OSSERVATORIO EUROPEO

THE CHIMERA OF TRANSPARENCY IN EUROPEAN UNION NEGOTIATIONS ON INTERNATIONAL AGREEMENTS*

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1. *Foreword: confidentiality versus transparency in international negotiations*.- The mythological figure of the chimera – a fantasy animal described as a monster with a lion's body and head, a dragon's tail and a goat's head protruding from its back – has become, over the centuries, a symbol of illusions, daring fantasies, but also unrealizable and even dangerous dreams.

The search for transparency in international negotiations seems to call into question some of these dreams. Moreover, the apparently inseparable link between confidentiality and the effectiveness of international negotiation is rooted in a practice that goes back a long way, when, not infrequently, even the text of the agreement, reached at the end, remained shrouded in secrecy, jealously guarded through the so-called secret diplomacy[1]. Even today the combination of transparency

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[1] Perhaps the best-known case of a secret agreement is the protocol attached to the non-aggression pact signed by Molotov and von Ribbentrop on 23 August 1939 concerning the partition of Poland and the annexation of the three Baltic States to the Soviet Union. On these and other related issues, please refer to the pages written by E. SERRA, *Trattato segreto e segreto diplomatico* and by G. ANDRE, *Trattato segreto e diplomazia segreta nella prassi del XX secolo* in the book edited by P. FOIS, *Il trattato segreto. Profili storici-diplomatici e*

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and international negotiation seems to represent a true oxymoron[2]. There is, however, a clear perception of a demand for greater transparency in the conduct of international negotiations mainly within and by the European Union and in particular in trade negotiations.

This contribution focuses therefore on the analysis of the various implications of transparency in the institutional system of the European Union in international negotiations.

In the text of the judgment of the General Court (Second Chamber) of the European Union of 19 March 2013, concerning the refusal by the European Commission to disclose the content of certain documents relating to the draft International Anti-Counterfeiting Trade Agreement (ACTA), it is stated that «it cannot be denied (...) that the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain degree of confidentiality to allow the mutual trust of the negotiators and the development of a free and effective discussion»[3]. This passage, which form the basis for the partial rejection of the proceeding against the decision of the European Commission, expresses, in a clear and peaceful way, a prevailing and still very topical

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regime giuridico, Padua, 1990, which remains, thirty years after its publication, a fundamental reference work in relation to the subject under examination. Among more recent contributions, see M. DONALDSON, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, in *The American journal of international law*, 2017, 575 ff; A.S. DEEKS, *A (Qualified) Defense of Secret Agreements*, in *Arizona State Law Journal*, 2017, 713 ff.; D. AZARIA, *Secret Treaties in International Law and the Faith of States in Decentralized Enforcement*, in *The American journal of international law unbound*, 2017, 469 ff.

[2] For a conceptual framework of the subject, we can read the considerations of A. BIANCHI, *On Power and Illusion: The Concept of Transparency in International Law,* in A. BIANCHI and A. PETERS (eds), *Transparency in International Law,* Cambridge, 2013, 8 ff. and, with reference to international economic law, C.S. ZOELLNER, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law,* in *Michigan Journal of International Law,* 2006, 579-628. See also A. PETERS, *The Transparency Turn of International Law*, in *The Chinese journal of global governance*, 2015, 3 ff.

[3] Judgment of General Court (Second Chamber) of 19 March 2013, in *Veld v European Commission*, T-301/10, paragraph 119. In the same judgment, in the following paragraph, it further states: «that the initiative and conduct of negotiations for the conclusion of an international agreement are, in principle, the responsibility of the executive, and that public participation in the procedure for the negotiation and conclusion of an international agreement is necessarily limited, taking into account the legitimate interest not to disclose the strategic elements of the negotiations». Previously, in the same sense, read the judgment of General Court (Second Chamber) of 4 May 2012, in *Veld v Council*, T-529/09, paragraph 88. For a comment, see V. MICHEL, *Accès aux documents et relations extérieures de l'Union. Le principe de transparence cède devant les impératifs de discrétion, indispensable à la bonne conduite, dans un climat de confiance mutuelle, des négociations d'un accord international*, in *Europe*, 2013, 11 ff.

reading of the notion and function of international negotiations[4], including those involving the European Union.

Before any other consideration, it may then be worth assessing whether confidentiality in the negotiations[5], aimed at concluding an international agreement, takes on a clear and shared scope and, if so, whether the matter is properly and comprehensively regulated.

The answer to this question is less simple and less clear-cut than, at least in the first place, we would expect. Certainly, we can say that confidentiality in international negotiations rests, at least implicitly, on the mutual trust of the negotiators. It finds its motivation in allowing them to express themselves freely and thus to conduct negotiations in the best possible way in terms of mutual concessions with a view to achieve a mutually convenient outcome. It is not always, and indeed rarely, the issue of confidentiality in negotiations that is addressed *ex professo*, perhaps on the very assumption that it is taken for granted[6].

The Vienna Convention on the Law of Treaties does not address the point[7]. The issues traditionally regulated by said Convention concern the legitimacy of the negotiators or, at most, the language(s) of negotiation and, above all, the manner in which the agreed text is adopted. If the procedure carried out is solemn and, *a fortiori*, multilateral, the Presidency of the Conference may, at the start of the proceedings, ask for the approval of rules of conduct of the negotiators which also cover the issue of the confidentiality of the negotiations. While there are no doubts that the negotiation should be conducted in good faith, it is equally

[4] The topicality of this debate, also within the Italian legal system, is confirmed, for example, by TAR Lazio (Regional Administrative Court of the Lazio region) ruling no. 11125 of 16 November 2018 ordering the Italian Government to make public the contents of the agreement signed by Italy with Niger in September 2017. On this issue, please refer to the considerations of A. SPAGNOLO, *The conclusion of bilateral agreements and technical arrangements for the management of migration flows: an overview of the Italian practice*, in *The Italian Yearbook of International Law Online*, 2019, 209-230. See also V. PUPO, *Le istanze di accesso civico come strumento di trasparenza democratica in tema di accordi internazionali in forma semplificata*, in *Diritto, immigrazione e cittadinanza*, 2019, 211 ff.

[5] According to the brief and precise description of D. CARREAU and F. MARRELLA, *Diritto internazionale,* Milan, 2016, 110, negotiation is the phase in which negotiations take place and, if they succeed, the text of the agreement, which contains the rules of the treaty, is drafted.

