

## A “Legal Eccentricity”: The European Parliament, its Non-binding Resolution, and the Legitimacy of the EU’s Trade Agreements

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### ABSTRACT

The European Union (EU) is pursuing an ambitious trade agenda despite increased controversy over the negotiating process and substance of trade agreements. This controversy raises questions about the legitimacy of trade agreements, as Cecilia Malmström, former European Commissioner for Trade, has acknowledged. This article seeks to evaluate the legitimacy of the EU’s agreements, with a focus on the role of the European Parliament as a legitimating actor. It argues that the Treaties do not provide for sufficient legitimacy and then considers whether Parliament has been able to use its informal governance tools, particularly the non-binding resolution, to narrow the legitimacy deficit.

### KEYWORDS

*Legitimacy; Trade; European Parliament; Soft Law; Resolution*

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*The world is changing, creating two major new challenges that demand new responses from trade policy makers. First, we must keep up with economic developments . . . The second major challenge to trade policy is about legitimacy.<sup>1</sup>*

INTRODUCTION

Generating sound trade policy presents significant challenges to policymakers, both in terms of substance and procedural development. This article takes up one of the challenges identified by former Commissioner Malmström and explores the legitimacy of a critical piece of the European Union’s [hereinafter EU] trade policy: trade agreements. The public is concerned about whether trade agreements promote economic growth while not compromising their values,<sup>2</sup> rendering it increasingly important to consider their legitimacy. A key player in any legitimacy analysis is the European Parliament [hereinafter Parliament], both as an institution elected to serve as the democratic representative of EU citizens<sup>3</sup> and as one of the institutions that must consent to any proposed trade agreement. The impact of the first role on the second may take on a new

<sup>1</sup> Cecilia Malmström, European Commissioner for Trade, Liberal International’s Isaiah Berlin Lecture at the Yale Club of New York: Liberalism, Free Trade and Other Values (Sept. 24, 2015), [https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153813.pdf](https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153813.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Consolidated Version of the Treaty on European Union art. 10(1)-(2), June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU]; see also Francis Snyder, *Soft Law and Governance: Structure and Process in the European Union Experience*, in *THE CHALLENGE OF SOFT LAW* (Luo Haocai ed., 2009).

– or renewed – significance for the other EU institutions during the von der Leyen Commission’s mandate. More precisely, the 2019 Parliamentary Elections had a turnout of over fifty percent for the first time in over twenty years.<sup>4</sup> This makes it “very difficult” to conclude that Parliament is not a representative of the public and therefore makes it increasingly important that the other EU institutions consider Parliament’s views.<sup>5</sup>

This article seeks to assess Parliament’s influence on the legitimacy of trade agreements to date, taking into consideration the relatively limited role provided for it in the Treaties as well as how it has sought to expand its role via informal governance tools, particularly the non-legislative, non-binding resolution. The non-binding resolution is of particular significance for several reasons. First, it is one of the most public “soft law” tools available to Parliament, as it is generally debated and voted upon in open sessions. Soft law is defined here as “[r]ules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”<sup>6</sup> Second, the resolution is voted on in plenary and reflects the majority view of Parliament. Third, it is often used by Parliament to seek commitments from the other EU institutions prior to as well as during negotiations despite the fact that the Treaties do not give Parliament a formal role during these stages. To put it bluntly, the non-binding resolution is something of a “legal eccentricity.”<sup>7</sup>

To undertake this evaluation, the article first introduces the concept of legitimacy and sets out how legitimacy will be measured. Next, it explores whether the Treaties sufficiently legitimise the EU’s trade agreements. Coming to the conclusion that they do not, the article subsequently analyses whether and how the European Parliament’s use of the non-binding resolution has affected this legitimacy deficit. To identify the relevant resolutions, searches of Eur-lex and the European Parliament’s website were performed using the phrases “trade & resolution,” “trade & [country],” and “investment & resolution.” All resolutions meeting the following criteria were included in the study: (1) they were about a particular agreement or addressed trade in a broader context and (2) they addressed trade policy or negotiations begun or continued after the Treaty of Lisbon went into effect, as this is when Parliament gained the power of consent with regard to trade agreements. The contents of these resolutions were then compared to the texts of the agreements and to other public documents released by the European

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<sup>4</sup> *Voter Turnout Rises for First Time Ever in EU Elections, Breaking 50%*, Euronews (May 28, 2019), <https://www.euronews.com/2019/05/27/voter-turnout-rises-for-first-time-ever-in-eu-elections-breaking-50> (last visited June 28, 2020).

<sup>5</sup> Interview 5 (C). See *infra* note 8 for an explanation of the author-conducted interviews.

<sup>6</sup> Francis Snyder, *SOFT LAW AND INSTITUTIONAL PRACTICE IN THE EUROPEAN COMMUNITY*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198* (Stephen Martin ed., 1994).

<sup>7</sup> Interview 3 (EP).

Commission [hereinafter Commission] and Council of the European Union [hereinafter Council] to assess their impact on the legitimacy deficit. Further insight into their potential effect was obtained by way of ten semi-structured interviews with individuals affiliated with the institutions directly involved in the negotiation and conclusion process: the Parliament, Commission and Council.<sup>8</sup>

## 1. THEORIES OF LEGITIMACY

When assessing the legitimacy of a political system, “two main methods” are used, with one using normative criteria and the other undertaking an empirical analysis.<sup>9</sup> This article adopts the normative approach, which has generally recognised “identity, representation and accountability, and performance” as the criteria by which to judge legitimacy.<sup>10</sup> Not only are these criteria applied extensively in the literature, but their appropriateness is supported by some empirical evidence indicating that “[c]itizens appear to use the criteria of democracy, identity and performance when evaluating the EU.”<sup>11</sup>

The literature classifies identity, representation and accountability as “input legitimacy” and performance as “output legitimacy.”<sup>12</sup> As defined by Scharpf, input legitimacy asks whether a system or governing process is “responsive to the manifest preferences of the governed.”<sup>13</sup> In other words, it asks whether a system includes citizen and representative participation in decisions taken by the relevant institutions. Output legitimacy asks whether the “policies adopted . . . effectively solve common problems” and whether the system is arranged in a manner that prevents abuse of power.<sup>14</sup> Few scholars rely solely on output legitimacy when assessing the EU’s legitimacy. Those that do submit that the technocratic nature of the EU provides it with sufficient legitimacy by guaranteeing more centrist and efficient outcomes than might result from more political

<sup>8</sup> All interview participants are anonymised and referred to by a randomly selected number and an abbreviation to indicate the institution with which they are affiliated: EP = European Parliament; COM = Commission; and C = Council. The interviews were conducted by telephone and in person in Brussels, Belgium, between April and May 2019.

<sup>9</sup> Ronald Holzhaecker, *Democratic Legitimacy and the European Union*, 29 J. EUR. INTEGRATION 257, 259 (2007).

<sup>10</sup> *Id.* (citing DAVID BEETHAM & CHRISTOPHER LORD, *LEGITIMACY AND THE EUROPEAN UNION: POLITICAL DYNAMICS OF THE EUROPEAN UNION* (1998)).

<sup>11</sup> Piret Ehin, *Competing Models of EU Legitimacy: the Test of Popular Expectations*, 46 J. COMMON MKT. STUD. 619, 632 (2008).

<sup>12</sup> Christopher Lord & David Beetham, *Legitimizing the EU: Is there a ‘Post-parliamentary Basis’ for its Legitimation?*, 39 J. COMMON MKT. STUD. 443, 444 (2001).

<sup>13</sup> Fritz W. Scharpf, *Problem Solving Effectiveness and Democratic Accountability in the EU* MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES, MPIFG WORKING PAPER, NO. 03/1(2003), <https://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html>.

<sup>14</sup> *Id.* at 1, 3.

processes.<sup>15</sup> By contrast, other scholars contend that output legitimacy cannot sufficiently legitimise the EU because, if the institutions are not designed to respond to the public's changing views, once-agreeable solutions may not be acceptable as time passes.<sup>16</sup> The system, therefore, must provide opportunities for input to ensure that the relevant actors are responsive.<sup>17</sup>

Additionally, some literature includes a third variable known as “throughput legitimacy,” which addresses how governance processes shape decision making.<sup>18</sup> This variable examines “the efficacy, accountability and transparency of the EU’s governance processes along with their inclusiveness and openness to consultation *with the people*.”<sup>19</sup> It is viewed as an essential component of any legitimacy analysis because poor throughput “regularly undermines public perceptions of the legitimacy of EU governance regardless of how extensive the input or effective the output.”<sup>20</sup>

As stated above, the public appears to appraise the EU based on notions of democracy, identity and performance. Therefore, this article adopts the input and throughput variables as a means of measuring legitimacy. Output legitimacy, while significant, is outside the scope of this article, as such an examination merits a more extensive empirical analysis than can be completed here.<sup>21</sup> Furthermore, in relying on Scharpf’s theory of input legitimacy, the article focuses primarily on identifying whether and where there may be input deficiencies rather than outlining the precise conditions for sufficient legitimacy. This is largely because Scharpf’s theory does not provide a clear answer as to when a process is sufficiently responsive (e.g., how much input is enough?)

<sup>15</sup> See, e.g., Andrew Moravcsik, *In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 603 (2002); Giandomenico Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, 4 EUR. L.J. 5, 5 (1998).

<sup>16</sup> See, e.g., Furio Cerutti, *Why Political Identity and Legitimacy Matter in the EU*, in *THE SEARCH FOR A EUROPEAN IDENTITY, VALUES, POLICIES AND LEGITIMACY OF THE EUROPEAN UNION* (Furio Cerutti & Sonia Lucarelli eds., 2008).

<sup>17</sup> Jens Steffek, *The Output Legitimacy of International Organizations and the Global Public Interest*, 7 INT’ L THEORY 263, 276 (2015); Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 549 (2006).

<sup>18</sup> See, e.g., Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’*, 61 POL. STUD. 2 (2013); Thomas Risse & Mareike Kleine, *Assessing the Legitimacy of the EU’s Treaty Revision Methods*, 45 J. COMMON MKT. STUD. 69 (2007).

<sup>19</sup> Schmidt, *supra* note 18.

<sup>20</sup> *Id.* at 3, 9.

<sup>21</sup> It has been posited that defining the public interest for purposes of measuring whether a decision comports with that public interest must be determined by counterfactual and “ex negativo.” Steffek, *supra* note 17, at 272-73. Given that trade agreements affect different sectors and individuals in divergent ways, and in the absence of a uniform definition of public interest, measuring this aspect of output legitimacy is exceptionally complex. Consider the disparate views set forth during the European Parliament’s debate on the EU-Canada Comprehensive and Economic Trade Agreement, during which even members of the same political group could not agree on whether CETA should be approved. European Parliament, Debate: EU-Canada Comprehensive Economic and Trade Agreement – Conclusion of the EU-Canada CETA-EU-Canada Strategic Partnership Agreement (Feb. 15, 2017), [https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004_EN.html) (last visited June 28, 2020).

or how to weigh the value of different inputs. Applying the theory is therefore context-specific and arguably more amenable to application when identifying insufficient input and output as opposed to identifying sufficient input and output. Thus, this article seeks to identify if and where there may be insufficient inputs and analyse whether the European Parliament can or has played a role in reducing some of these insufficiencies.

## 2. LEGITIMACY DEFICIT? THE TREATIES’ ALLOCATION OF COMPETENCES

Applying the input/throughput variables described above, this part analyses whether the formal allocation of powers between the EU institutions sufficiently legitimises the EU’s trade agreements.

