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Climate Change, The Paris Agreement, and Subsidiarity, 52 UIC J. Marshall L. Rev. 257 (2019)

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CLIMATE CHANGE, THE PARIS AGREEMENT, AND SUBSIDIARITY

PAUL B. LEWIS AND GIOVANNI COINU¹

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I. INTRODUCTION

The 2015 Paris Agreement achieved a broad international consensus on a methodology to limit emissions to control climate change.² By its terms, the Paris Agreement anticipates individual action by individual nation-states.³ But underlying this principle stands the fact that climate change need not and should not be addressed only by nation-states. Rather, combatting climate change requires attention at multiple levels – national, state, regional, and local – as well as requiring a public-private partnership to engage businesses in a dedicated effort to achieve meaningful results in abatement. This article examines overlapping competencies within the European Union (“EU”) and considers how various actors within the United States federalist system are engaged in trying to combat climate change. The question regarding overlapping competencies extends beyond the legal delineation of authority. At its core is the question of how to best utilize specific qualities of various constituencies with overlapping competencies to not only harmonize efforts but also to achieve maximum utilization of the efforts of different parties.⁴ Climate change is a global problem with globally felt externalities, and it must be addressed globally. It is not one that will self-resolve. Despite extensive technological advances, we cannot artificially create a livable habitat.⁵ People are dependent

2. Yamide Dagnet et al., *Staying on Track From Paris: Advancing the Key Elements of the Paris Agreement*, WORLD RES. INST. 3 (May 2016), www.wri.org/sites/default/files/Staying_on_Track_from_Paris_-_Advancing_the_Key_Elements_of_the_Paris_Agreement_0.pdf. Though of course the United States commitment to the Paris Agreement has changed since the time of its enactment. See President Donald J. Trump, Statement on the Paris Climate Accord (June 1, 2017), perma.cc/6GZ7-GJXP (announcing the withdrawal of the U.S. from the Paris Agreement); see also Chris Mooney, *Trump Can't Actually Exit the Paris Deal Until the Day After the 2020 Election. That's a Big Deal.*, WASH. POST, (Dec. 12, 2018), www.washingtonpost.com/energy-environment/2018/12/12/heres-what-election-means-us-withdrawal-paris-climate-deal/ (explaining the timeline by which the United States can withdraw from the Paris Agreement).

3. Paris Agreement to the United Nations Framework Convention on Climate Change art. 4, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

4. The issue is not just whether multiple levels of regulation are possible in combatting climate change. The issue also includes a determination of at which level of regulation climate change policy can most effectively be implemented. See Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in a National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y 231, 233 (2009) (contending that the multi-level government response to climate change must be as effective a use of resources as possible); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1039-40 (2017) (arguing that appropriate allocation of state and federal roles can reduce risk).

5. The major environment problems include: (1) Major changes to the earth's atmosphere and climate; (2) Destruction of the ozone; (3) Degradation of topsoil;

upon the continuing functioning of natural systems and habitats for survival. A coordinated approach to regulation among layers of government is essential to a properly functioning, fully utilized approach to climate change.

This article thus addresses issues of European subsidiarity and American federalism in the context of climate change. Part II provides an overview of the basic issues at stake and briefly sketches the effectiveness of international treaties designed to address climate change and other approaches to date. No prior international effort created the cause for optimism that attended the signing of the Paris Agreement.⁶ Part III of this article takes a detailed look at issues of subsidiarity and places the discussion in the context of climate change. Part IV examines the issue within the United States, as the federal government's approaches to climate change have been dramatically revised over the past couple of years.

II. CLIMATE CHANGE – A PRIMER

A. *The Problem*

Climate change is the ultimate problem of the commons: when individuals and corporations are allowed free access to an exhaustible resource, the natural tendency is one of overuse.⁷ The user realizes the benefits, but a significant portion of the cost is felt elsewhere.⁸ As a result, when applied to climate change, the full effects of carbon emissions are not appropriately reflected in their price.⁹ In addition, if individual *A* does not use the resource, individual *B* will. Thus, a socially destructive race to consume the resource before others do is the inevitable result.

Multiple approaches to address the problem of carbon emissions have been put forth. One possibility are so called “command and control” regulations, where government dictates either limit the absolute allowed amount of an activity or mandate

(4) Loss of biological diversity; and (5) Widespread air and water pollution.

6. Justin Worland, *Feeling of Optimism at Paris Climate Talks Despite Disagreement*, TIME (Dec. 9, 2015), time.com/4143334/paris-climate-talks-optimism-cop/. The 2018 United Nations Climate Change Conference, known as COP24 and held in Katowice, Poland, served largely to implement a game plan for achieving the goals of the Paris Agreement; *see generally*, COP24 KATOWICE 2018, cop24.gov.pl/ (last visited Mar. 17, 2019) (providing a “game plan” for implementing the Paris Agreement).

7. Maebh O’Gorman, *Global Warming: A Tragedy of the Commons*, COMP. RES. IN L. & POL. ECON., Research Report No. 32/2010 (2010), digitalcommons.osgoode.yorku.ca/clpe/99/.

8. *Id.*

9. Gabriel Weil, *Incentive Compatible Climate Change Mitigation: Moving Beyond the Pledge and Review Model*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 923, 929-30 (2018).

certain required standards.¹⁰ A second core approach encompasses various “cap and trade” structures, which are designed to allow individuals and the marketplace to shape the allocation of scarce resources once the government has set an overall emission limit.¹¹ Other options include tax penalties for those who excessively emit, and tax credits for those who employ methodologies designed to limit emissions, such as tax credits for those employing clean energy. The problem with the latter two approaches, however, is that they put no upper limit on the overall level of emissions.¹²

The impact of the current level of global emissions is not fully quantifiable, with the worst-case scenarios leading to truly catastrophic consequences.¹³ There do, however, seem to be a few certainties. First, rising emissions will lead to an overall negative impact on global welfare.¹⁴ Second, the losses will continue to grow as temperatures continue to rise.¹⁵ Third, different nations will benefit from global emission reduction to different degrees,¹⁶ and the degree to which countries are affected will not fully correlate either with the wealth of the country or the degree to which the country has or has not been an offender when it comes to emissions standards.¹⁷ Rather, many of the most vulnerable locations which stand to lose the most by rising temperatures are among the poorest nations on the planet, including many regions of Africa and Asia.¹⁸

10. Gary M. Lucas, Jr., *Behavioral Public Choice and the Carbon Tax*, 2017 UTAH L. REV. 115, 127 (2017) (requiring that cars be gas-efficient, for example).

11. *Id.* at 125. In cap and trade, the government sets an overall limit by issuing pollution permits which can then be bought and sold on the market. *Id.*

12. Perhaps it is worth noting that traditional cost benefit analysis measuring the costs of abatement versus the benefits of doing so are extremely problematic given the difficulty in determining costs in light not only of the difficulties of measuring long-term impact, but also of quantifying the results of a catastrophic worst-case scenario. Daniel A. Farber, *Coping with Uncertainty: Cost-Benefit Analysis, The Precautionary Principle, and Climate Change*, 90 WASH. L. REV. 1659, 1672 (2015).

13. Simon Beard, *Should We Care About The Worst-Case Scenario When It Comes To Climate Change?*, HUFFINGTON POST (Sep. 28, 2017), www.huffingtonpost.co.uk/simon-beard/climate-change_b_18110618.html.

14. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 501 (2014).