[6] For an overview of the subject of the negotiations for the conclusion of international agreements, please refer to the monographic work of G. MASTROJENI, *Il negoziato e la conclusione degli accordi internazionali*, Padua, 2000.

[7] The Vienna Convention on the Law of Treaties of 23 May 1969, entered into force on 27 January 1980. On this topic, see among many comments that of O. DORR and K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Heidelberg, 2012. According to Article 80 of the Vienna Convention, however, the publication and registration of treaties are required.

undeniable that entering into negotiation does not *per se* create any legal obligation with respect to the drafting of a final text let alone to its final adoption.

One element that indirectly and *ex post* brings the issue of the transparency of the negotiations into play during the negotiations is the rule, enshrined in Article 32 of the Vienna Convention, according to which "preparatory works" are a complementary means for interpretation of the text of the Treaties. The latter, therefore, are assumed, unless otherwise agreed by the Contracting Parties, to be made public or, in any case, to be rendered accessible to interested third parties. This circumstance is particularly important in what we shall say in last Section of this contribution.

2. *International negotiations and secret treaties*.- What must be kept separate is the issue of secrecy in negotiations from that of the value of the secret treaty. It is true, in fact, that a secret treaty can only be preceded by a secret negotiation, while a secret negotiation can certainly end with the publicity of its outcome and thus with the publication (and subsequent registration in accordance with the provisions of Article 102 of the Charter of the United Nations) of the text of the agreement reached[8].

In the event that the negotiations take place secretly and are concluded with the signing of a treaty destined to remain secret, attention to the implications of secrecy will inevitably focus on the scope of the agreement reached[9]. According to the prevailing view in the literature[10],

[8] On the secret treaty and international law, the reconstruction of international practice and the considerations contained in the article by P. FOIS, *Il trattato segreto nel sistema degli accordi internazionali,* in *Rivista di diritto internazionale*, 1990, 809-831, still apply. The A. points out that the secret agreement cannot be governed by the same rules of international law as those applicable to international treaties in general: «The rules in question, moreover, were formed with the obvious agreement as their point of reference, and certainly not the secret agreement: an examination of international practice and the Vienna Convention allows us to state this with certainty» (original text in Italian). The conclusion reached by the A. is as follows: «By far the prevailing indication is in fact in the sense of assimilation of the regime of secret agreements not to that of legally binding treaties, but to the legislation applicable to non-binding agreements, and in particular to *gentlemen's agreements*» (original text in Italian), i.e. agreements that are valid as long as they are so and, in any case, cannot be invoked before bodies of justice, as expressed in Article 102 of the Charter of the United Nations. According to the latter provision, as is well known, none of the parties «to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations».

[9] As shown by the well-known and already mentioned case of the secret protocol attached to the non-aggression pact signed by Molotov and von Ribbentrop on 23 August 1939, there can also be the case of an openly negotiated agreement whose outcome is made public but

the latter is assimilated, in the international legal system, to an agreement destined to be valid as long as it is observed by the Contracting Parties; in other words, a treaty, in the event of non-compliance, cannot be relied upon by the parties before a judicial body[11]. Domestically, secret agreements shall be considered lawful or illegal according to the provisions – normally at a constitutional level – of each national system. In the latter case, they are usually deemed to have no legal effects.

As far as the Italian legal system in concerned, the procedure for the solemn conclusion of treaties, provided for in Article 80 of the Constitution, makes the treaties, with special content, necessarily public[12]. The identification of the content of the treaties may, however, lend itself to more or less rigorous interpretations. The practice contemplates agreements concluded by the Italian Government in a simplified form although with reference to matters peacefully falling under the categories of Article 80 of the Constitution[13]. Therefore, an agreement concluded in a simplified form in areas covered by the reservation provided for by Article 80 of the Constitution, and even more

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accompanied by a protocol that remains secret. The case in question was made public first in the West and then, only in 1989, in the Soviet Union.

[10] The positions of the doctrine, with respect to the value to be recognised internationally to such agreements, are not, however, unequivocal. That of P. FOIS has already been mentioned earlier. B. CONFORTI, *Diritto internazionale, XI ed* (edited by M. IOVANE), Naples, 2018, 80, states, instead, that if the laws of the Contracting States allow the bodies competent to enter into treaties to do so in secret, and if the non-binding nature of the secret agreement is not fulfilled, it does not appear that international law can be invoked to deprive the agreement of its validity and binding force. Surely, the States which contravene the secret agreement intend, at least in principle and from a subjective point of view, to bind themselves, through it, in the same way as the customary rule according to which *pacta sunt servanda*.

[11] According to an extensive interpretation of Article 102, paragraph 2, of the United Nations Charter, already referred to.

[12] According to Article 80 of the Constitution, the Chambers authorize by law the ratification of international treaties that are political in nature, or provide for arbitrations or judicial regulations, or import changes in the territory, or charges to finances, or changes in the law. Please refer to the considerations of A. CASSESE, *Art. 80*, in G. BRANCA (ed.), *Commentario alla Costituzione*, Bologna, 1979.

[13] On this practice, which contemplates agreements of various kinds – even very important ones such as, for example, the *Memorandum of Understanding for Trieste of* 5 October 1954 which attributed "administration" of Trieste to Italy in zone A and Yugoslavia in zone B – reference is made again to B. CONFORTI, op. cit., 83. According to some authors (for example, F.M. PALOMBINO, *Sui pretesi limiti costituzionali al potere del Governo di stipulare accordi in forma semplificata,* in *Rivista di diritto internazionale*, 2018, 870-878) a real custom has been established, by derogation of the provisions of Article 80 of the Constitution, in the sense of extending the power of the Government to have recourse to the simplified procedure also in relation to treaties whose subject matter falls within the scope of this provision.

so if kept secret[14], is not capable, at least in abstract terms, of producing binding effects with respect to the Italian domestic legal system. The Government which, nevertheless, concludes and executes it over time will assume political responsibility for it before the Parliament – either immediately or when the agreement becomes public – and possibly also legal responsibility before the competent court if harmful consequences for individuals derive directly from it and the latter invoke them[15].

If, on the other hand, the text of the agreement reached is made public immediately at the time of its signature[16], the attention will shift to the question of whether or not the secrecy kept during the negotiations that led to the agreement was lawful.

In this second scenario, the subdivision of the two systems – the international system and the internal system of the States involved or, as we shall see in the following paragraph, of the European Union – will be repeated.