### 2.1 THE LEGAL CONTEXT

The authority to negotiate and conclude trade agreements is derived from articles 207 and 218 of the Treaty on the Functioning of the European Union [hereinafter TFEU]. As set out in article 218, the Commission submits recommendations to the Council for a decision to authorise negotiations, and the Council adopts negotiating directives addressed to the negotiator (here, the Commission).<sup>22</sup> When negotiations have concluded, the Commission sends a recommendation to the Council for a decision to authorise the signing and, “if necessary,” provisional application, of the agreement.<sup>23</sup> Once the Council has adopted such a recommendation, the agreement is submitted to the Parliament for consent, and if obtained, the Council adopts a final decision concluding the agreement.<sup>24</sup> If the agreement includes areas in which the EU does not have exclusive competence, so-called “mixed agreements,” the Member States must also approve it.<sup>25</sup>

As part of the process, Parliament must “be immediately and fully informed at all stages,” including “the authorisation to open negotiations, the definition of the

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<sup>22</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 218(2)-(3), June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU].

<sup>23</sup> TFEU art. 218(5).

<sup>24</sup> TFEU art. 218(6).

<sup>25</sup> See Op 2/15 [2017] ECLI:EU:C:2017:376 (May 16, 2017); Op 1/94 [1994] ECLI:EU:C:1994:384 (Nov. 15, 1994).

negotiating directives, the nomination of the Union negotiator ... the completion of negotiations, the authorisation to sign the agreement, where necessary, the decision on the provisional application ... and the conclusion of the agreement.”<sup>26</sup> As part of this obligation, the Commission must report regularly to Parliament.<sup>27</sup>

In addition, the EU institutions must, “by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views,” and must “maintain an open, transparent and regular dialogue with the representative associations and civil society.”<sup>28</sup> Further, the Commission must “carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.”<sup>29</sup>

## 2.2 AN ASSESSMENT

With regard to input legitimacy, the Treaties envision some opportunities for EU citizens and stakeholders to participate in the negotiation of trade agreements, as set out in article 11 of the Treaty on European Union [hereinafter TEU]. Nevertheless, the form and frequency of consultations and civil society dialogues are not specified, suggesting that the Treaties themselves do not inherently guarantee meaningful levels of citizen participation.

Parliament’s opportunities to provide input present a more complex puzzle, but the powers granted to Parliament in the Treaties – power to consent or veto a final agreement and the right to be informed – do not provide for sufficient legitimacy. First, one might contend that Parliament’s ability to approve or veto decisions to enter into trade agreements provide adequate input legitimacy, as Parliament legitimises an agreement by approving it or provides input by rejecting it. However, as reflected in the controversy about the substance of trade agreements and lack of transparency in trade negotiations, improving input legitimacy requires a process that provides Parliament and the public with meaningful access to information and a more nuanced ability to communicate policy preferences than a yes-no vote. Fundamentally, the process should reflect more “government by discussion.”<sup>30</sup> Consent or a veto may be part of that discussion, but cannot replace more specific and constructive discussions. More precisely, consent alone fails to reflect the compromises and concerns Parliament may

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<sup>26</sup> Case C-263/14, *European Parliament v. Council of the European Union*, 2016 E.C.R. 76.

<sup>27</sup> TFEU art. 207(3).

<sup>28</sup> TEU art. 11(1)-(2).

<sup>29</sup> TEU art. 11(3).

<sup>30</sup> Scharpf, *supra* note 13, at 1.

have notwithstanding its approval; similarly, a veto itself says little about the specific concerns that led Parliament to issue a vote of disapproval.

Additionally, relying on Parliament to exercise its veto power to ensure that its views, and indirectly, the views of EU citizens, may be considered overly optimistic. Between January 2010 and December 2012, for example, Parliament considered ninety-nine agreements and vetoed two (and has not vetoed any trade agreements since then).<sup>31</sup> While this suggests that the veto remains important, it also suggests that Parliament may feel constrained in exercising it, given the amount of time and effort – often years if not decades – involved in concluding trade negotiations and the political cost to the EU in attempting to reopen negotiations with a trade partner. Aside from the most extreme cases, it may be that the Parliament will accept an agreement for political reasons, even if it would prefer not to, on substantive grounds, which undermines the view that a veto ensures that EU citizens’ policy concerns have been considered and voiced through Parliament to the Commission.

Parliament’s right to be informed is also significant but the TFEU’s brief presentation of this right similarly suggests little of the “government by discussion” necessary for adequate input legitimacy. The ability to offer input about trade negotiations reflects “the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.”<sup>32</sup> Thus, although Parliament may not be a full participant in negotiations – the Commission alone presents the EU’s position to trade partners – it must be capable not only of receiving information but also of sharing its views with the Council and Commission. The Treaties are silent as to how this should happen, which is increasingly problematic as trade has become more controversial, thereby making input legitimacy and Parliament’s ability to engage with the other EU institutions all the more relevant.<sup>33</sup>

The Treaties also address some aspects of throughput legitimacy, but the relevant articles are too vague to ensure that such legitimacy is realised in practise. On the positive side, the Treaties delineate some lines of accountability. Each EU institution is allocated a particular role in the process, theoretically making it simple to identify

<sup>31</sup> Youri Devuyt, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J. INT’L & BUS L. 259, 314 (2013).

<sup>32</sup> Case C-658/11, Eur. Parl. v. Council, 2014 E.C.R. 81; Laura Feliu & Francesc Serra, *The European Union as a “Normative Power” and the Normative Voice of the European Parliament*, in *THE EUROPEAN PARLIAMENT AND ITS INTERNATIONAL RELATIONS* 17, 25 (Stelios Stavridis & Daniela Irrera eds., 2015).

<sup>33</sup> Other countries have similar executive-legislative divisions of responsibility during negotiations. Despite a recognition that a trade partner must be able to negotiate with a single voice, the EU is not alone in facing concerns about lack of input from elected representatives of the people during negotiations. See, e.g., Kimberly Ann Elliott, *The Process for Negotiating U.S. Trade Agreements Needs a Facelift*, *WORLD POL. REV.* (Feb. 19, 2019), <https://www.worldpoliticsreview.com/articles/27458/the-process-for-negotiating-u-s-trade-agreements-needs-a-facelift>.



which actor is responsible for the conduct at issue. Moreover, Parliament is accountable to the citizens via elections, and members of the Council are accountable to their duly elected national governments. Accountability of the Commission rests with Parliament,<sup>34</sup> and the obligation to fully inform Parliament is one way of ensuring that accountability is realised. However, the Treaties offer no clarification as to the meaning or method of implementing the obligation to fully inform Parliament. On a narrow reading, all that is required is a one-way interaction, with the Commission providing information to Parliament, indicating the Treaties do not inherently promote processes conducive to effective monitoring and oversight. Similarly, although the institutions have a general obligation to “ensure that [their] proceedings are transparent,”<sup>35</sup> there is no guidance on how to implement it.

A final, but significant, issue to consider is whether the participation of national parliaments in the development of trade policy may compensate for some of the Treaties’ shortcomings. From one perspective, Member States must consent to mixed agreements, and the approval of each Member State’s government, on behalf of its public, may lend these agreements an added layer of legitimacy. From another perspective, this approval may not sufficiently compensate for lack of guaranteed input during the negotiation of trade agreements. The Treaties themselves do not prescribe how national parliaments ought to be involved or informed during negotiations. Thus, domestic law plays a significant role in shaping the influence of national legislatures, and most EU Member States provide only a “limited role” for their legislatures in this area.<sup>36</sup> Moreover, although some national parliaments have sought a stronger role,<sup>37</sup> others question the parliaments’ interest or ability in playing a sustained and larger role in trade policy. In particular, some EU officials have suggested that national parliaments lack significant expertise in the area,<sup>38</sup> and “are not really reaching out to their European colleagues” for information or to collaborate.<sup>39</sup>

Given the limited legal role that national parliaments have in EU trade policy and lack of consensus as to how meaningful a role these legislatures may play, the voice of national parliaments arguably cannot compensate for the Treaties’ inability to guarantee

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<sup>34</sup> TEU art. 17(8).

<sup>35</sup> TFEU art. 15(3).

<sup>36</sup> Guillaume Van Der Loo, *National Parliaments and Mixed Agreements: Exploring the Legal Bumps in a Rocky Relationship*, in *THE DEMOCRATISATION OF EU INTERNATIONAL RELATIONS THROUGH EU LAW* 210, 215 (Juan Santos Vara & Soledad Rodríguez Sánchez-Tabernero eds., 2019).

<sup>37</sup> See Jan Wouters & Kolja Raube, *Rebels with a Cause? Parliaments and EU Trade Policy After the Treaty of Lisbon*, in *THE DEMOCRATISATION OF EU INTERNATIONAL RELATIONS THROUGH EU LAW* 195, 202-04 (Juan Santos Vara & Soledad Rodríguez Sánchez-Tabernero eds., 2019).

<sup>38</sup> Interviews 4, 6 (COM).

<sup>39</sup> Interview 7 (EP).

sufficient input and throughput legitimacy. These parliaments also cannot, therefore, substitute for the European Parliament as a legitimating force. Much could (and should) be written about the role of national parliaments as legitimating actors, but given the central role of the European Parliament in all EU trade agreements, this article will focus solely on the European Parliament.

In conclusion, the EU’s trade agreements cannot be legitimated solely from the processes and obligations established in the Treaties. It is therefore necessary to consider whether the manner in which the EU institutions behave in practise affects the agreements’ overall legitimacy.

### 3. FILLING THE GAPS: SOFT LAW AS A MEANS OF ENHANCING LEGITIMACY?

If the Treaties do not guarantee meaningful levels of participation in the decision making process and do not inherently promote good governance practises, can soft law alleviate some of the input and throughput legitimacy deficits? More precisely, for the purposes of this article, can Parliament use its non-binding resolution to improve legitimacy? As described above, the non-binding resolution is a significant instrument used by Parliament – perhaps the most significant, as suggested by several individuals affiliated with the Parliament and Commission<sup>40</sup> – to express its views on trade policy. While specific requests in these resolutions are not necessarily “red lines,”<sup>41</sup> they nonetheless provide “political guidance” as to what a final trade agreement should include and how Parliament would like the Council and Commission to conduct the process.<sup>42</sup> As set out below, resolutions feature prominently in how the institutions communicate on trade policy, suggesting that they are one way of expanding opportunities to provide input and of promoting better governance processes. However, the impact of the resolutions is often limited or dependent on a number of practical and legal factors. This part will discuss both how the resolutions affect legitimacy as well as the limits of their influence.

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<sup>40</sup> Interview 1 (EP); Interviews 4, 6 (COM).

<sup>41</sup> Interview 2 (EP); Interview 6 (COM).

<sup>42</sup> Interview 2 (EP).

### 3.1 INPUT LEGITIMACY

Input legitimacy addresses those who are involved in the decision making process, emphasising direct citizen and representative participation. As discussed above, the Treaties oblige the EU institutions to permit citizen participation and to be transparent, which enhances the quality and expands the opportunity for direct participation,<sup>43</sup> but the Treaties fail to explain how these obligations are satisfied. They also require the institutions to fully inform Parliament, but the content of this duty is not explained, thus leaving it unclear as to how, or if, it satisfies the need for representative participation. This section assesses how the non-binding resolution has been used to address these issues, focusing on Parliament's efforts to enhance its and the public's opportunities to provide input on trade negotiations and evaluating whether such opportunities have proven meaningful.

