INSTITUTE OF INTERNATIONAL ECONOMIC LAW
GEORGETOWN UNIVERSITY LAW CENTER

TradeLab

INTERNATIONAL ECONOMIC LAW PRACTICUM – GEORGETOWN UNIVERSITY

CREATING A FUTURE PROCESS ON THE CONCLUSION OF INTERNATIONAL TRADE AGREEMENTS WITHIN THE UNITED KINGDOM

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To:

An Organization based in the UK
United Kingdom

TradeLab

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List of Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement (EU)
Art.	Article
BL	Basic Law (German Constitution)
C Trade	Federal Provincial-Territorial Committee on Trade
CCP	Common Commercial Policy (EU)
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CJEU	Court of Justice of the European Union
CRaG	Constitutional Reform and Governance Act 2010 (UK)
CUSFTA	Canada-United States Free Trade Agreement
DAG	Domestic Advisory Group (EU)
DFAITD	Department of Foreign Affairs, International Trade and Development (Canada)
DG Trade	Directorate General for Trade (European Commission)
DIT	Department of International Trade
EA	Environmental Assessment (Canada)
EEAG	Environmental Assessment Advisory Group (Canada)
EU	European Union
FTA	Free Trade Agreement
INTA	European Parliament Committee on International Trade (EU)
ITC	International Trade Committee (House of Commons)
MoU	Memorandum of Understanding
MP	Member of Parliament (UK)
NAFTA	North American Free Trade Agreement (U.S Canada & Mexico)
NGO	Non-Governmental Organization
SIA	Sustainability Impact Assessment (EU)
STAG	Strategic Trade Advisory Group (UK)
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
TIC	Trade Investigation Commission (UK)

TPA	Trade Promotion Authority and Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (U.S.)
TPC	Trade Policy Committee
TTIP	Transatlantic Trade and Investment Partnership (EU-U.S.)
UK	United Kingdom
U.S.	United States of America
USITC	United States International Trade Commission
USMCA	US-Mexico-Canada Free Trade Agreement
USTR	United States Trade Representative

Executive Summary

The UK´s exit from the European Union (EU) is not only the UK´s departure from the EU as a supranational organization, but also reflects a general rejection of the EU as a form of hyper-globalization manifested in the imbalance between the expansive supranational regulation of the single market and nationally-driven political authority. In the area of international trade, Brexit will give the UK Government the chance to craft its own trade policy and a treaty-making process that may respond to the specific needs of the UK. Further, Brexit is a unique opportunity for the UK to acknowledge the recent backlash against comprehensive free trade agreements and learn from other countries' challenges. Failure to address the public's yearning for a more inclusive and transparent trade treaty-making process may exacerbate domestic tensions and squander this rare opportunity.

In the spirit of learning from others' successes and failures, this report cultivates the different ways in which the United States, Canada, and the European Union negotiate, approve, and implement international trade agreements. Utilizing these information, the report provides a detailed explanation of essential elements that a modern and inclusive trade treaty-making process may require in order to enable the UK to meet the challenges that far-reaching comprehensive free trade agreements pose, and ultimately to successfully negotiate and conclude such trade agreements. In case of a "no deal" scenario, Brexit makes it necessary to establish a new trade treaty-making process which follows the parameters of transparency, accountability and efficiency in a balanced manner throughout the four phases of pre-negotiation, negotiation, approval and *post*-ratification.

The proposed model treaty-making process is guided by three parameters: efficiency, transparency, and accountability. In light of the analysis articulated below and how current trade agreements result in particular domestic implications, a transparent, efficient, and accountable scheme addresses three major issues:

(1) Meaningful Involvement of the UK Parliament

An ideal trade treaty-making process requires the UK Parliament´s involvement in all four phases of the treaty-making process. Parliament may:

- issue a non-binding parliamentary resolution on the negotiation mandate of the UK Government during the pre-negotiation phase;
- be informed and consulted throughout the negotiation phase;
- send parliamentary observers to negotiations;
- be afforded a up or down vote for the approval of a signed (comprehensive) free trade agreement; and
- be in charge of making implementation legislation in *post*-ratification phase.

(2) Inclusion of Devolved Administrations

Given the devolved administrations in the UK (Scotland, Wales and Northern Ireland) have executive and legislative powers, they are integral parts of the UK. This requires them to be integrated in the UK´s new trade-treaty making process by:

- establishing a so-called Devolved Administrations Trade Forum in which devolved administrations have an institutionalized platform to discuss (general) trade policy matters with the UK Government;
- requiring the UK Government to consult with devolved administrations in the pre-negotiation phase;
- albeit with some constraints, allowing the executives of devolved administrations to actively participate in the UK Government´s negotiation team regarding devolved matters;
- introducing reporting and consultation obligations of the UK Government to devolved legislative bodies during negotiations; and
- requiring the UK Government to assist devolved administration when implementing their obligations deriving from a trade agreement in the post-ratification phase.

(3) Active Engagement with Stakeholders from Civil Society & Businesses

The active engagement of the UK Government with stakeholders from civil society and businesses is crucial to understand the concerns and needs of stakeholders as well as to gain their trust and support. Thus, a modern trade treaty-making process requires:

- creating a website that can disseminate all trade-related information in a user-friendly and digestible manner;
- regular meetings with civil society (e.g. NGOs and unions);
- reforming the already existing Strategic Trade Advisory Group (STAG) and make it more inclusive as well as democratically anchored;
- having institutionalized online consultations, e.g. with businesses, in the pre-negotiation phase;
- consulting with STAG during the negotiation; and
- give STAG a voice in the *post*-ratification phase by including it in the *ex post*-evaluations of (comprehensive) free trade agreements.

Finally, the UK Government may put the new trade treaty-making process on a statutory footing as well as develop guidelines of best practices covering all elements of the process, in particular those which require cooperation or communication within the Government or with certain institutions or bodies included to the treaty-making process, e.g. the UK Parliament or the Devolved Administrations Trade Forum. On the long-term, this will facilitate the entire treaty-making process and make it more efficient, while ensuring transparency and accountability of the UK Government to Parliament and other stakeholders.

I. Introduction

The Brexit vote by June 2016 has expressed the UK citizens´ will to "take back control"[1] by leaving the European Union (EU). In light of the UK Parliament's conduct and disagreement among a variety of stakeholders, UK´s exit pursuant to Art. 50 (3) of the Treaty of European Union (TEU) has been prolonged until 31 of October 2019. If Brexit should take place, it will mark an end to the UK´s participation in an "ever closer union"[2], a vision that has carried the EU to what it is today: the economically most integrated region of sovereign nations motivated by a future of even more enhanced economic and political cooperation and integration.

The UK intends not to be part of the European project anymore. It has always considered the EU as serving economic purposes in the first place, and therefore has regularly pleaded rather for more *inter*national cooperation among European states than *supra*nationalization.[3] This reflects a view which perceives the EU as a form of hyper-globalization,[4] manifested in the asymmetry between extensive economic integration and limited political integration, the restriction of national autonomy and diversity, and an unresolved democratic deficit. Essentially, hyper-globalization in the EU is enshrined in the imbalance between the supranational regulation of the single market and the still nation-state driven political authority.[5] Supranational regulation has increasingly expanded to new areas, though it is only supposed to remove transaction costs and barriers within the single market. The expansion of supranational law has entailed the expansion of the jurisdiction of the Court of Justice of the European Union (CJEU) as well.[6] The CJEU ultimately ensures that an increasing amount of supranational law may be enforced in EU Member States, though the EU´s legislative procedures are still largely of inter-governmental character. The Treaty of Lisbon may have enhanced the rights of the European Parliament, but has not substantially resolved the issue of the EU´s democratic deficit. Further, the UK´s narrow stance towards the

[1] Slogan of "Vote Leave"-Campaign in the UK before the 2016 referendum.

[2] Robert Schuman, Declaration of 9 May 1950, European Issue No. 204, 10 May 2011, Foundation Robert Schuman.

[3] See the addresses given by Margaret Thatcher, Bruges, 20 September 1988; David Cameron, EU Speech at Bloomberg, 23 January 2013.

[4] Dani Rodrik, *The Globalization Paradox, Democracy and the Future of World Economy*, 2011, at 214; Dani Rodrik, *Straight Talk on Trade*, 2018, at 4 and 13.

[5] Dani Rodrik, *The Future of European Democracy*, in After the Storm: How to Save Democracy in Europe (Luuk van Middelaar and Philippe Van Parijs (eds.), 2015) at 215; Gregory Shaffer, *Reading Rodrik: a Call for a New Land and Economics for International Law*, in Globalization Reimagined: A Progressive Agenda for World Trade and Investment Law (Alvaro Santos, Chantal Thomas & David Trubek (eds.), 2019).

[6] Dani Rodrik, *The Globalization Paradox, Democracy and the Future of World Economy*,2011, at 215.

EU[7] oftentimes resulted in opt-outs from EU legislation, for example, regarding the Monetary Union and the Charter of Fundamental Rights.

A. Implications of Brexit on the UK´s International Trade Policy

The following analysis contemplates the UK leaving the EU with no deal. Relatedly, the report assumes the UK will no longer be a part of the customs union, thereby basing its future trade relations on WTO rules.[8] Further, the EU's exclusive trade competence under Art. 3 (1) (e), 207 (1) TFEU will shift, among other competences, back to the UK post-exit. Consequently, the UK will regain the power to create its own trade policy and conclude comprehensive trade agreements with other countries and the EU.

1. The UK´s Objectives of its New Trade Policy

For the UK, exiting the EU does not denote a general escape from globalization and free trade, but rather calls for the redefinition of the UK´s trade policy within its sovereign powers.[9] The UK intends "to build a trade policy that delivers benefits not only for the UK´s economy, but for businesses, workers and consumers alike,"[10] embodied in the slogan "trade in an economy that works for everyone."[11] This endeavor involves a trade policy which "boost[s] trade relationships"[12], but is transparent and inclusive at the same time. Such a policy, as defined by the UK´s Department of International Trade (DIT), would allow different stakeholders to engage and participate in shaping trade and trade relations,[13] in particular when negotiating new international trade agreements with foreign nations. The UK envisions "greater access to overseas markets for UK goods exports as well as … greater liberalization of global services, investment and procurement markets"[14] alongside with ambitious trade packages covering cross-border data flows and data protection.

Overall, the UK´s ambitious and expansive trade policy agenda reflects the modern form of free trade agreements going beyond the "conventional" mere reduction of tariffs and non-tariff barriers. Future UK free trade agreements are supposed to also cover labor and

[7] Dani Rodrik, *Straight Talk on Trade*, 2018, at 50.

[8] Art. 129 of the Withdrawal Agreement between the UK and the EU, in contrast, would bind the UK to all EU agreements for the duration of the transitioning phase. Following the footnote to Art. 129 of the Withdrawal agreement, the UK shall be treated as EU Member within the transitioning period by EU's trading partners.

[9] Dani Rodrik, *The Globalization Paradox, Democracy and the Future of World Economy*, 2011, at 200-201.

[10] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 5.

[11] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 6.

[12] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 27.

[13] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 7.

[14] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 28.

consumer rights, environmental issues, public procurement, intellectual property rights, investment, and competition policies.

2. The Backlash against Comprehensive Free Trade Agreements

International free trade has experienced a considerable backlash following the negative impacts perceived as arising from free trade agreements. This backlash has its origins (1) in the displacement of workers and job losses, (2) the constraints to the domestic regulatory autonomy and (3) democratic concerns associated with international free trade agreements.

(1) Displacement of Workers and Job Losses

Over the past decades, free trade has had doubtless a major effect on erasing (extreme) poverty and has fostered development and progress in many countries because of "a more efficient use of domestic and global resources"[15]. At the same time, though, free trade has resulted in a significant shift of jobs from one country to another, if the latter was able to gain new comparative advantages, e.g. in the manufacturing sector. Job displacement has translated into economic insecurity and political unrest, particularly in developed countries.

(2) Constraints to National Regulatory Autonomy

Furthermore, free trade agreements regularly limit the regulatory autonomy of states. A state may be willing to introduce subsidies, safeguards or investment regulations or anti-dumping and countervailing duties laws,[16] in order to mitigate the detrimental effects of international free trade to certain societal groups. However, for example, investment treaties and investment chapters in free trade agreements may constrain a state´s endeavor in this regard substantially.[17] This may follow from the broad definition of the "investment" term and a broad understanding what "fair and equitable treatment" towards investors means.

Besides the general constraints resulting from international commitments in the realm of trade, free trade seems to have required states to curb domestic priorities such as social reforms, nation building and cultural reassertion.[18] Trade liberalization, nevertheless, requires

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[15] Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, University of California, Legal Studies Research Paper Series No. 2018-54, 2019, at 6.

[16] Dani Rodrik, *Straight Talk on Trade*, 3 (2018); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, University of California, Legal Studies Research Paper Series No. 2018-54, 2019, at 11.

[17] See Alvaro Santos, Chantal Thomas and David Trubek, *Part I: Introduction and Overview: World Trade and Investment Law in a Time of Crisis: Distribution, Development and Social Protection* in: A Progressive Agenda for World Trade and Investment Law (Alvaro Santos, Chantal Thomas and David Trubek (eds.), 2019).

[18] Dani Rodrik, *Straight Talk on Trade*, 2018, at 6.

inclusive tools, for example, in the form of compensation financed by tax revenue[19], to balance the detrimental effects of free trade commitments.

(3) Democratic Concerns Associated with International Free Trade Agreements

Lastly, the backlash against free trade stems from the concerns regarding the free trade-democracy-nexus. International trade agreements used to be negotiated solely between diplomatic or government officials without meaningful public participation or consultation, and in some jurisdiction even without substantial parliamentary oversight.[20] Governments have always been reluctant to disclose sensitive negotiation information or to engage in time-consuming public engagement procedures.[21] However, the expansive scope of modern free trade agreements and the tangible effects they have on the day-to-day life of citizens has changed the way in which the public perceives and reacts to trade-related matters. In recent years, the public seems to have substantially increased its interest in participating in international trade discussions with governments.

3. Lessons from the Backlash against Free Trade Agreements

Following the negative impacts comprehensive free trade agreements may yield, the UK should carefully consider which sectors and aspects it intends to include in the negotiation agenda when preparing for comprehensive free trade agreements. Ideally, the negotiation agenda of the UK would focus on the intersections between its economy and the economy of the other trading partner to selectively increase economic gains in both economies. This focus, may not apply if geopolitical reasons dominate the conclusion of free trade agreements.

At the same time though, the UK may include distributional elements, e.g. safeguards mechanisms and exceptions, into its future free trade agreements and its domestic policy to guarantee compensation for those parts of the economy and societal groups which experience the downsides of open markets.

B. Importance of an Inclusive Trade Treaty-Making Process

In light of the UK´s ambitious trade policy agenda and the challenges identified due to the backlash against free trade, it is of fundamental importance for the UK to establish an ideally modelled process for the making of comprehensive free trade agreements. Such a

[19] Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, University of California, Legal Studies Research Paper Series No. 2018-54, 2019, at 10.

[20] Maria Merceddu, *Participation in FTA Negotiations: Are the Times a-Changin´?,* 21 J. Int´l Econ. L., 681–702 (2018).

[21] Maria Merceddu, *Participation in FTA Negotiations: Are the Times a-Changin´?,* 21 J. Int´l Econ. L., 681–702 (2018).

process is the prerequisite for the successful negotiation, approval and implementation of comprehensive free trade agreements, while effectively mitigating the risk of pushbacks. In other words, a well-crafted internal process will substantially help that the UK is able to achieve its goal of "trade (…) that works for everyone."[22]

The most notable example illustrating the importance of inclusive internal processes is the backlash in EU public society against the negotiations of the intended Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and the EU. The secretive and non-transparent way in which TTIP negotiations took place,[23] caused a backlash against the overall TTIP project in the EU. The experience of a highly-politicized and tense atmosphere surrounding the TTIP negotiations demanded a change in the EU treaty-making process and has required the European Commission to ultimately incorporate more elements of transparency in the negotiation process.[24]

In comparison, in the case of the USMCA, the update of the North American Free Trade Agreement (NAFTA) between the U.S., Canada and Mexico, a backlash threatens to occur at a later stage of the treaty-making process. Following inter-partisan differences between Democrats and Republicans in the House and a strong opposition against the Trump administration´s approach towards the USMCA negotiations in general,[25] the USMCA is currently unlikely to be ratified by the U.S. Senate. Thus, it is crucial for successful treaty-making to include a variety of domestic stakeholders throughout the process in order to avoid pushbacks on the home stretch.

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[22] Department for International Trade, Preparing for Our Future UK Trade Policy, October 2017, at 6.

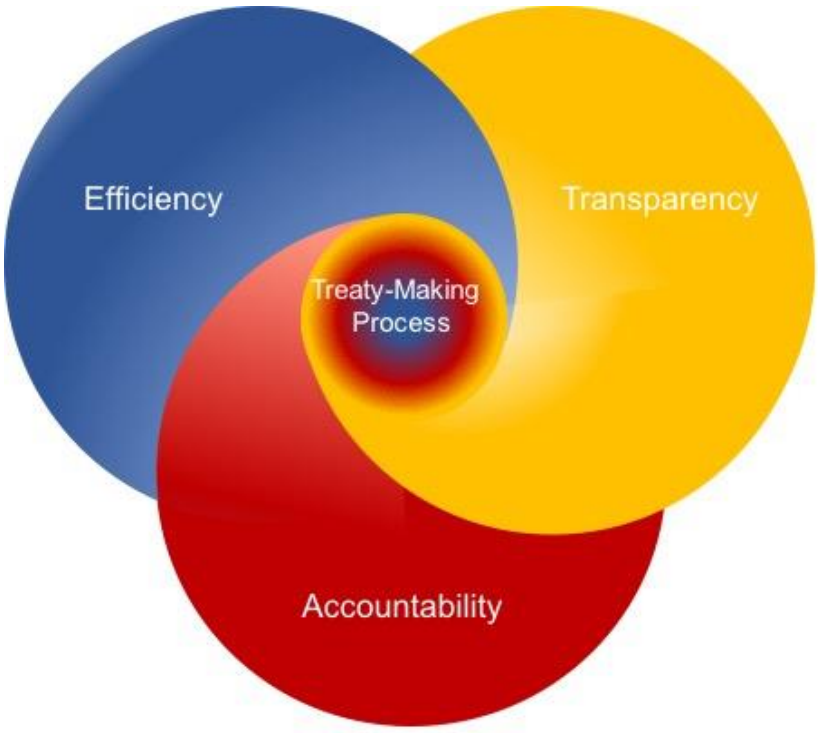
[23] James Organ, EU Citizen Participation, *Openness and the European Citizens Initiative: The TTIP Legacy*, 54 Common Market Law Review, 1713, 1713-1716 (2017).

[24] Elaine Fahey, *On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal order: A Legal Perspective*, 43 Leg. Is. Econ. Integration, 327, 330-332 (2016); see also Patricia Garcia-Duran & Leif Johan Eliasson, *The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions*, 51 J. World Trade 23, 23-42 (2017).

[25] See for an assessment of the effects of the USMCA, see United States, International Trade Commission, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors, Publication No. 4889, April 2019.

C. Methodology for Developing a New Trade Treaty-Making Process

The methodology for developing of a new treaty-making process follows the necessity of having in place a process that is largely characterized by inclusiveness. An inclusive process is key to adequately respond to the challenges posed by the backlash against free trade. More specifically, the degree of the process´s inclusiveness is ultimately determined by a trade-off between three guiding parameters of trade treaty-making processes: transparency, efficiency and accountability. As highlighted by the backlash against free trade agreements, transparency and accountability are necessary to be reinforced. Given the likely shift in power and abrupt exclusion of numerous previously-negotiated agreements due to Brexit, creating an efficient trade treaty-making process is equally important. As such, this report will utilize the parameters throughout the proposed model scheme and the assessment of novel ideas.



All three principles occur in varying degrees throughout the four phases of a (trade) treaty-making process: (1) pre-negotiation, (2) negotiations (3) approval and (4) post-ratification. Bearing in mind the three parameters at every stage of the treaty-making procedure ensures that the process contemplates the interest of all stakeholders throughout the process in a balanced manner. For the purpose of this report, the three principles are defined as follows:

Transparency demands the disclosure and easy access to information bolstered by a clear, traceable, and logical process of negotiating and concluding comprehensive trade

agreements. This includes the availability and publication of drafts, proposals, meetings minutes, and the negotiated text itself. Furthermore, transparency requires that laypersons have the opportunity to understand and retrace the trade treaty-making process.

Efficiency is the reasonable utilization of time, human capital, and other resources. It dictates the establishment of processes to conclude an international trade agreement, active involvement of institutions entrusted with treaty-making, and the government resources to conclude and implement the international trade agreement in the envisioned way. Efficiency is further characterized by the proportional ratio between the output (international trade agreement) to the input (e.g. time and resources).

Accountability is understood to mean the answerability of negotiators to the other branches of the state, especially the legislative branch, in order to ensure that the process reflects the interests of the state as a whole and is consistent with the legal system of the respective state.

II. The Current Treaty-Making Process in the UK

The UK has – already today – in place a general process for the negotiation and approval of international agreements in areas apart from those which are in the exclusive competence of the EU. The UK´s general process for the conclusion of international agreements[26] is efficiency-oriented, given its focus on the Government´s ability to independently prepare, negotiate and conclude them under its Prerogative Powers.[27] Thus far, accountability and transparency, however, clearly play a subordinate role in UK´s international treaty-making process, evidenced by the minor role of the UK Parliament in the treaty-making process, which makes the overall process lack inclusiveness.

A. Lack of Profound Parliamentary Involvement

1. Limited Parliamentary Scrutiny

The UK Parliament's rights regarding the approval of international agreements have been enhanced by the Constitutional Reform and Government Act 2010 (CRaG), a statue codifying *inter alia* the so-called Ponsonby Rule of 1924.[28] Under the rule, international agreements which have been signed by the UK Government, must be laid before Parliament for 21 sitting days.[29] The Ponsonby Rule is currently the only element in the UK´s treaty-making process that allows for some level of parliamentary scrutiny.

During the 21 days period, the governmental treaty-making process is at a standstill, given the treaty may not be ratified by the Government, while Parliament reviews it. However, the UK Parliament can neither propose any modifications to individual provisions of the treaty draft,[30] nor does it have the right to take an up or down vote on the ratification of the international agreement, either. Instead, it may only issue a non-binding resolution advising against the ratification. More specifically, upon a House of Lords' advisory resolution which has an advisory function, the Government may proceed to ratification as long as it provides an explanation on why it intends to ratify.[31] In contrast, upon a House of Commons' resolution,

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[26] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 4.

[27] House of Lords, European Union Committee, 27th Report of Session 2017-19: Scrutiny of International Agreements, 5 February 2019, at 4; House of Commons, Briefing Paper 03861, 17 August 2017, The Royal Prerogative, at 4.

[28] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 3.

[29] Sitting days are days during which Parliamentary meetings are taking place.

[30] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 21. Sometimes there are general political debates but they do not specifically relate to the specific issues of the negotiation.

[31] House of Lords, European Union Committee, Scrutiny of international agreements, Treaties considered on 5 February 2019, at 4-5.

the Government cannot proceed to ratification without waiting for another 21 days.[32] The House of Commons may effectively block ratification by passing repeated resolutions, thereby delaying the ratification indefinitely – although this has not occurred so far.

Against this background, Parliament´s rights under CraG have only a merely consultative character and do not provide Parliament with any meaningful opportunity to participate in the treaty-making process. This stands in stark contrast to the legislative procedure with Parliament at its center, necessary to give an international agreement full effect under national law.[33] Though, the UK Parliament may further – at least in theory – prevent the ratification of the international agreement by blocking the legislative procedure to transform the international agreement into national law.[34]

Parliament´s weak rights under CRaG, including the Ponsonby Rule of 1924, are essentially a relic of the interwar period, a time when international agreements dealt with matters of military defense.[35] Thus, there was a legitimate concern against a major role of Parliament and more transparency in a treaty-making process.[36] However, the expansive scope of today´s comprehensive free trade agreements involving manifold areas such as labor rights, food standards or the provision of general public services, may not uphold the justification of little parliamentary scrutiny and transparency any more. The breadth of areas falling under Parliament´s legislative powers illustrates the need to increase Parliament´s role in the treaty-making process for comprehensive free trade agreements.

Brexit appears to have already re-allocated and re-balanced powers of the UK Government and the UK Parliament with respect to international trade agreements. With respect to the prospective EU Withdrawal Agreement with the EU, Parliament has strengthened its position by utilizing the so-called “meaningful vote process”[37] under which it may issue an up or down vote. Further, in the *Miller* judgement, UK´s Supreme Court found that the Government needs to obtain the approval of Parliament when making or withdrawing from an international treaty constituting a “major change to UK constitutional arrangements.”[38]

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[32] House of Lords, European Union Committee, Scrutiny of international agreements, Treaties considered on 5 February 2019, at 4-5.

[33] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 7-8.

[34] House of Commons International Trade Committee, UK Trade Policy Transparency and Scrutiny, Sixth Report of Session 2017-19, at 13.

[35] David Lawrence, The Problem with CRaG: Why Parliament´s Processes For Approving Trade Deals Needs Reform, UK Trade Forum, 5 March 2019.

[36] David Lawrence, The Problem with CRaG: Why Parliament´s Processes For Approving Trade Deals Needs Reform, UK Trade Forum, 5 March 2019.

[37] Graeme Cowie, A User´s Guide to the Meaningful Vote, Commons Library, 25 October 2018, at 6-7.

[38] The Supreme Court, R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Judgement, 24 January 2017.

These constitutional developments due to Brexit indicate an increased importance of Parliament in the UK´s treaty-making process.

2. Lack of Information and Consultation Rights during Negotiations

Given that efficiency is the driving parameter throughout the UK´s current treaty-making process, the UK Parliament has no formal statutory information and consultation rights.[39] However, it is common practice that ministers inform the competent committee in Parliament before signing a negotiated agreement. Nevertheless, the scope, effect, and content of this communication is vague and not determined. Further, Parliament is involved when the Government holds non-binding public consultations.[40] Nevertheless, the fact that Parliament is only involved on the basis of unwritten common practices reveals the lack of sufficient formal involvement of Parliament, despite the strides made under CRaG.[41]

B. Little Inclusion of Devolved Administrations

Although (comprehensive) free trade agreements affect the policy areas of devolved administrations (i.e. the administrations of Northern Ireland, Scotland and Wales), e.g. agriculture or public procurement, they are currently not meaningfully included in the UK´s international treaty-making process. The contours of the cooperation with devolved administrations are specified in the politically (not legally) binding *Concordat on International Relations*, which recognizes that international agreements regularly affect law-making competences of devolved administrations. Thus, it requires them be part of consultations on treaty negotiations and implementation on a regular basis.[42] Furthermore, ministers and officials from devolved administrations can be included in negotiation delegations. However, the Concordat´s current scope of involving devolved administrations appears too narrow and insufficient, given the impact of international trade agreements on devolved administrations.

C. Lack of Formalized Inclusion of Businesses and Civil Society

The inclusion of businesses and civil society, i.e. NGOs and unions, in the trade treaty-making process enhances public trust in negotiations and further helps to render the process more transparent. Ultimately, it may ensure that the legitimate needs and concerns of special interest groups are considered. While some degree of informal consultation with businesses

[39] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 21.
[40] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 21.
[41] Holger Hestermeyer, Parliament and Trade Negotiations – It´s about Democracy, UK Trade Forum, 21 November 2017.
[42] Commons Library Briefing, Parliament´s Role in Ratifying Treaties, 17 February 2017, at 17.

and civil society already exists in the UK´s current treaty-making process, formal elements are missing. Non-formalized processes, however, do not guarantee that businesses and civil society are heard and that a broad variety of voices are taken into consideration.

D. General Modifications for an Inclusive Trade Treaty-Making Process

Given the deficiencies of the UK´s current treaty-making process, it is necessary to establish a significantly modified and enhanced treaty-making process for the UK. Such a process has to satisfy the demands which are outlined in the following. These are further described and explained in more detail and depth in the next section.

(1) Increase of the UK Parliament´s Role

A modified and enhanced treaty-making process needs to allow the UK Parliament to become an integral part with a meaningful voice in the pre-negotiation and negotiation phase. Further, and more importantly, Parliament needs to have a leading role in the approval phase for comprehensive free trade agreements. The enhancement of Parliament´s role and rights ensures accountability and transparency throughout the trade treaty-making process.

(2) Increase of the Role of Devolved Administrations

Devolved Administrations likewise require more attention. They have significant legislative functions and are allocated closer to the concerns of UK citizens and concrete

problems in their administrations. As such, they should be consulted or informed during every phase, particularly in areas that fall under their legislative purview. Stronger inclusion of devolved administrations helps to render the trade treaty-making process more transparent and accountable as well.

(3) Inclusion of Businesses and Civil Society

The formal inclusion of businesses and civil society in the trade treaty-making process helps to ensure that the needs and concerns of UK citizens and businesses are heard and addressed. Furthermore, it helps to prevent pushbacks against comprehensive free trade agreements. Elements for the inclusion of businesses and civil society are crucial to increase the transparency of the treaty-making process. Though, the goal is not to create an extensive bureaucracy for the sake of inclusion but to strategically harness information and create enough semblance of inclusivity across most stakeholder groups.

III. A Model Trade Treaty-Making Process for the UK

Derived from an evaluation of the UK´s existing procedure and the critical analysis of the Canadian, the U.S. and the EU treaty-making processes, the UK model trade treaty-making process proposal unifies and balances transparency, efficiency, and accountability. General process modifications are offered at the outset while the other elements are presented within the four general phases of the negotiating process: pre-negotiations, negotiations, approval phase, and the *post*-ratification phase. Each element will detail the particular parameter that it most adequately addresses while also highlighting the reality of adding bureaucracy. However, where there is a markedly large shift in process, the report will candidly offer empirical data and examples of best practices to rebut the argument against each parameter. Should the UK learn from both the positive and negative experiences of the case study jurisdictions and create an inclusive trade treaty-making process, this may the way to the UK´s successful conclusion of comprehensive free trade agreements in the future.

A. General Elements for an Inclusive Trade Treaty-Making Process

<u>Element 1:</u> Statutory Footing for the Trade Treaty-Making Process

The UK´s future process for the conclusion of international trade agreements necessitates a statutory footing. This helps to ensure that it is clearly and precisely prescribed to all stakeholders involved, but likewise enables the public to retrace the individual steps of the treaty-making process. The statute would ideally outline individual steps and stages that an international trade agreement is supposed to undergo until its successful implementation. Given the historical expansion of trade agreements from traditional tariff-based compacts to modern cross-sectoral agreements, it may further lay down the rights and obligations of each particular stakeholder involved in the treaty-making process, thereby promoting legal certainty and predictability. A formalized framework on the treaty-making process may take two forms: either as a statute prescribing a general process of treaty-making with a trade-specific chapter including tailored requirements such as stakeholder consultations or impact assessments; or as a statute solely dedicated to crafting international trade agreements.

Statutory Footing of the Treaty-Making Processes in the U.S., the EU and Canada

The examples of treaty-making processes in the U.S., the EU and Canada reveal that there is no common approach to place a treaty-making process on statutory footings. Whether or not to codify the process reflects the priorities in a country, to the benefit of legal certainty and predictability on the one side, or to the benefit of flexibility in the treaty-making process on the other one.