15. Lance N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENVTL. L.J. 58, 96 (2018).

16. Gabriel Weil, *Incentive Compatible Climate Change Mitigation: Moving Beyond the Pledge and Review Model*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 923, 929 (2018).

17. Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 448-49 (2018). The biggest emitters currently include China, the United States, Indonesia, Brazil, Russia, Japan, Brazil, and India. Johannes Friedrich et al., *This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed*, WORLD RES. INST. (Nov. 21, 2017), www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed.

18. Deepa Badrinarayana, *A Constitutional Right to International Legal Representation: The Case of Climate Change*, 93 TUL. L. REV. 48, 90-91 (2018);

This disparate impact stems not just from geography but also from such factors as a country's dependence on agriculture and the extent to which the nation can afford to divert resources toward efforts of abatement.¹⁹

Climate change is a problem requiring intervention by both nation-states and private actors. As a result, private, social, and market-driven incentives also potentially play a significant part in any successful methodology employed to address climate change. The activities of multinational corporations impact far more than their immediate economic concerns. Rather, a multinational's enterprises may have broadly felt ramifications in the political, cultural, social, and environmental realms. Compliance by multinationals is critical to any successful sustainable development program.²⁰ Currently, only six nation-states have revenues larger than the revenues of the largest transnational corporations.²¹ As corporations continue to grow in power and to affect not just economic development but also the quality of life world-wide, their impact on the planet will increasingly outweigh that of many national governments.

B. International Approaches to Date

The international community's approach to climate change has largely centered on the creation of a series of international agreements which collectively thus far have had little success in achieving abatement.²² The impetus for the need to address climate change began in earnest upon the wide-spread acceptance of the

Sharmila L. Murthy, *States and Cities as "Norm Sustainers": A Role for Subnational Actors in the Paris Agreement on Climate Change*, 37 VA. ENVTL. L.J. 1, 44 (2019). As a result, the poor in the future are by far the greatest likely to suffer the most from a lack of abatement efforts. *Id.*

19. See Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 229, 230-31 (2017) (arguing that the North-South divide is a significant factor in the inability to stop environmental degradation).

20. Behnam Taebi & Azar Safari, *On Effectiveness and Legitimacy of 'Shaming' as a Strategy for Combatting Climate Change*, 23 HARV. SCI. & ENG'G. ETHICS 1289 (Apr. 11, 2007).

21. NEIL BOTTEN, CIMA OFFICIAL LEARNING SYSTEM: ENTERPRISE STRATEGY 62 (2009). "Of the worlds [sic] 100 largest economic actors, 29 were transnational companies and only 6 nation states had revenues larger than the top 9 transnationals." *Id.* See also Fernando Belinchón & Ruqayyah Moynihan, *25 Giant Companies That are Bigger Than Entire Countries*, BUS. INSIDER ESPAÑA (July 25, 2018), www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7 (noting power of world's largest corporations).

22. David G. Victor, *Why Paris Worked: A Different Approach to Climate Diplomacy*, YALE ENV'T 360 (Dec. 15, 2015), e360.yale.edu/features/why_paris_worked_a_different_approach_to_climate_diplomacy (noting the lack of success of pre-Paris Agreement attempts to combat climate change).

link between economic development and climate change.²³ Alongside this recognition came the acceptance of a competing value – namely, the desire to respect the sovereignty of nations over their natural resources.²⁴ A conflict of course exists. The desire to recognize sovereign control is also an implicit recognition of the international community’s limitation in regulating environment transforming activity.²⁵

In the late 1980s, as concern about the environment and climate change began to receive ever-growing attention, the international community first convened the Intergovernmental Panel on Climate Change (“IPCC”).²⁶ The IPCC was created under the United Nations Environment Program and that of the World Meteorological Organization; it was charged with engaging in the scientific study of climate change.²⁷ The IPCC is currently in its sixth assessment cycle; to date it has produced five reports, each broken into sections stemming from the work of the IPCC’s three primary working groups: (1) the physical science basis of climate change; (2) impacts, adaptation, and vulnerability; and (3) mitigation of climate change.²⁸ The first and second IPCC reports provided much of the scientific basis for two watershed moments in international climate change conventions – the 1992 Framework Convention on Climate Change and the 1997 Kyoto Protocol.²⁹

The Framework Convention arose from the 1992 UN Conference on Environment and Development, known as the Earth Summit, which took place in Rio de Janeiro.³⁰ The level of participation at Rio was unusually widespread, with all UN member states plus more than 50 intergovernmental organizations in attendance.³¹ The Conference produced two new multilateral treaties.

The major one was the UN Framework Convention on Climate

23. Channing Arndt et al., *Economic Development under Climate Change*, 16 REV. OF DEV. ECON. 463 (2012) (examining relationship between climate change, growth, and investment in infrastructure).

24. David Takacs, *Forest Carbon (REDD+), Repairing International Trust, and Reciprocal Contractual Sovereignty*, 37 VT. L. REV. 653, 656-57 (2013).

25. *Id.*

26. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515, 518 (2015).

27. *Id.*

28. *Report*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), www.ipcc.ch/report/sixth-assessment-report-cycle/ (last visited Mar. 17, 2019).

29. See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 464–70 (1993) (explaining the role of IPCC in addressing the magnitude and impact of climate change).

30. Takacs, *supra* note 24, at 519.

31. Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in 2 POCKET BOOKS HAGUE ACAD. OF INT’L L. 64, 68 (2008).

Change; the other was the Convention on Biological Diversity, with the latter reaffirming that states are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.³² It also produced the non-binding Rio Declaration on Environment and Development, which is comprised of 27 principles on the environment and development – the Rio Declaration.³³

The 1992 United Nations Framework Convention on Climate Change is among the most important historical attempts at integrating sustainable development and global environmental concerns.³⁴ It reflected a significant effort to achieve a balance between global, regional, and local concerns, as well as a recognition of the issues that had historically arisen in the North - South debate.³⁵ Its stated objective was to stabilize greenhouse gases (“GHGs”) “at a level that would prevent dangerous anthropogenic interference with the climate system,” and that such stabilization “should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”³⁶ It represented the most politically important collaboration prior to Paris, bringing together social, economic, and environmental factors within one framework. There are 165 signatories to the Framework Convention, including the United States.³⁷

The Framework Convention incorporated a number of components, including procedural requirements for data exchange and reporting, a provision for adoption of ancillary protocols, rules for adoption and amendment of both the Convention itself and any protocols, a provision for periodic conferences of the parties to the Convention, and requirements for periodic review of scientific developments.³⁸ In addition, it contained discussion of such topics

32. United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

33. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992), www.unesco.org/education/pdf/RIO_E.PDF [hereinafter Rio Declaration]. Perhaps the most significant part of its 27 Principles is set forth in Principle 4, which affirms that in order to achieve sustainable development, environmental protection must constitute an integral part of the development process. *Id.* at princ. 4.

34. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter Framework Convention].

35. *Id.*

36. *Id.* at art. 2.

37. *Status of Treaties: United Nations Framework Convention on Climate Change*, UNITED NATIONS TREATY COLLECTION (Mar. 16, 2019), treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en.