As a matter of principle, no general principle requiring the publicity of bilateral or multilateral negotiations seems to exist within the international legal order. On the contrary, practice suggests that the conduct of delegations engaged in negotiations is quite often confidential[17].

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[14] Once again B. CONFORTI, *op. cit*., 81, specifies, in this regard, that a limit to the competence of the Government to enter into agreements in simplified form is given by the prohibition – which prevailing doctrine considers as implicitly provided for in Article 80 of our Constitution ("agreements of a political nature") – to enter into secret agreements.

[15] In any case, Article 4, Law no. 839, of 11 December 1984, provides for a precise obligation to publish. Under this Article: «The Department of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs shall transmit, for quarterly publication in a special supplement to the Official Gazette, all international acts which the Republic is obliged to comply with in foreign relations, treaties, conventions, exchanges of notes, agreements and other acts however named, which are also communicated to the Presidencies of Parliamentary Assemblies. The transmission shall take place no later than one month after the signing of the act by which the Republic is bound» (original text in Italian). It is controversial whether this obligation can be overcome on the basis of the provisions of Article 39 of Law no. 124 of 3 August 2007 on State secrecy. Pursuant to this Article: «Acts, documents, news, activities and anything else whose disclosure is likely to damage the integrity of the Republic, also in relation to international agreements, the defence of the institutions set out in the Constitution at its foundation, the independence of the State with respect to other States and relations with them, and the preparation and military defence of the State are covered by State secrecy» (original text in Italian). This could possibly happen only with reference, of course, to agreements concluded by the Government in a simplified form, without prejudice to the provisions of Article 80 of the Constitution. The D.P.C.M. (Presidential Decree) of 22 July 2011 on "Provisions for the administrative protection of State secrecy and classified information" should also be taken into consideration.

[16] The signature will make the agreement, if concluded in a simplified form, immediately effective, or mark the first functional fulfilment of its entry into force within the framework of the solemn procedure with ratification.

[17] For feedback on this practice, please refer again to G. MASTROJENI, op. cit., 200 ff.

In order to draw up any requirements regarding transparency in the negotiations it is therefore necessary to focus, on a case by case basis, on the specific national legal systems concerned by the negotiations and, for the purposes of this paper, on the European Union's legal system too. The latter may be relevant in relation to two competing, albeit distinct, aspects. The first concerns the strict respect of the division of competences between Member States' bodies and the institutions of the European Union (an effect that we might define as horizontal); the second, more broadly, refers to the protection of the citizens' expectation to be informed of the contents of the negotiations and, ultimately, to review the work of those who conduct the negotiations and who are the expression of executive power before they are signed, i.e. ex *ante,* or, if necessary, only after their entry into force, i.e. *ex post* (an effect that we could define as vertical)[18].

For the purpose of this contribution, we will leave aside the typical perspective internal to nation-states and we will focus on the secrecy or transparency of the negotiations conducted by the European Union and the resulting purely institutional implications[19].

3. *The impact of the way the negotiations are conducted on the institutional balance in the European Union*.- The general considerations made in the previous Section also apply to the conduct of international negotiations carried out by the European Union. The latter, however, take on certain very specific features that are worth exploring in greater depth.

So far, the analysis of the implications of international negotiations by the European Union has not received in the literature the attention it deserves. Studies have been devoted mainly to negotiations within the

[18] From this point of view, *ex post* control could be achieved by having access to the preparatory work that led to the conclusion of the individual treaty.

[19] The issue of access by EU citizens to negotiation documents through Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is not examined in this study as it involves a different kind of perspective. Due to its scope and implications, it requires a dedicated and autonomous examination, which cannot find enough space in this context. For an introduction, see: F. DONATI, *L'accesso ai documenti nel diritto dell'Unione europea,* in *Studi in onore di Franco Modugno,* Naples, 2011, 1411 ff. and the extensive bibliography contained therein as well as inter alia L. ROSSI, P. VINAGRE E SILVA, *Public access to documents in the EU*, Oxford, 2017; A. RIZZO, *Il regolamento (CE) n. 1049/2001 e la "nuova" politica comunitaria della trasparenza*, in questa *Rivista*, 2002, 87 ff. See also judgment of the Court (First Chamber) of 3 July 2014, Council v. In 't Veld, C-350/12, paras. 104-105 with comments by V. ABAZI and M. HILLEBRANDT, *The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In 't Veld*, in *Common Market Law Review*, 2015, 825.

European Union[20]. Similarly, there is no lack of work dedicated, more generally, to the conclusion of international agreements by the European Union, as provided for in Article 218 TFEU[21], as well as to the implications of the issue of transparency in the European Union's external relations[22].

To describe and analyse in detail the procedure for the conclusion of international agreements by the European Union is beyond the scope of this paper. Here, it seems more useful to focus the analysis on paragraphs 3 and 4 of the aforementioned Article 218 TFEU concerning the conduct of negotiations[23].

According to these paragraphs, the power to propose the opening of negotiations lies in the hands of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter referred to as the High Representative). If the proposal is accepted, the Council, in its relevant configuration, will adopt a decision authorising the opening of negotiations and will designate, again depending on the subject matter of the envisaged agreement, either the negotiator (i.e. the Commission or the High Representative[24]) or the head of the Union negotiating team (where appropriate, in view of the matters under negotiation, the Commission and the High Representative[25]). In

[20] See N. VEROLA, *Il punto d'incontro. Il negoziato nell'Unione europea*, Rome, 2020.

[21] For a concise but precise comment on Article 218 TFEU see S. SANNA, Art. 218 TFEU, in F. POCAR and M.C. BARUFFI (eds), *Commentario breve ai trattati dell'Unione europea,* Padua, 2014, 1187 ff., and A. MIGNOLLI, Art. 218, in A. TIZZANO (ed.), *Trattati dell'Unione europea,* Milan, II ed., 2014, 1788 ff.

[22] Leaving aside the contributions on specific topics that we will refer to later, we hereby refer, for example, to the monographic issue of *Politics and Governance*, Vol 5, No 3 (2017), entitled *EU Institutional Politics of Secrecy and Transparency in Foreign Affairs,* and, in particular, to P. LEINO, *Secrecy, Efficiency, Transparency in EU Negotiations: Conflicting Paradigms?*, 6-15. See also the contribution of D. CURTIN, *Official secrets and the negotiation of international Agreements: is the EU executive unbound?* , in *Common Market Law Review*, 2013, 423-458.