In the U.S., for example, the trade treaty-making process is codified in the Trade Promotion Authority (TPA), formerly known as “Fast Track”. The TPA, in conjunction with earlier iterations, stipulates each branches obligations throughout the four-phase process. In order for the President and his negotiating arm, the United States Trade Representative’s Office (USTR), to benefit from the legislative “short-cuts”, each branch of government must strictly adhere to the TPA requirements.

Conversely, in the EU, the negotiation and approval of free trade agreements follows general treaty-making rules as laid down in Art. 218 Treaty on the Functioning of the European Union (TFEU), with some trade-specific modifications as laid down in Art. 207 TFEU. Other details regarding the concrete negotiation process are laid down in documents issued by the European Commission, e.g. the *Vademecum on the EU External Action* establishing, for example, the legal and practical responsibilities of a trade negotiator.[43] In contrast, Canada has not codified a specific treaty-making process.

[43] European Commission, Vademecum on the EU External Action, SEC(2011) 881.

The lack of a concrete piece of codification, like in Canada, makes the treaty-making process more flexible, but leaves the treaty-making policy merely subject to the executive's sole discretion. This may cause a lack of transparency and accountability, particularly when concluding comprehensive free trade agreements. Without codification, the treaty-making process may further be vulnerable to political tensions or *ad hoc* changes. While the Canadian model may seem appealing to the UK in its rush to conclude trade agreements with large trading partners, a statutory-based process such as in the U.S. or in the EU is ultimately more reliable and predictable, and thus, better suited for making comprehensive free trade agreements.

Element 2: Development of DIT Guidelines for Trade Negotiations

The UK´s Department for International Trade (DIT) was established in July 2016 and has – so far – not completed any negotiations of a comprehensive free trade agreement. The DIT´s relative lack of experience may be compensated through the issuance of guidelines for how to conduct negotiations. This may help to establish and preserve well-functioning processes in the DIT and to gather knowledge on best practices.

The Development of Guidelines for Trade Negotiations in the EU

In the EU, the European Commission has created a publicly available "Commission Staff Working Document"[44] which provides helpful guidance on important elements in the trade treaty-making process. The guidelines explain how to organize consultations with stakeholders during the negotiation phase, including their preparation and conduct. By creating guidelines, the European Commission aims at "*designing EU policies and laws so that they achieve their objectives at minimum cost. (…) It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders.*"[45]

Similarly to the EU´s approach, a working group composed of DIT staff seems to be most adequate to deal with matters of developing guidelines for trade negotiations. Initially, the development and the implementation of such guidelines may admittedly place an administrative burden for the DIT. Ultimately, however, UK trade negotiators are likely to benefit in terms of efficiency of their negotiation performance, as the guidelines incorporate all experiences and expertise gained in prior trade negotiations. Further, guidelines increase the

[44] European Commission, Commission Staff Working Document – Better Regulation Guidelines, SWD(2017) 350, 7 July 2017.

[45] European Commission, Commission Staff Working Document – Better Regulation Guidelines, SWD(2017) 350, 7 July 2017, at 4.

consistency of the overall UK negotiation performance, which strengthens the reliability of the UK as a negotiation partner for other countries as well.

Element 3: Guidelines for Inter-Departmental Cooperation

The establishment of the DIT has cumulated the competence for all trade-related matters in the UK within the DIT´s mandate. However, given the fact that the negotiation agenda of comprehensive free trade agreements regularly goes beyond core trade issues and includes regulatory questions of agricultural, environmental issues or of labor rights,[46] the DIT is likely to seek for expertise and resources from across other departments, e.g. the Department for Environment, Food and Rural Affairs or the Department for Work & Pensions. The necessity of inter-departmental cooperation and communication persists even after ratification, when the comprehensive trade agreement is supposed to be implemented.

Channels for inter-departmental cooperation and communication seem to be most appropriately established under a "best practice" framework in the form of guidelines. If guidelines are precisely formulated, prescribing the contours of interaction between all involved departments for each step of the treaty-making process, they may govern and regulate the dialogue and information sharing between departments, agencies and relevant committees most effectively and efficiently. During the actual negotiation process, the guidelines may ensure smooth interaction and prevent delays or even gridlocks. This, again, bolsters the consistency of the UK´s negotiation performance, as well as the reliability of the UK as a negotiating partner.

Inter-Institutional/-Departmental Cooperation in the EU and the U.S.

In the EU, the European Parliament and the European Commission have agreed upon an inter-institutional agreement on cooperation. The agreement helps to delineate areas of competence and lays down key pillars for the political dialogue between both institutions. Similarly, in the U.S., the cooperation and interaction between different governmental bodies and agencies is embedded in a statute. Given the wide variety of political and institutional differences between all persons involved in the trade agreement process, both examples demonstrate the need to establish rules for inter-institutional/-departmental cooperation to ensure reliable, effective and efficient interaction.

Though a high degree of formalization, as generally preferred in the U.S., provides for a clear path and guidance, it may provoke some inflexibility at the same time. Thus, unlike in the U.S., and in order to strive for a balance between formalization and flexibility, a framework

[46] Oliver Ilott, Ines Stelk & Jil Rutter, *Taking Back Control of Trade Policy*, Institute for Government (2017), at 12.

of legally non-binding guidelines seems to more appropriately reflect the needs and the general practice of the UK in this regard. The development of such guidelines may again initially appear burdensome, but ultimately helps to anticipate potential conflicts or delays in the future.

Element 4: Establishment of a Trade Investigation Commission

Crafting international trade agreements that are beneficial to a variety of stakeholders and cut across industries requires intense research and analysis necessitating a large workforce. In the initial years post-Brexit, the DIT and other trade-related leaders will need a wide swath of statistical and sector-specific data to not only strategically prioritize potential trading partners but also ensure agreements are negotiated using the most up-to-date data. Given the data likely cuts across multiple departments and perhaps even the devolved administrations purview, creating an independent investigative department – the Trade Investigation Commission (TIC) – may ensure transparency, efficiency, and accountability.

Further, as concurrent research of various departments in Japan during the negotiations of the Trans-Pacific Partnership (TPP) demonstrated, overlapping research and analysis occurs.[47] In order to avert overlapping investigations by several departments and to prevent costly and inefficient outcomes, the TIC may help to pool all necessary research. Further, a TIC may avoid the outsourcing of research to academia or other experts.[48] If the TIC is provided with independency, it may also support the reduction of the impact of lobby-interests and enhance generally the objectivity and reliability of the TIC´s research. In this regard, it is also crucial to fund the TIC sufficiently by public financing to ensure a high quality of the TIC´s independent research.

The Establishment of a Trade Investigation Commission in the U.S.

The U.S. established the so-called United States International Trade Commission (USITC) which is an independent and quasi-judicial agency with expansive investigative duties. Its most notable contribution to the negotiation and consultation process is the provision of "*independent analysis, information, and support on matters of tariffs, international trade, and U.S. competitiveness*" to the President, USTR, and Congress. While the USITC publishes yearly impact reports on all aspects of trade, arguably their most utilized contributions are agreement-specific impact reports and yearly reports submitted to Congress on the general utility of trade agreements. Irrefutably, the reports have become the premier mechanism which the President and USTR uses to determine whether the U.S. would

[47] Oliver Ilott, Ines Stelk & Jil Rutter, *Taking Back Control of Trade Policy*, Institute for Government (2017), at 18.

[48] See, similarly, Oliver Ilott, Ines Stelk & Jil Rutter, *Taking Back Control of Trade Policy*, Institute for Government (2017), at 16-18.

benefit from more integrated market access. Further, given the agency's independent nature, the report USITC is required to submit to Congress within 105 days of signing the trade agreement is utilized widely as a tool for Congressional members to decide on whether or not to vote for an implementation bill.

Although highly valuable immediately, lack of available personnel and perhaps limited resources may prevent the scale at which the TIC should eventually become. Thus, in the first place, the TIC may strategically focus on the most important industries currently present that the UK would want to safeguard and the industries in which it believes there is a realistic opportunity to expand. Further, given the recent practice of including labor or environmental chapters in trade agreements, research should prioritize the policy aspects in which the current Government wants to bolster. By approaching subject matters and industries strategically in the initial stages of its inception, the TIC may avoid overwhelmingly the likely small group of personnel.

Element 5: Online Publication of Trade Policy-Related Information

It is crucial for a nation which considers itself a reliable trading partner, that it formulates its trade policy in clear and precise manner. A clear trade policy is also valuable for the purpose of fostering constructive domestic debates on whether certain trade policy objectives adequately address the public´s needs. Establishing a clear trade policy is valuable to foster constructive domestic debates on whether certain trade policy objectives adequately addresses the public's needs. In order to foster efficient and mutually benefit lines of communication between the Government (and DIT as its negotiator) and the public, a user-friendly website should be created. Given its strongest link to trade and relationship with the Government, DIT should be responsible for creating the data available on the proposed website. This will ensure policy continuity while promoting transparency.

The website should include "pages" directed at various stakeholders including, but not limited to: the general public, civil society (trade associations, NGOs, etc.), and businesses (further subcategorizes by size and perhaps encouraged classes (women, minority-owned, and the like). There should also be pages that immediately link to the various governmental pages that have trade-specific duties such as: DIT, the House of Commons International Trade Committee, the House of Lords Economic Affairs (or subsequently formed trade-related committee), the proposed Trade Investigation Commission. The website should also publish information regarding who sits on the governmental advisory committees and, were appropriate, publish their reports.

The website should consistently publish short videos or one-pagers, similar to the EU's practice, explaining basic, intermediate, and particularly controversial aspects of any hotly-contested agreement. These documents should be published on the main page so as not to get buried and should be widely disseminated through department-appropriate social media. Prior to "entering" the main page, a short quiz pop-up could be displayed in order to best guide the user to the appropriate location of the information they seek or explain the steps to submit comments to specific trade agreements. To guarantee the meaningful opportunity to participate and maintain transparency, the website should also include a calendar feature that lists important hearings, deadlines, and scheduled policy paper release dates.

Online Publication of Trade-Related Information in the EU and the U.S.

The EU has a comprehensive website dedicated to its free trade agreements. The website contains all relevant information regarding ongoing negotiations as well as information regarding all previously concluded free trade agreements. There are three main information access points: (1) the DG Trade´s "Transparency in Action" website with the most recent information about ongoing trade processes,[49] (2) websites detailing the portfolio of different third countries, including information regarding the country´s economy and current trade relations the EU has with the respective country[50] and (3) information published on the Commission's website regarding EU trade meetings with civil society[51]. Further, all communication of the EU Commissioner for Trade, e.g. his/her engagement in discussions with national parliaments or citizens, is publicly accessible upon request and provided that none of the disclosure exceptions apply.[52] Such exception, for example, includes correspondence between the Commissioner and his/her Cabinet.

The U.S. provides less user-friendly access to information regarding current trade relations and negotiations. The public must gather and synthesize information from a wide variety of sources such as the Federal Register, the USITC website, the Commerce Department website, the President's trade-related website, the two congressional committees with primary jurisdiction. However, the reports generally promote government-to-public transparency and government branch-to-branch accountability. Despite the obvious room for improvement, the system is generally viewed as transparent.

Given the fact that the UK is just at the beginning of defining a comprehensive trade policy, this situation may serve as an opportunity to start a modern user-friendly website with

[49] European Commission, *Transparency in Action,* 19 March 2019, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>.

[50] European Commission, *Negotiations and Agreements,* 15 Feb. 2019, available at <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>.

[51] European Commission, *EU trade meetings with Civil Society,* 26 March 2019, available at <http://trade.ec.europa.eu/civilsoc/>.

[52] See Art. 4 Regulation (EC) No. 1049/2001 of the European Parliament; exceptions are for example include public security, defense, and military matters.

all trade-related information. In contrast to U.S. practice, it is to avoid distributing information over a high number of different online platforms (as evolved in the US over the time), but to opt for one all-inclusive website that allows citizens and groups of stakeholders to find complete and accurate information on the domestic trade policy and current negotiations at one single collection point. Brexit may give the UK the chance to create one of the most advanced online information systems on all trade-related matters, and thereby becoming the model for combining technological ingenuity with the practical realities of curating large amounts of trade-related data.

Element 6: Modification of the Strategic Trade Advisory Group (STAG)

Establishing expert groups is a widely-shared practice in most countries meaningfully engaged in international trade. The UK has already established the so-called Strategic Trade Advisory Group (STAG) which is a permanent body tasked with advising the UK´s Department for International Trade (DIT) on trade policy matters in general and throughout the trade negotiation process in more specific terms. Currently, STAG is currently composed of 16 core members, consisting of various stakeholders from academia, businesses, trade unions, businesses, consumers, non-governmental organizations (NGOs) and developmental organizations.

All members of STAG are appointed for one year and meet quarterly. The current STAG membership for 2019/2020 is composed of nine members representing businesses or business representative organizations, one trade union representative, one NGO-representative, one member representing consumer interests, one academic, two members representing think tanks, and one member representing the British Standards Institution. Twelve members are male, whereas four members are female.

Element 6a: Increase of the Number of STAG Members

STAG may only become an integral and effective part of the treaty-making process, if it is equipped with the appropriate capacity to act. Since it is considered as a forum for high-level strategic discussions between the UK Government and stakeholders representing a cross-section of various interests, it plays a crucial role in increasing the inclusiveness of treaty-making process. In terms of capacity, the number of STAG members is a central factor.

Size and Composition of Expert Groups in the U.S. and the EU

In the U.S., the President is obligated to establish an Advisory Committee for Trade Policy and Negotiations.[53] It is a 45-person committee which includes representatives of non-federal governments, labor, industry, agriculture, small business, service industries, retailers, non-governmental environmental and conservation organizations, and consumer interests.[54] While comprised of similar high-level persons, the President may form General Policy Advisory Committees in order to receive more niche expertise during the negotiation process.[55]

In the EU, expert groups are composed by 20-30 members[56], which include individuals in either their personal capacity or acting in public interest (Type A members), individuals representing a common interests shared by stakeholders (Type B members), organizations such as NGOs, trade unions, universities, research institutes, law firms and consultancies (Type C members), Member States authorized at national, regional or local level (Type D) or other public entities such as EU agencies (Type E members).[57] Experts often represent or are a part of consumer associations, employers' organizations and trade unions.

The EU approach shows that a size of 20-30 members for an expert group is a minimum requirement to enable a variety of stakeholders to be adequately represented in a group which is mandated to provide substantial trade policy advice. Thus, if the size of STAG were to increase, e.g. up to 30 members, this would enhance the general capacities of the expert group. Further, STAG members are merely appointed for a period of one year. This fixed term seems too short to allow for sustainable and effective expertise, particularly given that negotiating comprehensive free trade agreements usually takes longer than a year.

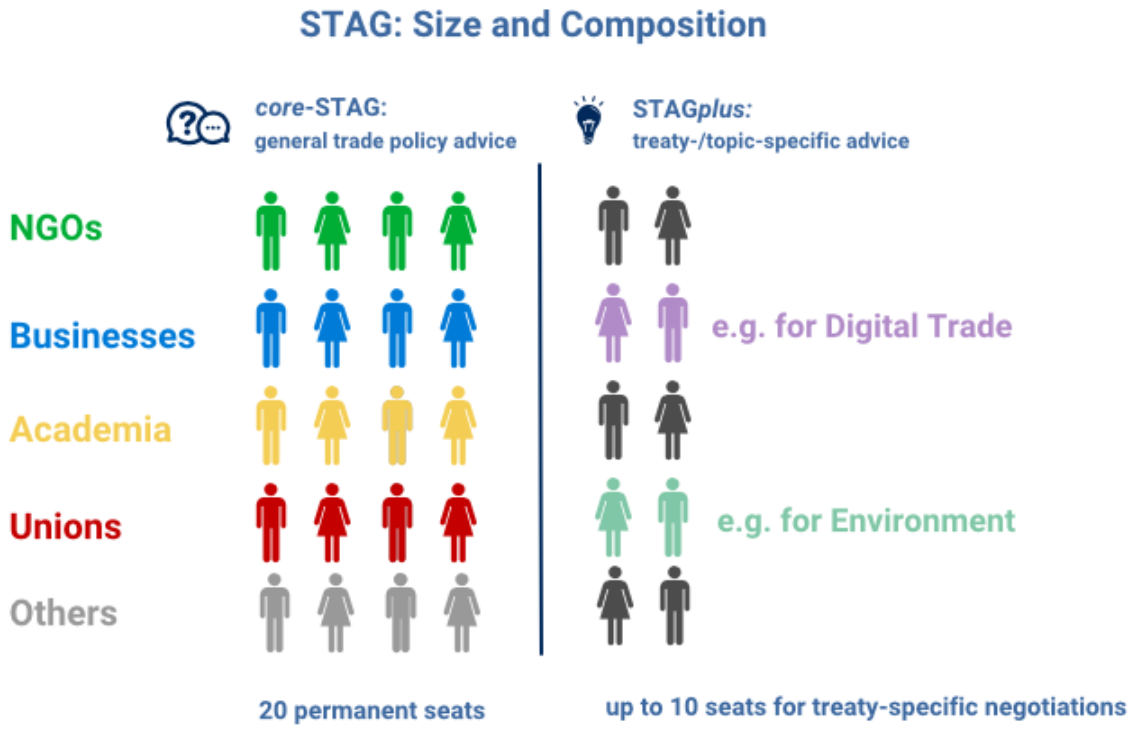
Element 6b: Introduction of More Specific Rules on STAG Composition in Line with a Two-Fold Mandate

The UK´s STAG may also be reformed in terms of its mandate and accordingly, in terms of its composition. STAG may be attributed with a clearly two-fold mandate, which includes to give, on the one side, advice on general trade policy matters, and on the other one, advice on matters concerning specific trade negotiations. Following this, it seems appropriate to reserve 20 "permanent" STAG seats for general trade policy advice (*core*-STAG), and up to ten STAG seats for treaty-specific advice (STAG*plus*). More specifically, the 20 seats are

[53] Trade Act of 1974 19 U.S.C. § 2155 (b-c).
[54] Trade Act of 1974 19 U.S.C. § 2155 (b).
[55] Trade Act of 1974 19 U.S.C. § 2155 (c).
[56] Art. 4 Commission Decision C(2017) 6113 final.
[57] Art. 7 Commission Decision C(2016) 3301 final.

equally distributed among five categories of stakeholders (businesses or business representative organization; workers' unions; academia; non-governmental organizations; others such as think tanks), with member appointments for a term of three years.

Further, in the case of making *comprehensive* international trade agreements, the remaining (up to) ten seats of STAG*plus* may be allocated on the basis of specific subjects relevant for a specific trade agreement under negotiation, e.g. data protection, environmental issues or labor rights. If a STAG*plus* member is appointed from a certain stakeholder category to cover a specific topic, a second member is to be appointed from another stakeholder group in order to ensure plurality of opinions in this regard. *STAGplus* members are appointed for the period until the ratification process is completed, or separately for the post-ratification phase of a trade agreement (to avoid conflict of interests). STAG*plus* composition thus differs from treaty to treaty, whereas *core*-STAG has one permanent membership for one term.



Element 6c: Selection and Appointment of STAG Members

It is further crucial to STAG´s public credibility that its members are selected and appointed through transparent procedures. Currently, the Secretary of State for International Trade annually appoints members of STAG on the basis of a call for applications, provided that applicants have (1) the competence and experience in areas relevant to international trade

and trade policy, (2) seniority and (3) demonstrated understanding of the procedure by which the UK conducts international trade. Less broad selection requirements are not available.

Selection and Appointment of Expert Group Members in the U.S. and the EU

In the U.S., USTR must recommend each member, without regard to political affiliation. Members will be appointed by the President for a 4-year term or the remaining duration of the committee.[58] Although the legislation requires the committees to be comprised of representatives from all industries, it does not impart an explicit requirement as to size or type of company nor the role in which the person plays in that particular sector. In practice, persons appointed are generally heads of large companies or thought leaders related to the agreement under negotiation. However, the legislation stipulates that private organizations or various groups representing all sectors, including small businesses generally, must have adequate and continuous opportunities to submit informal data or opinions.[59] Further, Congress saw fit to create a position within USTR—Assistant United States Trade Representative for Small Business, Market Access, and Industrial Competitiveness—intended to be mindful of effects current trade negotiations or agreements would have on small businesses.[60]

The EU selects expert groups through public calls for applications which are published on a register at least four weeks prior the establishment of the expert group. The Director General of DG Trade selects and appoints applicants which fulfill all requirements (e.g. no conflict of interests) for fixed terms. However, DG Trade may invite further experts on specific topics whenever more expertise is required. For purposes of transparency, the members of the expert group are listed in a register of expert groups. Furthermore, individuals, organizations and public entities can be invited as observers of expert groups. The European Commission strives for a gender balance when selecting individual experts.[61]

Given that STAG may be an important gateway for meaningful representation of a variety of stakeholders, the selection and appointment procedure need to be democratically anchored. In the U.S., the EU, and the current UK system, executive bodies exclusively control appointing the members of expert groups. The UK may use Brexit as an opportunity to empower one of the parliamentary committees with the, at least partial, responsibility to appoint members e.g. the Committee on International Trade of the House of Commons. The selection and appointment procedure may involve public hearings and interviews of applicants as well as may allow a vote on candidates. However, it should be noted that diversity within STAG should not be limited to diverse interest groups, but also to gender and geographical diversity.

[58] Trade Act of 1974 19 U.S.C. § 2155 (b).
[59] Trade Act of 1974 19 U.S.C. § 2155 (j).
[60] TPA, Section 9.
[61] Art. 10 (6) Commission Decision C(2016) 3301 final.

Element 6d: Competences and Obligations of STAG

Under its current design, STAG offers a way for the UK Government to engage with a highly-qualified group of stakeholders, ultimately supporting the DIT and the Government's creation of a strategic and all-inclusive trade policy.

Competences and Obligations of Expert Groups in the U.S. and the EU

In the U.S., once negotiations have come to a close, the Advisory Committee for Trade Policy and Negotiations and any other committees formed that represent affected sectors must compose a report detailing "what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives… [and] whether the agreement provides for equity and reciprocity within the sector or within the functional area."[62] The report must be submitted to USTR, Congress, and the President no later than 30 days after the President has notified Congress of his intent to enter into the agreement.[63] While USTR and other agencies affected by the particular trade agreements are bound to implement consultation procedures with the public, they are not bound by the committees' recommendations and simply required to notify the relevant advisory boards should the negotiations significantly depart from the advice given.[64]

The EU´s trade treaty-making process also includes expert groups whose purpose is to assist and provide alternative perspectives to the European Commission throughout the trade negotiations process and at the implementation stage, as consultative bodies in a broad range of specific technical questions, practical experience and questions.[65] The European Commission´s expert operate in principle on the basis of consensus. The work of the expert groups results in opinions, recommendations or reports. The European Commission's Trade Economist Network which meets informally twice a year and is composed by economists from EU Member States, Permanent Representations as well as by economist from the European Commission, also publishes its analyses and assessments of the effects of the EU´s trade policy in the form of papers.

In order to make the contribution of STAG more visible and perceivable in the public, STAG may be obliged to issue an annual report on its advisory activities, which is published for transparency purposes. Also, STAG may issue subject-specific opinions, recommendations or reports to support the DIT.

The annual STAG report is supposed to include not only the explanation of STAG´s past trade advice, but also recommendations and an outlook of the future UK trade policy from

[62] Trade Act of 1974 19 U.S.C. § 2155 (e).
[63] Trade Act of 1974 19 U.S.C. § 2155 (e).
[64] Trade Act of 1974 19 U.S.C. § 2155 (i).
[65] See the European Commission Decision C(2017) 6113 final; see also the European Commission Decision C(2016) 3301 final.

the perspective of STAG. Since it is proposed to have STAG members appointed by a parliamentary committee, e.g. the Committee on International Trade of the House of Commons, and given the intended central role of STAG in stakeholders´ representation in the UK´s treaty-making process, the respective parliamentary committee may use the STAG annual report as a basis to hold STAG accountable in hearings. Further, the report may also serve to support Parliament to hold the UK Government accountable for its trade policy.

Element 7: Establishment of a Devolved Administrations Trade Forum

A government which seeks to conclude comprehensive free trade agreement under the premise (and necessity) of an inclusive internal process, has to reflect on how to manage and integrate the internal system of government best into the treaty-making process. In the case of the UK, the devolved administrations[66] of Scotland, Wales and Northern Ireland require to be provided with a voice and appropriate rights in the trade treaty-making process. This assertion is not only grounded by their current legislative powers, which would likely be affected by comprehensive free trade agreements, but also their historical and current political significance.

Thus, an inclusive trade treaty-making process for the UK necessitates the permanent inclusion of devolved administrations in all matters relevant to devolved administrations. In this regard, a newly-established Devolved Administrations Trade Forum may provide an appropriate platform for executive representatives of devolved administrations to regularly exchange trade-related ideas and concerns regarding the Government´s general trade policy or agreement-specific matters. Ensuring that the Government's trade policy adequately represents the devolved administrations´ short and long-term needs, a permanent body should be formed with the impetus to comment on both general and specific trade-agreement matters. This is particularly relevant for the UK, since the Devolved Administrations Trade Forum offers devolved administrations to influence the Government´s trade agenda beyond their participation in the trade treaty-making process of a specific agreement.

[66] Devolved administrations do not equal federal states. Devolution is defined as a process by which the UK Parliament has transferred executive and legislative powers to Scotland, Wales and Northern Ireland. Despite the devolved powers, the UK Parliament retained its sovereignty and therefore has the power to revoke all devolved powers from Scotland, Wales and Northern Ireland.

Sub-Federal Governments as Integral Part in the Creation of Trade Policies

In Canada, the Federal-Provincial-Territorial Committee on Trade (C-Trade) was established in the mid-1990s. It has meetings four times a year during which federal, provincial and territorial officials exchange information and concerns related to international trade and negotiations. Draft documents related to issues falling within the provincial and territorial jurisdiction are exchanged and feedback on such issues is sought by the federal government during these meetings. They also provide for access to federal technical experts and sometimes lead negotiators.[67] In addition to C-Trade, there are *ad hoc* sectoral discussions between the federal and provincial and territorial governments on trade issues. The consultative basis has been widened over time through the inclusion of Federation of Canadian Municipalities, non-governmental organizations and public input.[68]

As the Canadian example demonstrates, the establishment of an exchange forum for sub-federal governments and the institutionalization of consultations is significant for including them in the trade treaty-making process. This gives trade policy-makers and negotiators an opportunity to identify and understand the concerns of sub-federal units to the benefit of an overall coherent and inclusive trade policy. There is a need to institutionalize the procedure of these forums to ensure the transparency and the accountability of the negotiators to the federal governments. Further, in the UK, a Devolved Administrations Trade Forum ensures that all devolved administrations are meaningfully included in the policy-making process and negotiations, thereby avoiding potential conflicts when implementing the international trade agreement. With respect to the inclusion of municipal or local governments in the Devolved Administrations Trade Forum, one may consider a right to petition of municipal or local governments in relation to the forum to bring forward input from the very local level.

Element 8: Regular Meetings with Civil Society

The backlash against free trade agreements in the EU during the TTIP-negotiations has illustrated the importance of integrating civil society in the treaty-making process of comprehensive free trade agreements. An important element of giving civil society a voice regarding trade-related matters are civil society meetings. At such meetings, civil society, predominantly consisting of NGOs and unions (especially those not represented in STAG) have the chance to express their ideas and concerns regarding areas such as environmental issues, labor rights and human rights protection in relation to comprehensive free trade

[67] Ann Weston, The Canadian 'model' for public participation in trade policy formulation, The North-South Institute (August 2005).

[68] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

agreements. By meeting with civil society, the UK Government has the opportunity to actively engage with the public and get in touch with challenges or concerns regarding an expansive trade policy. Therefore, civil society meetings are a core element for building the trust necessary for conducting negotiations for a comprehensive free trade agreement. Furthermore, civil society meetings help the UK Government to adapt its trade policy and its envisaged agenda of trade negotiations to the needs of civil society.

Dialogues with Civil Society in the EU

In the EU, the European Commission has initiated so-called Civil Society Dialogue meetings which regularly take place to discuss trade policy issues. Civil Society Dialogues are crucial to integrate European civil society such as NGOs, trade and business unions into the making of trade policy and to get to know the difficulties which civil society experiences with trade related issues.

The consultation of civil society is based on "Minimum Standards for Consultation" and the standards formulated in "Better Regulation for Better Results – An EU Agenda".[69] Apart from enhancing transparency, the Civil Society Dialogue has three goals: (1) to hear the civil society´s view on trade, (2) to address concerns in relation to the negotiation of trade agreements, and (3) to improve the policy-making by taking the ideas and concerns of civil society into account. *Ad hoc* meetings are organized.

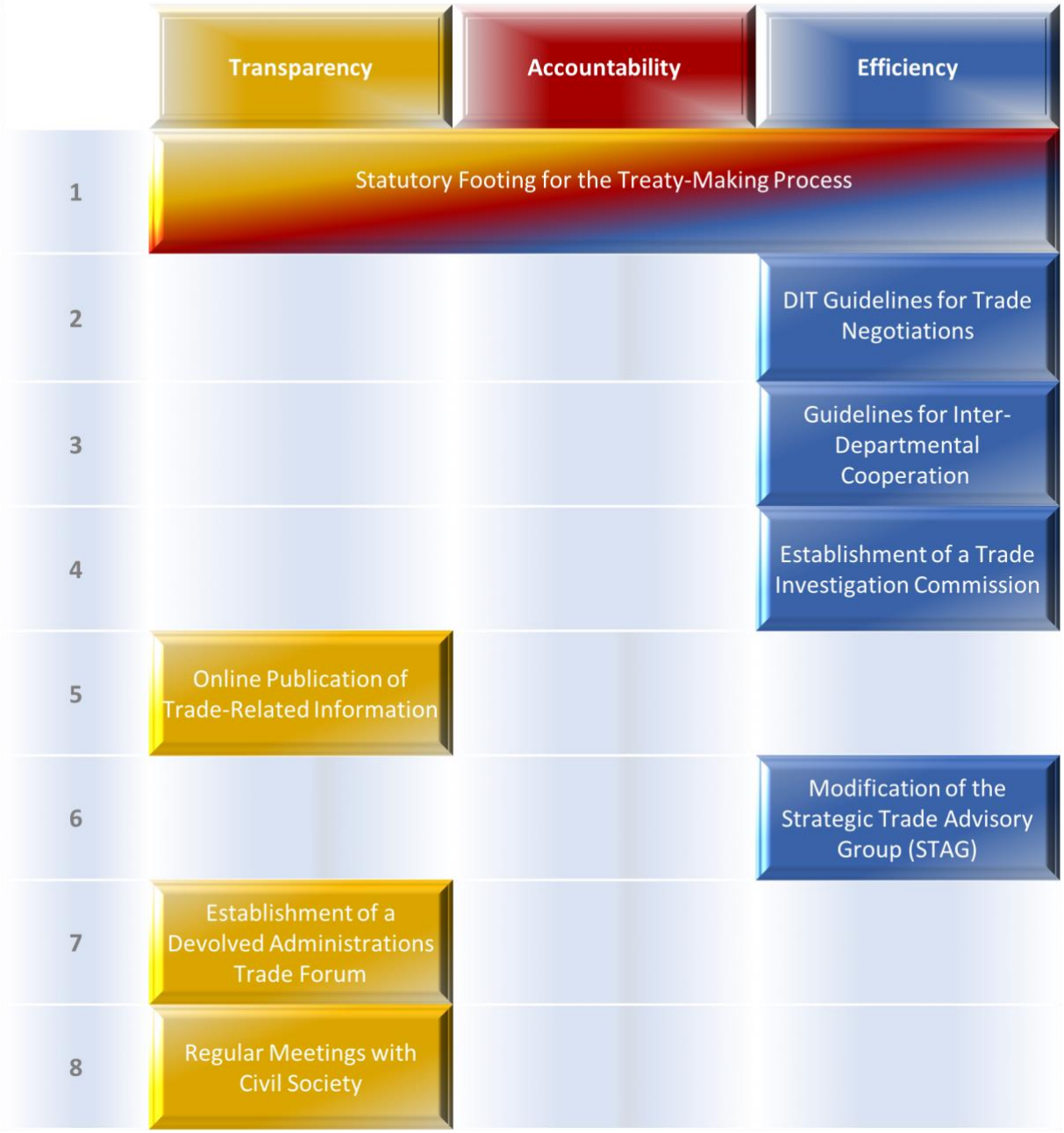
Organizations interested in participating in the Civil Dialogue or *ad hoc* meetings have to register in the EU´s transparency register prior attending meetings. The registration ensures that the EU´s code of conduct is adhered to and information about the organizations (e.g. business activity, mission and funding) attending and shaping public opinion accessible and can be controlled. Further, the list of participants of Civil Society Dialogues and of *ad hoc* meetings is publicly available online. The EU also publishes position papers of registered civil society organizations, explaining, justifying or recommending specific actions for trade related issues on its website. The EU follows the approach to include representatives of larger groups within civil society in its assessment instead of putting weight on singular concerns and opinions.