38. Framework Convention, *supra* note 34.

as intergenerational equity, common but differentiated responsibilities, and sustainable development.³⁹ Also, the Convention set forth the goal of stabilizing GHG concentrations “at a level that would prevent dangerous anthropogenic interference with the climate system.”⁴⁰

While broadly applicable within the Framework Convention, the doctrine of common but differentiated responsibilities specifically delineated two primary groups of signatories. The first group of nations⁴¹ was charged with the obligation to “communicate . . . detailed information on their policies and measures . . . with the aim of returning individually or jointly to their 1990 levels . . . anthropogenic emissions of carbon dioxide and other greenhouse gases . . .”⁴² In addition, excluding those states transitioning to a market economy, the countries so identified in Annex 1 were obligated provide to financial resources to developing country parties for mitigation, adaptation, and technology transfer.⁴³ The principle of common but differentiated responsibilities charged developed countries with a responsibility for a larger share of emissions reductions, both because of their greater wealth⁴⁴ and because developed countries had caused the largest share of environmental the harm to date.⁴⁵

But the Framework Convention lacked elements needed for meaningful implementation. It contained no binding limits on emissions.⁴⁶ Rather, its language was largely aspirational. However, one clear benefit stemming from the Framework Convention is that it required developed countries to produce annual inventories of their emissions.⁴⁷

The 1997 Kyoto Protocol specified the obligations of industrialized countries to reduce their emissions of greenhouse

39. *Id.* at art. 3.

40. *Id.* at art. 2.

41. Australia, Austria, Belarus†, Belgium, Bulgaria†, Canada, Croatia*†, Cyprus*, Czech Republic*†, Denmark, European Economic Community, Estonia†, Finland, France, Germany, Greece, Hungary†, Iceland, Ireland, Italy, Japan, Latvia†, Liechtenstein*, Lithuania†, Luxembourg, Malta*, Monaco*, Netherlands, New Zealand, Norway, Poland†, Portugal, Romania†, Russian Federation†, Slovakia*†, Slovenia*†, Spain, Sweden, Switzerland, Turkey, Ukraine†, United Kingdom, and United States of America (Countries added by amendment after the instrument’s initial adoption are indicated by *. Countries that were in the process of undergoing a transition to a market economy and identified as such in Annex I are indicated by †). *Id.* at annex I.

42. *Id.* at art. 4(2).

43. *Id.* at art. 4(3).

44. Framework Convention, *supra* note 34.

45. Shyam Saran, *Paris Climate Talks: Developed Countries Must Do More Than Reduce Emissions*, GUARDIAN (Nov. 23, 2015), www.theguardian.com/environment/2015/nov/23/paris-climate-talks-developed-countries-must-do-more-than-reduce-emissions.

46. Framework Convention, *supra* note 34, at art. 4.

47. *Id.* at art. 4(1)(a), 12.

gases and formulated these obligations in strict legal terms.⁴⁸ It received 84 signatures during the initial period it was open for signature, but not by the United States – the only major country which declined to ratify it.⁴⁹ The Kyoto Protocol stated that between 2008 and 2012, the emission of 6 types of greenhouse gases should be 5% lower than in 1990.⁵⁰ Its provisions included directives to parties to promote sustainable changes by implementing policies such as energy efficiency in their respective national economies,⁵¹ reducing emissions of greenhouse gases,⁵² promoting sustainable farming practices,⁵³ and researching and promoting new forms of energy.⁵⁴ But the Kyoto Protocol did not impose emissions limits on developing countries, nor did it impose significant burdens on most other countries, including China, the world’s largest emitter.⁵⁵ While there had been numerous other world summits and conventions prior to Paris, none of them effectuated real change in the regulation of emissions and the control of climate change.⁵⁶

Any successful approach will have to include all emitting nations, including developing nations. In Paris, the result came close to achieving that goal.

C. *The Paris Agreement (and Beyond)*

At its signing, the Paris Agreement was hailed as historic.⁵⁷ Binding and global, it applies to developed and developing countries alike.⁵⁸ It provides for a new paradigm for climate change regulation, envisioning increased action on climate change throughout the world. Its scope is broad, addressing mitigation, adaptation, and ‘loss and damage’ – the latter aimed at addressing harms caused by climate change – and it establishes processes for

48. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

49. *The Kyoto Protocol – Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, unfccc.int/process/the-kyoto-protocol/status-of-ratification (last visited April 6, 2019).

50. *Id.* at art. 3(1).

51. *Id.* at art. 2(1)(a)(i).

52. *Id.* at art. 2(1)(a)(vi)-(viii).

53. *Id.* at art. 2(1)(a)(iii).

54. *Id.* at art. 2(1)(a)(iv).

55. Henry Bewicke, *Chart of the Day: These Countries Have the Largest Carbon Footprints*, WORLD ECON. FORUM (Jan. 2, 2019), www.weforum.org/agenda/2019/01/chart-of-the-day-these-countries-have-the-largest-carbon-footprints/.

56. Victor, *supra* note 22.

57. United Nations Framework Convention on Climate Change, *Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius*, UNITED NATIONS CLIMATE CHANGE (Dec. 13, 2015), unfccc.int/news/finale-cop21 [hereinafter UNFCCC *Historic Paris Agreement*].

58. *Id.*

financing and for technology transfer.⁵⁹ The Paris Agreement entered into force on November 4, 2016, 30 days after the date in which at least 55 parties to the Convention, accounting for a total of 55% of the greenhouse gas emissions, had ratified it.⁶⁰ It allows for withdrawal after three years from the date the Agreement became effective.⁶¹ As of this writing, 185 Parties have ratified the Paris Agreement.⁶²

While recognizing differentiation by, among other things, taking into consideration the difference in circumstances each country faces in terms of capacity and operational ability to combat climate change,⁶³ the Paris Agreement adopts an approach which specifies the same core obligations for all signatories.⁶⁴ The Paris Agreement sets a goal of holding warming well below 2 degrees, with efforts to limit warming to 1.5 degrees.⁶⁵ It aims for greenhouse gas emissions to peak as soon as possible, and to achieve net zero emissions by the second half of the 21st century.⁶⁶ It contains a requirement for mitigation measures of individual countries to be expressed in nationally determined contributions (“NDCs”), and it requires that this process of NDCs be revised at least every five years.⁶⁷ There is also a mechanism for countries to achieve NDCs

59. *Id.*

60. Paris Agreement to the United Nations Framework Convention on Climate Change art. 21(1), Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

61. *Id.* at art. 28(1).

62. *Paris Agreement – Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, unfccc.int/process/the-paris-agreement/status-of-ratification (last visited Mar. 18, 2019); *Status of Treaties: Paris Agreement*, UNITED NATIONS TREATY COLLECTION, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited Mar. 18, 2019).

63. *Id.* at preamble. The Preamble states in part:

Also recognizing the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention, Taking full account of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology, Recognizing that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it.

Id.

64. See Paris Agreement, *supra* note 60, at art. 2(2) (stating “[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”).

65. *Id.* at art. 2(1)(a) (“[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”).

66. *Id.* at art. 4(1).

67. *Id.* at art. 4(2), (9).

jointly by working together on shared emissions targets.⁶⁸ The Paris Agreement establishes a mechanism for both private and public entities to support sustainable development projects.⁶⁹ Also included is a commitment to a collective goal of providing USD 100 billion per year to 2025, and beyond 2025 with USD 100 billion as a floor.⁷⁰ The Agreement recognizes the need for flexibility and transparency, and it takes into account the fact that signatories have different capabilities and issues in addressing climate change. It also contains a compliance mechanism that is designed to be facilitative rather than punitive in nature.⁷¹

Amongst its myriad provisions, it is worth highlighting a handful which provide for a marked delineation from past approaches. First, it is legally binding.⁷² Next, unlike Kyoto, it is global, applying to developed and developing countries alike.⁷³ In addition, it abandons the approach to differentiation of the Framework Convention and the Kyoto Protocol in favor of an approach which specifies the same core obligations for all signatories while still taking into consideration the difference in circumstances each country faces in terms of its capacity and operational ability to combat climate change. Next, its focus is long-term, and it creates a structure for ongoing compliance, requiring parties every five years to reassess their progress to date and to make emission reduction plans for the next five-year period accordingly.⁷⁴ Included within this is the expectation that the actions of each signatory country will grow progressively more aggressive over time.⁷⁵ Also, the level of transparency it requires is not only novel but very significant: if a country fails to carry out its NDC it will be common knowledge to all.⁷⁶ And finally, the extent of Agreement is unprecedented.

