



Maastricht University



CLEER
Centre for the Law of EU External Relations

The role of the EEAS in the negotiation of international agreements

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Outline of the lecture

- I. The HR and EEAS
- II. Actors and the procedure – Article 218
TFEU
- III. Practical aspects of negotiations

THE HIGH REPRESENTATIVE AND THE EUROPEAN EXTERNAL ACTION SERVICE



The HR and the EEAS

The Background

- EU: economic giant ↔ political dwarf
- Kissinger's question (?)
- European Constitution (Treaty of Lisbon) – to answer the question:
 - Three different roles
 - Javier Solana: HR 1999-2009 – „Foreign minister of Europe”
 - BFW – RELEX Commissioner
 - Rotating Presidency in Foreign Affairs

The Challenges



- Expectations: bridging the gap, avoid duplications, « European diplomatic culture »,

	27 EUMS	EU
• 1. Number of delegations (embassy + consulate)	~3.100	142+
• 2. Number of employees	~88.000	~3.750
• Total		
- own national	~52.500	~1.650
- local staff	~35.500	~2.100
- total staff/population	1/5330	1/135.000
3. Budgetary expenditure (2018 total)	7.529 m €	476 m €
- per capita	15 €	1 €

The actors

- The Council
 - Opens (authorises) and closes (authorises signature and concludes)
 - Decision maker (COM or joint COM/HR proposal)
 - Right to follow negotiations throughout (C-425/13)
- The Commission
 - Right of initiative on non-CFSP
 - The negotiator on non-CFSP / the technical expertise
- The HR/EEAS
 - Initiative for CFSP
 - Negotiator for CFSP and co-negotiator (part of the negotiating team), coordinates, conducts negotiations
- The EP
 - C-658/11 Mauritius: immediately and fully informed

The procedure

Article 218 TFEU

- Article 218 TFEU:
 - ‘single procedure of general application’/ CFSP and non-CFSP
[C-658/11 p. 52](#)
 - Externally mirroring division of powers, esp. legislative procedure
[C-244/17 p. 22](#)
- The procedural steps:
 - Exploratory talks
 - Opening of negotiations – 218(2)-(4) TFEU [C-425/13](#)
 - Signature of the agreement – 218(5) TFEU [C-551/21 COM v Council](#)
 - Conclusion of the agreement – 218(6) TFEU [C-658/11 Mauritius](#)
 - Implementation / suspension of the agreement – 218(9) TFEU
[C-399/12 OIV](#) , [C-244/17](#) , [C-180/20](#) , [C-687/15 ITU](#) , [C-600/14 OTIF](#)
- Other provisions:
 - Simplified modification procedure – 218(7) TFEU [C-275/20 Korea FTA](#)
 - Voting procedure – 218(8) TFEU [C-244/17](#) , [C-180/20](#) , [C-275/20 Korea FTA](#)
 - EP right to be informed – 218(10) TFEU [C-658/11 Mauritius](#) , [C-263/14](#)
 - Ask the opinion of the ECJ – 218(11) TFEU [Opinion 1/19 ‘Istanbul’](#)

Contentious issues

- Joint role of initiative? [C-244/17 'Kazakhstan'](#)
- Substantive legal basis for recommendation?
- Negotiations: to what extent can the Council influence the negotiations?
[C-425/13 ETS Australia](#)
- [Hybrid acts C-28/12](#) – MS competence?
- Who signs? Is signing or empowering the person to sign part of external representation? [C-551/21 COM v Council](#)
- Legal basis for signature and conclusion; CFSP? [C-180/20 Armenia](#)
- EU-only v mixity: [Opinion 2/15 'Singapore FTA'](#); [C-626/15 and C-659/16](#)
[Antarctic/Weddel Sea](#)

Practical aspects of negotiations (standard clauses) I.

- *EU negotiates based on a « template »*
 - *2009 Common Approach on the use of political clauses*
 - *Political clauses: HR, WMD, CT, SALW, ICC – the CFSP clauses;*
 - *Sectoral clauses: migration, good governance in the tax area;*
 - *Technical clauses: suspension mechanism/non-execution clause, authentic languages;*

Practical aspects of negotiations (standard clauses) II.

- Our experience in negotiating standard clauses:
 - ‘Political’ standard clauses: most difficult to negotiate; stumbling blocks; sensitivities; make or break decision; decided at the very end of negotiations;
 - Thailand: blocked three years over ICC; Singapore – very difficult negotiations on tax clause; Brunei stuck over ICC and HR; Ukraine AA: stuck over ICC, unblocking very last minute
 - The fact that the EU and its partners are interesting in entering an agreement it does not mean that it is easy to reach to it;
 - In particular HR and WMD pose difficulties; they are defined as essential elements – linked to suspension;
 - FR – climate change as essential element?

Practical aspects of negotiations (standard clauses) III.

- *Suspension clause linked to essential elements*
 - *If either Parties fail to fulfil their obligations under the human rights or WMD clauses, the other Party can unilaterally suspend with (almost) immediate effect*
 - *Declarative effect (only invoked in very grave and substantial violations of HR so far)*
- *Linkage clause:*
 - breach of essential elements triggers not only the suspension of the PCA, but also of the FTA;
 - Legal rationale: ensure a coherence of political and economic aspects; the commercial ties under an FTA should not be seen in isolation from other political objectives;
 - Institutional: Joint Council oversees the implementation and proper functioning of the PCAs and FTAs;
- They create blockages in negotiations; need to be creative