Given the fact that incorporating inclusive elements such as the Civil Society Dialogues into the EU trade treaty-making process has helped to end the backlash against free trade agreements in the EU, the organization of similar civil society meetings in the UK may constitute one meaningful element to prevent or mitigate (initial) opposition to comprehensive free trade agreements.

[69] See Commission, Minimum Standards for Consultation, COM(2002)704); Better Regulation for Better Results, EU Agenda COM(2015) 215.

Overview of Institutions and Bodies in the UK´s Model Treaty-Making Process

Overview of General Elements for Inclusive Treaty-Making Processes



B. Pre-Negotiation Phase

Transparency primarily drives the pre-negotiation phase. The primary goal during this phase is to ensure the Government has adequate opportunities to examine whether it is economically, politically, and perhaps socially beneficial to enter into formal negotiations with a foreign state. It is vital that the Government gather as much information from various stakeholders in order to pursue *collective* national interests. While admittedly cumbersome, the case studies have revealed that initial inclusivity and transparency ensure the least amount of friction during the remainder of the trade agreement process. In this regard, transparency prepares the grounds for appropriate levels of accountability, whereas the conduct of governmental assessments, that also includes stakeholder views, may increase the efficiency of the treaty-making process.

The U.S. and the EU Way to More Transparency

Following the backlash against TTIP and the growing interest in international trade agreements among the European public, the European Commission has put a strong emphasis on a transparent and inclusive trade policy to reinforce legitimacy and public trust for the negotiation of new (comprehensive) trade agreements. In light of the European Commission´s "Trade for All"-strategy and the lessons learned from the TTIP negotiations, transparency has become one of the major characteristics of the EU trade treaty-making process. In the pre-negotiation phase, the EU engages with stakeholders via consultations and the European Commission publishes the recommendations for the negotiation directives, while the Council publishes the final negotiation directive by now.

The U.S. has, under the Obama Administration, introduced changes to the Trade Promotion Authority Act (TPA) in 2015 which support more transparent negotiations by introducing the position of a Chief Transparency Officer in the USTR who is in charge of "consult[ing] with Congress on transparency policy, coordinate transparency in trade negotiations, engage and assist the public, and advise the United States Trade Representative on transparency policy."[70] Furthermore, USTR is now required to publish negotiation objectives before negotiations start and impact assessments and releasing the negotiation text prior signature.

Further, at multilateral level, transparency in negotiation rounds has also been strengthened. The World Trade Organization (WTO) promptly posted, for example, all texts of draft agreements on its website during the Doha Round and the negotiations of the Trade Facilitation Agreement (FTA). In contrast, the WTO´s dispute settlement procedures are comparably secretive as hearings are closed unless WTO members agree to open them, which however only means that the hearing is televised (without an online stream) to an extra room at the WTO premises in Geneva.

[70] TPA, Section 4 (f).

Element 1: Institutionalized Online Consultations with Stakeholders

The first step in the pre-negotiation phase is to develop strategic and beneficial cross-sector negotiation goals. This task requires a profound understanding of a wide variety of stakeholder interests. As such, consultations with stakeholders may serve as an effective tool during the pre-negotiation phase to examine and map out the relevant issues and areas that should be addressed or included in a prospective trade agreement. Utilizing that information, the UK Government and DIT may be able to anticipate or even preempt the challenges that may arise during and after the conclusion of the trade agreement. Therefore, the UK government may conduct consultations with various industries, large businesses, small and medium-sized enterprises (SMEs), NGOs, and unions, during the pre-negotiation phase.

Informal Consultations in Canada

In Canada, consultations with stakeholders are conducted in an informal environment and on an *ad hoc*-basis. Though there used to be institutionalized processes in place, under the so-called Sector Advisory Groups on International Trade (SAGIT), e.g. for the NAFTA negotiations, it currently favors practicability and flexibility over institutionalized meetings.[71] The lack of established processes and institutionalized pre-negotiation consultations has made the Canadian Government predominately accessible to larger organized stakeholders and lobbyists, to the detriment of small and unorganized stakeholders.[72] Moreover, call for consultations is not regularly widely circulated, leaving stakeholders generally uninformed about the consultation process. The TPP negotiations revealed the pitfalls of informal procedures, inciting recent discussion of returning to a more institutionalized procedure.[73]

The Canadian experience demonstrates the importance of institutionalized consultations allowing all kinds of stakeholder participation. Thus, the UK may take the opportunity to develop an efficient, transparent, and inclusive framework for how to manage consultations in a proper way. The framework may include regular and uniform calls for public consultations, their location, and include procedures for scaling events depending on the particular expected size of shareholder participants. In an effort to ensure the call for public comment is widely viewed, they should be published on the proposed trade website, DIT's website, social media, television, newspapers, radio, etc. While this may initially result in high attendance, the key is to initially flood the public with overwhelming opportunities to participate so as to desensitize the issue and ultimately lower public input to a manageable level.

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[71] Oliver Ilott, Ines Stelk & Jil Rutter, *Taking Back Control of Trade Policy*, Institute for Government, 2017, at 20-21.

[72] Anonymous Expert Interview.

[73] Oliver Ilott, Ines Stelk & Jil Rutter, *Taking Back Control of Trade Policy*, Institute for Government, 2017, at 21.

Washington-Based Stakeholder Consultations in the U.S.

The relevance of where consultations are held becomes evident in the U.S. consultation procedure. In theory, USTR's public stakeholder events are an opportunity for businesses, the general public, and non-governmental organizations to "make proposals, give critiques, and hear responses from U.S. negotiators."[74] However, events generally take place in Washington, D.C. and unsurprisingly all congressional hearings are within the district as well. In light of the Washington-based consultations, it is too costly for many stakeholders to travel to Washington. Instead, stakeholders do not participate in consultations. Whereas under President Obama there was a conscious effort to address the inadequacies regarding the location of consultations, the Trump Administration has not released any updated memoranda on their unique efforts to mitigate these issues.[75]

Given the fact that stakeholders in the UK are spread all over the country, public consultations and hearings may not be (exclusively) held in London. Instead, in order to promote transparency and encourage consultations with a larger swath of business persons and non-governmental groups, hearings are preferably held via online conferences. This allows all interested stakeholders to easily access consultations and to participate regardless of their financial means. In order to gather curated information and statistical data, the case studies have shown it is best to require stakeholders to submit written statements. However, in order to manage the statements most efficiently, the UK government may prepare standardized forms for statements or even questionnaires to facilitate the evaluation and review process.

Questionnaire-Based Stakeholder Consultations in the EU

In the EU, it is common practice to consult businesses and industry stakeholders such as companies and business organizations via questionnaires covering technical questions (e.g. rules of origin and trade flows) and requesting their practical experience with doing business in the negotiating partner´s country. The Directorate General for Trade (DG Trade) prepares the questionnaires generally covering areas such as trade in goods, trade in services (and investment), rules (e.g. transparency, IP rights) and other issues. The questionnaires aim to gather specific data and help to prioritize sectors and proposals on how to solve problems they experience in their business activity in the third country. All of this particular information that the European Commission collects, is confidential and falls under the scope of the EU rules on access to documents given the questionnaires would otherwise reveal

[74] USTR, Guidelines for Consultation and Engagement, issued on 27 October 2015,
[75] USTR Guidelines for Consultation and Engagement, USTR, issued on 27 October 2015.

sensitive information about the economic activity of business and industry stakeholders.[76] The European Commission curates the stakeholder information in a report[77] and presents a list of the priorities and main concerns businesses have expressed during consultations. The list of businesses which participated in the consultations are published are published, thereby allowing other parties to trace where the input came from.

For transparency purposes, the UK Government may document and publish the entire public consultation process, including how many stakeholders participated, what kinds of stakeholders, and their substantial contributions. All of these findings may be incorporated in a final report that is published *before* formal negotiations start.

Element 2: Consultations with Devolved Administrations

The Department for International Trade (DIT) should consult with devolved administrations to gather potential negotiation goals and address early onset concerns regarding the prospective trade agreement. Given devolved administrations have their own legislative functions, they also have their own expectations from future trade agreements, and are similarly accountable towards their own constituencies in this regard. The consultations allow DIT to filter priorities that fall under the legal powers of devolved administrations when establishing the negotiation agenda.

It is crucial for the UK Government to consult with devolved administrations prior to starting negotiations, though trade is an exclusive competence of the UK Government. However, comprehensive free trade agreements may affect many of the legislative domains reserved to devolved administrations and therefore may have considerable implications on devolved administrations, particularly in the areas of agriculture, food and health. The breadth of issues covered by comprehensive free trade agreements may require amendments to domestic laws and regulations. This underlines the importance of having devolved administrations involved in pre-negotiation consultations.

[76] See 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, OJ L 145, 43-45.

[77] European Commission, Questionnaire on a free trade agreement with the Philippines, Feedback from Industry Stakeholders, 29 July 2016.

Consultations with Provinces in Canada

In Canada, the authority to negotiates trade agreements and determine the trade policy solely resides with the federal government. However, comprehensive trade agreements often include subject matters which fall within the legislative jurisdiction of the provincial or territorial legislature. In such a case, if the matter is fundamental to provincial autonomy, federal general powers cannot be invoked and the legislative powers remain distributed.[78] In such an event, it is essential to be assured of the necessary provincial legislation before making a treaty on such a subject matter.[79] As such, the provinces are included through consultations in the treaty-making process. Apart from matters that fall under the exclusive provincial legislative powers, the Canadian government generally needs provincial support.

The current consultation process between the UK Government and devolved administrations establish only a political maneuver which is not necessary from a legal perspective. However, failure to include the devolved administrations at the pre-negotiation stage bears the risk of political discontent of devolved administrations at a later stage of the trade treaty-making process and may result in a considerable political pushback. In a worst-case scenario, such a pushback may hamper the successful conclusion of the trade agreement.

Element 3: Conduct of Impact Assessments

Prior to officially commencing negotiations, the proposed Trade Investigation Commission (TIC) (see General Elements, Element 4) investigates and publishes a report detailing the potential economic effects of a prospective free trade agreement. An economic impact assessment serves as the basis for assessing the future impact of the envisaged trade agreement on the domestic economy. The TIC may utilize data independently collected from other governmental agencies, as well as information submitted through the consultation process. This ensures adequate use of otherwise unavailable data while reinforcing accountability to stakeholders which are likely to be most affected by trade agreements. The (one-page) summary and the report of the impact assessment may be published on the official UK Government trade website to be easily accessible. The fields of inquiry in the economic impact assessment depend on the intended scope of the future trade agreement. In case of comprehensive free trade agreements and depending on whether a trading partner is a

[78] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[79] J. H. Aitchison, *The Political Process in Canada*, 1963, at 181.

developed or developing country, the TIC may conduct further impact assessments covering a variety of areas such as labor, equality and sustainable development.

Impact Assessments in the EU

In the EU, the preparation of impact assessments has become an essential part of the pre-negotiation phase. However, it may take up to one year in advance to actual trade negotiations, depending on the scope of the intended agreement and data availability.[80] The European Commission examines whether a prospective free trade agreement would positively impact the relations with the trading partner(s) at hand and the scope the respective agreement could have.[81] An impact assessment covers four steps: (1) it verifies existing trade-related challenges, (2) it analyzes the causes for the identified challenges, (3) it responds to the question of whether EU action is required, and (4) it gives a detailed assessment on what solutions are available and which trade-offs may come with the respective solution.[82] Reports on impact assessments are sent to the European Parliament and the Council, constituting an essential tool for reaching informed decisions within a democratic decision-making process.

An impact assessment is necessary, particularly given comprehensive trade agreements can have significant micro- and macro-economic, environmental or social effect on the UK. The impact assessment report is to be sent to the Strategic Trade Advisory Group (STAG), to the UK Parliament as well as to the assemblies of the devolved administrations, and published on the UK Government trade website. Depending on the focus of the UK´s trade policy, the impact assessment may also elaborate on specific (non-)economic issues or industries in more detail. In the context of a macro-economic assessment, for example, macro-related matters like environmental or development-related effects may necessitate separate impact assessments.

Possibility of Area-Specific Impact Assessments

In Canada, a special focus is placed on the so-called environmental assessment process. An environmental assessment is conducted through inter-departmental collaboration and public consultations. The method for conducting the environmental assessments involves the identification of economic effects of the negotiations, the likelihood and significance of resulting environmental impacts

[80] See European Commission, Better Regulation Toolbox, at 42.

[81] Se European Commission, Better Regulation Toolbox, at 41.

[82] The precise steps on how to prepare an impact assessment are laid down in Chapter 2 of the European Commission´s “Better Regulation Toolbox” complementing the “Better Regulation Guideline”, European Commission, Better Regulation Toolbox.

and/or the identification of mitigation and/or enhancement options to inform negotiators.[83] Environmental assessments are conducted through various phases that coincide with the development of the trade negotiations. At each stage of an environmental assessment, relevant consultations are conducted with experts, NGOs, civil society and provincial territorial governments to obtain inputs for a comprehensive environmental assessment. All communications at each phase is documented.

Impact assessments are time-consuming and require intense research and preparation. Nevertheless, they constitute the basis of realistic negotiation goals , help negotiators focus on particular sectors, and illuminate the areas in which the UK might be able to make concessions. More importantly, the impact assessments may reveal areas in which the UK may want to preserve more national autonomy and informs negotiators what sectors may need legal trade safeguards or exceptions.

Element 4: Exploratory Talks

Based on consultations and the economic impact assessment, the UK Government may conduct exploratory talks with the prospective trading partner(s) to discuss the scope of the intended agreement. Determining the scope will make the entire preparation and negotiation process more efficient and provide an outline of the upcoming negotiation.

Exploratory Talks in the EU

In the EU, exploratory talks are informal dialogues with the prospective negotiating partner(s). The involved parties discuss the purpose and scope of future negotiations providing the chance to evaluate whether they eventually intend to enter formal negotiations. Generally, the European Commission as the EU's negotiator is the driving force behind such trade-related exploratory talks in the realm of trade. Despite the informal character, Member States and the European Parliament need to be kept informed about the progress, difficulties or possible result of exploratory talks.

Element 5: Non-Binding Parliamentary Resolution on the Negotiation Mandate

Before entering formal negotiations, the UK Cabinet is required to formally mandate the Department for International Trade (DIT) with trade negotiations. Common practice dictates that the negotiation mandate is left broad in nature to provide flexibility during negotiations. If the negotiating mandate proves too narrow, DIT may seek a revised negotiating mandate.

[83] See the Canadian Government´s Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

However, given trade agreements must be implemented by Parliament through national law at the end of the treaty-making process, parliamentary reassurance is a political demand also with respect to the negotiation mandate. The UK Government may ask Parliament to pass a non-binding advisory resolution on the Government's outline of the *intended* negotiation mandate. The full Parliament may delegate this to a Joint Committee consisting of members of the House of Commons International Trade Committee (ITC) and the House of Lords Economic Affairs Committee (or a subsequently created committee with trade jurisdiction). A summary of the non-binding advisory resolution is to be circulated to all the members of Parliament. This allows to integrate the UK Parliament without changing the institutional balance between the Government and Parliament.

Advisory motions may be used to place some pressure on, or provide guidance to the UK Government when they are published. If the Government does not follow potential suggestions made in the resolution to amend the outline approach, the Government may be asked to explain and substantiate any of its deviations. Parliament may pass the non-binding resolution in a reasonable amount of time. Overall, a non-binding parliamentary resolution in conjunction with the Government's involvement in a "comply-or-explain" process, will increase the transparency of the Government´s negotiation strategy and make provide better grounds for holding the Government accountable to elected representatives in Parliament.

Element 6: Publication of the Negotiation Mandate

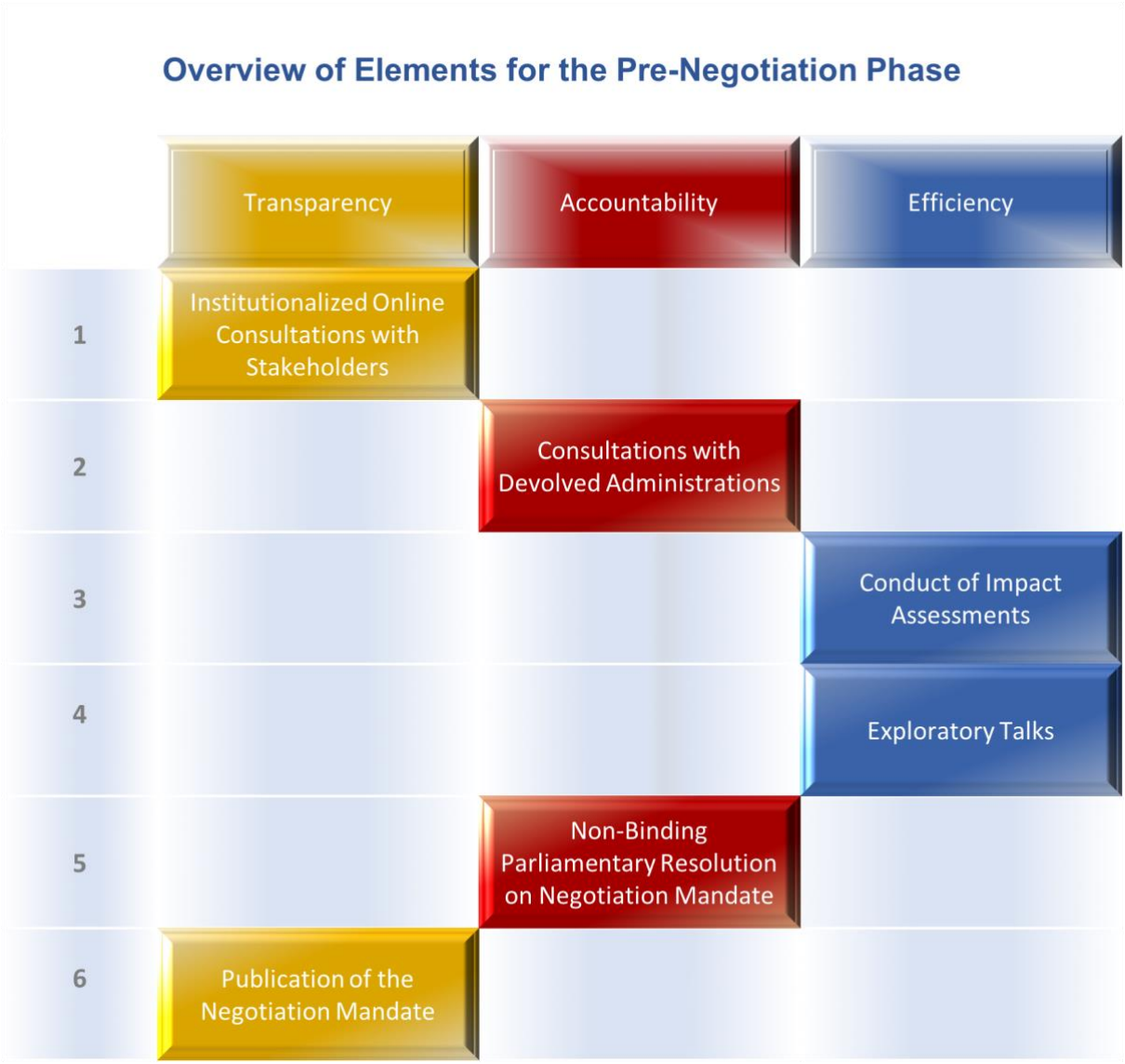
As soon as the negotiation mandate is approved, the UK Government may publish the negotiation mandate, an obligation that is supposed to be explicitly laid down in the new UK trade treaty-making process statute. The publication of the negotiation mandate informs the public about the following information: (1) the objectives and reasons of the trade agreement, (2) the legal basis of negotiations under the UK law, (3) the results and summary of stakeholder consultations and impact assessments, (4) the budgetary implications of the negotiations, and (5) the foreign policy implications of the negotiations. Publishing the negotiation mandate makes the entire negotiation process more transparent and ensures the Government is held accountable.

Publication of the Negotiation Mandate in the EU and the U.S.

In the EU, the Council by now publishes the negotiation directives which mandate the European Commission with negotiations, in accordance with its "Trade for All"-strategy that includes the enhancement of transparency.[84] For example, the negotiating directives for the negotiations of TTIP, TISA or CETA are all publicly available.

In the U.S., the President is required, at least 30 days prior to entering into negotiations, to publish on the USTR's website "a detailed and comprehensive summary of the specific objectives with respect to the negotiations, and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States."[85] There are unique reporting and consultation requirements if prospective trade agreements touch on agriculture,[86] fishing,[87] textiles,[88] and international investment treaties.[89] The negotiation objectives are published online at the beginning of the Trade Promotion Authority legislation and divided into three component pieces: (1) the overall negotiating objectives, (2) the principal trade negotiating objectives, and (3) other objectives. The objectives, are factually similar to an EU mandate but are not agreement-specific. If Congress believes President and USTR have exceeded the grant of negotiating power, they withhold the statutory benefits.

[84] European Commission, Trade for all – Towards a more responsible trade and investment policy, 2015.
[85] TPA, Section 5(a)(1)(D).
[86] TPA, Section 5(a)(2).
[87] TPA, Section 5(a)(3).
[88] TPA, Section 5(a)(4).
[89] TPA, Section 5(a)(5).


Overview of Elements for the Pre-Negotiation Phase
Transparency
Accountability
Efficiency
1
Institutionalized Online Consultations with Stakeholders
2
Consultations with Devolved Administrations
3
Conduct of Impact Assessments
4
Exploratory Talks
5
Non-Binding Parliamentary Resolution on Negotiation Mandate
6
Publication of the Negotiation Mandate

C. Negotiation Phase

While the Government, specifically the Department of International Trade (DIT), is first and foremost in charge of negotiations, the elements provided address legitimate internal demands for transparency and accountability. Efficiency can be balanced with transparency and accountability without disrupting the negotiations between the DIT and the potential trading partner government. Further, given historical experiences in all three case studies, failing to create an inclusive and transparent negotiation process yields one primary result: political upheaval and the ultimate failure to pass an otherwise beneficial trade agreement.

Element 1: Establishing a DIT Negotiation Team

Element 1a: Establishing Processes for Capacity Building

The DIT should maintain its role as the negotiating arm given that DIT officials have the most profound expertise in trade-related matters. However, DIT still needs to quickly gain more substantial negotiating experience[90] a key element to successful negotiations. DIT should expect that all of the UK´s future trading partners will bring experienced trade negotiators to the negotiating table.[91]

Composition of Negotiation Teams in the U.S., the EU and Canada

In the U.S., USTR is in charge of negotiating trade agreements. It is an executive agency formed in 1962, with the delegated authority to coordinate U.S. trade policy. Under the auspices of the Executive Office of the President, the head of USTR serves as the President's principal trade advisor, negotiator, and spokesperson on trade issues. As such, USTR has strategically cultivated expertise in trade negotiations over past decades and has established efficient processes to transfer that expertise to the next generation of trade negotiators.

In the EU, conducting trade negotiations falls under the sole responsibility of the European Commission. This is in particular the case if a trade agreement covers also for example foreign direct investment or competition chapters (EU-only competences[92]). Nevertheless, even if an EU trade agreement includes labor rights or environmental questions (which are still areas of the EU Member States´ domain or shared competences[93] between the EU and the Member States), the European Commission still acts as main negotiator. It has increased its ambition to engage in trade agreements

[90] Oliver Ilott, Ines Stelk & Jil Rutter, Taking Back Control of Trade Policy, Institute for Government, 2017, at 10-14.

[91] Anonymous Expert Interview with EU Official.

[92] As defined in Art. 3 TFEU.

[93] As defined in Art. 4 TFEU.

with third country especially under its “Trade for all”-strategy initiated in 2015. This has made it even more important for the EU to have general processes and strategies for successful negotiations in place, which may serve to sustainably build expertise on conducting trade negotiations.

In Canada, the Minister of Foreign Affairs (or another minister in cooperation with the Minister of Foreign Affairs) negotiates international treaties on behalf of Canada.[94] In practice, the Department for Foreign Affairs, Trade and Development (DFAITD) has a supervisory role and the negotiations may be conducted by the relevant departments of the government depending on the subject-matter of the treaty. The negotiation of treaties by the DFAITD ensures that the treaties are negotiated by experts in the field, enhancing the efficiency of the process.

As seen in the U.S. and the EU, the DIT is required to sustainably process the negotiating experience which it will gain soon in the first rounds of negotiations. This includes allowing otherwise junior trade negotiators to sit at the table at an early stage of their career,[95] even if they may remain in observer or subordinate positions. The DIT may also create special trade negotiator positions to build capacities for trade negotiations. It is crucial for the DIT to have available human resources of trained and specialized officials to cultivate “art of trade negotiating”. As such, the DIT should not shy away from offering a large amount of trade-related internship or apprenticeship positions to personnel that does not have trade-specific backgrounds. Given the lack of historical governmental competence to negotiate trade agreements, very few persons have had the opportunity or access to trade-related jobs. As such, without the historical job availability there was less interest in the field of study. The key is to educate and train persons that have a genuine interest in the field.

Element 1b: DIT´s Coordination Role

The Department of International Trade (DIT) is a young department, only founded in July 2016. The department as a whole may not have wide-spread or deep expertise in all areas necessary to negotiating *comprehensive* free trade agreements. Therefore, DIT may resort to other departments, for example, the Department for Environment, Food & Rural Affairs to gain special knowledge on trade-related regulatory areas such as environmental issues or labor rights (whose importance have risen in recent years).

[94] Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, subsection 10(2)(c).

[95] As suggested by Oliver Ilott, Ines Stelk & Jil Rutter, Taking Back Control of Trade Policy, Institute for Government, 2017, at 11-12.

Inter-Departmental Expertise: Cooperation in the EU, the U.S. and Canada

In the EU, the Directorate General for Trade (DG Trade) shares its competence with the Directorate General for Health and Food Safety regarding sanitary and phytosanitary (SPS) chapters and with the Directorate General for Agriculture and Rural Development when negotiating on agriculture. Therefore, the European Commission uses the expertise it collects from across all of its Directorate Generals. Similarly, in the U.S., USTR cooperates, for example, with the Treasury when negotiating finance- or service-related provisions and chapters. Regarding investment issues, USTR works together with the Department of State. Canada also applies an interdepartmental cooperation approach by seeking expertise from other departments such as the Department of Agriculture or the Department of Finance.

In the context of collecting cross-departmental expertise, the DIT may benefit from previously developed guidelines for inter-departmental cooperation and communication (see General Elements, Element 3). As the DIT is in charge of leading through the negotiations on the UK side, it is the DIT´s task to bundle and curate all trade-related special expertise and capacities. This may include allowing government officials from other departments to actively join the negotiating table, or at least, to be present when such areas are negotiated.

Element 2: Participation of Devolved Administrations in the Negotiations

The DIT may create negotiation teams joined by executive officials of devolved administrations where necessary. During negotiations, representatives of devolved executives may be present in the negotiation room, speak and have the right to answer questions upon request, regarding matters falling under the devolved administration's purview. This ensures that the needs and concerns of devolved administrations are appropriately represented if their interests are at stake during negotiations. Thus, executive representatives of devolved administrations have an assisting and consultative role, whereas the DIT negotiation team remains the main negotiator.

The Inclusion of Canadian Provinces in the CETA Negotiations

For the CETA negotiations, it was interestingly the EU which insisted on the inclusion of representatives of provinces in the Canadian delegation. Already at the stage of pre-negotiations, it was clear, for example, that CETA would cover subject matters, e.g. public procurement, which exclusively fall under the powers of Canadian provinces and territories, instead of the federal Government. Also, provinces and territories are not obliged to implement international (trade) agreements concluded by the

federal government in the provincial fields of jurisdiction.[96] This may create significant uncertainty for the implementation phase of the treaty-making process. As a result, provinces were directly involved in the trade negotiations for the first time in the history of trade negotiations.[97] However, during negotiations, the provincial and territorial officers had only limited participation rights. Essentially, they could speak upon request by the negotiator. This allowed the provinces and territories to influence issues covered by their jurisdiction.[98] Further, the provincial governments were involved in the overview briefings before and after every negotiation session on all areas of interest during and outside Federal-Provincial-Territorial Committee on Trade (C-Trade) meetings.[99] This allowed the provinces and territories to influence issues covered by their jurisdiction.[100]

Including the devolved administrations in the negotiations will facilitate consensus within the UK delegation, and make internal processes more efficient. DIT officials may save resources spent on briefing their counterparts from devolved administrations, while developing trust-based working relationships with the representatives of devolved administrations. This will make the UK´s overall negotiating position stronger on the long-term and prevents the threat of political backlash against free trade agreements from devolved administrations.[101]

Element 3: Consultations with STAG during Negotiations

The internal processes during negotiations further include consultations with STAG, whose members may be present "next door" to negotiating sessions at all times, to receive prompt update and – more importantly – to provide expertise and advice to the DIT negotiating team, e.g. on technical or factual matters. Here, the appointment of STAG*plus* members for specific areas covered by the prospective agreement may pay off and create a negotiation advantage (see General Elements, Element 6b). In any case, all STAG members keep the consultations with the DIT negotiation team confidential. When dealing with large or particularly skilled negotiators, prompt access to pertinent data is crucial and will lend credibility to a relatively "young" team of negotiators.

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[96] Patrick Fafard and Patrick Leblond, Twenty-First Century Trade Agreements: Challenges for Canadian Federalism, The Federal Idea, September 2012; Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[97] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[98] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[99] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[100] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[101] Pierre Marc Johnson, Patrick Muzzi & Véronique Bastien, The voice of Quebec in the CETA negotiations, 68 Int´l J., 560, 560-567 (2013).