#### 3.1.1 IMPROVING OPPORTUNITIES FOR PARTICIPATION

Parliament has attempted to improve its and the public's opportunities to participate in negotiations by calling for increased transparency and development of practices allowing for greater input.

Transparency is critical to input legitimacy as a means of ensuring that the public and Parliament have sufficient information to understand and participate in the process. Parliament has been vocal about disclosure, in a number of non-binding resolutions. For example, in 2011, Parliament issued a resolution reminding the Commission to conduct negotiations with "openness" and "to take account the interests of EU citizens," while also criticising it for not updating Parliament about negotiations with Canada "even though these negotiations commenced in October 2009."<sup>44</sup> These complaints persisted into 2014, with Parliament passing another resolution demanding to be "informed in advance by the Commission of its intention to launch an international negotiation" and "at all stages of the procedures for concluding international agreements," and thus to "be given access to the Union's negotiation texts" so that Parliament's decisions on trade agreements could be taken after "meaningful" consideration of all relevant documents.<sup>45</sup> In the face of Parliamentary criticism, as well

<sup>43</sup> Alberto Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, 39 EUR. L. REV. 72, 88-89 (2014).

<sup>44</sup> European Parliament resolution of 8 March 2011 on EU agriculture and international trade, July 7, 2012, para 57, 2012 O.J. (C 199) 48.

<sup>45</sup> European Parliament resolution of 13 March 2014 on the Implementation of the Treaty of Lisbon with Respect to the European Parliament, Sept. 9, 2017, paras 43, 45, O.J. (C 378) 218.

as criticism from the public and European Ombudsman,<sup>46</sup> the Commission published, for the first time, some of its draft negotiating directives and initial negotiating proposals.<sup>47</sup> Amidst further calls from Parliament to improve its efforts,<sup>48</sup> it eventually institutionalised these publication practises in its Trade for All strategy.<sup>49</sup> The Commissioner for Trade also acknowledged that the Commission needed to “work very closely” with Parliament, as members of Parliament [hereinafter MEPs] “represent our citizens and they are essential for our work.”<sup>50</sup> To that end, the institutions negotiated a binding Framework Agreement, pursuant to article 295 TFEU, that permits all MEPs, rather than only members of the Committee on International Trade [hereinafter the INTA Committee], to access the negotiating documents under specified conditions.<sup>51</sup>

Given how important transparency is for participation in the decision making process, perhaps it is not surprising that Parliament continues to raise the issue with the Commission.<sup>52</sup> This reflects the view of some MEPs that current levels of transparency are insufficient, as officials who want to review the texts must go to designated reading rooms, cannot make copies and have limited time to review the documents. Such strict procedures can make it difficult to develop an opinion about the final agreement,

<sup>46</sup> European Ombudsman, Cases OI/10/2014/RA and OI/11/2014/RA (Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (“TTIP”) Negotiations), <https://www.ombudsman.europa.eu/en/opening-summary/en/5463textsc1>.

<sup>47</sup> See James Crisp, *TTIP Papers Published as EU Ombudsman Demands More Transparency*, Euractiv (Jan. 14, 2015), <https://www.euractiv.com/section/trade-society/news/ttip-papers-published-as-eu-ombudsman-demands-more-transparency/> (last visited June 28, 2020).

<sup>48</sup> European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para. 2(e)(i), 2017 O.J. (C 265) 35.

<sup>49</sup> European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (Oct. 2015), [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf) [hereinafter *Trade for All*].

<sup>50</sup> See Cecilia Malmström, European Commissioner for Trade, Statesmen’s Forum (May 4, 2015), <https://www.csis.org/events/statesmens-forum-dr-anna-cecilia-malmstrom-eu-trade-commissioner> (last visited June 28, 2020).

<sup>51</sup> European Parliament Press Release, All MEPs to Have Access to Confidential TTIP Documents (Dec. 2, 2015), <http://www.europarl.europa.eu/news/en/press-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents> (last visited June 28, 2020).

<sup>52</sup> See, e.g., European Parliament resolution of 16 November 2017 on the EU-Africa Strategy: a boost for development, Oct. 4, 2018, para. 34, 2018 O.J. (C 356) 66; European Parliament resolution of 25 February 2016 on the opening of FTA negotiations with Australia and New Zealand, Jan. 31, 2018, para 12, 2018 O.J. (C 35) 136; European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 12, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 13, 2018 O.J. (C 346) 219; European Parliament resolution of 15 January 2015 on the annual report on the activities of the European Ombudsman 2013, Aug. 18, 2016, paras 24-25, 2016 O.J. (C 300) 14; European Parliament resolution of 16 September 2015 on the Commission Work Programme, Sept. 22, 2017, para 82, 2017 O.J. (C 316) 254; European Parliament resolution of 21 January 2016 on the activities of the Committee on Petitions 2014, Jan. 12, 2018, para 23, 2018 O.J. (C 11) 105; European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 8, 2018 O.J. (C 101) 30.

especially as the documents “can be a bit out of context and you have to [know] to ask for certain documents.”<sup>53</sup> Moreover, these officials cannot reveal what is in the documents and the public cannot use the reading rooms, leading some to criticise the arrangement as ineffective at improving public understanding and awareness.<sup>54</sup>

The debate as to the appropriate amount of transparency continues and is outside the scope of this article, but there may be a fundamental divergence in Parliament and the Commission’s views based, in part, on their respective roles in negotiations. Transparency comes with benefits, but it also imposes costs. For instance, while transparency may permit more informed public participation, it may also limit the EU’s negotiating flexibility because its trade partners may know or easily determine the EU’s “redlines.”<sup>55</sup> In other words, Parliament may view transparency primarily as a public (and parliamentary) participation tool, but the Commission may adopt a narrower view of “sufficient” transparency to preserve its bargaining power and strategic discussions.<sup>56</sup> There may well be a “middle ground” between the maximalist view of some parliamentarians and the Commission’s position. However one views the ongoing debate, it is evident that Parliament has played a significant role in encouraging the Commission to improve disclosure of relevant documents so the public and MEPs can participate in the process on a more informed basis, which is critical to improving the input legitimacy of trade agreements.

With respect to its own opportunities to provide input, Parliament has also attempted to comment on draft negotiating directives since the opening of the EU-Japan negotiations, when Parliament requested that the Council delay the vote to authorise the mandate until it could state its views.<sup>57</sup> This practice reflects Parliament’s understanding that making its views known early provides it with a greater chance of influencing the content of the agreements, as resolutions that come toward the end can be problematic for, and viewed as less credible by, the Commission.<sup>58</sup>

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<sup>53</sup> Interview 9 (EP).

<sup>54</sup> See, e.g., Matthias von Hein, *TTIP Reading Room: A small step toward transparency*, Deutsche Welle (Jan. 29, 2016), <https://www.dw.com/en/ttip-reading-room-a-small-step-toward-transparency/a-19012651> (last visited June 28, 2020).

<sup>55</sup> See, e.g., Eugénia C. Heldt, *Contested EU Trade Governance: Transparency Conundrums in TTIP Negotiations*, 18 *COMP. EUR. POL.L.* 215 (2019); see also Niels Gheyle & Ferdi De Ville, *How Much is Enough? Explaining the Continuous Transparency Conflict in TTIP*, *POL. & GOVERNANCE*, no. 3, 2017, at 16.

<sup>56</sup> See Panagiotis Delimatsis, *TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy*, in *MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TiSA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATION* 216 (Stefan Griller, Walter Obwexer & Erich Vranes eds., 2017).

<sup>57</sup> European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan, Nov. 15, 2013, 2013 O.J. (CE 332) 44.

<sup>58</sup> Interview 6 (COM); Interview 7 (EP).

A “LEGAL ECCENTRICITY”

Negotiation	Date Resolution Adopted	Date Mandate Adopted
United Kingdom	12/02/2020 <sup>59</sup>	25/02/2020 <sup>60</sup>
Australia	26/10/2017 <sup>61</sup>	22/05/2018 <sup>62</sup>
Chile	14/09/2017 <sup>63</sup>	10/11/2017 <sup>64</sup>
Indonesia	05/07/2016 <sup>65</sup>	18/07/2016 <sup>66</sup>
Japan	25/10/2012 <sup>67</sup>	29/11/2012 <sup>68</sup>
New Zealand	26/10/2017 <sup>69</sup>	22/05/2018 <sup>70</sup>
United States	23/05/2013 <sup>71</sup>	14/06/2013 <sup>72</sup>

Table 1

<sup>60</sup> Council Decision 2020/26, 2020 O.J. (L 58) 53 (Euratom).

<sup>61</sup> European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, 2018 O.J. (C 346) 212.

<sup>62</sup> Outcome of the Council Meeting (3618th Council Meeting) (May 22, 2018), <https://data.consilium.europa.eu/doc/document/ST-9102-2018-INIT/en/pdf>.

<sup>63</sup> European Parliament recommendation of 14 September 2017 to the Council, the Commission and the European External Action Service on the negotiations of the modernisation of the trade pillar of the EU-Chile Association Agreement, Sept. 20, 2018, 2018 O.J. (C 337) 113.

<sup>64</sup> Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations, on behalf of the European Union, on the provisions that fall within the competence of the Union, of a modernised Association Agreement between the European Union and its Member States, of the one part, and the Republic of Chile, of the other part (Nov. 10, 2017), <https://data.consilium.europa.eu/doc/document/ST-13553-2017-INIT/en/pdf>.

<sup>65</sup> European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, 2018 O.J. (C 101) 30 (note that Parliament did not make any substantive requests, but stated only its support for the negotiations).

<sup>66</sup> Outcome of the Council Meeting (3481st Council Meeting) (July 18, 2016), <https://data.consilium.europa.eu/doc/document/ST-11338-2016-INIT/en/pdf>.

<sup>67</sup> European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan, Mar. 11, 2014, 2014 O.J. (CE 72) 16.

<sup>68</sup> Council of European Union Press Release IP/16919/12, Council Agrees to Launch Free Trade Negotiations with Japan (Nov. 29, 2012), <https://data.consilium.europa.eu/doc/document/ST-16919-2012-INIT/en/pdf>.

<sup>69</sup> European Parliament resolution of 26 October 2017 containing Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, 2018 O.J. (C 346) 219.

<sup>70</sup> Outcome of the Council Meeting (3618th Council Meeting), supra note 62.

<sup>71</sup> European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, 2016 O.J. (C 55) 108.

<sup>72</sup> Council of European Union Press Release IP/10919/13, Council Approves Launch of Trade and Investment Negotiations with the United States (June 14, 2013), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/137485.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137485.pdf).