[23] According to Article 218(3) TFEU: «The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the Common Foreign and Security Policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team». According to Article 218(4) TFEU: «The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted».

[24] The High Representative will be designated if the matter falls exclusively or principally under the Common Foreign and Security Policy, otherwise the Commission will be responsible for conducting the negotiations. In particular, in the field of trade policy, the Commission is responsible for the negotiation and management of trade agreements involving tariff modulation, customs and trade provisions, and protective measures.

[25] It should be borne in mind, however, that the High Representative also holds, as is widely known, the position of Vice-President of the Commission.

both cases, during the international negotiations the negotiator will represent the European Union as a whole rather than one of its institutions in particular[26].

What is most relevant here, however, is Article 218 TFEU, paragraph 4, whereby the Council is empowered, on the one hand, to issue directives to the negotiator and, on the other hand, to designate a special committee to be consulted during the negotiation process. As is clear, there are two aspects of the items of the aforementioned provision that are relevant: a) the availability of directives addressed by the Council to the negotiator; b) the accessibility of the content of the consultations between the negotiator and the special committee for the purpose designated by the Council, as they take place.

The directives respond to the need to avoid that the negotiator (the Commission and/or the High Representative) contributes to the drafting of a text that could subsequently cause difficulties for the Council itself when it adopts the decision on the signing and then the conclusion of the international agreement. The negotiations are, in principle, confidential. The purpose of confidentiality is to allow the negotiator, especially in the first phase of negotiations, to play his cards close to the vest so to avoid benefits for the other negotiators. The content of the directives obviously relates to the subject of the negotiation, but may also cover procedural aspects, such as, for example, the maximum duration of the negotiation. Such aspects may affect, and sometimes even determine, the success or failure outcome of the negotiation.

The setting up of a special committee, designated by the Council, is intended to allow a periodic update on the progress of negotiations and an immediate debate, if necessary, on specific points of the negotiations. The consultation activity, whether periodic or occasional, takes place in a confidential manner too, just as the communication of the initial directives addressed by the Council to the negotiator. The reason is, once again, to allow the negotiator to conduct negotiations in the best possible way and thus, in the first instance, to make as few concessions as possible while obtaining as many as possible of them from the other parties.

[26] On this subject, please refer to M. GATTI and P. MANZINI, *External representation of the European Union in the conclusion of international agreements*, in *Common Market Law Review*, 2012, 1703-1734. The Authors underline that this circumstance strengthens the role of the negotiator, guaranteeing him a certain room for manoeuvre during the negotiations, withdrawing him from a condition of mere representative of the Council and making him impartial to the recommendations received. Of course, the room for manoeuvre will have to be used with extreme reasonableness by the negotiator, because otherwise his work will be vitiated because it is not done by the Council.

The subject matter of the future agreement affects and justifies in different ways the variable degree of confidentiality surrounding the issuance of directives to the negotiator and the consultations between the negotiator and the special committee appointed by the Council. It is very difficult, however, to identify guidelines to be followed systematically.

A very strong push in the direction of ensuring a certain level of information on the progress of international negotiations conducted on behalf of the European Union has been obtained, quite recently, due to the efforts of the European Parliament[27].

Article 218 TFEU reserves, as is well known, an effective role for the European Parliament in the final stage of the procedure for the conclusion of international treaties: the decision of the Council on the conclusion of the agreement, upon proposal by the negotiator, can be adopted only following the approval or simple consultation (depending on the subject matter of the treaty) of the European Parliament[28], «except where the agreement concerns exclusively the Common Foreign and Security Policy» [29].

Nevertheless, the role played by the European Parliament has become more and more evident also during the negotiation phase itself, finding its legitimacy in paragraph 10 of Article 218 TFEU, according to which «Parliament shall be immediately and fully informed at all stages of the procedure»[30]. In this respect, it is now clear that the provision in question – although included, as outlined in section 9 hereinafter, in the procedure for suspending the application of an agreement and establishing the positions to be adopted on behalf of the Union in a body set up by an agreement – is of general scope.

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[27] For an overview of the topic see: E. BARONCINI, *The Role of the European Parliament in the Conclusion and Implementation of Free Trade Agreements - An Introduction* (with P.T. STOLL and M. TRUNK-FEDOROVA), in *European Investment Law and Arbitration Review*, 2017, 315-317 and P. EECKHOUT, *EU External Relations Law*, Oxford, 2011, 197-198.

[28] As regards, in general, the approval of international agreements by the European Parliament, see: A. OTT, *The European Parliament's Role in EU Treaty-Making*, in *Maastricht Journal of European and Comparative Law,* 2016, 1009-1039; J. SANTOS VARA, *The role of the European Parliament in the conclusion of international agreements in the Post-Lisbon period,* in J. SANTOS VARA and A. RODRIGUEZ SÁNCHEZ-TABERNERO (eds), *The Democratisation of EU International Relations Through EU Law,* London, 2019, 63-81 and A.P. VAN DER MEI, *EU External Relations and Internal Inter-institutional Conflicts: The Battlefield of Article 218 TFEU*, in *Maastricht Journal of European and Comparative Law*, 2016, 1051 ss.

[29] This is provided for in Article 218(6) TFEU.

[30] The provision in question – although included in paragraph 9 hereinafter in the procedure for suspending the application of an agreement and establishing the positions to be adopted on behalf of the Union in a body set up by an agreement – is considered to be of general scope.

The new role of the European Parliament has been supported by the Court of Justice through the adoption of seminal judgments such as that of 24 June 2014 in Case C-658/11 (*Affaire Mauritius*)[31]. According to such judgements, the obligation – laid down in Article 218(10) TFEU, to ensure that Parliament is immediately and fully informed at all stages of the procedure for the conclusion of an international agreement – extends to the stages preceding the conclusion of such an agreement and, in this way, includes the negotiation phase in particular[32]. In addition, on the basis of the subsequent judgment of 14 June 2016 in Case C-263/14 (*Affaire Tanzania*)[33], it has been definitively clarified that the obligation to inform the European Parliament during negotiations also applies when dealing with matters falling within the scope of the Common Foreign and Security Policy[34], despite the different regime applicable to said sector. Therefore the role of the European Parliament is recognised extensively precisely because of its positive nature.

