, and Political Analysis, Ardsley: Transnational Publishers, 2006.

Stärkle, G. (2011) 'La protection et le traitement des information classifiées dans le cadre de la politique de sécurité et de défense commune (PSDC) au sein des institutions et agences de l'Union européenne'. Cahiers de droit européen, Vol. 47, pp. 155–229.

Thompson, D.F. (1999) 'Democratic Secrecy'. Political Science Quarterly, Vol. 114, No. 2, pp. 181–93.

Thomsen, J. and Van de Rijt, W. (2004) 'Public Access to Documents versus the Need for Security: How to Strike the Balance between Transparency and Confidentiality'. In Stolk, P.J. et al. (eds) Transparency in Europe II (The Hague: Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Department).

Thym, D. (2008), Parliamentary Involvement in European International Relations, WHI - Paper 5-08, Berlin 2008.

Weiler, J.H.H. (2002) The EU, the WTO and the NAFTA. Towards a Common Law of International Trade, Oxford: Oxford University Press.

Wouters, J. (2014): "Some Critical Issues in the EU-India Free Trade Agreement Negotiations" European Law Journal, Vol 20, No. 6. November 2014, pp 848-869.

Wyss, M von (2001) 'Maximen und Prinzipien des parlamentarischen Verfahrens. Eine Untersuchung über die Schweizer Bundesversammlung', Zurich: Schulthess.

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PHOTO CREDIT: iStock International Inc.

ISBN 978-92-823-6993-7 (print)
ISBN 978-92-823-6994-4 (pdf)
doi: 10.2861/704650 (print)
doi: 10.2861/846769 (pdf)

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