Expert Consultations during Negotiations in the EU

In the EU, the European Commission has established expert groups whose purpose is to act in a consultative function and assist throughout the trade negotiations on a broad range of technical, practical experience, or alternative perspectives. They may provide input with respect to the overall implementation of a trade agreement and may provide feedback on how a potential outcome may be perceived in the public debate.

Nevertheless, in the case of the ACP-EU Partnership Agreement of 2000 (Cotonou Agreement) between the EU and African, Caribbean and Pacific Group of States, non-state actors were even part of the negotiation delegation and had the right to observe negotiations.[102] Similarly, in 2009 when the EU started to negotiate with West-African countries as part of the Economic Community of West African States (ECOWAS) an economic partnership agreement (EPA), businesses and civil society representatives were present in the negotiation room, equipped with the right to actively participate in negotiations.

The expertise provided by STAG makes the process of negotiation process more efficient due to having expert advice readily available. Further, it helps negotiators to stay aware of the views and assessments of civil society, businesses and academia. Including the experts as non-state actors directly in the negotiations may however over-emphasize certain interests and may increase pressure on negotiating teams to include particular non-state actor interests. Since such an inclusive approach may give a meaningful voice to particular private actors, it is important to carefully balance their direct participation in negotiations if the UK Government intends to allow it.

Element 4: Inclusion of Parliamentary Observers

Trade agreements may have severe implications on the life of UK´s citizens. This makes it necessary that parliamentary representatives take part in negotiating sessions as observers. The goal is to keep negotiations as transparent as possible to avoid the impression of “backdoor deals”. Though parliamentary observers may not have the right to actively participate in the negotiations, it is important to allow their presence without putting any bargaining position of the UK Government at risk. Thus, it is crucial to bind parliamentary observer to confidentiality rules with respect to information obtained during the negotiations.

[102] See the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States of the other Part to promote and expedite the economic, cultural and social development of the ACP States (2000).

Observer Status in EU Negotiations

In the EU, negotiation delegations (under the lead of the European Commission) may include members of the European Parliament (EP). EP members have the role of observers provided that this status is legally, technically and diplomatically feasible. They do not have the right to directly participate in negotiations. The observer status further covers the participation of EP members in informal negotiations taking place before and after formal negotiations. This enables them to be fully informed about the negotiation progress. However, the European Commission has the right to refuse EP members, but has to substantiate such a motion.

Also, parliamentary representatives from devolved administrations may be allowed to have observer status during negotiations. This necessarily follows from the participation of devolved executives in the DIT´s negotiation team (see Negotiation Phase, Element 1b).

Element 5: Governmental Reporting and Parliamentary Monitoring

The Government keeps the UK Parliament updated on the progress of negotiations by informing the respective committees. Though this may produce additional administrative burden on the Government, it is necessary to make the treaty-making process transparent. Backed by parliamentary observers during negotiations, the parliamentary right to information and governmental reporting are part of parliamentary control of the UK Government, which is crucial for a functioning democracy.

The most appropriate parliamentary committee that DIT can report to in the information and reporting process, is a newly-formed Joint Trade Committee of both Houses of Parliament with members, equipped with the necessary knowledge and experience with international trade. The UK Parliament's right to information and/or the governmental reporting obligation may be included in the statute on the UK´s treaty-making process (see General Elements, Element 1). Further, confidential information shared with the committee may not be published. Disclosing information to the competent committee will ensure that Parliament is meaningfully included and provide it with the opportunity to hold the Government accountable, if ongoing negotiations significantly deviate from the Government's mandate.

Parliamentary Monitoring in the U.S., the EU and Canada

In the U.S., USTR is affirmatively required to "consult closely and on a timely basis" with a variety of committees of the House of Representatives and the Senate (e.g. the House Advisory Group on Negotiations and the Senate Finance Committee[103]), in particular with those committees of the House of Representatives and the Senate with jurisdiction over laws that could be affected by a trade agreement resulting from the negotiations.[104] While there are multiple sub-committees with jurisdiction, activism in these committees have slowed over time as Congresspersons and their staff are less educationally-equipped to provide meaningful discussion surrounding the ever-complicated aspects of trade.

In the EU, the European Parliament has no statutory-based role for initiating negotiations,[105] shaping the negotiation directives or supervising the course of negotiations.[106] However, following an inter-institutional agreement between the European Parliament and the European Commission, the latter has agreed to systematically inform the Parliament delegation about the outcome of a negotiation (round).[107] The information process is supposed to enable the Parliament to express views on the ongoing negotiations in the course of parliamentary procedures.[108] The European Commission´s duty to inform Parliament includes that the European Parliament has sufficient time to be able to express its point of views if appropriate, and that the European Commission is able to take the Parliament´s views into account.

In Canada, there is no statutory basis requiring negotiators to inform the Canadian Parliament about the negotiation progress. Therefore, the Canadian Parliament takes recourse to its general powers and organizes committee hearings, asks for studies and issues reports.[109] The Canadian Parliament focuses its work on crafting committee studies in, for example, the Standing Committee on International Affairs and International Trade (AEFA) in the Senate and the Standing Committee on International Trade (CIIT) in the House of Commons. The studies are an important tool for the Canadian Parliament given they direct questions to the Government about the particular trade negotiations. In contrast to the U.S. and the EU, Canada's parliamentary system allows concerned citizens to start an online petition forcing the Canadian Government to answer the petition questions within 45 days.[110]

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[103] TPA, Section 4 (a)(1)(c).

[104] TPA, Section 4 (a)(1)(d).

[105] This follows from Art. 218 (3) TFEU.

[106] Piet Eeckhout, *EU External Relations*, 2nd Edition, 2011, at 199.

[107] Framework Agreement on the relations between the European Parliament and the European Commission, OJ L 304, 47-62, at number 25.

[108] Framework Agreement on the relations between the European Parliament and the European Commission, OJ L 304, 47-62, at number 28.

[109] European Parliament, Parliamentary Scrutiny of Trade Policies across the Western World, March 2019, at 32.

[110] European Parliament, Parliamentary Scrutiny of Trade Policies across the Western World, March 2019, at 32.

Element 6: Non-Binding Parliamentary Resolutions on Information Submitted by the UK Government

During the negotiation phase, the newly-established Joint Trade Committee of the UK Parliament may discuss the information provided by the Government regarding an agreement´s progress of negotiations and issue non-binding resolutions to respond to the Government´s negotiating performance. Again, the Joint Committee may be formed of members from the House of Commons International Trade Committee and the House of Lords Economic Affairs Committee (or a newly created committee dealing more specifically with international trade) and other educated members of Parliament that sit on committees that would be most regularly implicated due to comprehensive trade agreements.

Non-Binding Parliamentary Resolutions on the Negotiation Process in the EU

In the EU, the European Parliament´s Committee on International Trade (INTA) discusses the information and has the right to make legally non-binding decisions in the form of resolutions on all information provided by the European Commission. More specifically, INTA may have an resolution on how negotiations should proceed. Following its role as main negotiator, the European Commission has the right to refuse a resolution coming from the European Parliament. A refusal, however, requires the European Commission to explain the reasons for its denial to support the resolution in a plenary sitting or at the next meeting of the relevant parliamentary committee.[111] Besides INTA, the European Parliament has the right to discuss the developments of the trade negotiations in a plenary session.

Non-binding resolutions give the UK Parliament an opportunity to provide the Government with parliamentary guidance during negotiations and to draw the Government´s attention to issues which the Parliament is critical about. The substantial inclusion of the Parliament in the negotiation process may add a burden to the Government during the negotiation phase, but allows to anticipate and resolve points of criticism at an early stage.

Element 7: Reporting to and Consultations with Devolved Legislative Bodies

Following the opportunity of devolved administrations to participate in DIT´s negotiating team and the related right of parliamentary representatives from devolved administrations to observe negotiations, the legislative bodies of devolved administrations are entitled to receive information on a regular basis and to be kept updated regarding aspects of the negotiations

[111] Framework Agreement on the relations between the European Parliament and the European Commission, OJ L 304, 47-62, at number 29.

that fall under their jurisdiction. The representatives of devolved administrations legislative bodies must keep all information obtained confidential, but may provide non-binding advice on such matters.

Rights to Information of Non-Federal Parliamentary Bodies in Germany & Canada

In Germany, the so-called Lindauer Abkommen of 1957, characterized as "contractual agreement of constitutional nature concluded between the Länder"[112], addresses the situation when the Federal Government acts externally in areas which fall within the exclusive competences of the states. The agreement lays down that whenever the "essential interests" of the states, are affected, the Federal Government has to inform them about the progress of the negotiations and give them the right to formulate proposals on topics to be negotiated. This has been considered a practical solution to potential interferences of international agreements negotiated by the Federal Government, with the interests of the states.

In Canada, trade agreements often touch upon areas of provincial jurisdiction. In such cases, provincial action is necessary for implementation. During the negotiations of the Canada-United States Free Trade Agreement (CUSFTA), provincial governments were provided with access to federal officials during negotiations.[113] Federal officials met monthly with representatives from all provinces to discuss various issues, although the federal government remained in control of the negotiations. Thereafter, the Committee on Free Trade Agreements was established, composed of representatives from the provinces. The federal government also established consultative committees with various provincial departments to address sectoral concerns.[114]

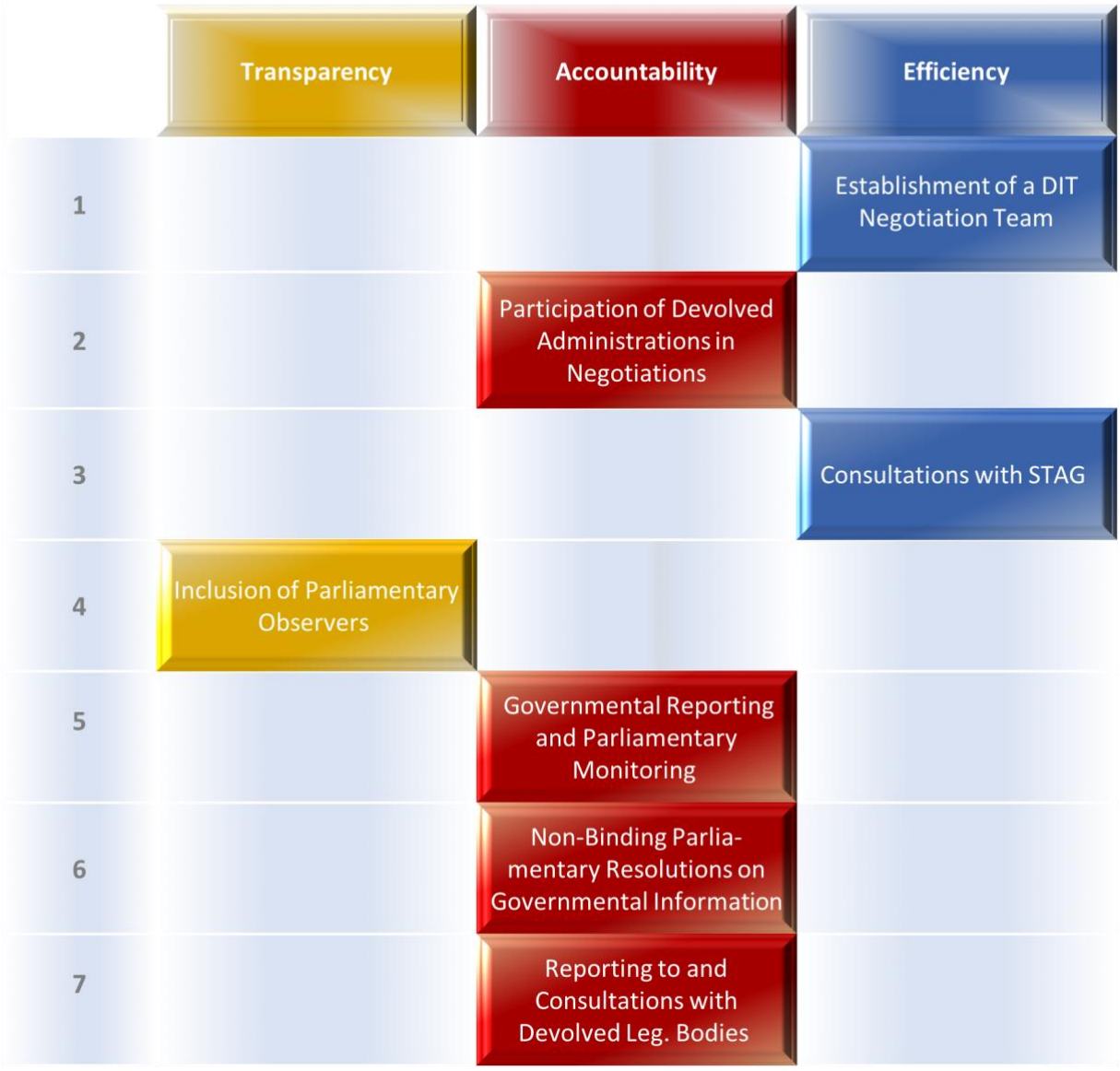
The experiences in German and Canadian experiences demonstrate the importance of putting the right of information and any consultations processes with devolved legislative bodies on the footing of a formalized framework that provides for efficient institutionalized cooperation. In the UK, this may be achieved by parliamentary legislation granting devolved legislative bodies the rights to be informed and consulted with by the UK Government. Further, a committee of representatives from devolved legislative bodies and DIT staff may be established to create a platform for the direct exchange of information and for holding the UK Government accountable towards devolved legislative bodies.

[112] BverfGE 42, 103, 113.

[113] Christopher J. Kakucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, No. 10, October 2016.

[114] Christopher J. Kakucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, No. 10, October 2016.

Overview of Elements for the Negotiation Phase



D. Approval Phase: Parliamentary Scrutiny

The approval phase of the treaty-making process means the period between signing and ratifying an international (trade) agreement and is subject to meaningful parliamentary scrutiny. A balanced trade treaty-making process A balanced process is not only efficient, but also ensure meaningful accountability and transparency throughout the approval phase. The most distinct element is to create the opportunity for Parliament to profoundly scrutinize the international trade agreement negotiated by Government.

<u>Element 1:</u> Submission of a Preliminary Report by Parliamentary Committees

The first step in the approval phase is to have a Joint Committee of members of the International Trade Committee (ITC) of the House of Commons and members of the House of Lords Parliament´s preparing and issuing a detailed public report evaluating the negotiated trade agreement in its current form. This necessarily occurs prior to Parliament's vote on the approval of the trade agreement. The Joint Committee report aims to inform MPs about the content, advantages and possible challenges of the international trade agreement.

Parliamentary Committees in the EU and the U.S.

In the EU, the International Trade Committee of the European Parliament (INTA) reviews the international trade agreement, already signed by the European Commission, together with representatives from businesses and representatives from civil society. Based on the discussion with other stakeholders, INTA writes a report on the agreement and subsequently votes on it. The INTA report serves as formal advice for the plenary session of the European Parliament.

In the U.S., before the U.S. President can enter into an agreement, a report specifying (among other information) how the negotiated agreement fits to the negotiation objectives, is to be submitted to both the House Ways and Means Committee and the Senate Financial Committee within a period of 180 days. As soon as the implementation bill to implement the trade agreement into domestic law is introduced to Congress, the House Ways and Means Committee and the Senate Financial Committee report within 45 sitting days to the House of Representatives and respectively, the Senate.

The ITC, given that it is comprised of MPs who regularly deal with trade matters, may be offered the first opportunity to review the agreement and express potential concerns related to particular subjects covered by the trade agreement. Though ultimately being published to the public, the report is addressed to the UK Parliament. Thus, the report is a crucial step for ensuring that all MPs make educated and informed decisions when ultimately voting on the trade agreement, and is a key element bolstering an efficient parliamentary approval process.

Element 2: Parliamentary Approval by Up or Down Vote

Approval by up or down vote is the premier mechanism to ensure accountability of the UK´s Government in the treaty-making process. Parliament can express whether the trade agreement reflects the needs and opinions of the MP's constituencies. The approval process may include two stages: (1) a debate on the respective trade agreement in both Houses, and (2) the formal approval or disapproval of the trade agreement. Given Parliament's familiarity with the CRaG process, a similar 21 sitting days for Parliament to approve or disapprove may apply. So, only if Parliament approves a trade agreement negotiated by the UK Government, the latter may ratify the respective agreement.

Parliamentary Approval in the U.S., the EU and Canada

In the U.S., Congress is at the center of the approval phase. The House Ways and Means and the Senate Finance Committees have primary jurisdiction over trade agreements. However, Congress has no ability to modify the agreement but will simply vote yes or no on the President's implementation bill, the President's Statement of Administrative Action, and *de facto* the international agreement itself.

In the EU, participation rights of the European Parliament have been significantly strengthened by the Treaty of Lisbon. The European Parliament votes in an up or down vote on whether it gives its consent to the trade agreement, meaning that it can only accept or reject the international trade agreement as a whole. It has not the power to request modifications of individual provisions.

In contrast to the U.S. and the EU, the Canadian parliament has no statute. Instead, it has conventional right to approve or disapprove a trade agreement that emerged in 2008.[115] The House has 21 days before taking any action to bring the treaty into force.[116] Once the text of a treaty has been tabled before the House of Commons along with an Explanatory Memorandum, and the period of 21 sitting days has passed, the government will consider concerns raised by the opposition. Afterwards, it will decide whether the treaty is to be ratified, or whether a legislation is to be introduced.[117]

In the case of Canada´s province Quebec, the Parliament of Quebec must approve the treaty before the government gives assent to it. The Parliament of Quebec is the only province that intervenes in the approval of treaties. This approval process takes place only when an agreement deals with a subject matter falling within the provincial jurisdiction. The Parliament of Quebec may approve or reject the treaty, but cannot change its text as this process takes place after the treaty has been signed by the Canadian government. The legislature is involved in the process of approving major international commitments by the Government of Quebec and goes beyond the powers of the Canadian Parliament.

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[115] European Parliament, Parliamentary Scrutiny of Trade Policies across the Western World, March 2019, at 33.

[116] See Government of Canada, Exceptions to Treaty Tabling Process, Policy on Tabling Treaties in Parliament, January 2008, Annex A, Section 6.3.

[117] See Government of Canada, Post Tabling, Policy on Tabling Treaties in Parliament, January 2008, Section 6.6.

Admittedly, the strengthening of the UK Parliament´s rights requires a departure from the Parliament´s narrowly defined parliamentary scrutiny. As previously mentioned, the *status quo* only allows reviewing trade agreements *after* signing for 21 sitting days and no meaningful opportunity to debate or vote. A more inclusive parliamentary approval process however responds to the political sensitivity of comprehensive trade agreements which are likely to impact Parliament´s sovereignty and domestic regulatory autonomy. Furthermore, the approval process of international trade agreement complements Parliament´s duty to transform the trade deal into domestic legislation. In contrast, excluding the UK Parliament from the approval stage has the potential to backfire on the UK Government´s trade policy at a later point of time.

Parliamentary Pushbacks in the Case of Non-Inclusion

The European Parliament has set a precedent for parliamentary scrutiny when it rejected the approval of the Anti-Counterfeiting Trade Agreement (ACTA) in 2012.[118] The parliamentary disapproval was preceded by poor inclusion of the European Parliament at the pre-negotiation and negotiation stage, although it had consistently urged for more information and inclusivity. Since the European Parliament is regularly informed about the progress of trade negotiations and transparency has been enhanced in this regard, the European Parliament has not rejected another trade agreement.

Similarly, in the context of NAFTA, the Canadian Government experienced a parliamentary pushback due to a lack of parliamentary inclusion in the treaty-making process. After it had successfully circumvented parliamentary involvement in the ratification process,[119] Parliament pushed general elections ultimately overturning the Government. The domestic disruptions severely endangered the successful conclusion of NAFTA-negotiations.

A potential backfire can, however, be avoided if Parliament is involved during the earlier stages and allowing it to air its grievances before the negotiations come to a close. Since many jurisdictions require parliamentary/legislative approval of (comprehensive) trade agreements, this democratic restraint does not hamper the UK's bargaining power in relation to its trading partner(s).

[118] European Parliament, Parliamentary Scrutiny of Trade Policies across the Western World, March 2019, at 17.
[119] Oliver Illot, Ines Stelk & Jill Rutter, Taking back Control of Trade Policy, Institute for Government, 2017, at 26.


Overview of Elements for the Approval Phase
Transparency
Accountability
Efficiency
1
Preliminary Report by Parliamentary Committees
2
Parliamentary Approval by Up or Down Vote

E. *Post*-Ratification Phase: Implementation and Reflection

The trade treaty-making process does not end with an agreement´s ratification through the executive, i.e. the UK Government, but includes a fourth phase: the *post*-ratification phase, in which it is the primary objective to implement the international obligations into domestic law. Further, it is crucial to analyze and reflect on the effects of the trade agreement. Whereas should have been addressed in an appropriate manner already before *post*-ratification phase, it is now to form a process that ensures effective and efficient implementation and reflection.

Element 1: Implementing Legislation by the UK Parliament

After ratification, the UK Parliament has to ensure that domestic law is in conformity with the international obligations set out in the trade agreement. This regularly requires statutory amendments of domestic laws. Even further, the UK's dualist system requires the UK Parliament to pass an implementing act to give the trade agreement full effect under domestic law.

Implementing Acts in Canada and the U.S.

In Canada, the dualist model requires the incorporation of a signed and ratified trade agreement in domestic law through parliamentary legislation. Only after implementation, the agreement may be domestically enforceable.[120] Aspects of a (comprehensive) trade agreement involving subject matters under the jurisdiction of the provinces or territories will be implemented by respective competent provincial institutions, but not by the federal government or parliament.[121]

In the U.S., the implementation legislation on trade agreements is conditioned on the President's ability to fulfill his/her notification duties, the submission requirements, and the implementing bill's enactment into law.[122] 30 days prior to entering into the agreement and afterwards, the President is required to send Congress (among other duties) a draft implementation bill, and a statement of administrative actions required to implement the bill.[123]

[120] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E, (revised on 6 November 2012), Library of Parliament.

[121] Canada (Attorney General) v Ontario (Attorney General), [1936] SCR 461 (JCPC).

[122] TPA, Section 6.

[123] TPA, Section 6(a)(d-e).

Element 2: Support of Devolved Administrations for Implementation

The devolved administrations are integral part of the UK and their active role in the *post*-ratification phase of the treaty-making process is thus indispensable. The DIT needs to notify the devolved administrations of the international obligations that UK as a whole has committed, and those that touch upon the legislative powers of the devolved parliaments and assemblies. DIT and relevant departments of the UK Government may advise and support devolved administrations in finding the best approaches to implement the international obligations in question. Assisting the devolved administrations will make the overall implementation process more efficient, and ensures coherence and consistency of implementing legislations passed by the UK Parliament and the legislative bodies of devolved administrations.

Cooperation between the Canadian Government and Provinces

In Canada, the *post*-ratification phase of international trade agreement starts with consultations between the federal government and the provincial or territorial governments. This kind of cooperation is necessary since the new generation of trade agreements is comprehensive and include various obligations which touch upon the jurisdiction of the provinces or territories.[124] If a subject matter of the treaty falls exclusively within the provincial or territorial jurisdiction and if it is essential to provincial autonomy, the Canadian Government may not invoke federal general power, but the legislative powers remain distributed.[125]

The UK Government, together with devolved administrations, may develop implementation guidelines utilizing past experiences, e.g. in the Devolved Administrations Trade Forum (see General Elements, Element 7).

Element 3: Conduct of Conformity Assessments

Having in mind the reputational importance of continually complying with negotiated and ratified agreements, the DIT and other relevant departments prepare a conformity assessment. To allow the devolved administrations a sufficient time frame to bring forward and craft their own implementing legislations, it seems appropriate to start the conformity assessment one year *after* the Government has notified the devolved administrations of their internal obligations deriving from the trade agreement.

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[124] Stéphane Paquin, Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA, 68 Int´l J. 545, 545-552 (2013).

[125] J. H. Aitchison, *The Political Process in Canada*, 1963, at 181.

Should the assessment discover any lack of conformity, the DIT and the other relevant departments conduct formal consultations and provide each devolved administration with a report on matters of non-compliance. The reports should include the particular portion of the agreement that has not been complied with, the reasons for non-compliance, and ways in which the particular devolved administration may achieve compliance. If the lack of conformity is due to external or internal economic changes, the Government may resort to relying on imbedded exceptions or economic safeguards provided for in the (comprehensive) free trade agreement.

Element 4: Conduct of *Ex Post*-Evaluations

Ex post-evaluations are another essential part of evidence-based trade policy-making. They function as a tool to ensure that the objectives and expectations pursued when entering into a (comprehensive) free trade agreement are met. Thus, it is to review and evaluate the effects of a (comprehensive) free trade agreement on the domestic economy and society from a micro- and macro-perspective. An evaluation may draw conclusions on the practical outcomes of a trade agreement.[126] In the UK, the Trade Investigation Commission (TIC), as an independent and research-focused agency (see General Elements, Element 4), appears to be most suitable to be tasked with preparing such evaluations. The TIC may conduct both (1) specific *ex post*-evaluations on newly concluded (comprehensive) free trade agreements and (2) general evaluations of all comprehensive free trade agreements that the UK has implemented. The conduct of these evaluations will enable the UK Government to further shape its trade policy and increase positive outcomes for the UK in future trade negotiations.

Ex Post-Evaluations in the EU and the U.S.

In the EU, the European Commission prepares two different sets of evaluations: (1) agreement specific reports, and (2) general reports analyzing the effects of all EU trade agreements in place. The European Commission´s annual reports on the general effects of implemented EU trade agreements[127] considers changes in trade in goods and services, its progress and outstanding issues on non-tariff barriers and rules, and the extent to which companies use tariff reductions and quotas. Based on this analysis, t the report establishes steps to overcome any identified challenges. The annual report is accompanied by a staff working document that analyzes each of the EU´s trade agreements.[128] The

[126] European Commission, Better Regulation Toolbox, at 315.

[127] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018.

[128] European Commission, Commission Staff Working Document, SWD(2018) 454 final.

agreement-specific analyses take concrete effects and challenges that occur in the context of the respective EU trade agreement into account.

In the U.S., the International Trade Commission must publish reports which are *not* agreement-specific but include a wide swath of information regarding the economic impact of *all* trade agreements concluded to date.[129] Generally, the publicly available report mirrors the agreement-specific reports and outlines the impact on: the U.S. economy as a whole; the particular impacts on intellectual property, international investment, and trade balances; the benefits to consumers; and any industry-specific impact models.[130]

Element 4a: Economic *Ex Post*-Evaluations

Comprehensive free trade agreements have the primary purpose to foster the economic integration of countries. Thus, separate *ex post*-evaluations with a specific focus on the economic implications of a trade agreement are of high importance. Given that reliable data on economic effects are regularly only available after a longer period of time, economic *ex post*-evaluations may be conducted three years after a (comprehensive) free trade agreement has entered into effect.

The *ex post*-evaluations are supposed to promote accountability and may provide the public and the UK Parliament with assurance that a concluded trade agreement still meets the expectations, i.e. successfully bolsters the domestic economy. However, they may also help to adjust certain aspects of the Government's trade policy, evidence the necessity to implement protectionist measures, or even the need to re-negotiate.

Element 4b: Special *Ex Post*-Evaluations

Since comprehensive trade agreements may include chapters on trade-related areas such as environmental or labor matters, evaluations may go beyond addressing the economic effects of an agreement, and may have a focus on, for example, environmental or social impacts as well. In light of the tangible effects of comprehensive free trade agreements, especially on civil society, the Trade Investigations Commission (TIC) may consult with representatives of NGOs and unions of both the UK and the UK´s trading partner(s) after the agreement has entered into force. To ensure transparency, it is crucial to make the *ex post*-evaluations available to both Parliament and the public.

[129] TPA, Section 5(f)(2).

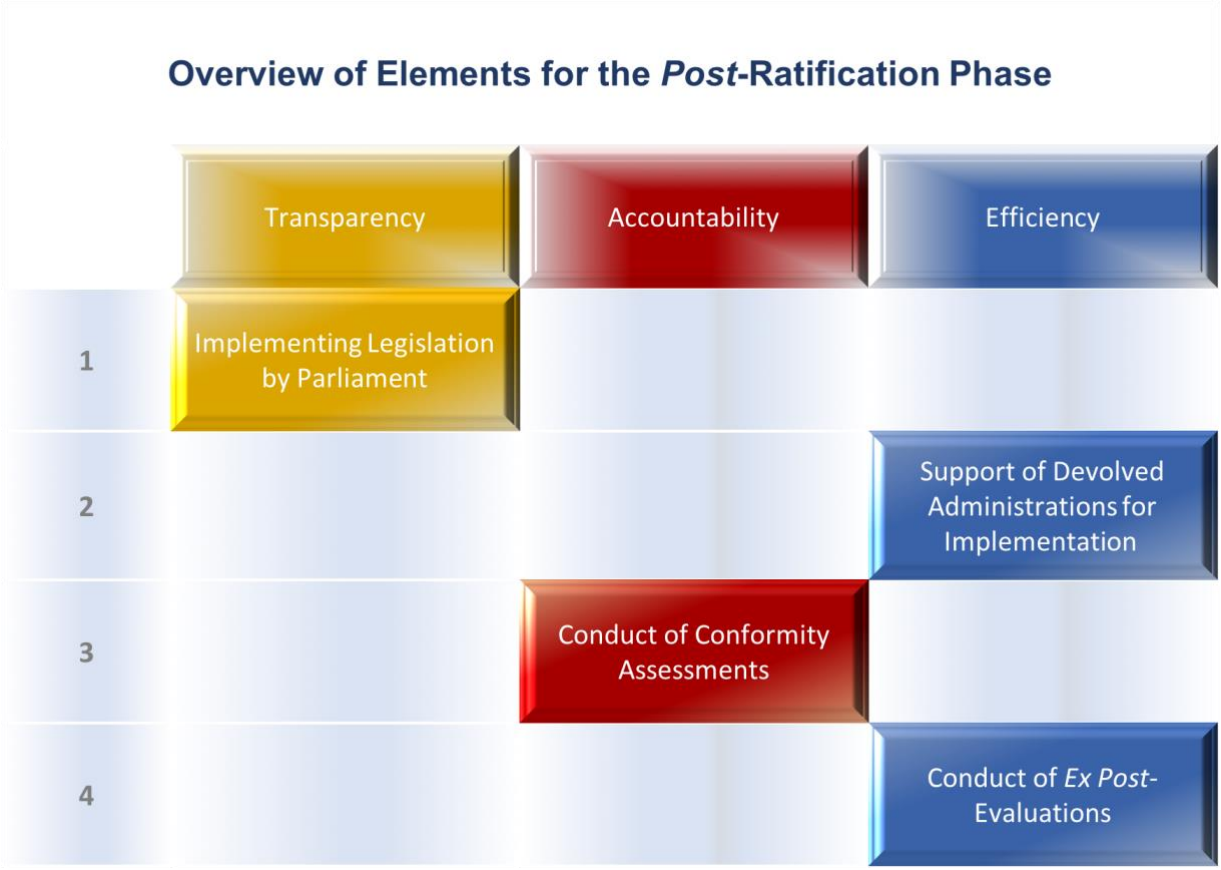
[130] U.S. International Trade Commission, Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2016.