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[31] See N. LAZZERINI, *Il ruolo del Parlamento europeo e della Corte di Giustizia nella conclusione degli accordi PESC*, in *Rivista di diritto internazionale*, 2014, 834 ff. and P. VAN ELSUWEGE, *Securing the institutional balance in the procedure for concluding international agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)*, in *Common Market Law Review*, 2015, 1379 ss.

[32] In this respect, read paragraphs 81 and 82 of the judgment of 24 June 2014 in Case C-658/11: «That rule is an expression of the democratic principles on which the European Union is founded. In particular, the Court has already stated that the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly (see, to that effect, Case 138/79 *Roquette Frères v Council* EU:C:1980:249, paragraph 33, and *Parliament v Council* EU:C:2012:472, paragraph 81). From that point of view, the Treaty of Lisbon has even enhanced the importance of that rule in the treaty system by inserting it in a separate provision that is applicable to all types of procedures envisaged in Article 218 TFEU».

[33] In particular, with regard to the well-known "Tanzania" and the previous "Mauritius" cases, see M.E. BARTOLONI's considerations, *Base giuridica sostanziale e accordi "interpilier": quale ruolo per il Parlamento Europeo? Note a margine del caso Tanzania*, in *European Papers*, 2016, 599-609.

[34] Read paragraph 68 of the judgment of 14 June 2016 in Case C-263/14: «In accordance with the Court's case-law, the obligation imposed by Article 218(10) TFEU, under which the Parliament is to be 'immediately and fully informed at all stages of the procedure' for negotiating and concluding international agreements, applies to any procedure for concluding an international agreement, including agreements relating exclusively to the CFSP (judgment of 24 June 2014, Parliament v Council, C-658/11, EU:C:2014:2025, paragraph 85). Article 218 TFEU, in order to satisfy the requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning the negotiation and conclusion of international agreements by the European Union in all the fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedure (see, to that effect, the judgment of 24 June 2014, Parliament v Council, C-658/11, EU:C:2014:2025, paragraphs 52 and 72)». See: M.E. BARTOLONI, *Sulla partecipazione del Parlamento europeo alla formazione di accordi in materia di politica estera e di sicurezza comune*, in *Rivista di diritto internazionale*, 2012, 796-808.

The conduct of negotiations takes on additional sensitivity when they take place on behalf of the European Union and in coordination with the Member States, which participate individually, in order to reach so-called mixed agreements[35]. In this case, the same procedure governed by Article 218 TFEU shall apply and the negotiator shall act in close coordination with the negotiators of the Member States in order to ensure a representation, as uniform as possible, during the negotiations[36]. In such case, Member States' delegations may grant the Commission a leading, but not exclusive, role during the negotiations. In such situation, which is quite recurrent in practice, relations between the Commission and the Member States delegations will be confidential. Confidentiality will be all the more necessary in order to avoid the disclosure to the negotiators of the other contracting parties of any divisions or, in any case, different visions that may emerge among the delegations of individual Member States which, otherwise, would weaken the negotiating position of the European Commission to the benefit of the counterparts. In this specific type of negotiation, confidentiality is more clearly justified than elsewhere.

4. *The practice in agreements included in trade policy: the TTIP, CETA, ACTA and TiSA cases*.- As a matter of principle, also in the specific case of agreements falling within the common commercial policy, the mechanism for conducting the relevant negotiations is essentially the same as that used in other contexts. However, Article 207 TFEU expressly provides that the Council should normally set up a special committee and that the Commission should[37] report regularly, in addition to the committee, also to the European Parliament on the progress of the negotiations. The provisions in question have further motivated the members of the European Parliament (MEPs) to follow the negotiations closely and to play an active role, not infrequently encouraged by civil society either directly (also through the use of the

[35] For an overview of the subject, see A. PISAPIA, *Gli accordi misti nel quadro delle relazioni esterne dell'Unione europea*, Torino, 2019. See, also, A. DASHWOOD and M. MARESCEAU, (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge, 2008 and S. AMADEO, *Unione europea e treaty-making power,* Milan, 2005.

[36] On this subject, see Council Decision 16632/10 of 6 January 2010. See F. CASOLARI, *Leale cooperazione tra Stati membri e Unione europea*, Napoli, 2020, 227-237.

[37] The Commission is, with regard to the common commercial policy, the only body responsible for negotiating the international agreement.

petition[38] or the citizens' initiative[39]) or indirectly (through the media and social media in particular).

Certain positions taken by the European Parliament have thus helped to guide the progress of the negotiations and the final outcome of some very important international trade agreements. For example, queries and resolutions supported by MEPs in the case of the first "SWIFT" agreement, concerning the transfer to the United States of database on EU citizens, and the "ACTA" agreement, dedicated to counterfeiting, computer piracy and the protection of copyright and patents, are well known and ultimately behind the conduct of the negotiations[40]. Equally significant was the European Parliament's contribution regarding the (failed) agreement on the "Transatlantic Trade and Investment Partnership - TTIP" with the US and the CETA trade agreement, now provisionally in force, with Canada[41] .

In particular, during these last two negotiations, civil society made its voice heard, and contested a very opaque conduct, especially in the TTIP case. It should, indeed, be made clear that the confidential modalities of the negotiations were requested by the counterparts[42] and

[38] Under Article 227 TFEU, any citizen of the Union has the right to petition the European Parliament, individually or in association with other citizens, on a matter falling within the Union's fields of activity and which affects him or her directly.

[39] A European Citizens' Initiative (ECI) invites the European Commission to recommend to the Council to repeal the negotiating mandate for the TTIP and not to conclude the Comprehensive Economic and Trade Agreement (CETA). See A. SANTINI, *L' iniziativa dei cittadini europei. Quale contributo alla legittimità democratica dell'Unione?*, Naples, 2019.

[40] On the ACTA case, in particular, see www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta.

[41] On these events, please refer to the contribution by K. MEISSNER, *Democratizing EU external relations: the European Parliament's informal role in SWIFT, ACTA and TTIP*, in *European Foreign Affairs Review*, 2016, 269 ff., according to which: «applying the democratic feature of parliamentary power to the EU, one way the EP can contribute to democratize the EU's external relations is by expanding its informal role in the conclusion of international agreements». See also the contribution, from a political point of view, by L.M. YOUNG and R.A. CHAFIZ, *The Promise of Transparency: Stakeholder Views on Changes to the EU Trade Negotiation Process*, in *Journal of International Law and Trade Policy*, 2019, 115-132. See also, for further critical considerations M. WENDEL, *International trade agreements and democratic participation*, in *Eur. YB Int. Econ. Law*, 2017, 61 ff. and P. DELIMATSISIL, *TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy*, in *TILEC Discussion Paper No. 2016-020*, 2016, 1-28.