Noteworthy, however, is what the Paris Agreement does not do. It contains no firm imposition of any emission reduction

68. Paris Agreement, *supra* note 60, at art. 4(16)-(18), 5(2).

69. *Id.* at art. 6(4).

70. *Id.* at art. 9; United Nations Framework Convention on Climate Change, *Climate Finance*, UNITED NATIONS CLIMATE CHANGE, unfccc.int/topics/climate-finance/the-big-picture/climate-finance-in-the-negotiations (last visited Apr. 18, 2019).

71. Paris Agreement, *supra* note 60, at art. 15(2).

72. UNFCCC *Historic Paris Agreement*, *supra* note 57. Though admittedly there are numerous non-binding elements contained within.

73. *Id.* As of this writing, 184 countries have put forth nationally determined contributions. *Paris Climate Agreement Q&A*, CTR. FOR CLIMATE & ENERGY SOL., www.c2es.org/content/paris-climate-agreement-qa/ (last visited Apr. 18, 2019); United Nations Framework Convention on Climate Change, *NDC Registry (interim)*, UNITED NATIONS CLIMATE CHANGE, www4.unfccc.int/sites/NDCStaging/pages/All.aspx (last visited Apr. 29, 2019).

74. Paris Agreement, *supra* note 60, at art. 4.

75. *Id.*

76. *Id.* at art. 4(5), (12).

obligations.⁷⁷ It includes no clear, quantifiable financial commitment on the part of developed countries to assist developing countries with achieving mitigation and adaptation.⁷⁸ Nor does it impose specific climate change policy or binding reduction targets.⁷⁹

Until Paris, most of what had emerged from the international community relating to climate change were non-comprehensive and neither sufficiently binding nor sufficiently substantive. Any successful approach will have to include all emitting nations, including developing nations. While the Paris Agreement comes close to achieving that goal, the results remain to be seen. According to the Climate Action tracker, no major industrial nation is currently on track to meet its obligations under the Paris Agreement.⁸⁰

Post-Paris, the most recent meeting of the United Nations Framework Convention on Climate Change was COP24 in December of 2018, which gave rise to the “Katowice Climate Package” (“the Package”).⁸¹ The Package was designed to implement the provisions of the Paris Agreement by, in essence, creating a “rulebook” which would provide uniform standards to measure and track the progress made by each country toward meeting the goals of the Paris Agreement.⁸²

Despite President Trump’s decision to withdraw the United States from the Paris Agreement, the United States participated in COP24.⁸³ The United States pushed for a uniform methodology to measure emissions, one of the major accomplishments from the COP24 meeting.⁸⁴ All parties are to use the same standards to measure and track emissions, with uniformity presumably helping with transparency,⁸⁵ the result being increased motivation of developing and developed countries alike to reach their climate

77. *Id.* at art. 4, 7, 9-11, 13.

78. *Id.* at art. 9(1).

79. *Id.* at art. 4(4).

80. See CLIMATE ACTION TRACKER, climateactiontracker.org/ (last visited Mar. 18, 2019) (tracking where countries are in relation to NDC’s of the Paris Agreement).

81. United Nations Framework Convention on Climate Change, *New Era of Global Climate Action to Begin Under Paris Climate Change Agreement*, UNITED NATIONS CLIMATE CHANGE (Dec. 15, 2018), unfccc.int/news/new-era-of-global-climate-action-to-begin-under-paris-climate-change-agreement-0.

82. Waskow et al., *COP24 Climate Package Brings Paris Agreement to Life*, WORLD RES. INST. (Dec. 21, 2018), www.wri.org/blog/2018/12/cop24-climate-change-package-brings-paris-agreement-life.

83. Office of the Spokesperson, *Outcome of the 24th Session of the Conference of the Parties (COP24) to the United Nations Framework Convention on Climate Change (UNFCCC)*, U.S. DEP’T OF ST. (Dec. 15, 2018), www.state.gov/r/pa/prs/ps/2018/12/288121.htm.

84. Brad Plumer, *Climate Negotiations Reach an Overtime Deal to Keep Paris Pact Alive*, N.Y. TIMES (Dec. 15, 2018), www.nytimes.com/2018/12/15/climate/cop24-katowice-climate-summit.html.

85. *Id.*

change targets.⁸⁶ Concerns continue to include that there is an inadequate framework to clarify how wealthier countries will financially aid developing countries that need financial assistance to meet their targets.⁸⁷ There is also concern over whether the current commitments will be enough to meet the Paris Agreement target.⁸⁸ Accounting for carbon credits and their impact on parties' targets was also delayed.⁸⁹

Despite these concerns, the hope following COP24 is that the "rulebook" will provide the necessary framework to implement the Paris Agreement.⁹⁰

D. Introduction to the EU and Climate Change

Multilevel governance issues in the area of climate change are critical following the Paris Agreement. While the international community has improved its regulatory approach to climate change, the actual implementation of those policies has been increasingly moving to local levels of government.⁹¹ This process aligns well with the European Union system of subsidiarity, which stipulates that policymaking should occur at the lowest effective level.⁹² The

86. *Id.*

87. Waskow et al., *supra* note 82.

88. Brad Plumer & Nadja Popovich, *The World Still Isn't Meeting Its Climate Goals*, N.Y. TIMES (Dec. 7, 2018), www.nytimes.com/interactive/2018/12/07/climate/world-emissions-paris-goals-not-on-track.html. See also *COP24 Agreement: Does it Go Far Enough?*, EURONEWS (Dec. 17, 2018), www.euronews.com/2018/12/17/cop24-agreement-does-it-go-far-enough (describing that many believe that the COP24 approach will be insufficient to achieve goals of Paris Agreement).

89. Fiona Harvey, *What was Agreed at COP24 in Poland and Why Did it Take so Long?*, GUARDIAN (Dec. 16, 2018), www.theguardian.com/environment/2018/dec/16/what-was-agreed-at-cop24-in-poland-and-why-did-it-take-so-long; See also Brad Plumer, *Climate Negotiators Reach an Overtime Deal to Keep Paris Pact Alive*, N.Y. TIMES (Dec. 15, 2018), www.nytimes.com/2018/12/15/climate/cop24-katowice-climate-summit.html (noting that revisions to the carbon trading market rules would be postponed).

90. *Katowice: COP24 Climate Change Deal to Bring Pact to Life*, CARBON BRIEF (Dec. 17, 2018), www.carbonbrief.org/daily-brief/katowice-cop24-climate-change-deal-to-bring-pact-to-life.