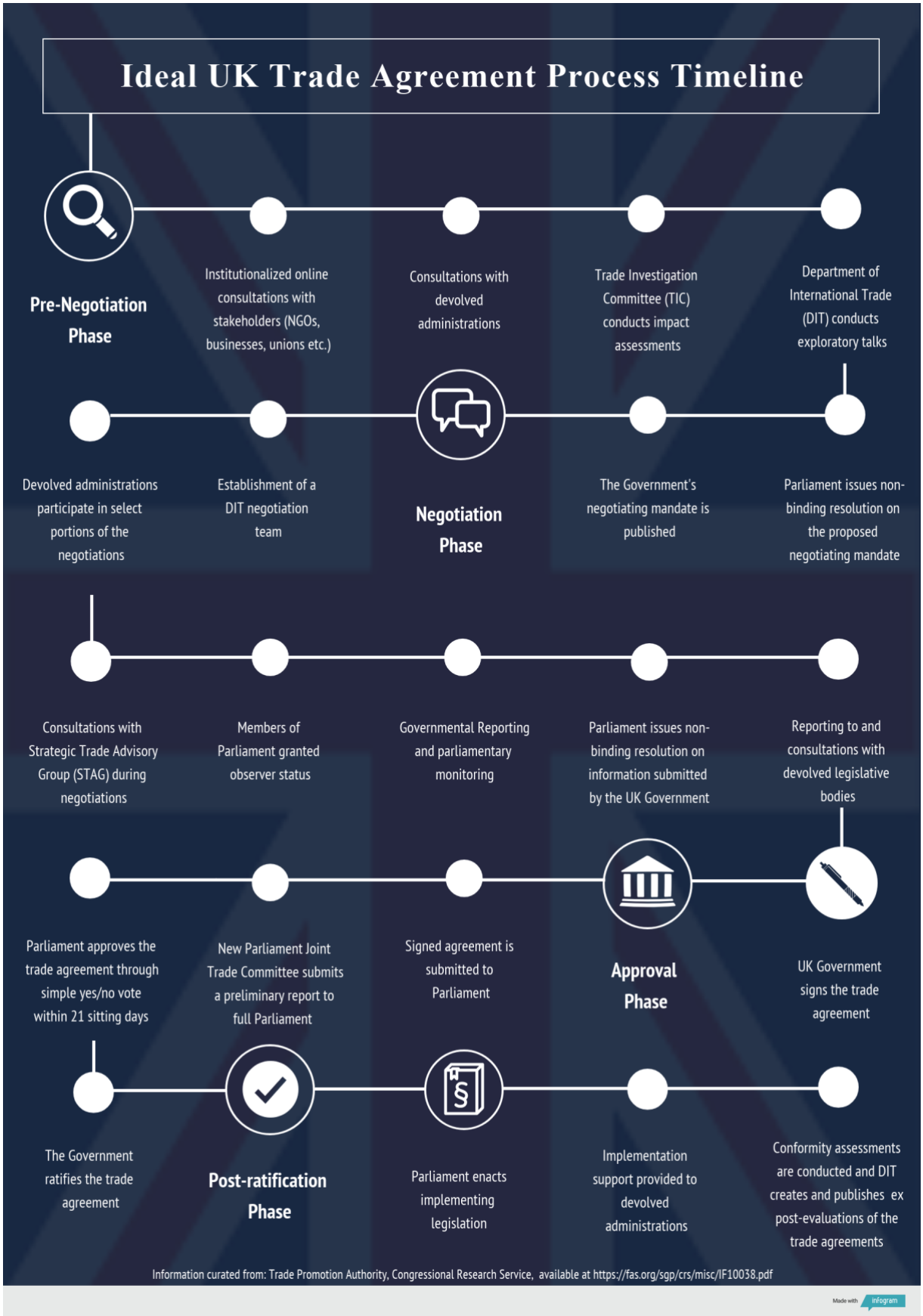
EU Domestic Advisory Groups (DAGs)

Following the EU-Korea FTA, the EU has established a new element in its trade treaty-making process. It has chosen to integrate civil society actors (also from the third country) during the *post*-ratification process of trade and sustainable development chapters of comprehensive free trade agreements via Domestic Advisory Groups (DAGs).

DAGs are composed of independent representative organizations of civil society and aim at equally representing business, labor and environment organizations. They meet in Civil Society Forums to discuss sustainable development aspects of the respective (comprehensive) trade agreement between the EU and a third country. DAGs are composed by up to 15 members and represent an institutionalized approach to give civil society, and especially civil society of the third country a voice.

In order to increase the efficiency of special *ex post*-evaluations, the TIC may want to confer with the Strategic Trade Advisory Group (STAG). Similarly to the EU´s Domestic Advisory Groups (DAGs), the TIC may benefit from the diversity of the proposed *core*-STAG, including representatives of businesses, unions, NGOs, academia and others (see General Elements, Element 6b). Further, hearings with STAG*plus* members appointed for the *post*-ratification phase, may be considered. Through the channels of STAG, the participation and contribution of civil society may help to promote continued exchange of information, ideas and concerns for special *ex post*-evaluations. Particularly STAG*plus* members, which are appointed for specific topics, may provide genuine insights on the effects of a particular (comprehensive) free trade agreement.


Overview of Elements for the *Post*-Ratification Phase
Transparency
Accountability
Efficiency
1
Implementing Legislation by Parliament
2
Support of Devolved Administrations for Implementation
3
Conduct of Conformity Assessments
4
Conduct of *Ex Post*-Evaluations


Ideal UK Trade Agreement Process Timeline
Pre-Negotiation Phase
Institutionalized online consultations with stakeholders (NGOs, businesses, unions etc.)
Consultations with devolved administrations
Trade Investigation Committee (TIC) conducts impact assessments
Department of International Trade (DIT) conducts exploratory talks
Devolved administrations participate in select portions of the negotiations
Establishment of a DIT negotiation team
Negotiation Phase
The Government's negotiating mandate is published
Parliament issues non-binding resolution on the proposed negotiating mandate
Consultations with Strategic Trade Advisory Group (STAG) during negotiations
Members of Parliament granted observer status
Governmental Reporting and parliamentary monitoring
Parliament issues non-binding resolution on information submitted by the UK Government
Reporting to and consultations with devolved legislative bodies
Parliament approves the trade agreement through simple yes/no vote within 21 sitting days
New Parliament Joint Trade Committee submits a preliminary report to full Parliament
Signed agreement is submitted to Parliament
Approval Phase
UK Government signs the trade agreement
The Government ratifies the trade agreement
Post-ratification Phase
Parliament enacts implementing legislation
Implementation support provided to devolved administrations
Conformity assessments are conducted and DIT creates and publishes ex post-evaluations of the trade agreements
Information curated from: Trade Promotion Authority, Congressional Research Service, available at https://fas.org/sgp/crs/misc/IF10038.pdf
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IV. Conclusion

By exiting the European Union, the UK has an unprecedented opportunity to craft a novel trade agreement scheme that can protect *and* bolster its economy and population. Concluding comprehensive free trade agreements demands not only meaningfully including Parliament and other stakeholders, but also allowing the UK Government to efficiently negotiate with their trading partner. The elements presented in this report may ensure the future UK trade agreement process would be transparent, accountable, and efficient.

Perhaps most importantly, the process presented advocates for Parliament's involvement during the pre-negotiation and negotiation phase. Given its legislative role and the domestic implications of comprehensive trade agreements, Parliament should be empowered to approve or reject (comprehensive) trade agreements, albeit through a simple up or down vote. The public only has two major means of recourse, should an agreement not balance stakeholder needs equitably, through protest or through Parliament. By involving Parliament throughout the treaty-making process, the scheme can ensure that there are mechanisms to hold the Government accountable, avoiding repeating recent backlashes. Further, a process that creates a meaningful two-way line of communication between negotiators and legislators could similarly prevent damaging stalemates.

The report also introduces several elements empowering various stakeholders with the opportunity to participate in the trade treaty-making process, ultimately ensuring transparent negotiations. Harnessing stakeholders' ideas while addressing their concerns helps the Department of International Trade (DIT) improve and adapt its negotiation strategy. Further, by allowing DIT to profit from expert advice of the Strategic Trade Advisory Group (STAG) during negotiations, the UK can craft strategic and mutually-beneficial agreements. Finally, the process introduces guidelines for interdepartmental communication. While this element appears to merely add bureaucracy, it ultimately ensures efficiency and promotes building intellectual capacity—an essential task given the UK's relative infancy negotiating trade agreements.

Incorporating elements bolstering transparency, efficiency, and accountability is essential to craft a balanced and inclusive trade agreement-making process. While the substance of a negotiated agreement is extremely important, in the end it is inoperable without a system that can help ensure its approval. Creating a unique process, such as the one this report has detailed, would help the United Kingdom successfully negotiate, approve, and implement modern comprehensive trade agreement with trading partners around the world.

V. Annex A: Case Study on the U.S. Trade Treaty-Making Process

A. The U.S.' International Trade Treaty-Making Process

The Trade Promotion Authority, formerly known as "Fast Track," was born out of the historical need to provide a singular and accountable voice on the world stage. Under Article II of the Constitution, the President and his executive branch have the exclusive authority to conduct foreign affairs, and negotiate treaties in particular.[131] While, the Constitution gave Congress the power to "regulate commerce with foreign nations" and to "lay and collect taxes, duties, imports and excises."[132] However, consequences stemming from the protectionist Smoot-Hawley Tariff Act in the early 1930s dictated a more diplomatic and stable approach to the administration of tariffs.

In order to alleviate some of the retaliation other countries had taken and reduce trade barriers, Congress implemented the antecedent to the modern bi-modal system: the Reciprocal Trade Agreements Act of 1934. The legislation allowed the President to act as the sole negotiator for bilateral trade agreements, politically bolstered by the main tenet of reciprocity and participation from the full Congress. While traditional international treaties required 2/3^{rds} vote from the Senate, this novel approach imposed only a simple majority from both the House and the Senate. Touting a more democratic mechanism for implementing international agreements, the RTAA and its subsequent iterations allowed duties on foreign goods to fall from about 46% in 1934 to an average of 12% by 1962.[133] Although couched by the President's foreign policy goals and his duty to protect the collective welfare of Americans, most have opted to take the power ceded by Congress to liberalize trade.

After domestic businesses began to value the broader access to other markets, Congress granted the President the authority to negotiate tariff reductions up to a record 80% through the passage of the Trade Expansion Act of 1962.[134] This subsequently allowed President Kennedy to not only negotiate bilateral agreements but to substantially participate in the new round of multilateral and non-tariff-specific trade negotiations under the auspices of the General Agreement on Tariffs and Trade [GATT]. Ultimately, Congress began to regret the broad extension of power they gave to the President and subsequently repealed portions of the hard-fought tariff and non-tariff barrier liberalization.[135] Although fully within their authority, Congress' second-guessing was ultimately viewed as damaging to the U.S.'s future credibility as an accountable negotiating partner. This ultimately led to the Trade Act of 1974, otherwise known as fast track, and the antecedent to the modern legislative-executive grant of authority that the U.S. utilizes today.

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[131] US Const. Art. II § 2.

[132] US Const. Art. I § 8.

[133] Michael Bailey & Weingast Goldstein, *The Institutional Roots of American Trade Policy*, World Politics, 309–38 (April 1997).

[134] 19 U.S.C. Ch. 7.

[135] The Cafta Conundrum, The Economist, (June 2005) http://www.economist.com/node/4079512.

B. The Legislative Scheme: Trade Promotion Authority

1. The Statutory Grant and Remnants of the Trade Act of 1974

While the Trade Act of 1974[136] has been modified on numerous occasions, the current system is a mere iteration of its parent legislation. Most notably, the renamed Trade Promotion Authority Act maintained the signature time constraints and up-down congressional vote. The constraint on congressional interference, by disallowing post-negotiation amendments and preventing member's ability to filibuster the implementation legislation, has become the hallmark protections that trading partners rely on to legitimize the conclusion of long-winded negotiations. As a temporary grant of power, each version is confined to a set time frame. However, it is generally qualified by maintenance of the status quo for those agreements already under negotiation. Although temporary in nature, some assert the President's need to request an extension of authority is a necessary step in order to promote efficiency, allow for modifications in foreign policy positions, and ensure active participation from Congress. The last iteration of the conferred power came in two pieces of legislation: the Bipartisan Congressional Trade Priorities and Accountability Act of 2015[137] ["TPA"] and the Trade Preferences Extension Act of 2015[138] ["TAA"]. In order for the President and the United States Trade Representative's office to deliver on their trade commitments, all branches of government must adhere to the strict statutory requirements in the applicable TPA.

In the executive branch, the persons and agencies involved with negotiating and implementing trade agreements are: the President, the United States Trade Representative, the International Trade Commission, the Department of Commerce, and industry or policy-related agencies.[139] The President, among other things, does the following: signs the trade agreement, issues the Statement of Administrative Action, signs the implementation bill after it has gone through the legislative process, and enacts the trade agreement by Presidential Proclamation.[140] The Office of the United States Trade Representative, or USTR, is an executive agency with the delegated authority to develop and coordinate the United States' trade policy.[141] Under the auspices of the Executive Office of the President, the head of USTR "serves as the president's principal trade advisor, negotiator, and spokesperson on trade issues."[142]

The United States International Trade Commission (USITC) is an independent and quasi-judicial agency with expansive investigative duties.[143] Its most notable contribution to the negotiation and consultation process is the "independent analysis, information, and support on matters of tariffs, international trade, and U.S. competitiveness" to the President, USTR, and Congress.[144] While they publish yearly impact reports on all aspects of trade, arguably the

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[136] Trade Act of 1974, Public Law 93–618, https://legcounsel.house.gov/Comps/93-618.pdf.

[137] Bipartisan Congressional Trade Priorities and Accountability Act of 2015**,** https://www.congress.gov/bill/114th-congress/senate-bill/995/text.

[138] Trade Preferences Extension Act of 2015, https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl.

[139] US Government Agencies, USTR, https://ustr.gov/about-us/trade-toolbox/us-Government-trade-agencies.

[140] Congressional Timeline, USTR, https://ustr.gov/Congressional-Timeline-TPP.

[141] About USTR, USTR, https://ustr.gov/about-us/about-ustr.

[142] About USTR, USTR, https://ustr.gov/about-us/about-ustr.

[143] About USITC, USITC, https://www.usitc.gov/press_room/about_usitc.htm.

[144] About USITC, USITC, https://www.usitc.gov/press_room/about_usitc.htm.

most utilized reports they create are the agreement-specific impact reports and the yearly reports it submits to Congress on the general utility of trade agreements.[145] Irrefutably, the reports have become the premier mechanism the President and USTR uses to determine whether the U.S. would benefit from more integrated market access. Further, given the agency's independent nature, the report USITC is required to submit to Congress within 105 days[146] of signing the trade agreement is utilized widely as a tool for members to decide whether to vote yes or no on the implementation bill.[147] The Department of Commerce, among other agencies, is generally tasked with aiding in implementation and enforcement of trade agreements.[148]

In the legislative branch, the House Ways and Means and the Senate Finance Committees both have primary jurisdiction over trade agreements. However, the entire Senate and House of Representatives will vote yes or no on: the President's implementation bill, the President's Statement of Administrative Action, and *de facto* the international agreement itself.[149] Although there are other opportunities for members of Congress to get involved in the trade negotiation and consultation process, the President and USTR must consult with both committees on a regular basis. As such, the longstanding history of both committees in conjunction with the member and staff's extensive trade experience have made these committees the most valuable asset for ensuring legislative success.[150] However, because the committees act as guardians of the TPA objectives, are steeped in trade knowledge, and are well aware of the political and practical effects of trade agreements, they are the most powerful "check" on the President and USTR.[151] Given the committees active role in the consultation and approval process, they will appear frequently in the current TPA legislative scheme discussion below.

The intertwined and statutorily-mandated relationship between the executive and legislative branches ensures consultations will occur before the negotiating parties sign the agreement and during the legislative process post-signature.[152] The remainder of this case study will delve deeper into the latest TPA and, where appropriate, discuss the pros and cons of the United States' unique process.

2. Congressional Oversight, Consultations, and Access to Information

While the authority conferred on the President and his negotiators is broad, it is couched by the three following statutory conditions: 1. the negotiating objectives, 2. the consultation and reporting requirements, and 3. the time-bound procedures for consideration.[153] As previously discussed, agreements negotiated under the statutory power cannot enter into force until: the President sends Congress the full legal text of the agreement,

[145] Research and Analysis, USITC, https://www.usitc.gov/research_and_analysis.htm.
[146] Congressional Timeline, USTR, https://ustr.gov/Congressional-Timeline-TPP.
[147] Former high-ranking staff member on House Ways and Means Committee.
[148] TPA, Section 5(e)(2)(b).
[149] Congressional Timeline, USTR, https://ustr.gov/Congressional-Timeline-TPP.
[150] Former high-ranking staff member on House Ways and Means Committee.
[151] Current high-ranking staff member on House Ways and Means Committee.
[152] Congressional Timeline, USTR, https://ustr.gov/Congressional-Timeline-TPP.
[153] *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties*, Congressional Research Service, 15 April 2013, https://fas.org/sgp/crs/misc/97-896.pdf.

the Statement of Administrative Action, and the agreement's implementation bill goes through the expedited enactment process.[154]

The negotiating objectives are generally available at the beginning of the Trade Promotion Authority legislation and divided into three component pieces: 1. the Overall Negotiating Objectives, 2. the Principal Trade Negotiating Objectives, and the 3. Other Objectives.

The Overall Negotiating Objectives are commonly broad policy goals, like obtaining "more open, equitable, and reciprocal market access," for example.[155] Although they are theoretically still constraints on the President's power to negotiate individual or politically-specific terms, they are not generally viewed as a powerful mechanism to prevent policy deviation given the broad language. The Principal Trade Negotiating Objectives, albeit not explicit mandates, are viewed as far more instructive given the sections mirror modern trade agreements and they are drafted using more conclusory language. For example, the third section regarding trade in agriculture instructs negotiators that agreements should seek "fairer and more open conditions of trade in bulk, specialty crop, and value-added commodities […] through more robust rules on sanitary and phytosanitary measures […]."[156] Lastly, Other Objectives have traditionally outlined policy views on topics such as labor or environmental concerns peripherally related to trade. Apart from the general requirement to adhere to the negotiating objectives, the President and his negotiators at the Trade Representative's office must comply with the various consultation and reporting requirements found in sections 4 and 5 of TPA.[157]

a) Consultations with Members of Congress

During the duration of the negotiation process, the United States Trade Representative [USTR], must "meet upon request with any Member of Congress regarding negotiating objectives, the status of negotiations in progress, [ ] the nature of any changes in the laws" and recommendations it has for Congress regarding the best way the U.S. can effectively and efficiently implement trade agreements.[158] Given that Members of Congress are deemed to have the security clearance necessary to view classified materials, USTR must also give access to "pertinent document relating to the negotiations" upon request.[159] Although members are provided access should they request it, the Act is careful to limit this duty to requests versus an affirmative duty to report on their own accord.

However, USTR is affirmatively required to "consult closely and on a timely basis" with both the House Ways and Means Committee and the Senate Finance Committee.[160] Further, under subsection D, USTR is also required to consult with the "House Advisory Group on Negotiations and the Senate Advisory Group on Negotiations convened under subsection (c) and *all* committees of the House of Representatives and the Senate with jurisdiction over laws

[154] Expedited procedures are set forth in Section 151 of the Trade Act of 1974, 19 U.S.C. § 2191, see also *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties*, Congressional Research Service, 15 April 2013, https://fas.org/sgp/crs/misc/97-896.pdf at 1.

[155] 19 USC 4021 § 102(a)(1).

[156] 19 USC 4021 § 102(b)(3).

[157] TPA, Section 3 (b)(2).

[158] TPA, Section 4 (a)(1)(a).

[159] TPA, Section 4 (a)(1)(b).

[160] TPA, Section 4 (a)(1)(c).

that could be affected by a trade agreement resulting from the negotiations."[161] While there are multiple subcommittees with jurisdiction, activism in these committees have slowed over time as Congresspersons and their staff are less educationally-equipped to provide meaningful discussion surrounding the ever-complicated aspects of trade.

b) Designated Congressional Advisers

In an attempt to garner the participation from a larger swath of congresspersons, the Act allows for members to be "designated as a congressional adviser on trade policy and negotiations" provided they consult with the respective leader of the entire body and the primary committee person.[162] This allows members interested in trade policy, that were not afforded a spot on either primary committees of jurisdiction, an opportunity to enjoy the USTR's affirmative duty to report, consult.[163] Further, they may act as an accredited "official adviser to the United States delegations to international conferences, meetings, and negotiating sessions relating to trade agreements."[164] Although subject to political influences, this is another mechanism by which the U.S. system has injected congressional scrutiny and transparency as between the two branches involved.

c) Congressional Advisory Groups on Negotiations

Given the likelihood of changes in sentiment toward particular agreements, new congressional advisory groups are convened no later than 30 days after each Congress is assembled.[165] The advisory committees in both the House and Senate are comprised of the chairperson and the ranking member of each committee of primary jurisdiction,[166] three other members from those committees, and any chairperson and ranking member of another committee that would have jurisdiction over the laws affected by the trade agreement undergoing negotiation.[167] Identical to a designated congressional adviser discussed above, each member serving on either advisory group is similarly accredited.

USTR, with the chairmen and ranking member's help, are required to draft written guidelines aimed at facilitating an efficient consultation process.[168] Per the legislation, the guidelines must include the following provisions: 1. detailed negotiating objectives, to be accomplished on a "fixed timetable" and modified as negotiations come to a close; 2. rules regarding access to relevant negotiation documents, subject to security clearances; 3. guidelines for practical coordination at each step of negotiation; 4. procedures for ensuring compliance and enforcement after the agreement has entered into effect; and 5. the timeframe associated with the report detailing changes in trade laws.[169] Notably, should a majority of

[161] TPA, Section 4 (a)(1)(d).
[162] TPA, Section 4 (b)(1)(a-b).
[163] TPA, Section 4 (b)(2).
[164] TPA, Section 4 (b)(3).
[165] TPA, Section 4 (c)(1).
[166] The committees of primary jurisdiction are the House Ways and Means committee and the Senate Finance Committee, see TPA, Section 4 (c)(2).
[167] TPA, Section 4 (c)(2).
[168] TPA, Section 4 (c)(3)(a).
[169] TPA, Section 4 (c)(3).

either advisory committee agree, the President is required to meet with such group regarding a particular agreement at any stage of the negotiating process.[170]

d) Consultations with the Public

In an effort to "facilitate transparency, encourage public participation, and promote collaboration in the negotiation process," the chairpersons and ranking members of each primary jurisdiction committee and the USTR have published guidelines on access to negotiation information.[171] The guidelines must provide both a means for quick disclosure in a form that is easily accessible and allow for "frequent opportunities for public input through Federal Register requests for comment and other means."[172] The Federal Register is the mechanism USTR uses to publish upcoming events, Congressional hearings, and solicit commentary regarding any particular agreement.[173] In theory, USTR's public stakeholder events are an opportunity for businesses, the general public, and non-governmental organizations to "make proposals, give critiques, and hear responses from U.S. negotiators."[174] However, almost all events are in Washington, D.C. and unsurprisingly all congressional hearings are within the district as well.

The Federal Register will release a summary, important upcoming dates, and the various aspects of the particular trade agreement or target future relationship that USTR would like public comment.[175] This is released approximately a month after the President has given notice of his intent to negotiate.[176] From the date the Federal Register publishes USTR's request for comment, stakeholders are generally allowed two months to submit their responses and must notify USTR their intent to testify within the same time frame.[177] Albeit in an effort to ensure efficiency, USTR requests the use of a separate online submission website.[178] Most of USTR's press releases detailing the date, time, and locations of hearings are issued a mere day before the event is scheduled to take place.[179] While this particular process is in reference to the pre-negotiation phase of crafting trade agreements, it is the same or similar process for other public comment requests.

Despite the technical transparency, current access to this type of information can only be found by undergoing a maze of clicks through the Federal Register's website or by unintuitive searches on USTR's comparatively barren site. Whereas under President Obama there was a conscious effort to address the digital inadequacies and relative D.C.-exclusivity

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[170] TPA, Section 4 (c)(4).

[171] TPA, Section 4 (d)(1-2).

[172] TPA, Section 4 (d)(3).

[173] Guidelines for Consultation and Engagement, USTR, 27 October 2015, https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf.

[174] Guidelines for Consultation and Engagement, USTR, 27 October 2015, https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf.

[175] Request for Comments, Federal Register, https://www.federalregister.gov/documents/2018/11/16/2018-24987/request-for-comments-on-negotiating-objectives-for-a-us-united-kingdom-trade-agreement.

[176] Request for Comments, Federal Register, https://www.federalregister.gov/documents/2018/11/16/2018-24987/request-for-comments-on-negotiating-objectives-for-a-us-united-kingdom-trade-agreement.

[177] Request for Comments, Federal Register, https://www.federalregister.gov/documents/2018/11/16/2018-24987/request-for-comments-on-negotiating-objectives-for-a-us-united-kingdom-trade-agreement.

[178] Request for Comments, Federal Register, https://www.federalregister.gov/documents/2018/11/16/2018-24987/request-for-comments-on-negotiating-objectives-for-a-us-united-kingdom-trade-agreement.

[179] Public Hearing Negotiating, USTR, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/public-hearing-negotiating.

issue, President Trump's Administration has not released any updated memoranda on their unique efforts to mitigate these issues.[180] Despite the obvious room for improvement, the system is generally viewed as a transparent and inclusive mechanism for the President, USTR, and Congress to collaborate with the public prior to and during the negotiation process.[181]

e) Consultations with Advisory Committees

Not to be confused with Congressional Advisory Committees, this type of advisory committee is comprised of persons in the private sector.[182] Although the overall guidelines for engaging with the advisory committees are outlined in the newest TPA, the rules regarding the establishment of varying types of committees are found in section 135 of the Trade Act of 1974.[183] In general, the President is required to obtain information and guidance from the affected sectors regarding various strategic bargaining positions, the effect of dispute resolution mechanisms included in modern agreements, and other consequences resulting from the "development, implementation, and administration of the trade policy of the United States."[184] Bearing in mind that these consultations should occur prior to the official commencement of negotiations, the President is the ultimate authority regarding the weight of their advice in light of the U.S.'s overall trade policy goals.[185]

Whereas more specific industry committees may be formed, the President is obligated to establish an Advisory Committee for Trade Policy and Negotiations.[186] The 45-person committee must include "representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, nongovernmental environmental and conservation organizations, and consumer interests." [187] USTR must recommend each member, without regard to political affiliation, and will be appointed by the President for a 4-year term or the remaining duration of the committee.[188] While comprised of similar high-level persons, the President may form General Policy Advisory Committees in order to receive more niche expertise during the negotiation process.[189]

Although the legislation requires the committees to be comprised of representatives from all industries, it does not impart an explicit requirement as to size or type of company nor the role in which the person plays in that particular sector. In practice, persons appointed are generally heads of large companies or thought leaders related to the agreement under negotiation. However, the legislation stipulates that private organizations or various groups representing all sectors, including small businesses generally, must have adequate and continuous opportunities to submit informal data or opinions.[190] Further, Congress saw fit to create a position within USTR—Assistant United States Trade Representative for Small

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[180] Guidelines for Consultation and Engagement, USTR, 27 October 2015, https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf.

[181] Former high-ranking staff member on House Ways and Means Committee.

[182] TPA, Section 4 (e).

[183] Trade Act of 1974 19 U.S.C. § 2155, at http://uscode.house.gov/quicksearch/get.plx?title=19&section=2155.

[184] Trade Act of 1974 19 U.S.C. § 2155 (a)(1)(c).

[185] Trade Act of 1974 19 U.S.C. § 2155 (a).

[186] Trade Act of 1974 19 U.S.C. § 2155 (b-c).

[187] Trade Act of 1974 19 U.S.C. § 2155 (b).

[188] Trade Act of 1974 19 U.S.C. § 2155 (b).

[189] Trade Act of 1974 19 U.S.C. § 2155 (c).

[190] Trade Act of 1974 19 U.S.C. § 2155 (j).

Business, Market Access, and Industrial Competitiveness—intended to be mindful of effects current trade negotiations or agreements would have on small businesses.[191]

Once negotiations have come to a close, the Advisory Committee for Trade Policy and Negotiations and any other committees formed that represent affected sectors must compose a report detailing "what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives… [and] whether the agreement provides for equity and reciprocity within the sector or within the functional area."[192] The report must be submitted to USTR, Congress, and the President no later than 30 days after the President has notified Congress of his intent to enter into the agreement.[193] While USTR and other agencies affected by the particular trade agreements are bound to implement consultation procedures with the public, they are not bound by the committees' recommendations and simply required to notify the relevant advisory boards should the negotiations significantly depart from the advice given.[194]

f) The Chief Transparency Officer

In response to USTR's reluctance to share particular documents or maintaining an open line of communication between the branches, Congress saw fit to create a new Office within USTR.[195] The Chief Transparency Officer must "consult with Congress on transparency policy, coordinate transparency in trade negotiations, engage and assist the public, and advise the United States Trade Representative on transparency policy."[196] Given that this position is a new feature of the latest trade promotion authority, it has yet to be seen whether this office has enhanced transparency as between the two branches of government.[197]

Most notably, although a Congressionally-created position, the President and USTR have the power to appoint whomever they deem is fit for the job.[198] Given that the new position was created during the Obama administration, President Trump acted within his authority to remove then acting Officer: Mr. Timothy Reif. However, the President has yet to name a successor, thereby leaving the office empty. Although there has been discussion of naming the newly sworn-in Deputy United States Trade Representative Mr. C.J. Mahoney, the President has yet to move forward with such action.[199] Despite the new feature's relatively innocuous nature within the Trade Promotion Authority grant of power, congresspersons have frequently asserted that the President's failure to appoint someone to the position constitutes

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[191] TPA, Section 9.

[192] Trade Act of 1974 19 U.S.C. § 2155 (e).

[193] Trade Act of 1974 19 U.S.C. § 2155 (e).

[194] Trade Act of 1974 19 U.S.C. § 2155 (i).

[195] TPA, Section 4 (f).

[196] TPA, Section 4 (f).

[197] Trade Promotion Authority (TPA): Frequently Asked Questions, Congressional Research Service, 13 February 2019, at https://fas.org/sgp/crs/misc/R43491.pdf.

[198] *Dingell, Pascrell Demand Increased Transparency at USTR*, Press Release, 29 March 2018, https://debbiedingell.house.gov/media-center/press-releases/dingell-pascrell-demand-increased-transparency-ustr.