[42] The US Administration, in particular, has demanded respect for considerable confidentiality. The practice at the US Embassies in European capitals equipped with the so-called reserved chambers to allow, during negotiations, to read the documents, but without making photocopies or taking notes, is well-known.

that the Commission has, as far as possible, made the European Union position public, albeit with a certain, at least initial, reticence[43].

In the specific case of the negotiations on the International Agreement on Trade in Services (TiSA), conducted within the framework of the World Trade Organisation (WTO), the negotiation talks took place in a confidential manner and the documents remained accessible to the participants only. In March 2015, however, the Council decided, in view of a growing public interest for this plurilateral agreement, to declassify and then make public the directives given to the Commission two years earlier for the conduct of the negotiations. The Commission, for its part, has published a number of documents relating to its position and sent regular reports to the Council and the European Parliament on the progress of the negotiations. Negotiations have, however, gradually become less frequent, and were later officially suspended.

If more than one clue is a proof of change, we are currently witnessing the Parliament's attempt to gain a more active and conscious role in the negotiation phase of international treaties designed to affect the European Union at least commercially[44], all the more so in areas considered strategic and fundamental for citizen-consumers. The monitoring exercised by the European Parliament, in particular during the negotiations conducted by the European Commission in the aforementioned cases, has contributed significantly to putting the issue of transparency back at the centre of the debate during the negotiations. The European Parliament has shown, on these occasions, that it is able to act as a spokesperson for civil society (and, in particular, for non-governmental organisations), by accepting and taking on board certain demands and requests for clarification addressed ultimately to the European Commission.

5. *The practice in agreements on migration flows: the* EU-Turkey Statement *case*.- There is one area that has recently been affected by a rather frequent recourse to secret negotiations aimed at reaching agreements in a simplified form or, in any case, technical arrangements without solemnity. These are, in particular, the agreements on irregular

[43] On the negotiation dedicated to the TTIP see, in particular, the considerations by M. CREMONA, *Guest editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in *Common Market Law Review*, 2015, 351-362 and by N. GHEYLE and F. DE VILLE, *How much is enough? Explaining the continuous transparency conflict in TTIP*, in *Politics & Governance,* 2017, 16-28.

[44] In this vein see inter alia M. FRENNHOFF LARSÉN, *The Increasing Power of the European Parliament: Negotiating the eu-India Free Trade Agreement*, in *International negotiation*, 2017, 473 ff.

migration flows concluded both by the European Union and its Member States with countries of origin and/or transit of these irregular migrants.

With particular reference to the European Union, the document that encouraged this practice is the *European Agenda on Migration* of 2015. The well-known *EU-Turkey Statement* of 18 March 2016[45] was reached on the basis of the *Agenda* and constituted the model followed to conclude similar agreements on the containment of illegal immigration with other States near the external borders of the European Union[46]. As is widely known, the joint declaration between the European Union and Turkey concerns the pattern to be followed for the return to Turkey of illegal migrants who have entered the territory of the Member States, in particular migrants with Syrian citizenship.

The negotiations that preceded the achievement of the Statement were conducted in an absolutely informal and confidential manner, all the more so since the whole process, which led to the progressive convergence of the will expressed by the Parties involved, did not culminate in a genuine international agreement, not even in a simplified form. This, at least, is the opinion expressed by the General Court in its order of 28 February 2017 in relation to case T-192/16 *NF v. European Council*[47].

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[45] *EU-Turkey Statement*, 18 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ commented by F. ARRIBAS, *The EU-Turkey Agreement: A Controversial Attempt at Patching Up a Major Problem*, in *European Papers*, 2016, 1097 ff. See also F. CHERUBINI, *The 'EU-Turkey Statement' of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing*, in S. BALDIN and M. ZAGO (eds), *Europe of Migrations: Policies, Legal Issues and Experiences*, Trieste, 2017, 32-47. See also M. ZOETEWEIJ and O. TURHAN, *Above the law beneath contempt: The end of the EU-Turkey deal*, in *Swiss Review of International and European Law*, 2017, 151-166; C. AKIN YAVUZ, *Analysis of the EU-Turkey Readmission Agreement: a Unique Case*, in *European Journal of Migration and Law*, 2019, 486 ff; C. FAVILLI, *La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?,* in *Diritti umani e diritto internazionale*, 2016, 40 ff.; A. LIGUORI, *Violazioni conseguenti all'attuazione della "Dichiarazione UE-Turchia" e giurisprudenza della Corte europea dei diritti umani sugli "hotspots" greci: la sentenza "Kaak"*, in *Diritti umani e diritto internazionale*, 2020, 246 ff.

[46] On this topic, in addition to the above-mentioned contribution by A. SPAGNOLO, *The conclusion of bilateral agreements and technical arrangements for the management of migration flows: an overview of the Italian practice*, op. cit., 209 ff., see also F. DE VITTOR, *Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di "accordi*" per il *controllo extraterritoriale delle migrazioni,* in *Diritti umani e diritto internazionale*, 2018, 1 ff.

[47] Paragraph 71 of the order of the General Court cited above states: «It follows from all of the foregoing considerations that, independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body,

The negotiation phase, which took place in the absence of transparency, and the outcome of the negotiations, a *Statement* deliberately devoid of any formality that would have entailed the implementation of a complex and unpredictable ratification process regarding the final results, appear to be strongly correlated. The mechanism of the agreement in question – as well as the bilateral ones between the States that have taken it as a model – is in itself grounded on a *trick* as simple as it is ambiguous. In practice, the European Union (*rectius*, its Member States), instead of resorting to a *push-back policy towards migrants* (more easily censurable before national and supranational jurisdictions[48]), cooperates with a *pull-back policy* in favour of the migrant's state of citizenship or even only the transit state (in particular, Turkey and Libya).

In such a sensitive area, the balance to be struck between the protection of confidentiality in the negotiations and the protection of individuals whose fate is directly impacted by the decisions taken by the contracting parties seems to be in favour of the former. Indeed, the need for confidentiality in the negotiations seems to be effectively diminishing and losing importance in favour of full transparency that would allow not only that the positions held by the negotiators can be grasped but also that, if necessary, it is possible to timely intervene in order to correct the outcome of the negotiations[49].