To date, a number of resolutions have been passed in advance of the Council's decisions to authorise negotiating mandates: This chronology may suggest that the Council intentionally gives the Parliament an opportunity to make its views heard.<sup>74</sup> However, the Council's view is that it generally does not wait for Parliament; rather, Parliament is simply able to act more quickly than the Council.<sup>75</sup> For the Council to wait is an exception based on political considerations, such as with the recent decision to authorise negotiations with the United States for limited agreements on industrial goods and conformity assessment<sup>76</sup> (although, in this case, Parliament failed to pass a resolution on the negotiations).<sup>77</sup> In this respect, Parliament has clearly had less success with the Council than the Commission with regard to shaping practises that affect input legitimacy. Some of the tension on this point appears in an aggressively worded resolution stating that Parliament has the "prerogative to ask the Council not to authorise the opening of negotiations until the Parliament has stated its position on a proposed negotiating mandate."<sup>78</sup> Despite this inter-institutional tension, there may be some improvements in the future. As suggested in the introduction, given the results of the 2019 parliamentary elections, the Council may feel more politically constrained with regard to when it can avoid giving Parliament the chance to comment.<sup>79</sup>

Beyond attempting to increase its input opportunities, Parliament has also sought to protect its input opportunities by seeking to limit the provisional application of trade agreements. Provisional application prior to a Parliamentary vote has been increasingly viewed as undermining the power of Parliamentary consent,<sup>80</sup> potentially because Parliament understands that affected parties rely on the new agreement and withholding consent may cause undue legal and market uncertainty.<sup>81</sup> Thus, at the beginning of 2010, Parliament began passing resolutions, and using other governance tools to seek commitments from the Commission with regard to provisional application. In 2010, Parliament asked Commissioner De Gucht during a hearing not to provisionally

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<sup>74</sup> Interviews 1, 7, 9 (EP).

<sup>75</sup> Interview 5 (C).

<sup>76</sup> *Id.* This is almost undoubtedly the case with the decision to open negotiations with the United Kingdom, which are arguably more politically sensitive than negotiations with the United States.

<sup>77</sup> European Parliament, Procedure File on Opening of Negotiations between the EU and the US (2019/2537(RSP)), <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2019/2537> (last visited June 28, 2020).

<sup>78</sup> European Parliament resolution of 13 March 2014 on the Implementation of the Treaty of Lisbon with Respect to the European Parliament, Nov. 9, 2017, para 42, 2017 O.J. (C 378) 218.

<sup>79</sup> Interview 5 (C).

<sup>80</sup> Devuyt, *supra* note 31, at 305.

<sup>81</sup> As suggested above, Parliament may already feel somewhat politically constrained in exercising its ability to disapprove decisions to conclude trade agreements. Provisional application may further exacerbate this political constraint.

apply the EU-Korea agreement prior to Parliamentary consent.<sup>82</sup> Subsequently, Parliament passed several resolutions requesting the same approach for the proposed EU-India and EU-Vietnam agreements.<sup>83</sup> It also requested Commissioner Malmström to commit to the same practise via written questions, and she agreed.<sup>84</sup> Commissioner Malmström’s promise notwithstanding, Parliament continues to raise the issue in resolutions. For example, in its July 2016 resolution on a new trade and investment strategy, Parliament demanded the Commission not “request provisional application of trade agreements, including trade chapters of association agreements” and of mixed agreements prior to Parliamentary consent, and requested this practise be included in an interinstitutional agreement [hereinafter IIA].<sup>85</sup> Parliament made the same demands in resolutions on the proposed agreements with Australia and New Zealand.<sup>86</sup> Much of Parliament’s emphasis on the issue reflects a suspicion that the Trade Commissioner will unilaterally change the policy and from the fact that no Commissioners other than Trade Commissioners have adopted the practise.<sup>87</sup>

Despite Parliament’s efforts, the Commission does not seem receptive to codifying its provisional application practices in an IIA. This reluctance likely stems from two related issues. First, Parliament has already extracted some binding concessions with regard to provisional application. Not only has the Trade Commissioner made guarantees with regard to the issue, but also the Commission has agreed, in a 2010 Framework Agreement, to inform Parliament whenever it believes provisional application is necessary.<sup>88</sup> The Commission as a whole may consider these concessions

<sup>82</sup> See Andrei Suse & Jan Wouters, *The Provisional Application of the EU’s Mixed Trade and Investment Agreements*, in *The Conclusion and Implementation of EU Free Trade Agreements* 176, 184-86 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019).

<sup>83</sup> European Parliament resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations, Dec. 7, 2012, para 36, 2012 O.J. (CE 377) 13; European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement, Dec. 22, 2017, para 1, 2017 O.J. (C 443) 64.

<sup>84</sup> Suse & Wouters, *supra* note 82, at 9-11; Cecilia Malmström, *Answers to the European Parliament: Questionnaire to the Commissioner-Designate 6 (2014)*, [https://www.europarl.europa.eu/hearings-2014/resources/questions-answers/Hearings2014\\_Malmstr%C3%B6m\\_Questionnaire\\_en.pdf](https://www.europarl.europa.eu/hearings-2014/resources/questions-answers/Hearings2014_Malmstr%C3%B6m_Questionnaire_en.pdf).

<sup>85</sup> European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, paras 36-37, 2018 O.J. (C 101) 30.

<sup>86</sup> European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 21, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 24, 2018 O.J. (C 346) 219.

<sup>87</sup> Interviews 7, 8 (EP). This dynamic appears to have continued into the von der Leyen Commission, with Parliament asking for similar commitments from the proposed Trade Commissioners. Phil Hogan, *Answers to the European Parliament: Questionnaire to the Commissioner-Designate (2019)*, <https://www.europarl.europa.eu/resources/library/media/20190927RES62441/20190927RES62441.pdf>; Valdis Dombrovskis, *Reply to the EP’s Written Questions by Executive Vice-President (EVP) for an economy that works for people*, Valdis Dombrovskis, <https://www.europarl.europa.eu/news/files/commissioners/valdis-dombrovskis/en-dombrovskis-written-questions-and-answers.pdf>.

<sup>88</sup> Framework Agreement on Relations between the European Parliament and the European Commission, Annex III, para 7, Nov. 20, 2010, 2010 O.J. (L 304) 47.



sufficiently respectful of Parliament's right of consent and that placing the Trade Commissioner's practices in an IIA that binds the whole Commission may severely limit its authority, especially if no exception is made for urgent cases.

Second, it is not ultimately the Commission that decides whether to provisionally apply an agreement. The Commission proposes provisional application, but the Council must approve it.<sup>89</sup> This dynamic may go far in explaining the Commission's hesitance to accept Parliament's position. Since the adoption of the 2010 Framework Agreement, the Council has objected to how the Commission has limited its own discretion, believing it is allowing Parliament to unlawfully modify the competences set forth in the Treaties.<sup>90</sup> Not only that, but the Council remains concerned that the decisions taken by the other institutions will limit the Council's autonomy, even threatening to take them to the Court of Justice if their actions "would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties."<sup>91</sup> Given this pushback from the Council, the Commission may well be reluctant to further limit its own discretion on an issue that implicates the Council's as well.

These case studies of Parliamentary efforts to improve opportunities for it and the public to provide input suggest a positive, but not altogether successful, record. First, by "channeling public concern ... and expressing these in its recommendations to the Commission,"<sup>92</sup> Parliament can play a significant role in encouraging greater transparency, which may allow it and the public to contribute more effectively to the substance of policy debates.<sup>93</sup> Second, by commenting on negotiations by using resolutions prior to approval of a mandate, Parliament has been able to provide input at the early stages of negotiations and thereby expanded the opportunities for representative participation in the process, albeit on an *ad hoc* basis. Third, by using resolutions as well as other governance tools, Parliament has, on a Commissioner-by-Commissioner basis, largely succeeded in limiting the provisional application of agreements, thereby protecting its consent authority.

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<sup>89</sup> TFEU art. 218(5).

<sup>90</sup> Framework Agreement on Relations between the European Parliament and the Commission, Oct. 23, 2010, 2010 O.J. (C 287) 1.

<sup>91</sup> *Id.*

<sup>92</sup> Ramses A. Wessel & Tamara Takács, *Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament*, 28 EUR. BUS. L. REV. 103, 114 (2017).

<sup>93</sup> See generally Patrick R. Hugg & Sheila M. Wilkinson, *The 2014 European Parliament Elections and the Transatlantic Trade and Investment Partnership: Economics and Politics Collide*, 24 J. TRANSNAT'L L. & POL'Y 117 (2014-15).

### 3.1.2 HAVE PARLIAMENT’S EFFORTS PROVED MEANINGFUL?

Although Parliament has significantly expanded its and the public’s access to information about trade agreements, access alone does not create opportunities to participate. Furthermore, any such opportunities must be meaningful to positively impact input legitimacy. This part considers how Parliament’s efforts have affected the opportunities for Parliamentary and public input. First, with regard to Parliamentary input, the discussion above indicates that the Parliament has increased its opportunities to provide input via resolutions, but the question remains as to whether the opportunities are meaningful. This section measures the meaningfulness of these opportunities by assessing whether the non-binding resolutions about the substance of trade agreements have been taken into account by the other EU institutions, as evidenced by public documents and statements, as well as information from interviews conducted by the author. In particular, this article uses several reactions as evidence that Parliament’s views have been taken into account: (1) substantive changes in position by another EU institution; (2) public statements addressing Parliament’s position; and (3) public debate with Parliament. While not a perfect measure of causation, this method provides indicators of Parliamentary influence on trade negotiations and the behaviour of the other institutions - i.e., whether the institutions respond to the concerns of the governed. A review of the Commission’s recent approach to trade policy, reflected in the Trade for All strategy,<sup>94</sup> indicates that it has been shaped, at least in part, by Parliament’s influence, primarily in the fact that it no longer reflects “a purely economic approach”, but includes a “social and sustainable angle.”<sup>95</sup> This can be seen in a number of issues repeatedly raised in non-binding resolutions and which now appear routinely in trade agreements. For example, the provisions on anti-corruption and human rights, as well as chapters on small and medium enterprises and trade and sustainable development are regularly requested<sup>96</sup> and included in

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<sup>94</sup> See, e.g., *Trade for All*, *supra* note 49.

<sup>95</sup> Interview 4 (COM); Interview 2 (EP); Wessel & Takács, *supra* note 92, at 113.

<sup>96</sup> See, e.g., European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, paras 6, 64, 2018 O.J. (C 101) 30; European Parliament resolution of 25 February 2016 on the opening of FTA negotiations with Australia and New Zealand, Jan. 31, 2018, para 7, 2018 O.J. (C 35) 136; European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, paras 14, 19(f), 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, paras 15, 20, 2018 O.J. (C 346) 219; European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(xii), 2017 O.J. (C 265) 35.

agreements.<sup>97</sup> This suggests that the Commission carefully considers and often incorporates Parliament's preferences into trade negotiations.<sup>98</sup>

Parliament has also expressed disappointment that “the Commission does not address the gender dimension of trade negotiations” in its Trade for All strategy, and requested the inclusion of gender-sensitive provisions in future trade agreements.<sup>99</sup> The Commissioner for Trade agreed to add gender-specific provisions to the Commission's draft negotiating directives and draft texts for the trade chapter of the EU-Chile Association Agreement.<sup>100</sup> As explained by the Commissioner, the EU's trade “policies are gender neutral, but they are not always gender sensitive.”<sup>101</sup> Some of Parliament's concerns have also spilled over to complete agreements. For instance, the EU-Canada Comprehensive Trade and Economic Agreement [hereinafter CETA] does not contain gender-specific provisions, but the CETA Joint Committee on Trade and Gender issued a recommendation in September 2018 to “increase women's access to and benefit from the opportunities created by CETA.”<sup>102</sup>

Another example suggesting that increased public and Parliamentary input has influenced trade negotiations is the reform of Investor-State dispute settlement [hereinafter ISDS] mechanisms. As early as 2011, Parliament expressed reservations about ISDS, notably stating in a resolution on CETA that a State-State mechanism and domestic courts should be used to resolve investor-State disputes, although adding that if an ISDS mechanism were considered, it should not “inhibit future legislation in sensitive policy areas.”<sup>103</sup> In October 2014, in response to continued Parliamentary and public concern, then-Commissioner De Gucht initiated a consultation on the ISDS

<sup>97</sup> See, e.g., Comprehensive Economic and Trade Agreement, Can.-Eur., artt. 18.8, 19.4(4c), Jan. 14 2017, 2017 O.J. (L 11) 23 [hereinafter CETA]; Strategic Partnership Agreement, Can.-Eur., artt. 2, 28(3), Dec. 3, 2016, 2016 O.J. (L 329) 45; Agreement between the European Union and Japan for an Economic Partnership, Eur.-Japan, chs. 16, 20, Dec. 27, 2018, 2018 O.J. (L 330) 3; Strategic Partnership Agreement, Eur.-Japan, artt. 2, 43, Aug. 24, 2018, 2018 O.J. (L 216) 4; EU-Mexico Agreement (in principle) chs. 16, 30, 36, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833> (last visited June 28, 2020).