91. Suriya Evans-Pritchard Jayanti, *Learning from the Leader: The European Union's Renewable Energy Mandates as a Blueprint for American Environmental Federalism*, 65 RUTGERS L. REV. 173, 200-02 (2012); see Allison C.C. Hoppe, *State-Level Regulation as the Ideal Foundation for Action on Climate Change: A Localized Beginning to the Solution of a Global Problem*, 101 CORNELL L. REV. 1627, 1631 (2016) (noting action by state level government on climate change); Amy Hsu & Amy Weinfurter, *All Climate Politics is Local: After Trump's Paris Withdrawal, Subnational Groups Have Stepped Up*, FOREIGN AFFAIRS (Sept. 24, 2018), www.foreignaffairs.com/articles/united-states/2018-09-24/all-climate-politics-local (describing movement of climate action to local government and the private sector).

92. ALAIN-G GAGNON, SOEREN KEIL & SEAN MUELLER, UNDERSTANDING FEDERALISM AND FEDERATION (2015); MICHAEL BURGESS, FEDERALISM AND

principle of subsidiarity is not focused on allocation of power, but rather on the regulation of the use of powers between the EU and its Member States.⁹³ Article Five of the Treaty on the European Union (“TEU”) states that “[t]he limits of Union competences are governed by the principle of conferral.”⁹⁴

The use of Union competences is governed by the principles of subsidiarity and proportionality and Article 4 adds that “competences not conferred upon the Union in the Treaties remain with the Member States.”⁹⁵ The Treaty and the EU Court of Justice (“ECJ”) case-law collectively suggest that few areas that do not fall within the competences of the Union, either directly or indirectly. However, the third paragraph of Article 5 makes clear that the subsidiarity principle governs all non-exclusive competences.⁹⁶ Each policy not exclusively given to the EU has to clear a two-fold test in order to verify the best decision-making level of government allocation.⁹⁷ First, the EU bodies must demonstrate that the objectives of the proposed action cannot be sufficiently achieved by the Member States “either at central level or at regional and local level.”⁹⁸ Second, it must be demonstrated that the proposed action “by reason of the scale or effects, can be better achieved at Union level.”⁹⁹ What constitutes “sufficiently achieved” is not clearly articulated, and it may relate not just to effectiveness, but also to the degree a process is democratic or consistent with other EU policy. Since environmental policy is not a competence exclusively given to the EU, the principle of subsidiarity applies to that specific matter.¹⁰⁰

EUROPEAN UNION, THE BUILDING OF EUROPE, 1950-2000, at 231 (2000); ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 244 (2009); RONALD L. WATTS, COMPARING FEDERALISM SYSTEMS 6, 92 (3rd ed. 2008).

93. Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community art. 3(b), Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter Treaty of Lisbon].

94. Consolidated Version of the Treaty on the European Union art. 5, Oct. 15, 2012, (C 326) [hereinafter TEU].

95. *Id.* at art. 4; Treaty of Lisbon, *supra* note 93, at art. 3(b)(2).

96. TEU, *supra* note 94, at art. 5.

[I]n areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can either be by reason of the scale or effects of the proposed action, be better achieved at Union level.

Id.; See also Treaty of Lisbon, *supra* note 93, at art. 5(3) (setting forth the means by which the TEU will be applied).

97. Treaty of Lisbon, *supra* note 93, at art. 3(b)(3).

98. *Id.*

99. *Id.*

100. Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 *FORDHAM INT'L L.J.* 846, 848 (1993).

EU issues in regard to subsidiarity and climate change arise when nation-states balk at accepting federalization of policy and institute national and local policies instead.¹⁰¹ Complicating this further has been the EU's willingness to support national climate change adaptation and mitigation programs, believing that such programs will eventually be consolidated.¹⁰² The result has been that member states proactively acting on climate change have focused more on national than on European goals.¹⁰³

In the EU, the European Committee of the Regions, the EU's political assembly of regional and local government entities, represents sub-national governments in the EU's decision-making process.¹⁰⁴ The regions and cities have become indispensable parts of climate change negotiation, in no small part due to their expertise in policy-making.¹⁰⁵ In addition, the Covenant of Mayors, launched by the European Commission in 2008, has brought together more than 6,500 signatories, representing 210 million inhabitants, further bringing multi-level governance to climate change.¹⁰⁶ An Integrated Covenant of Mayors for Climate and Energy now addresses both climate change mitigation and climate change adaptation under a single entity.¹⁰⁷

III. CLIMATE CHANGE IN THE EU: SUBSIDIARITY, THE DEMOCRATIC DEFICIT, EFFICIENCY, AND THE EU LAW-MAKING PROCESS

The EU's multilevel governance goes under the principle of subsidiarity, which is not focused on powers allocation, but rather

101. Andrew Jordan & Tim Jeppesen, *EU Environmental Policy: Adapting to the Principles of Subsidiarity?*, 10 EUR. ENV. 64, 66 (2000).

102. *Commission Green Paper on Adapting to Climate Change in Europe: Options for EU Action*, COM (2007) 354 (June 29, 2007), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0354&qid=1488204560202&from=EN.

103. Isabelle Niang-Diop & Henk Bosch, *Formulating an Adaptation Strategy*, in ADAPTATION POLICY FRAMEWORKS FOR CLIMATE CHANGE: DEVELOPING STRATEGIES, POLICIES & MEASURES, 185-86 (Bo Lim & Erika Spanger-Siegfried eds., 2005).

104. THE GEORGE WASHINGTON LAW REVIEW, GUIDE TO INTERNATIONAL LEGAL RESEARCH § 9.01 (1)(d)(iii)(B) (2018). See also *European Committee of the Regions (CoR)*, EUROPEAN UNION, europa.eu/european-union/about-eu/institutions-bodies/european-committee-regions_en (last visited Apr. 7, 2019).

105. Cécile Barbière, *Regions Push For Greater Influence in Climate Negotiations*, EURACTIV (Nov. 23, 2015), www.euractiv.com/section/climate-environment/news/regions-push-for-greater-influence-in-climate-negotiations/.

106. Committee of the Regions, *EU Cities and Regions Leading the Way Against Climate Change: COP21 In Paris*, at 17, EUROPEAN UNION (Nov. 2015), cor.europa.eu/en/engage/brochures/Documents/EU%20cities%20and%20regions%20leading%20the%20way%20against%20climate%20change/COP21.pdf.

107. *Id.*

on the regulation of the use of powers between the EU and the Member States.¹⁰⁸

In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹⁰⁹

Member States, however, are often unhappy about the definition of what goes under EU control and what lies on their own authority.

The wording of Article 5(3) raised well-founded doubts on the legal nature of subsidiarity in the EU legal system. Whether the principle of subsidiarity could be used as the legal basis in front of the ECJ or whether it would only produce limited political effects is still strongly debated.¹¹⁰ Such doubts regarding the criteria given in paragraph two for justifying the EU action: “not sufficiently” and “better” are indeed very ambiguous legal concepts.

That provision only regards the relationship between the Community and the Member States and leaves the sub-national level – mainly the regions – out.¹¹¹ Moreover, it refers to the relationship between the EU and the Member States as a whole, not an individual State; but in some policy areas of the EU legal system, powers are distributed differently.¹¹² Finally, the principle of subsidiarity concurs with other principles in the Treaty and cannot claim priority in all cases.¹¹³

The lack of a secure legal basis has called for a general consensus about the function of subsidiarity as a mere political issue.¹¹⁴ A lot of EU policies are not competences exclusively given

108. See TEU, *supra* note 94, at art. 5(1) (stating that “[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality”) and Article 4 adds that “competences not conferred upon the Union in the Treaties remain with the Member States.” *Id.* at art. 4).