6. *Towards a new model for international negotiations by the European Union: the case of the new trade partnership with the United Kingdom*.- A further area of interest, in view of the main subject matter of this analysis, is the negotiations which took place between the European Union and the United Kingdom during 2020 and, precisely, since the political withdrawal which took place, as is known, with the entry into force of the relevant agreement (the so-called *Withdrawal Agreement*) on 1 February 2020.

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office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure».

[48] See, for example, the condemnation of Italy by the European Court of Human Rights, *Hirsi Jamaa and Others v. Italy,* 23/02/2012.

[49] See also the considerations expressed in E. CANNIZZARO, *Denialism and the Supreme Expression of Realism – A Quick Comment on NF v. European Council*, in *European Papers*, 2017, 256-257. According to the Author, attributing the conclusion of such an informal agreement to the Member States sitting in the European Council represents a dangerous precedent for the future. Certain agreements, plainly falling within a competence of the EU, would nevertheless be concluded outside the EU law framework, in avoidance of the basic constitutional guarantees of transparency and protection of fundamental rights.

This second negotiation (the first being the one that led to the conclusion of the United Kingdom's political withdrawal agreement from the European Union) was initiated by the Commission's recommendation to the Council to authorise the opening of negotiations for a new trade partnership with the United Kingdom[50]. The recommendation is based on the guidelines and conclusions of the European Council existing at that time and on the political declaration agreed between the European Union and the United Kingdom in October 2019. The document includes a comprehensive proposal for negotiating directives setting out the scope and modalities of the European Union's future relations with the United Kingdom.

On the basis of this recommendation, the Council, in its General Affairs composition, adopted on 13 February 2020 the resulting decision by which the Commission is appointed *Union negotiator* and authorised to open negotiations with the United Kingdom on the basis of the directives contained in an *Addendum* to the decision. In recital 7 of the Decision, the Council welcomes the Commission's intention to appoint «Mr. Michel Barnier for the negotiations on the future relationship with the United Kingdom»[51].

This is clearly not the place to analyse the contents of the directives, which are indeed complete and rather detailed with respect to the individual dossiers on the table. Our aim is rather to give an account of the procedural aspects addressed and regulated in paragraphs 164 to 167 of the *Addendum*.

The mechanism set up provides for a continuous and permanent exchange of information on the ongoing negotiations between the European Commission, on the one hand, and the Permanent Representatives Committee (COREPER) and the Specialised Committee on the UK (*Working Party on the UK*) on the other, in order to enable the

[50] The recommendation is contained in the document COM (2020) 35 final of 3 February 2020. The first paragraph of the recommendation reads «with this recommendation, the European Commission invites the Council of the European Union to authorise the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, to nominate the Commission as Union negotiator and to address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted».

[51] It should be borne in mind that in international negotiations each party may, at its own discretion, compose the delegation conducting the negotiations and, therefore, it is peacefully accepted that the Commission may invite a party whose role is extraneous to the topic in concern. What constitutes a rather rare circumstance is that such an entity should assume a role of primary importance, to the point of being considered the *chief negotiator*. Mr. Michel Barnier is a French politician who has previously held important roles in the French Government, as Minister for Foreign Affairs, and in the European Commission, for two terms (1999-2004 and 2010-2014).

Council to update the negotiating directives as a last resort. Paragraph 170 of the Addendum expressly states that the Commission shall provide in a timely manner all necessary information and documentation relating to the negotiations. It is not specified, perhaps because it is implicitly understood, that the information and documents in question shall be provided in a confidential manner.

In the last two paragraphs of the *Addendum* (171 and 172) it is clarified that the Commission, on the one hand, will inform the European Parliament, in line with the provisions of Article 218(10) TFEU, and that, on the other hand, it will cooperate with the High Representative on matters falling within the latter's competence, i.e. those covered by the Common Foreign and Security Policy.

The conduct of the negotiations, in a manner not dissimilar to that of the *Withdrawal Agreement*, has revealed, first of all, a strong control exercised by the Council, and ultimately by the Member States, over the progress of the dealings[52]. Secondly, probably also as a consequence of the attention given by the European media to the content of the affair[53], the Commission has adopted a transparent approach as to the profile of the negotiation modalities, making public in advance not only the dates of the sessions but also the topics addressed and, in summary form, even the outcome. Periodically, and in particular at the end of the main sessions, Mr. Michele Barnier had an account published of the results achieved and the critical issues still unresolved, without going into individual details. In the meantime, in a special section of the European Union's website, the underlying documents of the negotiations and even the more advanced versions of the agreements provisionally reached on certain dossiers at the centre of the proceedings have been published[54].

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[52] For an introduction to the topic see: M. KENDRICK and G. SANGIUOLO, *Transparency in the Brexit negotiations. A view from the EU and the UK*, in *Federalismi.it*, 2017, vol. 15, p. 18 ff. See also: P. KOUTRAKOS, *On Transparency-but do not mention Brexit!*, in *European Law Review*, 2019, 587: «Viewed from this angle, whatever the outcome of this sad story, Brexit has shown us that the move from the transnational to the national does not necessarily entail more transparent decision-making».

[53] From this point of view, it appears to mean that the Commission is responsible for publishing in a special section of the website specific press releases related to the results of the individual negotiation tables. It can be consulted via the link: https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/. On citizen involvement, see: N. ATHANASIADOU, *Facilitating the Participation of EU Citizens in the Brexit Negotiation Process,* in T. CHRISTIANSEN and D. FROMAGE (eds), *Brexit and Democracy*, Berlin, 2019, 293-320.

[54] Documents available in the section https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/guide-negotiations_en. See, in particular, the draft text of the Agreement on the New Partnership with the United Kingdom – prepared by the Commission at the beginning of the negotiations and notified to the United Kingdom delegation – including the Foreign Policy, Security and Defence part of the draft

This transparent approach, which is also the result of experience during the TTIP and CETA negotiations[55], may have helped to maintain the cohesion of the 27 Member States and, more in general, the public opinion, given that during the negotiations in question, as in the previous one in view of the *Withdrawal Agreement,* no critical positions emerged with regard to the work of the Commission, which was thus able to speak with a single voice to its interlocutor until the final agreement is successfully reached [56].