<sup>98</sup> See Interviews 3, 8 (EP).

<sup>99</sup> European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 22, 2018 O.J. (C 101) 30.

<sup>100</sup> *Joint Recommendation for a Council Decision Authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to Open Negotiations and Negotiate a Modernised Association Agreement with the Republic of Chile* (May 24, 2017), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017JC0019> (last visited June 28, 2020); Draft Provisions on Trade and Gender Equality in the Context of the Modernisation of the EU-Chile Association Agreement, COM, [http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc\\_156962.pdf](http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156962.pdf).

<sup>101</sup> Cecilia Malmström, European Commissioner for Trade, speech at the plenary session of the European Round Table of Industrialists (ERT): Changes in Trade (May 28, 2018), [https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156894.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156894.pdf).

<sup>102</sup> CETA Joint Committee on Trade and Gender, Recommendation 002/2018 of 26 September 2018, [http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157419.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157419.pdf).

<sup>103</sup> European Parliament resolution of 8 June 2011 on EU-Canada trade relations, Dec. 11, 2012, para 11, 2012 O.J. (CE 380) 20.

reform,<sup>104</sup> with his successor, Cecilia Malmström, acknowledging that “ISDS is now the most toxic acronym in Europe.”<sup>105</sup> Following the consultation, the INTA Committee held a public hearing with the Commissioner to share its views on how to reform ISDS.<sup>106</sup> Several months later, the Commission created a Concept Paper, outlining an Investment Court System,<sup>107</sup> and Parliament soon, thereafter, passed a resolution endorsing the approach and calling for the full replacement of ISDS in the proposed Transatlantic Trade and Investment Partnership [hereinafter TTIP].<sup>108</sup> Commissioner Malmström responded to the vote, stating: “What today’s vote also signals is that the old system of investor-state dispute settlement should not and cannot be reproduced in TTIP – Parliament’s call today for a ‘new system’ must be heard, and it will be.”<sup>109</sup> Thereafter, the Commission formally released its proposed Investment Court System,<sup>110</sup> which is now included in several trade agreements.<sup>111</sup>

Aside from Parliamentary influence over the Commission’s policy, a review of available draft directives, resolutions and final directives shows that, while there is often significant policy convergence between the Parliament and the Council,<sup>112</sup> several of Parliament’s requests have been incorporated into the final mandates, suggesting some level of Parliamentary influence within the Council. For example, Parliament requested that the draft mandates for Australia and New Zealand be amended to reference the sectoral Organisation for Economic Co-operation and Development [hereinafter OECD] guidelines and United Nations Guiding Principles on Business and Human Rights and to

<sup>104</sup> See European Commission Press Release, European Commission Launches Public Online Consultation on Investor Protection in TTIP (Mar. 27, 2014), [http://europa.eu/rapid/press-release\\_IP-14-292\\_en.htm](http://europa.eu/rapid/press-release_IP-14-292_en.htm) (last visited June 28, 2020).

<sup>105</sup> Malmström, Statesmen’s Forum, *supra* note 50.

<sup>106</sup> See European Parliament Committee on International Trade, Draft Agenda for 18-19 March 2015, [http://www.europarl.europa.eu/doceo/document/INTA-OJ-2015-03-18-1\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/INTA-OJ-2015-03-18-1_EN.pdf), EUROPEAN PARLIAMENT COMMITTEE ON INTERNATIONAL TRADE, EXCERPT OF DEBATE ON ISDS (Mar. 18, 2015), <https://www.youtube.com/watch?v=ybs5TDEuGzE> (last visited June 28, 2020).

<sup>107</sup> See *generally* Concept Paper: Investment in TTIP and Beyond - the Path for Reform, COM (May 5, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

<sup>108</sup> European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(xv), 2017 O.J. (C 265) 35.

<sup>109</sup> European Commission Press Release ST/15/5327, Statement by EU Trade Commissioner Cecilia Malmström on the European Parliament’s vote on the TTIP Resolution (July 8, 2015), [http://europa.eu/rapid/press-release\\_STATEMENT-15-5327\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5327_en.htm) (last visited June 28, 2020).

<sup>110</sup> European Commission Press Release IP/15/6059, European Commission Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm) (last visited June 28, 2020).

<sup>111</sup> See, e.g., CETA ch. 8; EU-Mexico Agreement (in principle) ch. 19; Council Decision 2018/1676, 2018 O.J. (L 279) (EU) (EU-Singapore Investment Protection Agreement ch. 3); Council Decision 2019/1096, 2019 O.J. (J175) (EU) (EU-Vietnam Investment Protection Agreement ch. 3).

<sup>112</sup> Parliament’s convergence with the views of other EU institutions may serve as a legitimising force. For instance, if Parliament expresses approval in a resolution of a Commission position, such approval from the representatives of the EU public arguably provides the position additional legitimacy.

include provisions requiring that attention be paid to the interests of the overseas countries and territories and the outermost regions.<sup>113</sup> The final negotiating directives incorporated part of the first request regarding the OECD guidelines and also adopted the second.<sup>114</sup> Similarly, Parliament requested an express reference to the Paris Agreement on Climate Change in the EU-Chile Association Agreement,<sup>115</sup> which the Council included in the final mandate.<sup>116</sup> Parliament also successfully requested the exclusion of audio-visual services from TTIP.<sup>117</sup> Aside from Parliamentary input, there remains the question of whether Parliament's efforts, particularly with regard to transparency, have created meaningful opportunities for public input. Parliament's influence has arguably increased transparency vis-à-vis the public with regard to its efforts to encourage the Council and the Commission to release selected negotiating documents. However, greater transparency alone does not always translate to improved or more opportunities for public input, especially since information about trade agreements is not always generated in accessible language, such that the public may feel more engaged with and capable of offering informed views about trade policy.<sup>118</sup> Thus, Parliament's transparency efforts must be considered in conjunction with its efforts to increase the Commission's engagement with the public. In resolutions, Parliament has reminded the Commission of its obligation to engage with EU citizens and encouraged the Commission to expand its outreach beyond civil society organisations and industry

<sup>113</sup> European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, paras 19(h), (m), 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, paras 20(h), (m), 2018 O.J. (C 346) 219.

<sup>114</sup> European Council, Negotiating Directives for a Free Trade Agreement with Australia 3, 6, 17 (May 22, 2018), <http://data.consilium.europa.eu/doc/document/ST-7663-2018-ADD-1-DCL-1/en/pdf>; European Council, Negotiating Directives for a Free Trade Agreement with New Zealand 3, 6, 18 (May 22, 2018), <http://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf>.

<sup>115</sup> European Parliament recommendation of 14 September 2017 to the Council, the Commission and the European External Action Service on the negotiations of the modernisation of the trade pillar of the EU-Chile Association Agreement, Sept. 20, 2018, para 1(x), 2018 O.J. (C 337) 113.

<sup>116</sup> Council, Directives for the Negotiation of a Modernised Association Agreement with Chile 29 (Nov. 10, 2017), <https://www.consilium.europa.eu/media/32405/st13553-ad01dc01en17.pdf>.

<sup>117</sup> European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, para 11, 2016 O.J. (C 55) 108; European Parliament resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs, Mar. 9, 2016, para 60, 2016 O.J. (C 93) 95; European Council, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America para 21 (June 14, 2013), <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>; Lore Van den Putte, Ferdi De Ville & Jan Orbie, *The European Parliament as an International Actor in Trade*, in *EUROPEAN PARLIAMENT AND ITS INTERNATIONAL RELATIONS* 25, 55 (Stelios Stavridis & Daniela Irrera eds., 2015).

<sup>118</sup> See Heldt, *supra* note 55, at 217 (transparency improvements in TTIP negotiations "did not help public perception").

stakeholders.<sup>119</sup> However, Parliamentary influence in this area appears to be relatively limited. On the one hand, the Commission’s continued engagements with civil society dialogues and consultations converge with Parliament’s concerns. On the other hand, the Commission often limits participation in these forums to civil society organisations and industry stakeholders – the public cannot always participate by offering input or by attending.<sup>120</sup> This selective form of public engagement appears to be problematic given that the effectiveness of these forums as a means of ensuring input remains debated. Consultations occur, but somewhat infrequently; for example, the Commission opened negotiations with Australia in 2018 and held only one consultation to date.<sup>121</sup> Furthermore, the timing and contents of consultations have not always been well-considered. The 2014 public consultation on the ISDS, for instance, “virtually coincided” with the end of the CETA negotiations and “confounded the necessary debate” by merging the debate about including the ISDS in the CETA and in the TTIP into a single consultation.<sup>122</sup> Despite this somewhat limited outreach, the Commission deserves credit for announcing a study in April 2020 into the effectiveness of its civil society dialogue process<sup>123</sup> and publishing documents attempting to explain the contents of trade agreements, indicating the Commission is aware of the “disconnect” between trade policy and the public.<sup>124</sup>

<sup>119</sup> See, e.g., European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(vi), 2017 O.J. (C 265) 35. Parliament has also raised this issue in resolutions in other contexts, including WTO negotiations. See, e.g., European Parliament resolution of 3 February 2016 containing the European Parliament’s recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA), para. Q(1)(i)(iv), [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0041\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0041_EN.pdf).

<sup>120</sup> See European Commission, Consultations, [https://trade.ec.europa.eu/consultations/#\\_tab\\_2020](https://trade.ec.europa.eu/consultations/#_tab_2020) (last visited June 28, 2020) (the target audience for free trade agreement [hereinafter FTA] consultations is often limited to industry stakeholders); European Commission, Consultation: Questionnaire on the Modernisation of the Trade Pillar of the Modernisation of the EU-Chile Association Agreement (2018), [https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc\\_156407.pdf](https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156407.pdf) (“This questionnaire is targeting European Union (EU) business (companies/business organisations) and is not intended to be an open public consultation.”); European Commission, Civil Society Meetings, <https://trade.ec.europa.eu/civilsoc/meetlist.cfm#year-2020> (last visited June 28, 2020) (note attendees must be “civil society organisations”); Vivien A. Schmidt, *The European Union: Democratic Legitimacy in a Regional State?*, 42 J.COMMON MKT. STUD.975, 983 (2004) (“the Commission is mostly concerned with the politics of organized interests” – i.e., “civil society”).