[199] *Lighthizer swears in Mahoney for deputy USTR sl*ot, Inside Trade, 13 March 2018, https://insidetrade.com/trade/lighthizer-swears-mahoney-deputy-ustr-slot.

a breach of his duties under the legislative scheme.[200] Should Congress agree, on a simple majority basis, that the President has not adhered to the conditions of their grant of negotiating power, they can revoke the "fast track" approval and voting benefits.[201]

Although the language appears somewhat vague regarding the duty to consult and coordinate transparency between the two branches, various congresspersons in both the Democratic and Republican parties have alluded that ensuring access to up-to-date negotiation text falls within the purview of the Officer.[202] Congresswoman Dingell went so far as to introduce a bill, H.R. 3339, seeking to amend the most recent Trade Promotion Authority and compelling USTR to publish certain texts for trade agreements negotiated under that Act and add new appointment requirements for the Chief Transparency Office.[203] The most notable modification would foreclose the "dual-hatting" practice, or appointing persons with multiple titles within the same branch.[204] Specifically, "the individual who is appointed the Chief Transparency Officer [can]not, because of any other position the individual holds or otherwise, have, or appear to have, any conflict of interest in ensuring the transparency of the activities of the Office of the Trade Representative, including trade negotiations."[205]

As the deadlock suggests, the Chief Transparency Officer tasked with ensuring Congress's interests are most adequately met should not be appointed by the Executive branch seeking to keep Congress at an arm's length. Again, the Constitutional constraints within the U.S. with the ultimate purpose of creating a new office that reports directly to Congress—not the Executive, is not a logical match. Should another government without identical separation of powers concerns want to emulate the Chief Transparency Office, it would be wise to allow the legislative body to appoint whomever they wish to ensure the office's mandate is met within their Executive branch equivalent. Such person should also be exclusively devoted to that office and not hold multiple titles, regardless of where the person is pulled from—i.e. legislative or executive branches.

3. Notice and Reports

With respect to any agreement modifying tariff and non-tariff barriers,[206] prior to negotiation the President is obligated to: give 90-days-notice to Congress of his intent to negotiate; consult with both committees of primary jurisdiction and others deemed appropriate prior to and after giving notice; and meet with either or both Congressional Advisory Groups should a majority of members see fit.[207] He is also required to, at least 30 days prior to entering into negotiations, publicly publish on the USTR's website "a detailed and comprehensive

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[200] *Dingell, Pascrell Demand Increased Transparency at USTR*, Press Release, 29 March 2018, https://debbiedingell.house.gov/media-center/press-releases/dingell-pascrell-demand-increased-transparency-ustr.

[201] *Dingell, Pascrell Demand Increased Transparency at USTR*, Press Release, 29 March 2018, https://debbiedingell.house.gov/media-center/press-releases/dingell-pascrell-demand-increased-transparency-ustr.

[202] *USTR 'consulting with Congress' on who serves as chief transparency officer*, Inside Trade, 24 Aug. 2017, https://insidetrade.com/share/160003.

[203] Dingell et. al, H.R. 3339, 20 July 2017, https://www.congress.gov/bill/115th-congress/house-bill/3339/text.

[204] *USTR 'consulting with Congress' on who serves as chief transparency officer*, Inside Trade, 24 Aug. 2017, https://insidetrade.com/share/160003.

[205] Dingell et. al, H.R. 3339, 20 July 2017, https://www.congress.gov/bill/115th-congress/house-bill/3339/text.

[206] These types of agreements that require notification are further defined in Section 3(b) of the TPA.

[207] TPA, Section 5(a)(1).

summary of the specific objectives with respect to the negotiations, and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States."[208] There are unique reporting and consultation requirements should current trade agreements touch on agriculture,[209] fishing,[210] textiles,[211] and international investment treaties.[212]

Prior to entering into a trade agreement, the President is required to consult with all Congressional committees enumerated above to discuss the: "a. the nature of the agreement; b. how and to what extent the agreement will achieve the applicable purposes, policies, priorities, and objectives of [the] Act; and c. the implementation of the agreement under section 6, including the general effect of the agreement on existing laws."[213] The President is also obligated to report to both the House Ways and Means and the Senate Finance committees, no less than 180 days before entering into an agreement, the range of offers proposed, and how they related to the three objectives types.[214]

Also within the 90-day time frame, the President must notify and consistently update the International Trade Commission on the details of the agreement.[215] The purpose of keeping the lines of communication open, is so the Commission can prepare and submit the impact of the agreement on the U.S. economy to the President and Congress.[216] After no more than 105 days have passed since the President has announced his intent to negotiate, USITC must publicly publish the report.[217] The most recent impact report published details the impact of the Trans Pacific Partnership Agreement commenced under President Obama.[218] Given the modern trend to negotiate expansive and broad trade agreements on a multilateral basis, the TPP impact report serves as an ideal model.

Chapter 1 of the document outlines the scope, the organization of the report, a general overview of the agreement itself, and a regional review of the countries interested in joining the TPP.[219] Chapter 2 reveals the quantitative modeling results of the economy-wide effects, broad sector effects, and the particular industry effects.[220] Given the broad effects to food and agricultural products, chapter 3 is exclusively devoted to breaking down the impacts on: imports and exports; an overview of the market access provisions; and sector-specific analysis on goods ranging from dairy products to seafood.[221] Chapter 4 includes the agency's assessment of the TPP's effect on manufactured goods, natural resources, and energy

[208] TPA, Section 5(a)(1)(D).
[209] TPA, Section 5(a)(2).
[210] TPA, Section 5(a)(3).
[211] TPA, Section 5(a)(4).
[212] TPA, Section 5(a)(5).
[213] TPA, Section 5(b)(1).
[214] TPA, Section 5(b)(3).
[215] TPA, Section 5(c)(1).
[216] TPA, Section 5(c)(2).
[217] TPA, Section 5(c)(1).
[218] USITC Publication Library, https://www.usitc.gov/commission_publications_library.
[219] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.
[220] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.
[221] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.

products while emulating the degree of specificity and structure of chapter 3.[222] Chapter 5 takes a deep dive into the U.S. services industry and explains the TPP provisions and how negative service commitments are applied.[223] Again, recent international trade agreements include commitments far beyond modifying tariff bindings. As such, chapter 6 includes an assessment of those "cross-cutting and procedural provisions and other provisions addressing rules and nontariff measures."[224] The appendixes include the notice document, hearing documents, the various nonconforming measures that would need to change, more quantitative analysis of the effect liberalization would cause, and summaries of comments from external parties.[225]

However, the agreement-specific document is not the only report that the International Trade Commission must publish. This other document is *not* agreement-specific but includes a wide swath of information regarding the economic impact of *all* trade agreements concluded to date.[226] This report must be made available publicly[227] and sent no later than one year after the Trade Promotion Authority Act has entered into force and no later than five years post-enactment.[228] Generally, the report mirrors the agreement-specific reports and outlines the impact on: the U.S. economy as a whole; the particular impacts on intellectual property, international investment, and trade balances; the benefits to consumers; and any industry-specific impact models.[229]

Chapter 1 usually details the scope of the report, data related to international trade trends, the economic modeling that the report will use, and outlines the rest of the document.[230] Chapter 2 includes a critique of the trade agreement's provisions and effect on particular sectors, usually in the same order of modern trade agreements, i.e. starting with agriculture and ending with government procurement.[231] Chapter 3 includes a deeper dive into numerical impacts of the trade agreement.[232] While chapter 4 includes case studies such as: the effect NAFTA will have on the avocado industry or the impact of the Yarn-Forward Rule of Origin on the textile industry.[233] The final chapter includes a survey of prior reports, treaty-specific impacts, and a broad response to the effect of bilateral versus multilateral trade agreements.[234]

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[222] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.

[223] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.

[224] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.

[225] Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, USITC, May 2016, https://www.usitc.gov/publications/332/pub4607.pdf.

[226] TPA, Section 5(f)(2).

[227] TPA, Section 5(c)(4).

[228] TPA, Section 5(c)(2).

[229] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

[230] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

[231] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

[232] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

[233] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

[234] Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, *International Trade Commission*, 2016, https://www.usitc.gov/publications/332/pub4614.pdf.

The International Trade Administration [ITA], publishes various reports on agreement-specific impacts.[235] The Office of Trade Negotiations and Analysis conducts "industry-specific sector reports for the agreements highlighting the effects of the agreement on those industries' market access in the partner markets."[236] Notably, the Office of Trade and Economic Analysis scrutinizes how third countries, or agreements to which the United States it not a party to, will affect the American economy.[237]

Included with the final legal text submitted to Congress and the Congressional Committees, the President must produce public impact reports on the environment,[238] employment,[239] and labor rights.[240] Concurrently, he is required to submit and make public an implementation and enforcement plan outlining in particular: 1. border personnel requirements, 2. agency staffing requirements, 3. Customs infrastructure requirements, 4. Impact on state and local governments, 5. budgetary analysis and requests.[241]

There are other reports required once an agreement has been concluded and a report regarding the impact of the grant of negotiation authority itself.[242] Otherwise termed *sunset reports*, the President is required to reassess after the one-year mark whether particular penalties or remedy allowed by a trade agreement were "effective in changing the behavior of the targeted party and whether the penalty or remedy had any adverse impact on parties or interests not party to the dispute."[243] He is also required to submit yearly reports to the committees of primary jurisdiction regarding enforcement conduct and its legal basis required under trade agreements.[244] The appendixes include copies of the Federal Register notice, list of hearing witnesses, and summaries of interested parties.

Although all aspects of the notice and reporting requirements are technically transparent, or available publicly, the documents are spread across number agencies. As such, one hoping to keep abreast of hearings, Presidential comments, or agency impact reports would have to assume the appropriate place and peruse the catacombs of documents using strategic search terms. That being said, Congress is likely familiar with this type of cross-agency spread of information. It is those new comers or unfamiliar business leaders that would suffer from the legally compliant but practically ineffectual delivery of information.

4. Approval Phase: the Voting Mechanism

One of the hallmark features of the Trade Promotion Authority are the limitations it places on Congress's ability to amend and slow-down the legislation approval process. TPA requires both the House and the Senate to introduce the implementing bill provided by the

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[235] Trade Agreements, *International Trade Administration*, last updated 2 Nov. 2017, https://www.trade.gov/mas/ian/tradeagreements/index.asp.

[236] Trade Agreements, *International Trade Administration*, last updated 2 Nov. 2017, https://www.trade.gov/mas/ian/tradeagreements/index.asp.

[237] Trade Agreements, *International Trade Administration*, last updated 2 Nov. 2017, https://www.trade.gov/mas/ian/tradeagreements/index.asp.

[238] TPA, Section 5(d)(1).

[239] TPA, Section 5(d)(2).

[240] TPA, Section 5(d)(3).

[241] TPA, Section 5(e).

[242] TPA, Section 5(f).

[243] TPA, Section 5(f)(1).

[244] TPA, Section 5(f)(3).

President.[245] Further, it is referred to the primary committees of jurisdiction and automatically discharged out of their committees after 45 in-session days have passed and must be voted on within 15 days of its discharge.[246] Most notably, there can be no amendments to the implementation bill and both the House and the Senate are confined to only 20 hours of debate on the issue.[247] With an up or down simple majority vote, the implementation bill is either enacted and is sent to the President for signature or goes back to the negotiators for further refinement.[248] The limitations and time constraints results in the completion of entire process in a mere 90 legislative days.[249]

5. Implementation and Enforcement Phase

The implementation of trade agreements is conditional on the President's ability to fulfill his notification duties, the submission requirements, and the implementing bill's enactment into law.[250] He is first required to notify Congress and the Federal Register of his intent to enter into an agreement within 90 calendar days.[251] He must then make the final text of the agreement available on the USTR's website and provide Congress with a report outlining the expected changes to U.S. law, both within 60 days.[252] Both 30 days prior to entering into the agreement and afterwards, the President is required to send Congress: 1. a copy of the final legal text, 2. a draft implementation bill, and 3. a statement of administrative actions required to implement the bill.[253] After the implementation bill is enacted and 30 days prior to entry into force, the President must report to Congress whether the other trade partners have "taken measures necessary to comply with those provisions of the agreement that are to take effect on the date on which the agreement enters into force."[254]

C. General Benefits and Critiques of the US System

The purpose of Congress's grant of negotiation power to the Executive is to promote a singular voice on the global stage. It is generally accepted that TPA has accomplished that goal by affording trading partners the assurance that negotiations will not be derailed by a wider swath of opinions in Congress.[255] Regardless, there is a general sense within the

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[245] Trade Act of 1974 § 2191(c).

[246] Brainard and Shapiro, *Fast Track Trade Promotion Authority*, Brookings Institute, (December 2001) 3, https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf.

[247] Trade Act of 1974 §2191(d), *see also* Brainard and Shapiro, *Fast Track Trade Promotion Authority*, Brookings Institute, (December 2001) 3, https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf.

[248] Renew Trade Promotion Authority, Department of Commerce, https://www.uschamber.com/issue-brief/renew-trade-promotion-authority.

[249] Congressional Timeline, USTR, https://ustr.gov/Congressional-Timeline-TPP, see also, Brainard and Shapiro, *Fast Track Trade Promotion Authority*, Brookings Institute, (December 2001) 3, https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf.

[250] TPA, Section 6.

[251] TPA, Section 6(a)(1).

[252] TPA, Section 6(a)(b).

[253] TPA, Section 6(a)(d-e).

[254] TPA, Section 6(a)(f-g).

[255] Brainard and Shapiro, *Fast Track Trade Promotion Authority*, Brookings Institute, (December 2001) 3, https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf.

Republican and Democratic Parties that both branches of government are bound to work in tandem in order for generate, pass, and enforce a trade agreement.[256]

While the American consultation system can prove unfruitful without persons at least minimally versed in trade, it is often celebrated for its institutionalized and generally inclusive consultation procedure.[257] In particular, the committees of primary jurisdiction have proved to be a valuable conduit between USTR and Congress given their continuous involvement, high access to various agency data, and staff steeped in trade experience.[258] However, congressional subcommittees and non-governmental advisory groups become largely superfluous when there are few people with sophisticated enough trade knowledge to conduct meaningful two-way consultations.[259]

What appears to be without major disagreement is the value in the legislative expiration date associated with each grant of trade negotiation authority.[260] Although most view the expiration as an integral "check" on the President's power to negotiate, some believe the power to modify each new TPA has gone unused.[261] While Section 4 of the latest TPA requires Congress to collectively create fresh negotiating objectives, the common practice has been to simply copy-paste prior iterations.[262] Congress, given the highly political nature of trade agreements, tend to make minor changes to language and relegate more controversial policy objectives to the third "Other Objectives" portion.[263] Though this practice may be viewed as strategically vague, some have argued that both Congress's and USTR's failure to consistently reevaluate the potency of the language has reduced the objectives to empty words instead of a meaningful guide.[264] Given the President and USTR are mandated to follow all three objectives, some also contend that their failure to draft more concrete language weakens Congress' ability to hold the President and USTR accountable for any failure to adhere to the mandates.[265]

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[256] Brainard and Shapiro, *Fast Track Trade Promotion Authority*, Brookings Institute, (December 2001) 3, https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf.

[257] Former high-ranking staff member on House Ways and Means Committee.

[258] Former high-ranking staff member on House Ways and Means Committee and multiple current high-ranking staff members on House Ways and Means Committee and Senate Finance Committee.

[259] Former high-ranking staff member on House Ways and Means Committee.

[260] Former high-ranking staff member on House Ways and Means Committee and multiple current high-ranking staff members on House Ways and Means Committee and Senate Finance Committee.

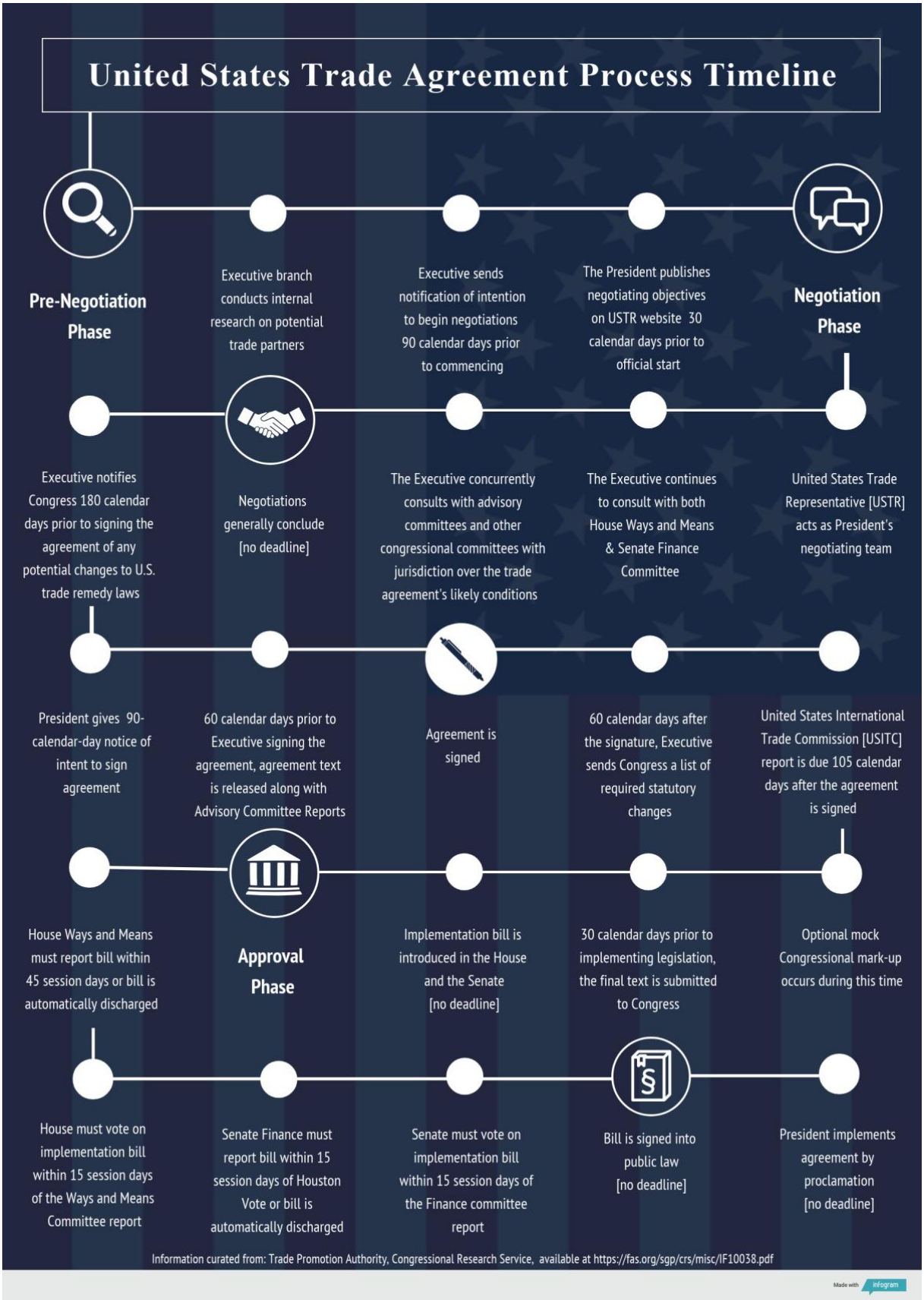
[261] Former high-ranking staff member on House Ways and Means Committee.

[262] Former high-ranking staff member on House Ways and Means Committee.

[263] Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Section 4 (a)(3)(a) and former high-ranking staff member on House Ways and Means Committee.

[264] Former high-ranking staff member on House Ways and Means Committee and multiple current high-ranking staff members on House Ways and Means Committee and Senate Finance Committee.

[265] Former high-ranking staff member on House Ways and Means Committee and multiple current high-ranking staff members on House Ways and Means Committee and Senate Finance Committee.


United States Trade Agreement Process Timeline
Pre-Negotiation Phase
Executive branch conducts internal research on potential trade partners
Executive sends notification of intention to begin negotiations 90 calendar days prior to commencing
The President publishes negotiating objectives on USTR website 30 calendar days prior to official start
Negotiation Phase
Executive notifies Congress 180 calendar days prior to signing the agreement of any potential changes to U.S. trade remedy laws
Negotiations generally conclude [no deadline]
The Executive concurrently consults with advisory committees and other congressional committees with jurisdiction over the trade agreement's likely conditions
The Executive continues to consult with both House Ways and Means & Senate Finance Committee
United States Trade Representative [USTR] acts as President's negotiating team
President gives 90-calendar-day notice of intent to sign agreement
60 calendar days prior to Executive signing the agreement, agreement text is released along with Advisory Committee Reports
Agreement is signed
60 calendar days after the signature, Executive sends Congress a list of required statutory changes
United States International Trade Commission [USITC] report is due 105 calendar days after the agreement is signed
House Ways and Means must report bill within 45 session days or bill is automatically discharged
Approval Phase
Implementation bill is introduced in the House and the Senate [no deadline]
30 calendar days prior to implementing legislation, the final text is submitted to Congress
Optional mock Congressional mark-up occurs during this time
House must vote on implementation bill within 15 session days of the Ways and Means Committee report
Senate Finance must report bill within 15 session days of Houston Vote or bill is automatically discharged
Senate must vote on implementation bill within 15 session days of the Finance committee report
Bill is signed into public law [no deadline]
President implements agreement by proclamation [no deadline]
Information curated from: Trade Promotion Authority, Congressional Research Service, available at https://fas.org/sgp/crs/misc/IF10038.pdf
Made with infogram

VI. Annex B: Case Study on the Canadian Trade Treaty-Making Process

A. Legal Authority for Treaty-Making

For historical reasons, the Constitution of Canada does not explicitly grant the treaty making power to the executive branch of the federal government.[266] Over time, the power to enter into treaties which is a royal prerogative has devolved on the executive branch which fulfills these functions on behalf of the crown, as its representative.[267] Only the executive branch of the federal government has the power and the authority to negotiate, sign and ratify international conventions and treaties.[268] This has also been clarified and reiterated through several rulings related to treaty making, trade and commerce, peace, order and good government.[269]

The Canadian treaty making policy establishes the procedure for treaty making and the same procedure is applicable for making trade agreements. Canada has not legislated upon or determined a specific procedure for trade agreements. The lack of a legislation and institutionalized, traceable processes leaves the treaty making policy subject to the discretion of the government. This may cause a lack of transparency and accountability. Hence, it is advisable that the treaty making process be codified and there be a clear layout of the treaty making process which will ensure greater transparency and accountability of the treaty making process.[270]

B. The Canadian Trade Treaty-Making Process

1. Pre-Negotiations

Upon the decision of the executive to enter into trade agreements, information is sought through consultations with stakeholders.[271] Consultations with stakeholders are conducted through publication of notices in the Canada Gazette and other print media, issuance of press release and posting of call for comments on the departmental websites.[272] This helps identify the key fields in the economy for the trade agreement and allows for the identification of

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[266] See A.E. Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968) at 27; see also Peter W. Hogg, Constitutional Law of Canada, 4th ed. (Scarborough Carswell, 1997) at para. 11.2.

[267] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[268] Capital Cities Communications Inc. v Canadian Radio-Television Commission, [1978] 2 S.C.R. 141; Attorney General of Canada v. Attorney General of Ontario, [1937] 1 D.L.R. 673 (JCPC).

[269] G. Skogstad, "International Trade Policy and the Evolution of Canadian Federalism," in Canadian Federalism: Performance, Effectiveness, and Legitimacy, 3rd ed., ed. H. Bakvis and G. Skogstad (Don Mills, ON: Oxford University Press, 2012), 205-6; C.J. Kukucha, "From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy," Canadian Journal of Political Science 38, no. 1 (March 2005): 129-52.

[270] Anonymous Expert Interview.

[271] AE Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968) at 10; Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

[272] Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

interests and concerns in various sectors.[273] The consultations with the public at the pre-negotiation stage allows the executive to obtain feedback from the public regarding the trade agreement at the initial stage, thus making the process more inclusive and accountable to the public.

The lack of an established and institutionalized process for the pre-negotiation consultations has led to them being accessible for large organized stakeholders and lobbyists such as the auto worker unions but often cannot be easily accessed by the small and unorganized stakeholders.[274] Moreover the lack wide circulation of the notice for the call for consultations also leads to several stakeholders being uninformed about the initiation of the consultation process. Hence, for these objectives to be achieved effectively, the mere publication of the initiation of a treaty to seek consultations at this stage may not be enough to seek consultations from various sections of the society and from various parts of the nation.

This stage also involves preliminary talks between Canada and parties interested in the trade agreement to determine the scope of the potential trade agreement, obtain information relevant for the agreement in order to determine whether a successful trade agreement is possible.[275] The information obtained during these talks could be helpful to develop guidelines for negotiations.[276] The Canadian treaty making policy requires that an environmental assessment be conducted to help identify and evaluate the environmental impacts and benefits of Canada's treaty initiatives.[277] This assessment is initiated at the pre-negotiation stage.

2. Negotiations

Before entering negotiations, the initiating department or agency must have a negotiating mandate which is obtained by submitting the Memorandum to Cabinet.[278] The Memorandum to Cabinet should set out the following:[279]

i. the expected purpose of the agreement and its relation to the existing agreements
ii. its potential foreign policy implications

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[273] Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

[274] Anonymous Expert Interview.

[275] Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

[276] Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

[277] Canadian Environmental Assessment Agency, The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals (Ottawa: Privy Council Office, 1990, revised in 1999 and in 2004), online: CEAA; Global Affairs Canada, International Trade Agreements and Local Government: A Guide for Canadian Municipalities, Annex E.

[278] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."; The Cabinet is chosen by the Prime Minister, generally members of the Parliament, although it is customary for at least one Senator to be a member of the Cabinet. The size of the Cabinet is determined by the Prime Minister. The Cabinet lasts as long as the mandate of the Prime Minister who appoints it.

[279] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

iii. its possible domestic impact
iv. a preliminary outline of any financial obligation that might be incurred
v. the legislative changes that may be necessary if the negotiations prove successful

The department seeking the negotiating mandate is also required to show that other departments and agencies, territories and provinces, NGOs and industry stakeholders have been consulted before the negotiating mandate is granted.[280] The inclusion of the feedback obtained through this process in the Memorandum to Cabinet to seek the negotiating mandate ensures that the executive has sought this consultation and taken it into consideration while proposing the negotiating mandate. The Memorandum to Cabinet may seek a blanket policy authority to enter negotiations for similar treaties if no new legislation is required to undertake obligations or amendments to the current legislation, there are no funding implications or interdepartmental or federal-provincial jurisdictional issues.[281] The process of seeking the negotiating mandate from the cabinet ensures that the efficiency of the process is maintained.

The Minister of Foreign Affairs or another minister in co-operation with the Minister of Foreign Affairs negotiates international treaties on behalf of Canada.[282] In practice, the DFAITD has a supervisory role and the negotiations may be conducted by the relevant departments of the government depending on the subject-matter of the treaty. The negotiation of treaties by the DFAITD ensures that the treaties are negotiated by experts in the field, thus enhancing the efficiency of the process. The treaties are negotiated behind closed doors and little is revealed until the parties to the treaty agree with respect to the wording of the treaty.

During the negotiation of the treaty it must be ensured that the parties do not go beyond the negotiating mandate obtained for the purpose of the treaty.[283] If the negotiations go beyond the mandate obtained, the negotiations must be suspended until the mandate is revised.[284] The negotiation of the treaty within the negotiating mandate ensures that the negotiations are conducted in consonance with the principle of accountability to the Cabinet.

During the negotiations, other departments, provinces and agencies are consulted when the provisions of the treaty impact their constitutional jurisdiction, thus making the negotiations accountable.[285]

The negotiators have no obligation to report to the Parliament regarding the progress of the negotiations. The Standing Committee on International Trade (CIIT) in the House of Commons and the Standing Committee on International Affairs and International Trade (AEFA) in the Senate have the responsibility to conduct studies.[286] However, they can also initiate their

[280] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

[281] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

[282] Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, subsection 10(2)(c).

[283] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

[284] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

[285] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 4, "Negotiating a Treaty."

[286] Policy Department for External Relations, Parliamentary Scrutiny of Trade Policies across the Western World, European Parliament, at 32.

own studies when and how they see fit.[287] These studies can be included in the report for which the Committee can request the government to respond and the Committee also can request a briefing meeting as was conducted during the NAFTA renegotiations.

Additionally, electronic petitions can be made by five native Canadian concerned citizens. If this petition is endorsed by a MP, and if the petition gathers five hundred signatures, the government must respond to the enquiry within 45 calendar days.[288]

3. Signature

Signature to the treaty requires Cabinet approval of the treaty as well as the legal authority through an Order of the Council to sign the treaty.[289] A Memorandum to Cabinet along with the text of the treaty is submitted to discuss the negotiated text explaining the implications of its entry into force.[290] The Memorandum to Cabinet should seek:[291]

i. the approval of the text of the treaty in both official languages;
ii. the policy approval to sign the treaty, as well as to ratify it should the Government so decide after the tabling period;
iii. the policy approval for all resources required to implement the treaty;
iv. the policy approval to draft any legislation necessary to implement the treaty.

If the government authorizes the signature of the treaty, the Treaty Section of the DFAITD with the lead department of the treaty will prepare an Order in Council to be submitted to the Governor in Council to be considered by the Treasury Board, seeking legal authority to sign the treaty.[292] The Order in Council will also seek full powers authorizing the signature.[293]

Signature is the first step in the treaty making process which is followed by its ratification, with some exceptions.[294] Canada must refrain from actions that would defeat the object and purpose of the treaty but is not officially bound by the obligations of the treaty until the treaty is ratified.[295]

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[287] Standing Order 108(2)

[288] Policy Department for External Relations, Parliamentary Scrutiny of Trade Policies across the Western World, European Parliament, at 32.

[289] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[290] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[291] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[292] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[293] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[294] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 5, "Signature."

[295] Vienna Convention on Law of Treaties, 1969, art. 18.

4. Tabling in the House of Commons

Since January 2008, the federal government announced a new policy to enhance the involvement of the Parliament in the process of ensuring that all treaties between Canada and other states or entities are tabled before the House of Commons before its ratification.[296] The text of the treaty accompanied by a brief Explanatory Memorandum is submitted to the members of the House of Commons before the treaty is ratified.[297] The purpose of the Explanatory Memorandum is to explain Canada's interest in becoming a member of the treaty, the advantages and disadvantages of Canada becoming a party, obligations accrued as a result of the treaty, the economic, social, cultural, environmental and legal effects and impacts and the cost of complying with the treaty.[298] The Explanatory Memorandum must include information regarding the following:[299]

i. Subject matter
ii. Main Obligations
iii. National Interest Summary
iv. Ministerial Responsibility
v. Policy Considerations
vi. Federal-Provincial-Territorial Implications
vii. Time Considerations
viii. Implementation
ix. Associated Instruments
x. Reservations or Declarations
xi. Withdrawal or Denunciation
xii. Consultations

Thus, the Explanatory Memorandum ensures that the members of the House and the public have the requisite information about the treaty and its implications for Canada.[300] The information regarding the text of the treaty and the economic and political implications are useful for the purposes of a meaningful debate, thus making the process transparent and accountable.[301]

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[296] Canada, Department of Foreign Affairs and International Trade, News Release, "Canada Announces Policy to Table International Treaties in House of Commons" (25 January 2008), online: Canada News Centre <http://news.gc.ca/web/view/en/index.jsp?articleid=374729> ; Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.; the treaty tabling process may be done away with in certain cases such as where a treaty's urgent ratification is required. In such cases, approval for exemption is to be sought from the Prime Minister through a joint letter that states the rationale for the exemption. If the exemption is approved, the House of Commons should be informed about the treaty at the earliest opportunity following ratification.

[297] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex B.

[298] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex B.

[299] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex B.

[300] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex B.

[301] Armand de Mestral & Evan Fox-Decent, Rethinking the Relationship Between International and Domestic Law, (2008) 53 McGill L.J. 573.