It seems equally significant that the Members of the European Parliament[57], not dissimilar to the citizens of the Member States, have had access to the calendar of the negotiation sessions and, in summary form, to the results of the negotiations as reported on the Commission's website.

The experience of negotiating a new trade partnership between the European Union and the United Kingdom (the *Trade and Cooperation Agreement*), such as and perhaps more so than the achievement of the *Withdrawal Agreement,* could be a paradigmatic model for transparent negotiation in the future, at least in the area of international trade.

7. *Conclusions*.- The analysis of the practice of international law in general[58], and that referring specifically to negotiations with the involvement of the European Union, shows that the introduction of transparency in international negotiations still meets widespread resistance. It is, however, difficult to find a valid paradigm for any negotiation, given that the variables are numerous and important,

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text. Operational guidelines to be held during the negotiations from an organisational and logistical point of view have also been published, such as the Guidelines approved on 25 October 2020 to speed up and simplify the negotiation procedures in order to complete them in the shortest possible time.

[55] On the change of approach, especially of the European Commission, see: P. TEREM and V. MULLER, *Transparency in EU Trade Negotiations: Parallels and Differences between TTIP and Brexit* (conference paper), *International Conference on European Integration*, 2018, 1514-1521.

[56] According to O. PATEL, *The EU and the Brexit Negotiations: Institutions, Strategies and Objectives*, in *UCL European Institute papers*, 2018, 6 : «In sum, the EU has used transparency as a negotiating tool to control the public narrative, exert control over the content of the negotiations, and put pressure on the UK. It has used it efficiently to expose the UK's difficulties, and to increase its bargaining power».

[57] On the role of the European Parliament, see C. CLOSA, *Inter-institutional cooperation and intergroup unity in the shadow of veto: the construction of the EP's institutional role in the Brexit negotiations*, in *Journal of European public policy*, 2020, 630 ff.

[58] In this vein, see also M. LIMENTA, *Open trade negotiations as opposed to secret trade negotiations: From transparency to public participation*, in *The New Zealand Yearbook of International Law*, 2012, 73 ff., dealing in particular with the lack of transparency of the so-called Trans-Pacific Partnership (TPP) negotiating process.

including, just to mention the most significant and recurrent, the attitude of the individual Contracting Parties, the object of the negotiation, and the geo-political context.

In the case of negotiations involving the European Union, there are further and peculiar profiles which increase the overall complexity. On the one hand, the mechanisms for the division of competences between the different institutions and, in some cases, between the European Union and its Member States come into play and, on the other hand, the synthesis of Member States national interests and the ways in which it is to be achieved are as delicate as they are controversial, especially in the so-called mixed agreements.

In this overall picture, characterised by constant and rapid evolution, there is a clear perception of a widespread demand for greater transparency in the conduct of international negotiations by the European Union. This call has been particularly supported by the European Parliament which, by invoking Article 218, paragraph 10, TFEU, in the last years has begun to exert and will continue to exert pressure on the negotiators (Commission and/or High Representative) to make public, insomuch as possible, not only the manner and timing of the negotiations but also the results achieved and the position of the European Union with regard to them. This new role has become particularly evident and effective during the negotiation of trade agreements such as, in particular, TTIP, CETA, ACTA and TiSA. The transparent negotiation model, which led to the *Withdrawal Agreement* and to the *Trade and Cooperation Agreement* between European Union and the United Kingdom, could be replicated in future EU negotiations.

It is clear that the degree of transparency tends to be inversely proportional to the content of the negotiations when they concern aspects of the Common Foreign and Security Policy. On the other hand, it should be pointed out that, especially when the negotiations deal with issues directly involving the fundamental rights of individuals, the degree of transparency should even be higher, otherwise the outcome of the agreements reached may prove – as in the case of the well-known *EU-Turkey Statement* of 18 March 2016 – particularly disappointing and questionable[59].

[59] See Opinion A.G. Sharpston in *In 't Veld*, EU:C:2014:88, para 73: «Executive acts cover a wide range of different activities, including the negotiation and conclusion of international agreements. Where such activities concern matters that have an impact on EU citizens – in particular where they concern those citizens' fundamental rights – openness is an important part of the decision-making process. Transparency strengthens democracy allowing citizens to be informed and to participate in decision making. (49) In that respect, the considerations that apply to legislative acts are equally relevant to executive activities. That

True transparency, just like the mythological animal known as the chimera, is still elusive and feared by negotiators during negotiations. It could, however, usefully manifest itself in the real world if the documents related to the negotiations were made public in full and automatically, at least *ex post*, i.e. immediately after the entry into force of the agreement in question. This would allow negotiators to have a certain degree of confidentiality but not be induced to abuse it, knowing that, even at a later date, their positions would be made known to the public[60].

ABSTRACT

The Chimera of Transparency in European Union Negotiations on International Agreements

The analysis of the practice of international law in general, and that referring specifically to negotiations with the involvement of the European Union, shows that the introduction of transparency still meets widespread resistance. There is, however, a clear perception of a demand for greater transparency in the conduct of international negotiations by the European Union. This contribution analyses the various implications of transparency in the institutional system of the European Union, takes into account the growing role of the European Parliament – in particular in trade negotiations – and explains why the experience of negotiating a new trade partnership between the European Union and the United Kingdom, such as and perhaps

makes it difficult to justify applying a different standard of review to institutional acts based on how the institution's activity should be classified in a particular instance».

[60] The exception would prove the rule only on those occasions when express reference is made to state secrecy or its equivalent within the European Union, as expressed in Article 4(1)(a) of Regulation 1049/2001, which establishes that «The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security; defence and military matters; international relations; the financial, monetary or economic policy of the Community or a Member State», or Article 9, stating that «sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters», thus delaying, for a number of years, the publication of preparatory work. In this respect, see: E. DE CAPITANI, *European Union and State Secret: a regulatory framework still in full development*, in *Astrid,* 2010, 1-8. For aspects related to external relations see P. LEINO, *The principle of transparency in EU external relations law-Does diplomatic secrecy stand a chance of surviving the age of Twitter?* in M. CREMONA (ed.), *Structural Principles in EU external relations law,* Oxford, 2018, 201-223 and the extensive bibliography cited therein.

more so than the achievement of the *Withdrawal Agreement* and the *Trade and Cooperation Agreement*, could be a paradigmatic model for transparent negotiation in the future, at least in the field of international trade.