<sup>121</sup> See European Commission, Consultations, [https://trade.ec.europa.eu/consultations/#\\_tab\\_2018](https://trade.ec.europa.eu/consultations/#_tab_2018) (last visited June 28, 2020) (2018 consultation on EU-Australia FTA).

<sup>122</sup> See, e.g., Delimatsis, *supra* note 56, at 12–13.

<sup>123</sup> See European Commission Press Release, Study on the European Commission Trade Department’s Civil Society Dialogue (Apr. 28, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2134&title=Study-on-the-European-Commission-trade-departments-Civil-Society-Dialogue> (last visited June 28, 2020).

<sup>124</sup> See, e.g., European Commission, *Guide to the EU-Vietnam Trade and Investment Agreements* (updated Mar. 2019), [https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc\\_154622.pdf](https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf); European Commission, *EU-Australia Trade Agreement Factsheet* (June 2018), [https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc\\_156941.pdf](https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156941.pdf); European Commission, *EU-Mexico: Questions and Answers* (Apr. 2018), [https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156874.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156874.pdf).

In other words, Parliament's influence in this area has not brought about marked changes thus far, but, continued pressure – in conjunction with the Commission's willingness to rethink the issue – may well be worth the effort.

In conclusion, a review of the substantive policies adopted by the Commission and Council demonstrates that the opportunities for Parliamentary input have not been wasted. Rather, the input received has often been taken into account, in part or in full, which strongly suggests that Parliament's efforts have enhanced the input legitimacy of the EU's trade agreements in this respect. However, Parliament's attempts to encourage the Commission to increase its openness to public input have been met with less success. Opportunities for public input remain relatively limited although continued Parliamentary attention to the issue may encourage the Commission to continue refining its approach to public involvement.

### 3.1.3 CONTEXTUALISING PARLIAMENTARY INFLUENCE

The discussion above indicates that Parliamentary pressure, particularly via the non-binding resolution, has influenced the negotiating process and the substance of trade agreements, but this dynamic must be appropriately contextualised. First, the non-binding resolution has power only because the Parliament can refuse to give consent to a trade agreement, as the Parliament often reminds the other institutions<sup>125</sup> – “we can sink it, and they know it.”<sup>126</sup>

Second, the receptiveness of the other institutions limits Parliamentary influence. With regard to the Council's mandates, the contents do not reflect Parliament's concerns simply because Parliament asked. There is often significant policy convergence between the Council and Parliament, and it is therefore not always clear when Parliament has an impact.<sup>127</sup> Furthermore, “the Commission and Commissioner and DG-Trade have their policy and their own policy agenda” and will adopt only the positions that they are “convinced about.”<sup>128</sup> To illustrate this, consider the issue of ISDS reform. As can be seen from the sequence of events, it was not only Parliament driving

<sup>125</sup> See, e.g., European Parliament resolution of 19 January 2011 on the Interim Partnership Agreement between the EC and the Pacific States, May 11, 2012, para 7, 2012 O.J. (C 136) 19; European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 21, 2018 O.J. (C 346) 212; European Parliament resolution of 5 May 2010 on the upcoming EU-Canada Summit on 5 May 2010, Mar. 15, 2011, para 9, 2011 O.J. (C 81) 64; European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, para 25, 2016 O.J. (C 55) 108.

<sup>126</sup> Interview 3 (EP).

<sup>127</sup> See, e.g., Van den Putte *et al.*, *supra* note 117, at 52-69.

<sup>128</sup> Interview 3 (EP).

the debate, but also the Commission, which held a consultation on the issue prior to Parliament formally rejecting the use of ISDS in all future agreements. Thus, while Parliamentary pressure played a role in shaping the debate, this is also an instance in which the views of a Parliamentary majority and the Commission were ultimately aligned.<sup>129</sup>

By contrast, consider the debate about whether to incorporate sanctions into trade agreements to enforce Trade & Sustainable Development [hereinafter TSD] chapters. Regarding the trade agreement between the EU, Peru and Colombia, in 2012, Parliament passed a resolution expressing regret that the TSD standards were not subject to the sanctions mechanisms,<sup>130</sup> and later suggested that the parties to this agreement consider sanctions as an enforcement tool.<sup>131</sup> Parliament asked for similar consideration in its resolution on the opening of trade negotiations with Australia.<sup>132</sup>

To date, the Commission has declined to adopt a sanctions-based approach, which arguably reflects a certain lack of openness to Parliament’s position. Nonetheless, the debate around the issue shows a more nuanced dynamic at work. In response to Parliament’s focus on the issue, the Commission launched a debate on how to reform TSD chapters<sup>133</sup> and issued a fifteen-point plan to improve them.<sup>134</sup> For some, the lack of sanctions in the plan is “disappointing” because “it falls far short of what a lot of the Parliament was actually asking for,” and, in their view, proves that the Commission “want[s] to be seen to give us something [without] actually going all the way to meet Parliament’s expectations.”<sup>135</sup>

From the Commission’s perspective, however, there was no majority support for a sanctions-based approach in Parliament and thus no convincing political reason to abandon the position.<sup>136</sup> The Commission’s view of Parliamentary support for sanctions

<sup>129</sup> Wessel & Takács, *supra* note 92, at 117.

<sup>130</sup> European Parliament resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru, Nov. 15, 2013, para 1, 2013 O.J. (CE 332) 52.

<sup>131</sup> European Parliament resolution of 16 January 2019 on the implementation of the Trade Agreement between the European Union and Colombia and Peru, para 18(d), [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0031\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0031_EN.pdf).

<sup>132</sup> European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 19(g), 2018 O.J. (C 346) 212.

<sup>133</sup> See *Commission Non-paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (Nov. 7, 2017), [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf); European Parliament, Debate: Trade and sustainable development chapters in EU trade agreements (Jan. 16, 2018), [https://www.europarl.europa.eu/doceo/document/CRE-8-2018-01-16-ITM-015\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-8-2018-01-16-ITM-015_EN.html) (last visited June 28, 2020).

<sup>134</sup> See European Commission Press Release, Commissioner Malmström Unveils 15-Point Plan to Make EU Trade and Sustainable Development Chapters More Effective (Feb. 27, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1803> (last visited June 28, 2020).

<sup>135</sup> Interview 8 (EP).

<sup>136</sup> Interview 6 (COM); Interview 1 (EP).



finds some backing in the language of the resolutions. Rather than stating the Commission “must” include a sanctions-based approach, a number of resolutions request that the Commission should “consider, among various enforcement methods, a sanctions-based mechanism.”<sup>137</sup> Moreover, if a sanctions-based mechanism were something that Parliament “badly wanted” in recent and future trade agreements, “we would have had to say no to the agreement” at the consent stage, and this has not yet happened.<sup>138</sup> For the purposes of evaluating input legitimacy, this demonstrates that even when the institutions have different policy preferences, the Commission may still make a serious effort to engage with Parliament. In other words, input legitimacy is not inherently stymied when the institutions disagree.

The question of interpreting the resolutions sheds light on another limitation on Parliament’s influence. Sometimes, the resolutions include geopolitical statements rather than actual demands. For example, the Parliament twice suggested its support for TTIP would be “endangered” if the United States continued its “blanket mass surveillance activities” and failed to adequately respect data privacy rights.<sup>139</sup> However, because the audience for the resolution was the public, refusal to grant consent based on these issues seemed “not likely.”<sup>140</sup> While such strong statements are unusual, their symbolic value may impair the other EU institutions’ ability to interpret when and why Parliament will actually withhold its consent, indicating that Parliament should exercise caution when deciding what to include in its resolutions lest it undermines its own credibility. Of course, the value of a resolution to Parliament may not rest in its influence on the other EU institutions, but in the political signals it transmits to certain constituencies in the European public. The Commission is undoubtedly aware of this, and as seen in the debate about sanctions for TSD chapters, is capable of discerning when a parliamentary majority is demanding substantive changes. But what if the Commission is mistaken in its view of the message Parliament intended to send? Such a situation may

<sup>137</sup> See, e.g., European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 19(g), 2018 O.J. (C 346) 212.

<sup>138</sup> Interview 2 (EP). Indeed, Parliament approved the FTA between the EU and Vietnam despite continued concern about enforcement of TSD chapters, as stated in a non-binding resolution accompanying its approval of the FTA. European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, para 20, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.pdf); see also Council Decision 2019/753, 2020 O.J. (L 186) 1 (EU).

<sup>139</sup> European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs, Nov. 9, 2017, para 74, 2017 O.J. (C378) 104; European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(b)(xiii)2017 O.J. (C 265) 35.

<sup>140</sup> Interview 9 (EP).

not occur often, but leaving the Commission to sort through the symbolic versus substantive may limit Parliament’s ability to affect policy changes.

A potentially less significant, but nonetheless real limitation on Parliament’s influence may be the personalities involved in the policy debates. For example, parliamentary staffers from across the political spectrum commend Commissioner Malmström for her efforts to engage constructively with Parliament.<sup>141</sup> Even some of those who remain critical overall – suggesting that she was sometimes too flippant, even “mocking,” in her exchanges with the INTA Committee – believe that the Commission and Parliament’s working relationship improved from that with the prior Commissioner who may have given some MEPs the impression that “he looked down on the European Parliament.”<sup>142</sup> Strained relationships may lead to fewer efforts to communicate as well as less regard for the views of the other institutions. Not only could this diminish Parliament’s respect for or trust in the Commission, but it may also result in a loss of Parliamentary influence within the Commission.

Additionally, the significance of the non-binding resolution is curtailed to some extent by the fact that it is not used frequently throughout the entire negotiating process. Understanding that negotiations are fluid, Parliament prefers not to issue resolutions while negotiations are ongoing, except when circumstances have changed or political developments merit a response.<sup>143</sup> This cautious approach sometimes also reflects reluctance to commit to a position and an awareness that politically sensitive mistakes can be made. For example, in a resolution on palm oil and sustainability, Parliament included statistics about Indonesia’s industry.<sup>144</sup> On a visit to Indonesia, several Indonesian officials showed the resolution to the European delegation, stated that the figures were incorrect and asked why they were not consulted about their own industry as part of “a serious process” before Parliament adopted the resolution.<sup>145</sup>

During periods when MEPs prefer not to issue resolutions, Parliament uses its other tools to convey its views. The INTA Committee holds public hearings, as in the above example of ISDS reform, and has created monitoring groups - unique to this committee - that hold *in camera* meetings on a monthly basis, during which MEPs discuss trade negotiations with the Commission and, occasionally, representatives from third countries. Although the full contents of the *in camera* meetings remain confidential, which permits the participants to “have a very frank exchange of views,”<sup>146</sup> MEPs

<sup>141</sup> Interview 1 (EP); Interview 3 (EP); Interview 7 (EP); Interview 8 (EP); Interview 10 (EP).

<sup>142</sup> Interview 9 (EP).

<sup>143</sup> Interviews 2, 7, 8 (EP).

<sup>144</sup> European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests, Aug. 23, 2018, 2018 O.J. (C 298) 2.

<sup>145</sup> Interview 3 (EP).