109. *Id.* at art. 5(3).

110. See Gabriél A. Moens & John Trone, *The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?*, 41 J. LEGIS. 65, 77-78 (2015) (explaining that the majority of constitutional courts focus on subsidiarity as a legal issue).

111. Ian Bache, *Multi-level Governance and European Union Regional Policy*, in MULTI-LEVEL GOVERNANCE 165-78 (Ian Bache & Matthew Finders, eds., 2004); Elizabeth Bomberg & John Peterson, *European Union Decision Making: The Role of Sub-National Authorities*, 46 POL. STUD. 219, 219-35 (1998).

112. Consolidated Version of the Treaty on the Functioning of the European Union art. 4(2), Oct. 26, 2012 O.J. (C 326/1) [hereinafter TFEU], art. 3-6.

113. Thomas Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 J. OF COMMON MKT. STUD. 267-82 (2012).

114. Andrea Biondi, *Subsidiarity in the Courtroom*, in EU LAW AFTER

to the EU, and they fall into the so-called shared competences.¹¹⁵ Thus, the struggle between the communitarian and the (inter)national approach (which is represented inside the very European Union main institutions) asks to investigate what is the legal basis, the most appropriate level of decision-making, and the better trade-off about the way to legislate.¹¹⁶ Those issues are still of great relevance, because they have been the cause of many of the restraints that EU regulation has had to face.¹¹⁷

EU lack of legitimacy is still widely claimed by the general public opinion and most scholars.¹¹⁸ Yet, Member States' interests have not disappeared at the EU level.¹¹⁹ Main reasons for the EU institutions' democratic deficit lie on the high rates of abstention in the European Parliament elections.¹²⁰ Others point out the absence of an EU government voted in or out by citizens.¹²¹ Thus, it is unlikely for *the people* to express their direct approval or disapproval of EU policies. As a result, "policy making at the EU level can be characterized as *policy without politics*, which in turn makes for national *politics without policy*, as increasing numbers of policies are transferred from the national political arena to the EU."¹²²

That is why the EU law-making process used to be so burdensome. Political representations at the Parliament, Council, and Commission levels often struggle to find agreements on normative texts to reconcile the interests of the community with those of the nation-states, both represented on the EU institutional ground, causing broad inefficiency of the European law-making

LISBON 213, 216 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012).

115. See TFEU, *supra* note 112, at art. 10-12 (setting out various policies to follow under TFEU).

116. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 121-149 (5th ed., 2011) (analyzing the EU decision-making process).

117. See generally Robert Podolnjak, *Explaining the Failure of the European Constitution: A Constitution-Making Perspective*, 57 *COLLECTED PAPERS OF ZAGREB L. FAC.* 5 (2007) (analyzing voting and constitutions in the EU).

118. See CRAIG & DE BÚRCA, *supra* note 116, at 149-156 (evaluating democracy in the EU and the lack of legitimacy argument).

119. Joseph H. H. Weiler, *European Models: Polity, People and System*, in *LAWMAKING IN THE EUROPEAN UNION* 9-17 (Paul Craig & Carol Harlow eds. 1998).

120. See *2019 European election results*, EUROPEAN PARLIAMENT, (June 24, 2019), www.election-results.eu/turnout/ (setting forth the turnout in the EU Parliament elections since 1979, showing how differently EU voters have been participating to the polls, and showing how each single Country's turnout has been decreasing through time).

121. Weiler, *supra* note 119, at 4-5 (defining the EU's undemocratic governmental structure as "inverted regionalism"). See also CRAIG & DE BÚRCA, *supra* note 116, at 150 (pointing to the central power of decision-making in Brussels).

122. Vivian A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, 61 *POL. STUD.* 2, 12 (2013).

process.¹²³ Politics and procedures have often failed to keep up with the timing of the actual needs of Member States and their populations.¹²⁴

The Treaty of Lisbon introduced two different institutional tools to try and ease the law-making process. On the one hand, it introduced the so-called “early warning system,” to make the nation-states more involved in the monitoring of the principle of subsidiarity and proportionality (which enhances legitimacy in the EU).¹²⁵ On the other, it introduced the so-called “conciliation procedure” after the (fruitless) second reading of the ordinary legislative procedure, to give the Parliament and the Council the chance to find an agreement on any proposed legislative text (which apparently reduces legitimacy in the EU).¹²⁶

Was it enough? Were those tools capable to solve the inefficiency-legitimacy deficit *ratio* of the EU law-making process?

A. *Toward a Major Role of the Nation-States*

When compared to the American federal system, the EU contains a rather complicated system of division of powers between the Member States and the Union, which the European Treaties have essentially codified.¹²⁷

The basis of the principle of subsidiarity lies in the social doctrine of the Roman Catholic Church, because it can be seen as an adaptation of that principle to European Union governance.¹²⁸

Within the European Community, the principle of subsidiarity appeared for the first time in the Report on European Union in 1975¹²⁹ and later in the European Parliament's Draft Treaty on

123. CRAIG & DE BÚRCA, *supra* note 116, at 150.

124. *Id.*

125. Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality art. 6, OFFICIAL J. OF THE EUROPEAN UNION, C 202/206 (2009), ec.europa.eu/info/sites/info/files/protocol_no_2_on_the_application_of_the_principles_of_subsidarity_and_proportionality_dec2004_en.pdf [hereinafter Subsidiarity and Proportionality].

126. TFEU, *supra* note 112, at art. 294.

127. Rudolf Hrbek, *The Role of the Regions in the EU and the Principle of Subsidiarity*, 38 THE INT'L SPECTATOR 59, 69 (2008).

128. Michelle Evans, *The Principle of Subsidiarity in European Union Law: Some Comparisons with Catholic Social Teaching*, 3 SOLIDARITY 61, 62 (2013). Subsidiarity's core is that the action of a larger group should be restricted to supporting individuals or smaller groups only if they are incapable of performing the task. *Id.* The higher authority is not allowed to take action which the lower level government is capable of well performing on its own (more efficient action is not a sufficient criterion). *Id.* If this is not the case, then the higher authority is obliged to give support. *Id.*

129. Leo Tindemans, *Report on European Union*, BULL. OF THE EUR. COMTY, (Supp. 1/76 1975), aei.pitt.edu/942/1/political_tindemans_report.pdf. The Report on the European Union was published on December 29, 1975 and presented to the European Council in Luxembourg on April 2, 1976. *The Tindemans Report*, CVCE.EU, www.cvce.eu/en/education/unit-content/-/unit/

European Union of 1984.¹³⁰ It was first implemented, however, with the Single European Act of 1987 (subsidiarity then referred only to environmental policy) and then extended to all fields of shared competence by the Treaty of Maastricht in 1992.¹³¹ Until the Lisbon Treaty, however, it has only served as a symbolic principle because, on the one hand, it did not play an essential role in the legislative actions by both the European Parliament (“EP”) and national parliaments; and on the other hand, courts only reviewed the procedure and the reasoning for policy measures in a very marginal way.¹³² There is a general feeling amongst legal scholars that the principle of subsidiarity is a “non-binding political principle,” i.e., a principle of which the enforcement thereof essentially must lie in the hands of political institutions.¹³³ Therefore, as detailed in the following paragraphs, the role of the national parliaments and the courts in enforcing the principle of subsidiarity has been widely limited.¹³⁴

02bb76df-d066-4c08-a58a-d4686a3e68ff/63f5fca7-54ec-4792-8723-1e626324f9e3 (last visited Mar. 21, 2019). The Report “advocated consolidation of the existing institutions and the development of common policies. It wanted to extend the powers and authority of the Commission and, to this end, proposed that the President should be appointed by the Council and approved by the European Parliament.” *Id.* The Report “also wanted to strengthen the powers of the European Parliament, the Members of which he wanted to see elected by universal suffrage before the end of 1978, by conferring on it the right to propose legislation, a right . . . the sole prerogative of the Commission” so far. *Id.* The Report “also advocated the extension of majority voting in the Council and changing the period when each Member State held the Council Presidency from the current six months to one year.” *Id.*

130. Commission of the Eur. Communities, *Draft Treaty Establishing the European Union*, 2 BULL. EUR. COMMUNITIES 7, 9 (1984), aei.pitt.edu/65287/1/BUL273.pdf.