The House has twenty-one sitting days before taking any action to bring the treaty into force.[302] Provinces and territories are to be consulted when appropriate and these consultations are to be recorded in the Explanatory Memorandum.[303]

Once the treaty has been tabled before the House of Commons and the waiting period has passed, the government will consider concerns raised by the Opposition Parties during the tabling process and then the government will decide whether the treaty is to be ratified or whether legislation is to be introduced before bringing a treaty into force.[304] If the government decides to proceed, the Treaty Section of the DFAITD will work with the responsible Department and the DFAITD will take the necessary steps to bring the treaty into force.[305]

With respect to the tabling of the treaty, the parliament cannot vote on the treaty when tabled before it and thus has no official role in the treaty making process.[306] The power to merely present the treaty in the parliament without it having any power to intervene makes the executive unaccountable to the members of Parliament.[307] The government retains power with respect to ratification of the treaty. This makes the tabling process a mere political gesture without legal significance.[308]

5. Ratification

After the signature of the international treaty, a document is prepared establishing that the treaty is in force and has been implemented in Canada. Cabinet prepares an Order in Council authorizing the Minister of Foreign Affairs to sign an Instrument of Ratification or Accession. Upon depositing this instrument with the appropriate authority, Canada is bound by the treaty and it comes into force.

6. Implementation

Canada operates according to the dualist model as per which a treaty that has been signed and ratified by the executive needs to be incorporated in the domestic law to be enforceable.[309] The transformation of international law into domestic law is not a self-executing

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[302] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 6.3, "Exceptions to Treaty Tabling Process."

[303] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, Annex A, section 6, "Tabling in the House of Commons."

[304] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, section 6.6, "Post Tabling."

[305] See, Government of Canada, Policy on Tabling Treaties in Parliament, January 2008, section 6.6, "Post Tabling."

[306] AE Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968) at 4-5.

[307] Armand de Mestral & Evan Fox-Decent, Rethinking the Relationship Between International and Domestic Law, (2008) 53 McGill L.J. 573.

[308] Peter W. Hogg, Constitutional Law of Canada, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007) c. 11.1-11.18; (2008), online: Canada Treaty Information, Annex A <http://www.treaty-accord.gc.ca/Tabling.asp> [Treaty-Tabling Policy]; Armand de Mestral & Evan Fox-Decent, Rethinking the Relationship Between International and Domestic Law, (2008) 53 McGill L.J. 573.

[309] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

process in Canada.[310] Hence, Canada cannot ratify an international treaty until measures are in place to ensure that the terms of the treaty are enforceable in Canadian law.[311]

Implementation can be done in two ways, the first being by passing an implementing law by following the legislative process of Canada.[312] The North American Free Trade Agreement Implementation Act is an example of this process.[313] Another method, which is particularly prevalent for human rights and foreign investment promotion and protection agreements is for the government to state that domestic legislation is already consistent with Canada's international obligations or that the object of the treaty does not require new statutory provisions.[314] In this case, the officials will determine whether any amendments or a new legislation are needed to comply with the treaty.[315]

It has been held that a treaty involving subject matter that is under the jurisdiction of the provinces or territories will be implemented by them and not by the federal government.[316] Hence, where provincial or territorial legislation is implicated, the executive will not ratify the treaty until all Canadian jurisdictions have indicated that they support ratification.[317]

7. Federalism and Treaty-Making

The new generation trade agreements are comprehensive, and the obligations incurred under these agreements often fall under the jurisdiction of the provinces or territories. Hence, the implementation of a treaty requires the co-operation of the provinces and territories.[318] If the subject matter of the treaty falls exclusively within the provincial jurisdiction and if such a matter is fundamental to provincial autonomy, the conditions for invoking federal general power are not met and the legislative powers remain distributed.[319] In such an event, it is essential to be assured of the necessary provincial legislation's willingness to enact the implementing legislation before making a treaty on such a subject matter.[320] This gives rise to the need of consultations and involvement of the provinces in the conclusion of treaties.

In the case of *Reference re Newfoundland Continental Shelf,* the Supreme Court of Canada discussed the role of the provinces in the conduct of foreign affairs.[321] It stated that under Canadian constitutional law, entities having external sovereignty may operate in the

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[310] Capital Cities Communications Inc. v Canadian Radio-Television Commission; Attorney General of Canada v. Attorney General of Ontario, [1937] 1 D.L.R. 673 (JCPC).

[311] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[312] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[313] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[314] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[315] Laura Barnett, Canada's Approach to the Treaty-Making Process, Publication No. 2008-45-E (24, Nov. 2008, Revised 6 November 2012), Library of Parliament.

[316] Canada (Attorney General) v Ontario (Attorney General), [1936] SCR 461 (JCPC).

[317] Senate, Standing Committee on Human Rights [RIDR], Children: The Silences Citizens, April 2007, at 9-15.

[318] Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[319] J. H. Aitchison, The Political Process in Canada, University of Toronto Press (1963) at 181.

[320] J. H. Aitchison, The Political Process in Canada, University of Toronto Press (1963) at 181.

[321] Reference re Newfoundland Continental Shelf, [198411 S.C.R. 86,51 N.R. 362,5 D.L.R.

international arena and exercise the rights and powers conferred on sovereign states by international law.[322] The court also held that the sine qua non of external sovereignty is extraterritorial capacity, i.e., the jurisdiction to pass laws having extraterritorial application and to make executive decisions having extraterritorial effect.[323]

Despite this, provinces are not inactive in trade negotiations. At the constitutional level the federal government having the responsibility for international trade and the ability to negotiate in the areas of exclusive provincial jurisdiction.[324] Despite this, as Canada is a dualist state, in order to implement these treaties, a legislation to that effect must be passed either at the federal or the provincial level.[325] Trade agreements often include areas of provincial jurisdiction and in such cases provincial action is necessary.[326]

During the negotiations of Canada-United States Free Trade Agreement (CUSFTA), provincial governments were given access to federal officials during negotiations.[327] Federal officials met monthly with representatives from all provinces on various issues although the federal government remained in control of the negotiations. Thereafter, the Committee on Free Trade Agreement was established which has representatives from the provinces.[328] The federal government also established consultative committees with various provincial departments to address sectoral concerns.[329]

In the mid-1990s, the Federal-Provincial-Territorial Committee on Trade (C-Trade) was established which meets four times a year during which federal, provincial and territorial officials exchange information and concerns related to international trade and negotiations. Draft documents related to issues falling within the provincial and territorial jurisdiction are exchanged and feedback on such issues is sought by the federal government during these meetings. They also provide for access to federal technical experts and sometimes lead negotiators.[330] In addition to C-Trade, there are ad-hoc sectoral discussions between the federal and provincial, territorial governments on trade issues.[331] The consultative basis has been widening with time with the inclusion of Federation of Canadian Municipalities, non-governmental organizations and citizen input.[332]

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[322] Reference re Newfoundland Continental Shelf, [198411 S.C.R. 86,51 N.R. 362,5 D.L.R. at 398-401, 419.

[323] Reference re Newfoundland Continental Shelf, [198411 S.C.R. 86,51 N.R. 362,5 D.L.R., at 397-401.

[324] SKOGSTAD Grace, 2012, « International Trade Policy and the Evolution of Canadian Federalism », dans H. BAKVIS, G. SKOGSTAD (dir.), Canadian Federalism, 3e éd., Don Mills, Oxford University Press.

[325] MESTRAL Armand de et Evan FOX-DECENT, 2008, « Rethinking the Relationship Between International and Domestic Law », McGill Law Journal, vol. 53, no 4, 573-648.

[326] SKOGSTAD Grace, 2012, « International Trade Policy and the Evolution of Canadian Federalism », dans H. BAKVIS, G. SKOGSTAD (dir.), Canadian Federalism, 3e éd., Don Mills, Oxford University Press.

[327] Christopher J. Kakucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, No. 10 (October 2016).

[328] G.B. Doern and B. Tomlin, Faith and Fear: The Free Trade Story (Toronto: Stoddart Publishing, 1991), 128-30.

[329] Christopher J. Kakucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, No. 10 (October 2016).

[330] Ann Weston, The Canadian 'model' for public participation in trade policy formulation, The North-South Institute (August 2005).

[331] Foreign Affairs and International Trade Canada, "It's Your Turn: Federal-Provincial Territorial Consultations on Trade".

[332] Stéphane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

The establishment of C-Trade and the institutionalization of the consultations with the provinces is significant to obtain relevant information during consultations, ensuring that all provinces are meaningfully included in the process of negotiations and to avoid conflicts while implementing the treaty.[333] This also increases accountability and transparency of negotiations to the provincial governments and territories.

The lack of formal procedures, lack voting and unanimous provincial consensus and uncertainty about the effect of these meetings affect trade negotiations does not preclude federal decisions contrary to the opinions in these consultations and may also permit provinces to use their discretion and abuse the process.[334]

8. CETA

Canada and the European Union initiated a new generation trade agreement that initially consisted of 12 areas which eventually expanded to include 20 areas with several sub-areas identified.[335] During the initiation of the trade deal, the European Union insisted on the inclusion of provinces in the Canadian delegation recognizing that the agreement covered subject matter that falls under the jurisdiction of provinces and territories and the implications of the provinces and territories not being obliged to implement accords concluded by the federal government in the provincial fields of jurisdiction.[336] As a result, for the first time in the history of trade negotiations, provinces and territories were directly involved in the trade negotiations.[337] Despite their involvement, the provincial and territorial officers only had the authority to speak during the negotiations if asked to do so by the negotiator thus reducing their role to be consultative and advisory in nature.[338]

The provinces were included while defining the terms of the joint reports and the negotiating mandate for the trade negotiations, thus allowing the provinces and territories to influence issues under the jurisdiction of the provinces and territories.[339] It was decided at the initial stage that information will be sought from each level of government in various formats

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[333] Stéphane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[334] Douglas M Brown, "Canadian Federalism and Trade Policy: The Uruguay
Round Agenda" in Ronald L Watts & Douglas M Brown, eds, Canada: The State of the
Federation (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989).
211.; France Morrissette, "Provincial Involvement in International Treaty Making: The European Union as a Possible Model" 37 Queen's LJ 577 (2011).

[335] Christopher Kukucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, 10 (Oct. 2016).

[336] Patrick Fafard and Patrick Leblond, Twenty-First Century Trade Agreements: Challenges for Canadian Federalism, The Federal Idea (Sept. 2012).; Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[337] Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[338] G. Skogstad, "International Trade Policy and the Evolution of Canadian Federalism," in Canadian Federalism: Performance, Effectiveness, and Legitimacy, 3rd ed., ed. H. Bakvis and G. Skogstad (Don Mills, ON: Oxford University Press, 2012), 205-6.

[339] Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

and forums.[340] Provincial views were also sought through the Canada Gazette publication process.[341] The provincial governments were also involved in the overview briefings before and after every negotiation session on all areas of interest during and outside the C-Trade meetings.[342]

With respect to CETA, the involvement of the provincial government in the negotiations facilitated consensus within the Canadian delegation as federal officials did not have to spend additional time briefing their provincial/territorial counterparts from time to time. This also helped develop a working relationship between the provincial and territorial governments.[343] The interactions between the officials of the provinces and territories and the development of a strategy along with the federal government helped make Canada's position stronger in the negotiations.[344]

9. Quebec

Quebec has made the only statute containing specific provisions on the approval of treaties.[345] This law gives the National Assembly[346] and *minister des relations internationals* an important role in the process of approval and implementation of treaties by the province of Quebec.[347] In the case of Quebec, the Parliament of Quebec must approve the treaty before the government gives assent to it. Thus, the parliament of Quebec is the only province that intervenes in the approval of treaties. The legislature is involved in the process of approving major international commitments by the Government of Quebec and in this way goes beyond the powers of the Canadian Parliament. When an international commitment is "important", i.e., it requires the adoption of a law, the creation of a regulation, the imposition of a tax or government acceptance of a financial obligation or concerns human rights or international trade, it must be approved by the Parliament.[348]

In Quebec, the treaty and the explanatory notes are deposited by the Minister of International Relations with the National Assembly after which the minister can introduce a motion for the approval or rejection of the of the treaty.[349] The government may ratify the treaty

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[340] Christopher Kukucha, Provincial/Territorial Governments and the Negotiation of International Trade Agreements, IRPP Insight, 10 (Oct. 2016).

[341] Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[342] G. Skogstad, "International Trade Policy and the Evolution of Canadian Federalism," in Canadian Federalism: Performance, Effectiveness, and Legitimacy, 3rd ed., ed. H. Bakvis and G. Skogstad (Don Mills, ON: Oxford University Press, 2012), 205-6; Stephane Paquin, Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA, International Journal, Vol. 68, No. 4, 545-552 (December 2013).

[343] Anonymous Expert Interview.

[344] Pierre Marc Johnson, Patrick Muzzi and Véronique Bastien, The voice of Quebec in the CETA negotiations, International Journal, Vol. 68, No. 4, 560-567 (December 2013).

[345] Loi sur le ministère des Relations internationales, R.S.Q. c. M-25.1.1.

[346] The National Assembly is the legislative organ of the province of Quebec with 125 members election from the electoral divisions of the province.

[347] Loi sur le ministère des Relations internationals, R.S.Q. c. M-25.1.1, ss. 22.1-22.7.

[348] LEDUC François, 2009, Guide de la pratique des relations internationales du Québec, Québec, Les publications du Québec at 550-551).

[349] Paquin, S. (2017). Federalism and Trade Negotiations in Canada: CUSFTA, CETA and PTP Compared.

in case of an emergency without there being a vote in the National Assembly.[350] This approval or rejection by the National Assembly occurs after the government of Canada has signed the treaty, and hence the National Assembly can only adopt or reject it but cannot affect its content at this stage.[351] The legislators of Quebec may influence the content of the treaty by sending their federal counterparts their opinions.

A problem that arises from these provisions is that the federal government cannot guarantee that the treaty will be properly implemented if the subject matter falls within provincial jurisdiction.[352] In order to overcome this situation, during the Canada-Colombia Free Trade Agreement with Peru, the Government of Canada excluded from the treaties provincial measures that predates the conclusion of the Canada-Colombia agreement in areas of services and investment.[353] This may also be done using federal clauses to limit the scope of international treaties or by creating intergovernmental mechanisms for trade negotiations that enable provinces to collaborate the negotiation process.[354]

C. Environmental Assessment Process

The Environmental Assessment (EA) process is conducted through interdepartmental collaboration and public consultations.[355] The method for conducting the EA involves identifying economic effects of the negotiations, the likelihood and significance of resulting environmental impacts, identification of mitigation and/or enhancement options to inform negotiators.[356]

[350] LEDUC François, 2009, Guide de la pratique des relations internationales du Québec, Québec, Les publications du Québec at 550-551).

[351] TURP Daniel, 2016, «L'approbation des engagements internationaux importants du Québec : la nouvelle dimension parlementaire à la doctrine Gérin-Lajoie », Revue québécoise de droit international, Hors-série, juin : 24-25.

[352] MESTRAL Armand de et Evan FOX-DECENT, 2008, « Rethinking the Relationship Between International and Domestic Law », McGill Law Journal, vol. 53, no 4: 573, 644 (December 2013).

[353] VANDUZER Anthony, 2013, « Could an Intergovernmental Agreement Make Canadian Treaty Commitments in Areas within Provincial Jurisdiction More Credible? », International Journal, vol. 68, no 4 536-544 (December 2013).

[354] Paquin, S. (2017). Federalism and Trade Negotiations in Canada: CUSFTA, CETA and PTP Compared. Retrieved from http://archives.enap.ca/bibliotheques/2017/02/ 031402256.pdf

[355] Final Environmental Assessment of the Canada-European Union Comprehensive Economic Trade Agreement, The Environmental Assessment Process.

[356] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

1. Phases of the EA Process

The EA is conducted through various phases that coincide with the development of the trade negotiations. At each stage of the EA, relevant consultations are conducted with experts, NGOs, civil society and provincial territorial governments to obtain inputs for a comprehensive EA. All communications at each phase is to be documented. Following are the phases of the EA:[357]

a) Preparatory Phase

This phase marks the beginning of the EA process and begins with the establishment of the EA Committee. The committee must determine the scope of the EA, work program and the resource requirements. At this stage, a notice of intent is publicized in conjunction with the announcement of trade negotiations.[358]

b) Initial Environmental Assessment

All trade negotiations are subject to this phase of EA. This involves a preliminary examination conducted to identify potential issues and environmental effects resulting from trade negotiations as well as providing an opportunity to reflect on environmental considerations while negotiations are ongoing.[359] If it is found that the trade agreement will likely have a small impact on the environment, the second phase is not required.[360] This ensures efficiency and does away with the need of an unnecessary procedure.

c) Draft Environmental Assessment

This phase is undertaken if it is found during the Initial phase that the trade agreement will have a significant environmental impact.[361] During this phase a detailed inquiry and analysis into the issues identified in the first phase is undertaken.[362] The findings are published during the early phases of negotiations and these findings are used to take informed positions in the negotiations.[363]

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[357] The detailed process of each stage has been provided in Table 1.

[358] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

[359] Final Environmental Assessment of the Canada-European Union Comprehensive Economic Trade Agreement, The Environmental Assessment Process.

[360] Final Environmental Assessment of the Canada-European Union Comprehensive Economic Trade Agreement, The Environmental Assessment Process.

[361] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".; Analysis of the EA is to be guided by four steps: identification of the economic effects of trade negotiations, identification of the likely environmental impact of economic changes, assessment of the significance of the identified likely environmental impacts, identification of enhancement/mitigation options.

[362] Final Environmental Assessment of the Canada-European Union Comprehensive Economic Trade Agreement, The Environmental Assessment Process.

[363] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

d) Negotiations

This phase involves informing the negotiations based on the Draft EA report.[364] If required, further analysis may be conducted.[365]

e) Final Environmental Assessment

This phase takes place after the conclusion of the negotiations. The final report is prepared to reflect on the environmental concerns considered throughout the negotiation process.[366] The report explains any divergence from previous EA reports, responds to comments received on previous EA reports and indicates how the EA affected the negotiation.[367]

f) Follow-Up and Monitoring

At this stage, the mitigation and enhancement actions recommended by the EA Committee in the final report are reviewed.[368] This can take place at any time during the process of implementation of the trade agreement on the recommendation of the Steering Committee. At the conclusion of the Initial Draft and Final phases a public report is issued along with a request for comments.[369] This ensures transparency and accountability in the process of the EA.

2. Roles and Responsibilities in the EA Process

In order to effectively and efficiently conduct the EA process, various committees have been established with specific roles assigned to each of them.[370] In addition to the committees and institutions formed for the purposes of the EA, the existing institutions also participate in the EA process. Some divisions of the DFAITD serve in an advisory capacity to assist the implementation and management of the various aspects. The C-Trade and Environmental Assessment Advisory Group (EAAG) composed of individuals from industry, academia and NGOs are consulted at various stages throughout the process and comment on the EA reports. The C-Trade is also consulted throughout pre–negotiation and negotiation stages, and development of Initial, Draft and Final EA reports for guidance on federal–provincial–territorial jurisdictional issues. The consultations with experts and other relevant departments, provinces and territories ensure that the EA is comprehensive in nature thus ensuring efficiency. Moreover, the information sharing also makes the process transparent.

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[364] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

[365] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

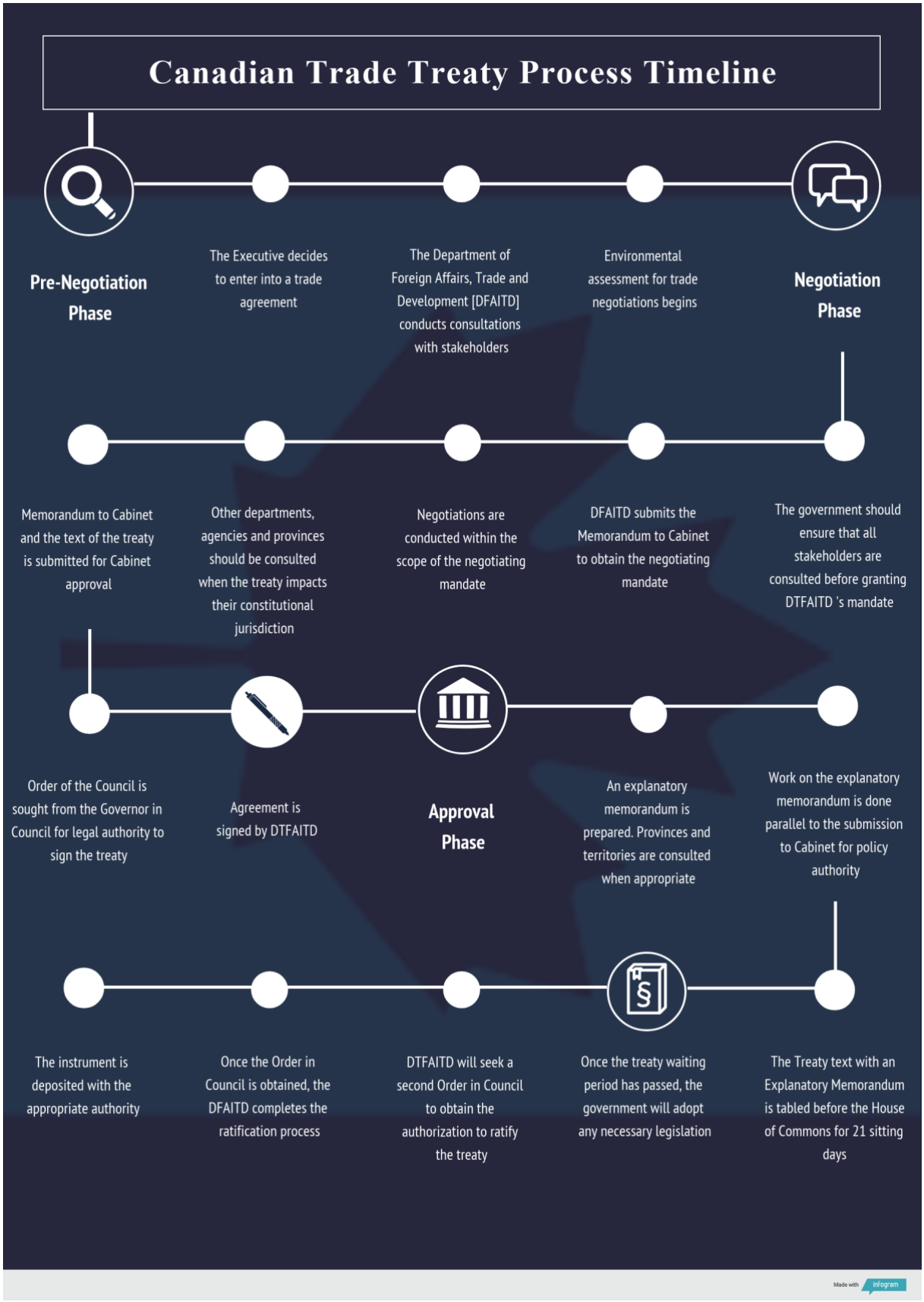
[366] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

[367] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

[368] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 4, "Conducting an EA of Trade Negotiations".

[369] Handbook for Conducting Environmental Assessments of Trade Negotiations, March 2008, Section 2.2, "An Overview of the EA Process".

[370] The roles of which have been expanded upon in Table 2.


Canadian Trade Treaty Process Timeline
Pre-Negotiation Phase
The Executive decides to enter into a trade agreement
The Department of Foreign Affairs, Trade and Development [DFAITD] conducts consultations with stakeholders
Environmental assessment for trade negotiations begins
Negotiation Phase
Memorandum to Cabinet and the text of the treaty is submitted for Cabinet approval
Other departments, agencies and provinces should be consulted when the treaty impacts their constitutional jurisdiction
Negotiations are conducted within the scope of the negotiating mandate
DFAITD submits the Memorandum to Cabinet to obtain the negotiating mandate
The government should ensure that all stakeholders are consulted before granting DTFAITD 's mandate
Order of the Council is sought from the Governor in Council for legal authority to sign the treaty
Agreement is signed by DTFAITD
Approval Phase
An explanatory memorandum is prepared. Provinces and territories are consulted when appropriate
Work on the explanatory memorandum is done parallel to the submission to Cabinet for policy authority
The instrument is deposited with the appropriate authority
Once the Order in Council is obtained, the DFAITD completes the ratification process
DTFAITD will seek a second Order in Council to obtain the authorization to ratify the treaty
Once the treaty waiting period has passed, the government will adopt any necessary legislation
The Treaty text with an Explanatory Memorandum is tabled before the House of Commons for 21 sitting days
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VII. Annex C: Case Study on the EU Trade Treaty-Making Process

A. The EU Trade Treaty-Making Process

Under the Common Commercial Policy (CCP),[371] the EU has the power to negotiate and conclude international trade agreements.[372] All trade agreements falling under the CCP are termed "EU-only agreements". Contrary to EU-only agreements, there are cases in which the subject matters of a trade agreement fall outside the exclusive EU competences. Such agreements are called "mixed agreements"[373] and are a specialty under EU-law.[374] The determination of whether a trade agreement is EU-only or a mixed agreement has to be determined on a case by case analysis depending on the specific scope of the agreement. Regarding the EU-Singapore agreement, the European Court of Justice (ECJ) held in its Opinion 2/15 that non-direct investment and ISDS are shared competences which require the involvement of the EU Member States

Unlike the U.S, the EU does not have a separate process for trade agreements in place. Therefore, the negotiation and approval of trade agreements follows the general treaty making procedure under Art. 218 TFEU, with some modest modifications following the "trade"-specific Art. 207 TFEU.

1. Pre-Negotiations

a) Adopting an Internal Position: Impact Assessment and Public/Industry Consultations

In the EU, preparing impact assessments is an essential step of reaching an informed decision in the pre-negotiation phase. An impact assessment is necessary whenever the expected (comprehensive) free trade agreement has a significant economic, environmental, or social impact on the EU. The criterion of "significant impact" covers micro- and macro effects of the international agreement so that the effects on specific sectors and/or specific types of stakeholders can be considered.[375]

The impact assessment investigation includes four steps: (1) verifying existing challenges the EU faces when trading with the potential trading partner, (2) analyzes the causes of the identified challenges (3) responds to the question whether EU action is required, and (4) gives a detailed assessment what solutions may overcome the identified challenges and the trade-offs of the envisaged solutions. The precise steps on how to prepare an Impact Assessment are laid down in Chapter 2 of the European Commission´s "Better Regulation

[371] Art. 207 TFEU.

[372] Panos Koutrakos, EU International Relations Law, 2nd Ed. 2015, at 18-19.

[373] Piet Eeckhout, EU External Relations, 2nd Edition 2011, at 213.

[374] The determination of whether a trade agreement is EU-only or a mixed agreement has to be determined on a case by case analysis depending on the specific scope of the agreement. Regarding the EU-Singapore agreement, the European Court of Justice (ECJ) held in its Opinion 2/15 that non-direct investment and ISDS are shared competences which require the involvement of the EU Member States.

[375] European Commission, Better Regulation Toolbox, at 48.

Toolbox"; complementing the "Better Regulation Guideline".[376] After the end of an investigation, up to a year depending on the agreement's scope and available data,[377] the impact assessment is sent to the European Parliament and the Council.[378]

b) Public Consultations: Engagement with Companies and Business Organizations

Industry stakeholders, e.g. companies and business organizations, are consulted via questionnaires covering technical questions (e.g. rules of origin) and to share their practical experience of doing business in the negotiating partner´s country. The Directorate General for Trade (DG Trade) prepares the questionnaires that generally cover areas such as: trade in goods, trade in services (and investment), rules (e.g. transparency, IP rights) and other issues. The questionnaires aim to gather specific data to prioritize sectors and curate proposals aimed at solving the problems businesses face while trading with the third country. The Commission compiles the stakeholder information in a report[379] and presents a list of (non-confidential) priorities and main concerns that businesses have. The list of businesses that participate in the consultations are published.

c) Exploratory Talks

Exploratory talks consist of informal dialogues with the respective negotiating partner or partners. Due to their informality, exploratory talks do not require any prior involvement of the Council.[380] During exploratory talks, the involved parties discuss the purpose and scope of future negotiations allowing them to evaluate whether they should ultimately conduct formal negotiations. Generally speaking, the Commission acts as the primary negotiator and is the driving force during the exploratory talks. Despite the informal character, Member States and the European Parliament need to be kept informed about the progress, difficulties, and the results.

d) The European Commission's Recommendation to Open Negotiations

Since the launch of negotiations with Australia and New Zealand in 2017, the Commission has consistently published its recommendations for the trade agreement negotiating directives allowing civil society better access to information. The recommendation for the negotiating directives is prepared after the Commission has completed the scoping exercise and generally constitutes the basis of the Council´s authorization to commence negotiations.[381]

The Commission's "recommendation for a Council Decision authorizing the opening of negotiation and negotiating directives"[382] includes: (1) an explanatory memorandum, (2) the

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[376] European Commission, Better Regulation Toolbox.

[377] See European Commission, Better Regulation Toolbox, at 42.

[378] Interinstitutional Agreements on Better Law-Making (Non-legislative act), OJ 123/4 (May, 12 2016).

[379] European Commission, Questionnaire on a free trade agreement with the Philippines, Feedback from Industry Stakeholders, (July 29, 2016).

[380] The informality of exploratory talks follows implicitly from Art. 218 TFEU which exclusively refers to the negotiation and approval of international agreements.

[381] See Art. 207 (3) TFEU.

[382] In this context, it has to be emphasized that there the Commission is confined by a negotiation mandate. The Commission is not legally bound by the Council's negotiation directive, see Commission, Vademecum on the EU external action, at 32-33.

recommendation to authorize opening negotiations, as well as (3) other details such as the appointment of a negotiator and a draft Council decision.[383] In the explanatory memorandum, the Commission is required to describe the scope of the future agreement and outline whether it will fall under the exclusive competence of the EU or be a mixed agreement. The Commission also reveals the motivation behind the proposal and negotiation objectives it is hoping to accomplish.[384]

Apart from engaging civil society, the Commission also informs the EU Parliament of the draft negotiation directive and automatically sends it to the Council, to the EU Parliament, and all Member State Parliaments.[385]

e) Inter-Institutional Accountability: the Authorization to Negotiate

Based on the submitted recommendations of the Commission, the Council then decides whether to authorize opening negotiations and on the negotiating directive.[386] If it is a comprehensive trade agreement covering areas such as trade in services, intellectual property or direct investment, the authorization to negotiate can require unanimity.[387] However, Council decisions concerning trade agreements are generally unanimous.[388] The Council has three different options on how to decide. The first option is to authorize beginning negotiations and issue the negotiation directive on the basis of the Commission´s recommendations. Second, it may modify either (or sometimes both) the authorization to negotiate and/or the negotiation directive.[389] Third, the Council may refuse to authorize the negotiation. Despite the non-binding character of the negotiation directive,[390] the directive helps the Commission understand what the Council—composed of EU member state leaders—expect from the Commission as the exclusive negotiator.