<sup>146</sup> Interview 4 (COM).

provide public summaries to the full committee with details of participants and general topics discussed.<sup>147</sup> In addition, MEPs ask the Trade Commissioner to answer oral questions and send letters or written questions. Oral questions can prove most effective when a Commissioner is faced with a unanimous view of the INTA Committee or when she may be forced to make a commitment on the record.<sup>148</sup> Moreover, submitting oral questions and thereby provoking a debate itself provides Parliament an opportunity to ensure the Commissioner listens to its views. For instance, in 2015, the Chair of the INTA Committee and MEP Schaake sent oral questions to Commissioner Malmström on behalf of the entire committee, which the Commissioner then agreed to debate with Parliament during a plenary session.<sup>149</sup> Letters may also prove effective at ensuring the Commission takes notice of Parliament's concerns. As several Commission officials noted, although resolutions are "number one" in terms of Parliamentary influence, a letter from the INTA Committee or a cross-party group might be "number two" in influence – "we would take that very seriously."<sup>150</sup> For example, in 2018, a cross-party group of thirty-two MEPs sent a letter to Commissioner Malmström and High Representative Mogherini to express concern about the EU-Vietnam Free Trade Agreement given the deteriorating human rights situation in Vietnam.<sup>151</sup> Although the letter did not resolve the debate, the Commission took notice, with Commission officials mentioning this letter as significant.<sup>152</sup> That these other tools may influence the Commission's policies sometimes more and sometimes less than non-binding resolutions is not surprising. These other tools have the advantage of speed and, for oral questions, direct communication with the Commissioner. However, resolutions often reflect a majority view of the Parliament while letters or questions from subgroups of Parliament may not. As one interviewee explained, even if the Commissioner debates an oral question with Parliament, "you don't normally know where this is going to lead," as the MEPs engaged in the debate may

<sup>147</sup> See, e.g., Eur. Parl. Committee on International Trade Committee Meeting (Feb. 19, 2020), [https://multimedia.europarl.europa.eu/en/inta-committee-meeting\\_20200219-1500-COMMITTEE-INTA\\_vd](https://multimedia.europarl.europa.eu/en/inta-committee-meeting_20200219-1500-COMMITTEE-INTA_vd) (last visited June 28, 2020) (reports on monitoring groups begins at 16:47). The agenda of the meeting can be found at EUR. PARL. DOC. INTA(2020)0219\_1 and its minutes at EUR. PARL. DOC. INTA\_PV(2020)0219\_1.

<sup>148</sup> Interviews 1, 9 (EP).

<sup>149</sup> Committee on International Trade on "Question for oral answer O-000116/2015 to the Commission", (Sept.30,2015) (remarks of Bernd Lange and Marietje Schaake), [https://www.europarl.europa.eu/doceo/document/O-8-2015-000116\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/O-8-2015-000116_EN.pdf); See also Eur. Parl. Deb. (2821) (Nov.23, 2015), [https://www.europarl.europa.eu/doceo/document/CRE-8-2015-11-23-ITM-012\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-8-2015-11-23-ITM-012_EN.html) (last visited June 28, 2020).

<sup>150</sup> Interviews 4 and 6 (COM).

<sup>151</sup> Letter from 32 MEPs to High Representative Federica Mogherini and Commission Cecilia Malmström (Sept. 17, 2018), <http://tremosa.cat/noticies/32-meps-send-joint-letter-mrs-mogherini-and-commissioner-malmstrom-ask-more-human-rights-progress-vietnam> (last visited June 28, 2020).

<sup>152</sup> Interviews 4 and 6 (COM).

not represent a majority position.<sup>153</sup> Given the different advantages and limits of these tools, they might be best described as complementary to, but not substitutes for, the non-binding resolution.

Finally, binding law also limits Parliamentary influence. For an action to improve legitimacy, it must be legal, as otherwise the action would itself not be legitimate.<sup>154</sup> When an institution doubts the legality of Parliament’s request, it is, unsurprisingly, not willing to take Parliament’s requests on board. For instance, Parliament has requested that the Council wait for it to comment on draft mandates before approving them, and the Council has sometimes done so. However, the Council refuses to guarantee that it will wait due to concerns about protecting its own discretion and preventing Parliament from, in its view, attempting to modify the Treaties’ allocation of competences.<sup>155</sup> To overcome this resistance, it may be necessary to amend the Treaties to ensure that Parliament has a voice at the opening of negotiations, although this solution comes with significant political and practical challenges.<sup>156</sup>

Despite these limits, the non-binding resolution has proved a significant tool with which Parliament has enhanced its ability to influence the substance of trade policy. While Parliament does not always achieve its goals, as with its attempts to increase the public’s ability to participate more directly in negotiations, it generally receives a response from the Commission<sup>157</sup> and has arguably influenced the Council’s final mandates. For input legitimacy purposes, this responsiveness is critical and demonstrates that Parliament has narrowed, but not eliminated, the legitimacy deficit.

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<sup>153</sup> Interview 6 (COM). This dynamic is further complicated by the multifaceted aspect of trade agreements. Specific topics raised may not lead to a veto, as many other considerations enter Parliament’s calculus. The EU-Vietnam debate provides a good illustration. Although a number of MEPs, including the Chair of the INTA Committee, raised human rights as a concern on several occasions, Parliament voted 401-192 (with 40 abstentions) to approve the EU-Vietnam FTA, which does not include more comprehensive enforcement mechanisms for TSD chapters than other EU FTAs. After the vote, the Chair of the INTA Committee indicated that Parliament ultimately decided that approving the agreement and thereby gaining more economic leverage with Vietnam outweighed the remaining concerns, which could be addressed via good implementation. See European Parliament Press Release, Parliament Approves EU-Vietnam Free Trade and Investment Protection Deals (Feb. 12, 2020) <https://www.europarl.europa.eu/news/en/press-room/20200206IPR72012/parliament-approves-eu-vietnam-free-trade-and-investment-protection-deals> (last visited June 28, 2020).

<sup>154</sup> See LINDA SENDEN, *SOFT LAW IN EUROPEAN COMMUNITY LAW* 26 (2004).

<sup>155</sup> Interview 5 (C).

<sup>156</sup> See Devuyst, *supra* note 31, at 292.

<sup>157</sup> See Heldt, *supra* note 55.

### 3.2 THROUGHPUT LEGITIMACY

Throughput legitimacy addresses how decisions are made and the quality of the decision-making processes. As argued above, the Treaties do not provide for sufficient throughput because there is no explanation of how Parliament holds the Commission accountable, and they do not guarantee openness or transparency in negotiations. Lack of such throughput may not only lead to policy that the public views as illegitimate, but can also undermine the EU's efforts to finalise trade agreements. For example, “[t]here is in fact a general belief that the failure to agree on [the Anti-Counterfeiting Trade Agreement] was a consequence of the lack of good communication.”<sup>158</sup> Thus, more systematic and open practises that enhance communication between the institutions and with the public are essential to developing better throughput legitimacy. This section addresses whether and how Parliament's non-binding resolution has affected throughput, first addressing accountability and then, openness and transparency.

#### 3.2.1 IMPROVING ACCOUNTABILITY

Of relevance to trade negotiations is Parliament's role in holding the Commission accountable. One of the most important tools for promoting accountability is article 218(10) TFEU, which states that Parliament is entitled to be “immediately and fully informed at all stages of the procedures.” To affect throughput legitimacy, this reporting obligation must improve Parliament's ability to perform its oversight and legislative duties. In other words, there must be processes for dialogue between the institutions as a means of ensuring that the Commission responds to Parliamentary concerns about any information transmitted to it.

Parliament has repeatedly demanded improved communication from and with the Commission via non-binding resolutions. As detailed above, some of these resolutions address MEP access to negotiating documents. In response, the Commission has institutionalised controlled access to these documents in its Trade for All strategy and in a framework agreement, which enhances Parliament's ability to exercise its oversight authority. However, as with input legitimacy, MEP access to documents must be coupled with an actual dialogue between the institutions to substantially improve throughput. As can be seen from the shift in the Commission's trade policy and its willingness to debate Parliament on issues such as ISDS and TSD enforcement, the

<sup>158</sup> Letter from the President of the European Parliament to the European Ombudsman, Eur. Parl. Doc (SEC 2392/2011/RA) (Jan. 10, 2014), <https://www.ombudsman.europa.eu/en/correspondence/en/53286> (last visited June 28, 2020).

resolution remains a powerful tool for creating such a dialogue. That said, other tools play an equally (if not more) important role in promoting throughput, particularly the hearings held by INTA and its monitoring groups. These regular hearings promote constant communication between the institutions and are rated highly among Parliamentary staffers. “We still have some asks as to how it could work even better, but . . . we are way better served than many other committees by their respective counterparts.”<sup>159</sup>

Overall, Parliamentary pressure via the non-binding resolution has improved its ability to hold the Commission accountable, particularly through the institutionalisation of improved transparency practises. However, the resolution has played a supporting role in promoting communication with the Commission during the negotiation process, with regular hearings by INTA and its monitoring groups playing a leading role. Nonetheless, the influence of the non-binding resolution is not insubstantial, particularly as it has been deployed quite successfully to improve Parliament’s access to information, without which its oversight capability is significantly impaired.

### 3.2.2 IMPROVING OPENNESS AND TRANSPARENCY

Governance processes that promote openness and transparency are essential to throughput legitimacy.<sup>160</sup> As described above, Parliament has repeatedly called for the Commission to increase public and MEP access to documents relevant to trade negotiations. In response, the Commission has adopted standard practises in its Trade for All strategy and routinely disclosed its draft negotiating directives and negotiating texts to the public. Given this dynamic, it seems reasonable to conclude that Parliamentary pressure has played a significant role in shaping these practises, thereby improving throughput legitimacy.

Parliament’s apparent influence on the Council has been more limited, with its non-binding resolution playing a much weaker role in encouraging institutional change. First, with respect to Parliament’s ability to comment pre-mandate, the Council has not promised to provide Parliament with such an opportunity for all negotiations. Not only is the Council concerned about limiting its own discretion, but it may also be unsure about how such a commitment would work in practise. Because the Treaties provide no role for the Parliament at the pre-mandate stage, it is unclear how differences between the institutions should be resolved and what the legal basis would be for potentially

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<sup>159</sup> Interview 2 (EP).

<sup>160</sup> See Schmidt, *Democracy and Legitimacy in the European Union Revisited*, *supra* note 18.

giving precedence to Parliament's views over the Council's.<sup>161</sup> Moreover, Parliament is not always interested in commenting on draft mandates. For instance, Parliament first offered its support for updating the EU-Mexico agreement only after the Council approved the negotiating directives and, even then, did not make substantive comments on the contents of the agreement.<sup>162</sup> Thus, even if the Council were inclined to guarantee Parliament the right to comment on proposed draft mandates, any mechanism would need to address how to handle those situations, potentially by imposing a time limit on Parliament's right to comment.

Second, Parliament has been active in urging the Council to publicly disclose final negotiating mandates. Unlike with other transparency issues, however, a significant amount of the pressure on the Council initially came from the Commission, as part of its own concerns about the lack of transparency, and from the European Ombudsman, who called on the Council to publish the TTIP negotiating mandate.<sup>163</sup> Despite initial reluctance from some Member States who were concerned that disclosure would "diminish the Commission's range of [. . .] discretion during negotiations,"<sup>164</sup> the Council eventually voted to release the mandate.<sup>165</sup> Parliament soon thereafter issued a resolution expressing its support for the Council's decision<sup>166</sup> and subsequently called on the Council to "publish all previously adopted and future negotiating mandates without delay."<sup>167</sup> Although the Commission has since institutionalised its practice of disclosing its draft mandates,<sup>168</sup> the Council has actively resisted doing so. In the Council's view, "[s]uch a decision is exclusively for the Council to make on a case-by-case basis,"<sup>169</sup>

<sup>161</sup> See Devuyt, *supra* note 31, at 315 (proposing the institutionalisation of a procedure to allow Parliament to comment on draft directives with a mechanism to resolve differences between the institutions).