The European Parliament adopt[ed] a draft Treaty on European Union, also known as the ‘Spinelli draft’, with a view to bringing about a reform of the Community institutions. Despite the limited impact of the draft Treaty, its adoption motivates the governments of the Member States of the Communities to propose a treaty, the draft Single European Act, in December 1985.

Draft Treaty Establishing the European Union (14 February 1984), CVCE.EU, www.cvce.eu/en/obj/draft_treaty_establishing_the_european_union_14_february_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html (last visited Mar. 21, 2019).

131. TEU, *supra* note 94, at art. 3b.

132. See Biondi, *supra* note 114, at 214, 218, 227 (concluding that the introduction of the concept of subsidiarity has been a gradual process and was only considered marginally at first).

133. ELIES STEYGER, EUROPE AND ITS MEMBERS: A CONSTITUTIONAL APPROACH 64 (1995); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J INT’L L. 38, 38 (2003); PHILIPP KIIVER, THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION: A CRITICAL VIEW ON EU CONSTITUTION-BUILDING 157–58 (2006).

134. Nicolas de Sadeleer, *Principle of Subsidiarity and the EU Environmental Policy*, 9 J. EUR. ENVTL & PLAN. L. 63, 65 (2012).

This is probably the reason why the Treaty of Lisbon introduced significant new elements, along with the annexed Protocols on the *Role of National Parliaments in the EU* and on the *Application of the principles of subsidiarity and proportionality*. The Protocols ensure the Member States, the Committee of the Regions, and the Court of Justice play a major role in the *ex-ante* political control of the respect of the principle of subsidiarity by EU bodies.¹³⁵

According to the Protocols, national parliaments are now asked to check all legislative proposals for their compatibility with subsidiarity through the so-called early warning system.¹³⁶ The Committee of the Regions is now entitled to bring legal actions before the ECJ.¹³⁷ Consequently, the ECJ is given a specific jurisdiction to hear actions sued by the Member States - on behalf of their national parliament or a chamber of it - and the Committee of the Regions for the respect of the principle of subsidiarity.¹³⁸

The two Protocols establish a dual system. One provides for the transmission from the Commission to national parliaments (at the same time as to the EP and the Council) of both “consultation documents” and “draft legislative acts” granting nation-states unlimited scrutiny over them.¹³⁹

Article 5 of the *Protocol on the application of the principles of subsidiarity and proportionality* states that “Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.”¹⁴⁰ This provision introduces the early warning system provided by Articles 6 and 7, which includes the possibility for national parliaments (or each chamber of national parliaments, in the case of bicameral systems) to send a reasoned opinion “stating why it considers that the draft in question does not

135. Treaty establishing a Constitution for Europe - Protocols and Annexes - 1. Protocol on the Role of National Parliaments in the European Union, 2004 O.J. (C 310) 204; Official Journal of the European Union, *Protocol on the application of the principles of subsidiarity and proportionality*, C 310/207, 16.12.2004. Both Protocols come from the working group appointed during the Laeken European Council (2001) which highlighted that the principle of subsidiarity is essentially political and that the responsibility for it should therefore rest with political bodies. In its final report, the working group recommended, on the one hand, to setting up a political early warning system to strengthen the national parliaments’ monitoring of the principle of subsidiarity; on the other hand, to expanding the scope to referral to the ECJ on grounds of failure to comply with the principle of subsidiarity. *Conclusions of Working Group I on the Principle of Subsidiarity*, CONV 286/02, Brussels, 2002.

136. Subsidiarity and Proportionality, *supra* note 125, at art. 6, 8.

137. *Id.*

138. *Id.*

139. *Id.* at art. 2, 3 (extending to eight weeks the period that shall elapse between a draft legislative act being made available to national parliaments in the official languages of the Union and the date when it is placed on the provisional agenda of the Council for its adoption (after the following ten days)).

140. *Id.* at art. 5.

comply with the principle of subsidiarity.”¹⁴¹

The Commission “shall take account of the reasoned opinions issued by national parliaments or by a chamber of national Parliament.”¹⁴² Each parliament has two votes.¹⁴³ In the case of a bicameral system, each chamber shall have one vote.¹⁴⁴ When reasoned opinions represent at least one third (one quarter on the area of freedom, security, and justice) of the votes allocated to national parliaments, “the draft must be reviewed.”¹⁴⁵ However, the Commission is still not bound by the reasoned opinions because it can decide to maintain, amend or withdraw the act, giving reasons for its decision.¹⁴⁶

Paragraph 3 of Article 7 includes another additional guarantee, the so-called “orange card.”¹⁴⁷ Under the ordinary legislative procedure, when reasoned opinions on the non-compliance with the principle of subsidiarity represents at least a simple majority of the votes of national parliaments, the Commission can still decide to maintain, amend or withdraw the proposal.¹⁴⁸ However, if the proposal is maintained, the Commission must, in a reasoned opinion, justify why it considers that the proposal complies with the principle of subsidiarity.¹⁴⁹ As the second subparagraph of Article 7(3) states,

This reasoned opinion, as well as the reasoned opinions of national parliaments shall be submitted to the Union legislator, for consideration in the procedure: (a) before concluding the first reading, the co-legislators (the EP and the Council) shall consider whether the

141. *Id.* at art. 6(1); Roberta Panizza, *The Principle of Subsidiarity*, EUROPEAN PARLIAMENT (2018), europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity.

142. Subsidiarity and Proportionality, *supra* note 125, at art. 7(1).

143. *Id.*

144. *Id.*

145. *Id.* at art. 7(2).

146. *Id.* The mechanism, by analogy with soccer jargon, has been defined as a *yellow* and not as a *red* card system. Jean-Victor Louis, *National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits*, 4 EUR. CONST. L. REV. 429, 431 (2008). As Louis points out:

Some members of the Convention had preferred the establishment of a red card system but this idea was discarded essentially in order to avoid infringing the monopoly of initiative of the Commission maintained as a principle in the Lisbon Treaty, the principle of the necessity for the Council to be unanimous in order to amend a proposal of the Commission.

Id. at 438.

147. Subsidiarity and Proportionality, *supra* note 125, at art. 7(3). That nickname comes from traffic lights, but it also keeps trace of its Dutch Government original proposal. It stresses the fact that “opinions of national parliaments are not sufficient in order to block the proposal”; Louis, *supra* note 146, at 438.