Once the Council's directive is issued, the Commission can conduct negotiations in a comparably flexible manner. However, the Council (through its special committees) maintains a supervisory function, which it uses to closely follow the Commission´s negotiations and informally influences the Commission.[391] The authorization to negotiate also serves a practical purpose, since it would make little sense to invest in negotiations that do not benefit from Council support. If a mixed agreement, the negotiation directive and the intergovernmental mandate must correspond. After criticism regarding a lack of transparency in the TTIP-negotiations, the "Trade for All"-strategy was created to ensure the Council publish its negotiation directive directly after its adoption.[392] The Council´s negotiating directives for the

[383] European Commission, Vademecum on the EU external action, at 32.

[384] European Commission, Transparency Policy in DG Trade, at 2.

[385] European Commission, Negotiating EU Trade Agreements, Who does what how we reach a final deal.

[386] Negotiating directives do not correspond to directives as addressed in Art. 288 TFEU, see Piet Eeckhout, EU External Relations, 2nd Edition 2011, at 197.

[387] Art. 207 (4) TFEU.

[388] Anonymous Expert Interview.

[389] Such modification does not require unanimity, because the authorization of negotiations is not taken on the basis of a proposal pursuant to Art. 293 (1) TFEU.

[390] Negotiation directives are not considered as directives in the sense of Art. 288 TFEU, see Piet Eeckhout, EU External Relations, 2nd Edition 2011, at 197.

[391] Piet Eeckhout, EU External Relations, 2nd Edition, 2011, at 197.

[392] European Commission, Trade for all – Towards a more responsible trade and investment policy, 2015.

TTIP, TISA, CETA, Japan and Australia and New Zealand negotiations are all publicly available online.

2. Negotiation Phase

a) The European Commission as Negotiator and the Organization of Negotiations

The European Commission functions as the lead negotiation team, regardless of whether the proposed agreement's subject matter is within the EU's exclusive competence or is shared with EU Member States.[393] The Commissions' Directorate General for Trade (DG Trade) appoints experts from all directorates across the Commission.[394] If negotiating a mixed agreement, the negotiating team would consist of both DG Trade and negotiators from the Member States. For such negotiations, the principle of *sincere cooperation* requires EU and Member States negotiators to coordinate and to cooperate.

A first important step of successfully negotiating a trade agreement requires establishing negotiation areas and working groups. As such, dates and negotiating goals are specified to establish concrete negotiation rounds.[395] In the first negotiation round, draft texts are presented, data is analyzed together, policies in specific areas are explained, and practices, experiences, and procedures are explained. In more controversial areas, the discussions are less formal.[396] After each negotiation round, the Commission publishes a report summarizing the main content and the area by area developments.[397]

b) Parliamentary Observers

Apart from the Commission´s negotiating team, EU negotiation teams may imbed members of the European Parliament in the negotiating process. Members of the European Parliament will be "observers", provided that this status is legally, technically, and diplomatically feasible. As observers, members of the European Parliament do not have the right to directly participate in negotiations. Still, they are fully informed about the negotiation progress. Notably, the Commission has the right to refuse the inclusion of members of the EP. However, should the Commission seek to exclude a member of the European Parliament, it must lay down reasons for doing so before the European Parliament. The European Parliament observer status also extends to the informal negotiations before and after the formal negotiations.

c) Consultation with Expert Groups

The Commission's expert groups act in a consultative capacity throughout the trade negotiation process. The expertise sought covers a broad range of technical questions, practical experience, diverse perspectives, public perception on particular agreements, and a trade agreement should ultimately be implemented.[398]

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[393] Piet Eeckhout, EU External Relations, 2nd Edition, 2011, at 196-197.

[394] European Commission, Negotiating EU Trade Agreements, Who does what how we reach a final deal, at 3.

[395] European Commission, Negotiating EU Trade Agreements, Who does what how we reach a final deal.

[396] See Report of the 1st round of negotiations for a Free Trade Agreements between the European Union and Australia, 2-6 July 2018, Brussels.

[397] See Report of the 1st round of negotiations for a Free Trade Agreements between the European Union and Australia, 2-6 July 2018, Brussels.

[398] Commission Decision C(2017) 6113 final; Commission Decision C(2016) 3301 final.

Expert groups are composed by 20-30 members,[399] generally consisting of:

- individuals in either their personal capacity or who act in public interest (Type A members);
- individuals representing stakeholder's common interests (Type B members);
- organizations such as: NGOs, trade unions, universities, research institutes, law firms and consultancies (Type C members);
- Member States authorized at the national, regional or local level (Type D);
- or other public entities such as EU agencies (Type E members).[400]

Experts generally come from consumer associations, employers' organizations, and trade unions.[401] However, the Commission strives for a gender balance when selecting members.[402] Experts are selected through public calls for applications, which are published on a register at least four weeks prior the establishment of the expert group. The Director General of DG Trade selects applicants that fulfill all requirements (e.g. no conflict of interests) for fixed terms.[403] However, DG Trade may invite further experts on specific topics whenever their expertise is required.[404] For transparency purposes, the expert group members are listed in a register of expert groups.[405] Furthermore, individuals, organizations, and public entities can be expert group observers.[406]

d) Consultations with the Council

Under Art. 207 (3) TFEU, the Council has the right to appoint a special committee that the Commission must consult with before and after negotiation sessions. The so-called Trade Policy Committee (TPC), expresses the Member States desire to be involved in the negotiation process and to act the Commission's partner. Utilizing the TPC´s expertise on the respective trade matters, the Commission can draw upon the gained knowledge for further negotiations. However, the Commission has no duty to follow the TPC's instructions. The TPC regularly discusses the Commission's trade negotiations and the latest developments.[407] The consultations create a transparent relationship between the Commission and EU Member States through the Council.

e) The European Parliament's Right to Information and Resolutions

aa) The European Parliament´s Right to Information

Parliament only starts to participate actively when the agreement enters the approval stage. However, following the interinstitutional agreement,[408] the Commission has agreed to systematically inform the Parliament of the outcome of the negotiation round whenever

[399] Art. 4 Commission Decision C(2017) 6113 final.

[400] Art. 7 Commission Decision C(2016) 3301 final.

[401] Expert group on EU trade agreements, http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156487.pdf.

[402] Art. 10 (6) Commission Decision C(2016) 3301 final.

[403] Call for Applications for the Selection of Members of the Expert Group on Trade Agreements.

[404] Call for Applications for the Selection of Members of the Expert Group on Trade Agreements.

[405] Call for Applications for the Selection of Members of the Expert Group on Trade Agreements.

[406] Call for Applications for the Selection of Members of the Expert Group on Trade Agreements.

[407] European Commission, Negotiating EU Trade Agreements, Who does what how we reach a final deal.

[408] The interinstitutional agreement is based on Art. 295 TFEU.

appropriate.[409] The information is intended to enable the Parliament to express views on the ongoing negotiations during the course of the parliamentary procedures.[410] The Commission´s duty to inform Parliament should enable Parliament "*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."*

bb) Resolutions on the Information by INTA

The European Parliament then has the right to adopt resolutions on any developments the Commission has relayed. INTA, European Parliament´s trade committee, discusses the information and may issue resolutions regarding the Commission's negotiation updates. INTA may issue non-binding decisions or resolutions on how negotiations should proceed. However, as main negotiator, the Commission has the right to refuse a European Parliament resolution. A refusal, however, requires the Commission to explain the reasons for its denial to support the resolution in a plenary sitting or at the next meeting of the relevant parliamentary committee.[411] The full European Parliament also has the right to discuss the developments of the trade negotiations in a plenary session.

f) Coordination with EU Member States during Negotiations

The Commission will also coordinate with Member States, often outside of negotiations, offering them the chance to discuss unforeseen or difficult subject matters in an *ad-hoc* and informal way. However, such meetings must follow three basic-rules. First, the Commission or the EU Delegation has to appoint and chair such meeting. Second, the meetings cannot overrule or amend the negotiation directive. Third, fundamental institutional or procedural discussions cannot be held during such meetings. In sum, the informal coordination constitutes an inclusive and effective element to enhance transparency between the Commission and Member States.

g) Information Available to Public Society

There are several initiatives in place to ensure that public society is informed and integrated in the negotiation process.

aa) Publishing of Documents and Round Reports

First, the Commission publishes substantive documents giving all interested parties the chance to closely follow the development of negotiations. This includes the EU´s initial proposals for legal texts[412] and allows interested parties to retrace the Commission´s position in all negotiation areas. In order to understand the initial proposal, especially without knowledge of trade law, the Commission prepares explanatory material clarifying the substance and implications of the proposal.

Second, the Commission prepares a report that is published online after each negotiating round.[413] The round report briefly summarizes the general approach of the negotiation round, for example what kind of working groups were in place, and then gives an

[409] EU, Framework Agreement between Commission and Parliament, point 25.
[410] EU, Framework Agreement between Commission and Parliament, point 28.
[411] EU, Framework Agreement between Commission and Parliament, point 29.
[412] European Commission, Transparency Policy in DG Trade.
[413] European Commission, Transparency Policy in DG Trade.

update on specific areas which were discussed, e.g. non-tariff measures and public procurement.[414]

bb) Publication of Consolidated Negotiation Text

After finalizing negotiations and even before legal scrubbing takes place, the consolidated negotiation text is published on the DG Trade´s website. The published negotiation text is accompanied by a brief explaining the negotiated text in a practical and easily digestible manner.[415] This element is commendable; as it gives interested laymen the chance to inform themselves about the negotiated text.

h) Civil Dialogue and *Ad Hoc* Meetings

The Commission continues its Civil Society Dialogue meetings, a crucial step to integrate European civil societies such as NGOs, trade, and business unions. The civil society consultations are based on "Minimum Standards for Consultation" and the standards formulated in "Better Regulation for Better Results – An EU Agenda".[416] Apart from enhancing transparency, the Civil Society Dialogue has three aims: (1) hear the civil society´s view on trade, (2) address concerns in relation to the negotiation of trade agreements (3) improving the EU's trade policy by incorporating the ideas and concerns of civil society. *Ad hoc* meetings are also regularly organized.[417]

Organizations interested in participating in the Civil Dialogue or *ad hoc* meetings must register through the EU´s transparency register prior to attending meetings. Registering ensures that the EU's code of conduct is adhered to. It also allows the EU to control and publish information about the organizations (e.g. business activity, mission and funding) attending meetings and thereby shaping public opinion. As such, the list of participants of Civil Society Dialogues and of *ad hoc* meetings is publicly available online. The EU also publishes position papers of registered civil society organizations, explaining, justifying, or recommending specific actions for trade related issues on its website. However, the EU does not include the opinions and concerns of individuals in their consultation process.

i) Sustainability Impact Assessment

The EU also conducts an *ex-ante* Sustainability Impact Assessment (SIA), primarily in negotiations concerning comprehensive free trade agreements.[418] SIAs are separate from the economic impact assessments and specifically take place after the Council has authorized negotiations. They intend to integrate sustainable development into trade policy in the form of economic development, social development, and environmental protection. SIAs examine the potential economic, social, and environmental impacts of the trade agreement under negotiation. They generally cover issues such as: energy, waste, labor market, adequate standards of living, and transport.[419] As such, SIAs aim at simultaneously fostering anticipated

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[414] See for example, Report of the 18th EU-Japan FTA/EPA Negotiating Round, Tokyo, Week of. 3 April 2017.

[415] European Commission, Transparency Policy in DG Trade.

[416] See Commission, Minimum Standards for Consultation, COM(2002)704); Better Regulation for Better Results, EU Agenda COM(2015)215).

[417] European Commission, Transparency Policy in DG Trade.

[418] European Commission, Handbook for trade sustainability impact assessment, 2nd edition, 2016.

[419] *Handbook for trade sustainability impact assessment*, 2nd edition, 2016, p. 31.

positive effects of the trade agreement while mitigating possible negative impacts of the trade agreement.

3. Approval Phase

a) Finalizing the Trade Agreement

After finalizing the negotiated text which includes legal review and lawyer-linguist review (so called "*legal-scrubbing*"), the Commission drafts proposals for the Council decision on signing and concluding the international trade agreement. The proposals are translated into all EU languages and are circulated within the Commission ("inter-service consultation") before they reach the Council. Although legally not binding, formal negotiations are ended when the negotiating parties "initial" the agreed text. Initialing constitutes an intermediate phase between formally negotiating and signing the international agreement.[420]

b) Council Decision on the Signature

The Commission proposes the signature of the agreement to the Council, which then authorizes the signing of the agreement. In the case of comprehensive trade agreements according the Council regularly requires unanimous decisions.

Under Art. 17 (1) and (2) TEU, the Commission ensures that the President of the Council empowers a Commission representative who ultimately signs the agreement.[421] When mixed-agreements are at stake, the agreement provisionally enters into force after it is signed under Art. 218 (5) TFEU. Under Art. 18 VCLT, the signing agreements that are subject to ratification binds the signatory state or organization to *good faith*. Good faith requires the parties be prohibited from undertaking actions which defeat or undermine the object and purpose of the agreement. Therefore, the signature constitutes an official endorsement of the negotiated agreement.

c) INTA and the Approval by the European Parliament

The Council sends the international trade agreement to the European Parliament, a procedural step known as *saisine*.

aa) INTA

The INTA reviews the signed international trade agreement together with representatives from businesses and representatives from civil society. Based on the discussion with the representatives, INTA writes a report and takes a vote on the report. The INTA-report functions as formal advice for the plenary session of the European Parliament. In the plenary session, the European Parliament consents or rejects the agreement through a simple up/down vote, meaning that the European Parliament can only accept or reject the international trade agreement as a whole and has not the power to change individual provisions.

bb) Approval by the European Parliament

The Treaty of Lisbon, has significantly strengthened the European Parliament´s participation rights. When an international agreement is concluded, a differentiation has to be

[420] Commission, Vademecum on the EU external action, at 37.

[421] EU Vademecum on the EU external action, at 38.

made between approval and consultation requirements. In the overwhelming majority of cases, the European Parliament´sv consent is generally needed whereas consultations are rarely conducted. Under Art. 218 (6) TFEU, the EU Parliament has to give its consent to most agreements—especially those addressing fields of competence to which the ordinary legislative procedure would apply.

d) Role of the Council

Once the European Parliament has given its consent,[422] the Council adopts the final decision to conclude the international trade agreement. The Council´s decision requires again unanimity following its general practice regarding trade agreements.[423] Upon final conclusion (ratification), the international trade agreement becomes legally binding for EU institutions and its Member States pursuant to Art. 216 (2) TFEU.

4. Implementation Phase

DG Trade has become more transparent in the implementation phase. It has started to publish all CETA negotiation reports and committee meeting agendas. This approach serves as the new standard for all other trade agreement negotiations.[424]

a) *Ex Post*-Evaluations

Ex post-evaluations are another essential part of creating an evidence-based trade policy. *Ex post*-evaluations function as a tool to ensure that the objectives and expectations pursued through the trade agreement are met. Thus, the evaluation goes beyond a descriptive analysis but assesses the effects of the trade agreement and draws conclusions about the outcomes of actions.[425] Most notably, the *ex post*-evaluation examines what concrete and potential unexpected effects the trade agreement has had. As such, the analysis helps to prevent negative effects due to future trade agreements and helps improve future negotiation strategies. An *ex post*-evaluation usually takes place 5 years[426] after the agreement has entered into effect, given data, effects, and practical experiences are necessary to formulate the report.

aa) Annual Reports on the Implementation of EU Trade Agreements

The Commission has also started to publish annual reports on the general implementation of EU trade agreements.[427] The report considers changes in trade in goods and services, progress and outstanding issues on non-tariff barriers, any other rules, and the extent to which companies use tariff reductions and quotas. The report evaluates what steps can be taken to mitigate agreement-related challenges. The annual report is accompanied by a Staff Working Document that includes a detailed analysis of each of the EU´s trade agreements.[428]

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[422] This refers to cases pursuant to Art. 207 (3) together with Art. 218 (6) (2) (a) (v) TFEU.

[423] Anonymous Expert Interview.

[424] European Commission, Transparency Policy in DG Trade.

[425] European Commission, Better Regulation Toolbox, Tool #43.

[426] European Commission Transparency Policy in DG Trade.

[427] European Commission, Second Annual Report on the Implementation of EU Trade Agreements; European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018.

[428] Staff Working Document, SWD(2018) 454 final, 31.10.2018.

bb) EU Domestic Advisory Groups (DAGs)

Following the EU-Korea trade agreement, the EU has established a new element in its trade treaty-making process: integrating civil society actors (also from the third country) into the implementation process of trade and sustainable development chapters of Comprehensive Free Trade Agreements via Domestic Advisory Groups (DAGs). Recent examples of DAGs are the trade agreements with South Korea, Colombia/Ecuador/Peru or the Ukraine.

DAGs are composed of independent representative organizations within civil society, equally represented by business, labor, and environment organizations. DAGs meet at Civil Society Forums to discuss sustainable development aspects of the respective FTA between the EU and the third country. DAGs are composed of up to 15 members[429] and represent an institutionalized approach to give civil society, and especially civil society of the third country a voice. The European Economic and Social Committee (EESC) also has an active role in DAGs. The EESC has an advisory role,[430] consulted by the European Parliament, the Council, and/or the Commission[431] and consists of "representatives of organizations of employers, of the employed and of other parties' representatives of civil society, notably in social-economic, civic, professional and cultural areas".[432] Compared to other institutions, the Commission has frequently relied on the EESC, especially in order to address civil society aspects of EU external action.[433]

The EESC has over 353 organizations representing different parts of civil society at its disposal[434] and relies on the secretariat to administer the different actors of DAGs. However, DAGs have considerable downsides given the selection mechanisms and parameters are not generally transparent.[435] Furthermore, third countries usually do not have an EESC-similar body and the DAGs meeting consistency varies widely.[436] DAGs can be considered an institutionalized complement to Civil Society Dialogues and as innovative. However, only in so far as they include civil society from the trading partner and reflect the EU´s approach of including civil society both in direct and indirect (advisory board) manner.[437] In sum, the composition and operation of DAGs could be significantly improved.

B. Overall Assessment

Post-TTIP, the Commission has established a "gold standard"[438] for transparency by meaningfully engaging with EU citizens, businesses, and civil society representatives.

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[429] EU-CARIFORUM.

[430] Art. 13 (3) TEU.

[431] Art. 304 TFEU.

[432] Art. 300 (2) TFEU.

[433] Martin Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, Bruges Political Research Papers, 66/2017, at 7.

[434] Martin Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, Bruges Political Research Papers, 66/2017, at 8.

[435] Martin Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, Bruges Political Research Papers, 66/2017, at 10.

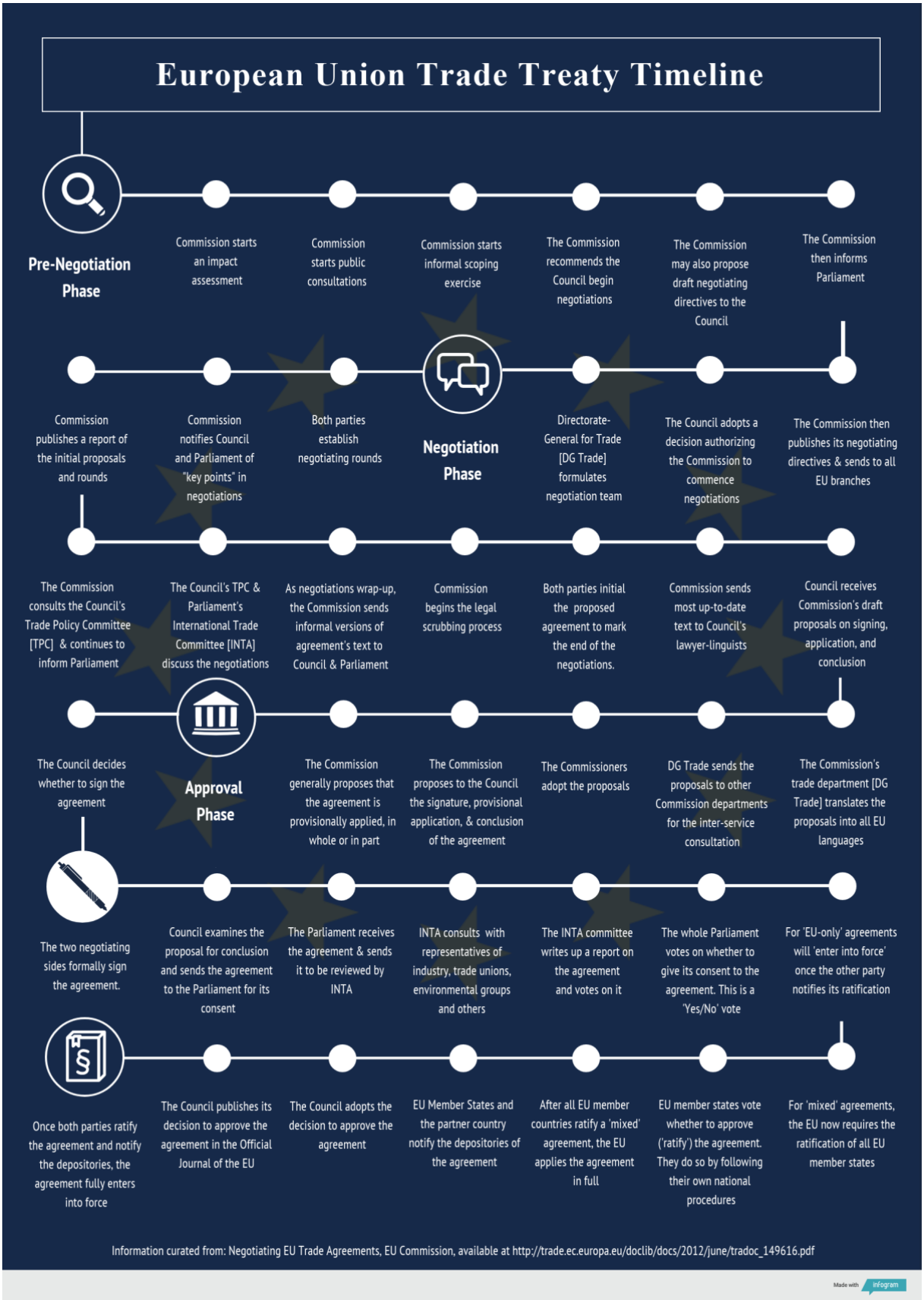
[436] Martin Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, Bruges Political Research Papers, 66/2017, at 10.

[437] Martin Westlake, Asymmetrical institutional responses to civil society clauses in EU international agreements: pragmatic flexibility or inadvertent inconsistency?, Bruges Political Research Papers, 66/2017, at 8.

[438] Anonymous Trade Lawyer D.C.

However, the EU trade treaty-process is partially efficient. Although, the Commission, acting as the main negotiator, helps ensure the EU's trade policy is offered as a coherent negotiating position. Unlike the U.S., the EU does not have specific time-lines in place to expedite the different phases of the treaty-making process have to adhere to. The many different requirements for integrating stakeholders create a comparably cumbersome trade treaty-process.

Further, mixed-agreements constitute a considerable challenge for the EU, given the Commission cannot guarantee whether EU Member States will ultimately ratify the "mixed" parts of the agreement. These mixed-agreement challenges were demonstrated during the CETA ratification process in which Wallonia, one of Belgium's federal sub-entities rejected to give its approval. However, the disadvantages cause by the highly integrative elements are outweighed by the imbedded transparency and accountability elements that ensure the trade agreement is ultimately concluded. The success of all recently concluded (comprehensive) free trade agreements demonstrates the EU´s trade treaty-process not only delivers results that are supported by the different stakeholders in the EU but is also accepted by negotiating partners.


European Union Trade Treaty Timeline
Pre-Negotiation Phase
Commission starts an impact assessment
Commission starts public consultations
Commission starts informal scoping exercise
The Commission recommends the Council begin negotiations
The Commission may also propose draft negotiating directives to the Council
The Commission then informs Parliament
Commission publishes a report of the initial proposals and rounds
Commission notifies Council and Parliament of "key points" in negotiations
Both parties establish negotiating rounds
Negotiation Phase
Directorate-General for Trade [DG Trade] formulates negotiation team
The Council adopts a decision authorizing the Commission to commence negotiations
The Commission then publishes its negotiating directives & sends to all EU branches
The Commission consults the Council's Trade Policy Committee [TPC] & continues to inform Parliament
The Council's TPC & Parliament's International Trade Committee [INTA] discuss the negotiations
As negotiations wrap-up, the Commission sends informal versions of agreement's text to Council & Parliament
Commission begins the legal scrubbing process
Both parties initial the proposed agreement to mark the end of the negotiations.
Commission sends most up-to-date text to Council's lawyer-linguists
Council receives Commission's draft proposals on signing, application, and conclusion
The Council decides whether to sign the agreement
Approval Phase
The Commission generally proposes that the agreement is provisionally applied, in whole or in part
The Commission proposes to the Council the signature, provisional application, & conclusion of the agreement
The Commissioners adopt the proposals
DG Trade sends the proposals to other Commission departments for the inter-service consultation
The Commission's trade department [DG Trade] translates the proposals into all EU languages
The two negotiating sides formally sign the agreement.
Council examines the proposal for conclusion and sends the agreement to the Parliament for its consent
The Parliament receives the agreement & sends it to be reviewed by INTA
INTA consults with representatives of industry, trade unions, environmental groups and others
The INTA committee writes up a report on the agreement and votes on it
The whole Parliament votes on whether to give its consent to the agreement. This is a 'Yes/No' vote
For 'EU-only' agreements will 'enter into force' once the other party notifies its ratification
Once both parties ratify the agreement and notify the depositories, the agreement fully enters into force
The Council publishes its decision to approve the agreement in the Official Journal of the EU
The Council adopts the decision to approve the agreement
EU Member States and the partner country notify the depositories of the agreement
After all EU member countries ratify a 'mixed' agreement, the EU applies the agreement in full
EU member states vote whether to approve ('ratify') the agreement. They do so by following their own national procedures
For 'mixed' agreements, the EU now requires the ratification of all EU member states
Information curated from: Negotiating EU Trade Agreements, EU Commission, available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf
Made with infogram

VIII. Annex D: Case Study on the German and Belgium Federal System with Respect to (Trade) Treaty-Making

A. Germany

Internally, the German Constitution stipulates that the federal states (Länder) are competent for law-making except for cases which fall under the exclusive or shared competence of the Federal State (*Bund*)[439]. Externally, the German Constitution[440] establishes a presumption that the Federal Government has the power to conduct foreign relations.[441] Despite Germany´s federal structure, the German Constitution intends to ensure that Germany represents clear positions in foreign relations, is able efficiently interact with other states but at the same time takes account of the need for balancing different interests within the federal structure of Germany.[442]

In light of the difference between the externally unified representation and the internally complex separation between law-making powers between the state and the federal level, the federal government and the federal states and the Länder concluded an agreement that addresses situations of when an international agreement covers competences that would internally fall under the exclusive competence of the Länder.[443]

The so-called Lindauer Abkommen of 1957,[444] addresses several questions arising when the Federal Republic externally acts in competences which internally exclusively fall under the competences of the states and has proved to be a practical solution.

First, the *Länder* agreed to explicitly attributed accept federal treaties in enumerated areas in which the exclusive competence of the federal state would be otherwise ambiguous.[445] Secondly, the *Länder* agreed to compromise to give the Federal Republic the power to conclude international agreements in areas which fall under the exclusive competence of states provided that the *Länder* have given their prior consent.[446] Conversely, the prior consent binds the *Länder* to not obstruct the transformation of the treaty in national law. For such treaties, the Lindauer Abkommen requires the federal state to involve the *Länder* in treaty preparations and to prior consultations. Thirdly, the Lindauer Abkommen establishes that whenever the "essential interests" of the Länder are affected, the Federal Republic has to meet further requirements to take account of Germany´s internal balance between the Federal

[439] as further specified and enumerated in Art. 71-74 Basic Law, see Christian Seiler, Art. 70, para. 1, in BeckOK Grundgesetz (Epping/Hillgruber, 39. Ed.).

[440] Art. 32 (1) Basic Law.

[441] Heintschel von Heinegg, Art. 32, para. 1, BeckOk Grundgesetz, (Epping/Hillgruber, 39. Ed.).

[442] Martin Nettesheim, Art. 32 para. 2, Maunz/Dürig, Grundgesetz-Kommentar,

[443] Martin Nettesheim, Art. 32 para. 72, Maunz/Dürig, Grundgesetz-Kommentar.

[444] The full title of the agreement is: „Verständigung zwischen der Bundesregierung und den Staatskanzleien der Länder über das Vertragsschließungsrecht des Bundes".

[445] No. 2 Lindauer Abkommen.

[446] No. 3 Lindauer Abkommen.

Republic and the Länder.[447] This includes information requirements about the progress in negotiations and the Länder´s rights to formulate wishes on topics to be negotiated.

Furthermore, a permanent treaty commission established under Art. 4 of the Lindauer Abkommen which consists of representatives of the Länder whose aim is establish a dialogue between the ministries dealing with the negotiation of the international agreement and to find compromises in diverging subject matters and facilitate coordination between the Länder and the Federal Government. Following the majority view, mixed agreements between Member States, the EU and a third party involve federal states under the conditions set in the Lindauer Abkommen.[448]

B. Belgium

Since 1993, Belgium has a multilayered federal structure composed by five regions and three communities reflecting the three cultural communities in Belgium.[449] In this multi-layered structure, every region has exclusive competences over a wide range of matters such as economy, planning, housing within their territory whereas the three communitarian federal entities have the power to legislate linguistic, cultural and educational matters.[450]

The treaty making power in Belgium follows the principle "*in foro interno, in foro externo*" pursuant to Art. 167 of the Belgian Constitution.[451] The principle means that the governments of Communities and Region can conclude treaties if they fall under their competence (Art. 167 § 3 Belgian Constitution). Since the "Sint-Michiels Agreement", regions have the competence to enter international agreements in areas in which they have exclusive competence.[452] Comprehensive free trade agreements such as CETA are considered commercial treaties under Belgian constitutional law and therefore require regional approval before the Belgian government can proceed with signing and ratifying a commercial agreement.

Wallonia, which has the constitutional power to approve commercial treaties, denied its approval to the Belgian signature of CETA. The Federation of Wallonia-Brussels parliament was concerned that CETA would give multinational companies the right to sue governments.[453] Ultimately, the disagreement between the Wallonian region and the Belgian government wanting to proceed to the signature of CETA was solved by an agreement between the Belgian government and the Wallonian region.[454] The example of Wallonia illustrates, however, that Belgium´s system might not serve as a role model for the UK.

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[447] No. 4 Lindauer Abkommen.

[448] Michael Schweitzer & Hans-Georg Dederer, § 3 Rn. 777, Staatsrecht III – Staatsrecht, Völkerrecht, Europarecht, (11. Aufl. 2016).

[449] Anthony Aust, Modern Treaty Law and Practice, 62 (3rd Ed. 2013).

[450] Céline Romainville, Dynamics of Belgian Plurinational Federalism: A Small State under Pressure, 38 Boston College International & Comparative Law Review, 225 (226) (2015).

[451] Luc Lavrysen et. al., Developments in Belgian constitutional law: The year 2016 in review, I Con (2017), Vol. 15 No. 3, 774.

[452] Yelter Bollen, Feri De Ville and Niels Gheyle, From nada to Naumr: national parliaments' involvement in trade politics, the case of Belgium, at 2.

[453] Maïa de la Baume, Walloon Parliament rejects CETA deal, Politico (14 October 2016).

[454] Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l'Etat fédéral et les Entités dédérées pour la signature du CETA (27 October 2016).