<sup>162</sup> European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 48, 2018 O.J. (C 101) 30.

<sup>163</sup> See Heldt, *supra* note 55, at 11; see generally European Ombudsman, Case OI/11/2014/RA, Public Disclosure of the Transatlantic Trade and Investment Partnership Negotiating Mandate, <https://www.ombudsman.europa.eu/en/summary/en/58303> (last visited June 28, 2020); Letter from European Commissioner for Trade to Minister for the Economy, Investment and Small Business, SEC (2017) (May 24, 2017). [https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5b28a816d&title=CM\\_signed](https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5b28a816d&title=CM_signed) (last visited June 28, 2020) (requesting disclosure of EU-Japan mandate).

<sup>164</sup> Heldt, *supra* note 55, at 13.

<sup>165</sup> See Council of European Union Press Release ST 14095/14, TTIP Negotiating Mandate Made Public (Oct. 9, 2014), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/145014.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf).

<sup>166</sup> European Parliament resolution of 15 January 2015 on the annual report on the activities of the European Ombudsman 2013, Aug. 18, 2016, para 25, 2016 O.J. (C 300) 14.

<sup>167</sup> European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 9, 2018 O.J. (C 101) 30.

<sup>168</sup> See *Trade for All*, *supra* note 49.

<sup>169</sup> Draft Council Conclusions on the Negotiation and Conclusion of EU Trade Agreements, Brussels European Council, at para 8 (May 8, 2018), <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>, adopted in Council of European Union Press Release 9102/18, Outcome of the Council Meeting (May 22, 2018), *supra* note 62.

which is one of the reasons for which the negotiations between all three EU institutions on updating the Interinstitutional Agreement on Better Lawmaking<sup>170</sup> collapsed.<sup>171</sup>

The Council’s concerns are aggravated by the fact that it also views the Commission’s practise of disclosing draft mandates as illegal: all decisions regarding disclosure belong solely to the Council.<sup>172</sup> Furthermore, as indicated above, disclosure may limit the Commission’s bargaining power during negotiations, as some literature suggests.<sup>173</sup> This concern notwithstanding, however, there may well be reason to believe that even if the Council does not authorise public disclosure, “negotiating partners will probably get a copy of it somehow.”<sup>174</sup> Additionally, it does not appear that trade partners have been able to unfairly use the mandates, especially as the EU institutions publicly release a significant amount of information anyway.<sup>175</sup> The debate over public disclosure will undoubtedly continue; indeed, Parliament has continued to stress disclosure, most recently in resolutions on opening negotiations with Australia and New Zealand.<sup>176</sup> As the 2019 elections may lead the Council to feel more obligated to consider Parliament’s requests, the full effect of Parliament’s efforts on this issue is likely yet to be seen. However, given the Council’s deep-seated concern about protecting its own authority, as well as its belief that its position is legally correct, even Parliament’s increased political and normative power may be insufficient to overcome the Council’s resistance.

Nonetheless, Parliamentary pressure on the Council may have contributed to improved institutional procedures in a more limited respect. In prior years, after approving a mandate, the Council forwarded the decision to Parliament with a note that the mandate was included in an annex. However, the annex itself was not attached. If the Parliament wanted to see the mandate, it had to submit a written request.<sup>177</sup> In recent years, however, the Council revisited its policy, and is now attaching the final negotiating directives to the decision transmitted to Parliament.<sup>178</sup> The revised policy

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<sup>170</sup> Interinstitutional Agreement on Better Law-Making, May 12, 2016, 2016 O.J. (L 123) 1.

<sup>171</sup> Interview 5 (C).

<sup>172</sup> *Id.*

<sup>173</sup> *See, e.g.,* Heldt, *supra* note 55.

<sup>174</sup> Interview 5 (C).

<sup>175</sup> *Id.*

<sup>176</sup> European Parliament resolution of 26 October 2017 containing the Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 12, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament’s recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 13, 2018 O.J. (C 346) 219.

<sup>177</sup> Interview 5 (C); *see also* Letter from Bernd Lange to Jeppe Tranholm-Mikkelsen and Marten Van den Berg, COM (2016)11117/16 (June 2, 2016), <https://data.consilium.europa.eu/doc/document/ST-11117-2016-INIT/en/pdf>.

<sup>178</sup> Interview 5 (C).



may be attributed in part to the use of the non-binding resolution, but also underscores that the resolution is often secondary to, or more powerful when used in conjunction with, other tools. In this case, at the same time that Parliament was passing resolutions related to disclosure of mandates for trade agreements, Parliament prevailed in several disputes alleging that the Council failed to “immediately and fully inform” it about the agreements negotiated under the Common Foreign and Security Policy.<sup>179</sup> The combination of these parliamentary tactics may have influenced the Council’s decision to automatically forward all the final negotiating mandates for trade agreements to Parliament.

Overall, parliamentary pressure has improved the transparency and openness of the EU institutions’ governance processes and thereby improved throughput legitimacy, but markedly more so with respect to the Commission than the Council. Given the remaining tension between Parliament and the Council, it is not surprising that MEPs sometimes describe their relations as “one-way traffic.”<sup>180</sup> Thus, although Parliament’s efforts have influenced the establishment of improved governance practises, there remains significant work to be done towards resolving the debates about how much transparency and openness is required or ideal. Until there is a consensus among the EU institutions, Parliament’s influence will remain somewhat inconsistent. Nonetheless, that Parliament’s efforts have been institutionalised or approved on an *ad hoc* basis suggests it possesses substantial capacity to encourage the other institutions to adopt practices that will improve throughput legitimacy.

## CONCLUSION

Assessing and solving the legitimacy deficit that, amongst other things, makes trade agreements so controversial is a continuing challenge. The European Parliament, in its role as the democratic representative of the public, has played a significant role in attempting to address the issue. In particular, its use of the non-binding resolution has proven a powerful normative and political tool for encouraging the other institutions to adapt their practises in ways that have improved input and throughput legitimacy on an *ad hoc* or systematic basis.

<sup>179</sup> See C-263/14, *supra* note 26; C-658/11, *supra* note 32.

<sup>180</sup> Interview 8 (EP).

To date, the Commission has proved an especially receptive partner, not only heeding Parliament’s requests for greater openness, but also institutionalising new disclosure and transparency practises, thus allowing Parliament and, to a lesser extent, the public to offer input on negotiations in a more consistent and informed manner. Although there is no guarantee that the von der Leyen Commission will follow suit throughout its five-year mandate, given the highly fragmented Parliament that has already displayed an attitude of assertiveness vis-à-vis the Commission,<sup>181</sup> it is difficult to imagine that a retreat from the Juncker Commission’s approach would prove politically sustainable.<sup>182</sup>

When the Commission has resisted adopting Parliamentary requests, a significant factor appears to be the Council’s resistance to adopting any practise that would curb the Council’s discretion or potentially allow Parliament to use soft law to modify the Treaties, as can be seen in the debate about provisional application of trade agreements. The Council’s resistance can also be seen in the debates about public disclosure of negotiating mandates and Parliament’s ability to comment on draft mandates. Nonetheless, it is unfair to tag the Council as anti-transparency, as its hesitation reflects reasonable differences of opinion about policy and legality. Moreover, the Council has been influenced to some extent by Parliamentary pressure, releasing mandates on an *ad hoc* basis and occasionally waiting for Parliament to comment on draft mandates before voting to approve them.

In sum, Parliament has demonstrated a growing awareness of its own power and increasing political savvy in deploying its informal governance tools to influence the conduct and substance of trade negotiations. However, its ability to affect the legitimacy of trade agreements is especially limited when the other institutions believe

<sup>181</sup> See, e.g., Maia de la Baume, *Von der Leyen to Change some Commission Titles, Social Democrats Claim Win*, POLITICO (Nov. 13, 2019), <https://www.politico.eu/article/von-der-leyen-to-change-some-commission-titles-social-democrats-claim-win/> (last visited June 28, 2020); *European Parliament Rejects 2 of von der Leyen’s Commission Candidates*, DEUTSCHE WELLE (Sept. 30, 2019), <https://www.dw.com/en/european-parliament-rejects-2-of-von-der-leyens-commission-candidates/a-50642274> (last visited June 28, 2020); Alex Barker & Mehreen Khan, *Ursula Von Der Leyen Survives Tight Vote to Win EU Top Job*, FIN. TIMES (July 16, 2019), <https://www.ft.com/content/138afa0e-a7df-11e9-984c-fac8325aaa04>.

<sup>182</sup> Over time, this may be particularly true due to the loss of the United Kingdom’s MEPs, which may reduce the number of MEPs likely to support the EU’s current trade policy. See Mehreen Khan, *How Life After Brexit Will Get Uncomfortable for Von Der Leyen*, FIN. TIMES (Jan. 27, 2020), <https://www.ft.com/content/599d631c-40b2-11ea-bdb5-169ba7be433d> (last visited June 28, 2020). However, this potential effect has not been immediately apparent. For example, Parliament approved CETA in February 2017 by a vote of 408-254, with 33 abstentions, and approved the EU-Vietnam FTA and Investment Protection Agreements in February 2020 by a vote of 401-192, with 40 abstentions. European Parliament Press Release, *Parliament Approves EU-Vietnam Free Trade and Investment Protection Agreements* (Feb. 12, 2020), <https://www.europarl.europa.eu/news/en/press-room/20200206IPR72012/parliament-approves-eu-vietnam-free-trade-and-investment-protection-deals> (last visited June 28, 2020); European Parliament Press Release, *CETA: MEPs back EU- Canada Trade Agreement* (Feb. 15, 2017), <https://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement> (last visited June 28, 2020).

Parliament's demands conflict with or shift the allocation of competences set out in binding law. To resolve some of the remaining debates about transparency and Parliamentary input, Treaty amendments may ultimately be the best way forward. Until that becomes a realistic option, however, Parliament should continue engaging with the other institutions on issues affecting the legitimacy of the EU's trade agreements.

In particular, Parliament should consider means of “normalising” certain relationships or lines of communication, including by revisiting the idea of creating an interinstitutional agreement to cover issues like provisional application (especially if it feels more empowered vis-à-vis the Commission than during the Juncker mandate) and improving the use of its governance tools. As described above, the Parliament possesses a number of tools through which it may provide input and oversight of trade negotiations. However, using them effectively can prove challenging given the number of demands on Parliament's attention,<sup>183</sup> and Parliament should evaluate how best to consistently use its tools to ensure its views are considered and responded to by the other institutions. For example, while Parliament holds regular hearings, it may wish to consider whether a more constant use of other oversight tools (e.g., letters from the INTA Committee, regular written questions to the Commissioner) could improve input to and influence on the other institutions. Although these informal governance tools, including the non-binding resolution, cannot alone eliminate the legitimacy deficit, their ability to diminish it should not be underestimated, especially as Parliament improves its ability to strategically deploy them. Perhaps most importantly, use of these tools offers the opportunity for continued reflection and debate among the institutions about how they can or should engage with the public and with each other.

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<sup>183</sup> See, e.g., Interview 8 (EP) (“[T]he monitoring role of the Parliament through these resolutions and follow-up has been probably quite weak in the last couple of years, so it could be better ... in terms of consistency, in terms of involvement, and in terms of resources as well.”).