148. Subsidiarity and Proportionality, *supra* note 125, at art. 7(3).

149. *Id.*

legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission; (b) if, by a majority of 55 percent of the members of the Council or a majority of the votes cast in the EP, the legislators are of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.¹⁵⁰

It is likely to assume that the Member States' and judicial control over the respect of the competences conferral to the EU would be more effective in the future, in spite of what happened so far. A significant argument for that may already be found in the German and Czech Constitutional Court's (so-called) Lisbon Rulings, which held that every transfer of competences needs a clear "delimitation" of the transferred powers in order to allow the national parliaments to predict the degree to which competences are actually transferred to the EU.¹⁵¹ According to the latter, rather than address preliminary proceedings to the ECJ when in doubt about European law (as stated in the Treaties), both Constitutional Courts announced the will to keep their own authority to decide whether EU regulations are compatible with the "remaining national identity" of their sovereign countries.¹⁵²

1. National Parliaments and the Early Warning System

Since the Treaty establishing a Constitution for Europe was signed in Rome in October 2004, national parliaments have had and played a very marginal role in the subsidiarity check during the EU law-making process.¹⁵³ They could only be found with reference to ensuring compliance with the principle of subsidiarity in accordance with the procedure set out in the Protocol.¹⁵⁴ They are also mentioned in Article I-18, where the EU Commission shall draw national parliaments' attention to proposals for monitoring the

150. *Id.*

151. BVerfG, Judgement of the Second Senate of Jun. 30, 2009, 2 BvE 2/08, bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html; Petr Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 EUR. CONST. L. REV. 143, 152 (2009).

152. See THE GERMAN CONSTITUTIONAL COURT'S LISBON RULING: LEGAL AND POLITICAL SCIENCE PERSPECTIVES 45 (A. FISCHER-LESCANO, C. JOERGES & A. WONKA eds., 2010) (pointing out, "[i]n its ruling, the GCC gives itself the right to judge over *ultra vires* and sufficient remaining national identity. It is critical that it usurps itself this right, rather than announcing to address preliminary proceedings to the ECJ when in doubt about European law").

153. Louis, *supra* note 146, at 431; Jit Peters, *National Parliaments and Subsidiarity: Think Twice*, 1 EUR. CONST. L. REV. 68, 70 (2005).

154. Treaty Establishing a Constitution for Europe art. 1-11(3), Oct. 29, 2004, 2004 O.J. (C 310) 20.

subsidiarity principle.¹⁵⁵

Further, the only reference to national parliaments in Title VI on “The Democratic Life of the Union” could be found in a provision on “Representative Democracy.”¹⁵⁶ It mentions the democratic responsibilities of the heads of State or of Government, or governments (composing respectively the European Council and the Council) either to their national parliaments, or to their citizens.¹⁵⁷ On the one hand, the accent is on the control of the Governments as members of the Council, especially in the elaboration of EU legislation; on the other hand, it is on the *active contribution* of national parliaments to Union's affairs.

The Treaty of Lisbon now provides for a complement to the early warning system in the control of the application of the principle of subsidiarity in family law with cross-border implications,¹⁵⁸ which introduces a new possibility for national parliaments to *veto* the use of a so-called “*passerelle* procedure” which, according to Article 48 TEU, allows the switch to a different kind of legislative procedure.¹⁵⁹

Title II – “*Democratic principles*” – of the modified TEU includes a new Article 12 on the active contribution of national parliaments “to the good functioning of the Union.”¹⁶⁰ They take

155. *Id.* at art 1-18 at 24.

156. *Id.* at art. 1-46 at 40.

157. *Id.*

158. TFEU, *supra* note 112, at art. 81(3).

159. TEU, *supra* note 94, at art. 48 states that,

Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Id.

160. *Id.* at art. 12.

part in the inter-parliamentary cooperation, among national parliaments, each other, and with the European Parliament.¹⁶¹ National parliaments also get informed by having draft legislative acts of the Union forwarded to them (in accordance with the Protocol on the role of national parliaments in the EU) for checking whether the principle of subsidiarity is respected (in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality).¹⁶²

Yet, the Commission keeps stating that the principle of subsidiarity is not being observed in an appropriate way.¹⁶³ The 2014 Commission's *Annual Report on Subsidiarity and Proportionality* stated that the reasoned opinions on alleged breach of the principle of subsidiarity received by the Commission from national parliaments in 2014 represented a decrease of 76% compared to the number of reasoned opinions received in the previous years.¹⁶⁴ Further, the reasoned opinions received in 2014 accounted for a considerably lower proportion (4%) of the overall number of opinions received by the Commission in the same year in the wider context of the political dialogue.¹⁶⁵ The majority of national chambers thus issued one or no reasoned opinions.¹⁶⁶

According to the decrease of reasoned opinions produced by national parliaments, one may think about a significant improving of the respect of the principle of subsidiarity by the EU institutions. However, the smaller number of reasoned opinions must be seen in the light of the decrease in the overall number of legislative proposals issued by the Commission towards the end of its term of office and not as an indication of an increased satisfaction by national parliaments in subsidiarity matters.¹⁶⁷ As the Commission reports, "[a]lthough national parliaments were less active in terms of issuing reasoned opinions in 2014, a growing number of national chambers called for strengthening of the subsidiarity control procedure."¹⁶⁸ The Danish Folketing¹⁶⁹, the Dutch Tweede

161. *Id.* at art. 12 (f).

162. *Id.* at art. 12 (a) and (b).

163. *Commission Annual Report 2014 on Subsidiarity and Proportionality*, at 4, COM (2015) 315 final (Feb. 2, 2015) [hereinafter *Commission 2014 Report*].

164. *Id.*

165. *Id.*

166. *Id.* at 5.

167. Diane Fromage, *Regional Parliaments and the Early Warning System: An Assessment Six Years After the Entry into Force of the Lisbon Treaty*, Luiss School of Government, Working Paper Series 5 (2016).

168. 2014 Report, *supra* note 163, at 5.

169. EUROPEAN AFFAIRS COMM., DANISH PARLIAMENT, TWENTY-THREE RECOMMENDATIONS TO STRENGTHEN THE ROLE OF NATIONAL PARLIAMENTS IN CHANGING EUROPEAN GOVERNANCE (2014).

Kamer,¹⁷⁰ and the UK House of Lords¹⁷¹ submitted reports with ideas on how to extend the scope of subsidiarity control.¹⁷² “They suggested that reasoned opinions should not only concern compliance with the principle of subsidiarity, but also compliance with the principle of proportionality or the legal basis for the proposal.”¹⁷³ “The reports also advocated an extension of the deadline for submitting reasoned opinions and proposed that when a ‘yellow card’ is triggered, the Commission should be bound to withdraw or amend its proposal.”¹⁷⁴

Since those provisions have a purely indicative value (and thus no normative value), they include different tools of intervention of national parliaments in the context of EU lawmaking. Those tools show how data on reasoned opinions are not reliable of a better satisfaction with the respect of the principle of subsidiarity on national parliaments’ side.¹⁷⁵

Consistently, in 2016, the Commission kept practicing the Better Regulation agenda on assessing subsidiarity in the policy-making process.¹⁷⁶ Those guidelines, first adopted in 2015 and amended in 2017, require the Commission to carry out a subsidiarity analysis for every new both legislative and non-legislative initiative or proposals in matters included in the sharing competence areas.¹⁷⁷ According to the guidelines, the aim of the analysis is twofold: first, “to assess whether action at national, regional or local level is sufficient to achieve the objective pursued; second, to assess whether Union action would provide added value over action by the Member States.”¹⁷⁸

When considering a new policy process, the Commission publishes a preliminary description of the envisaged initiative along with inception impact assessments, also including an initial justification as regards to subsidiarity.¹⁷⁹ During the policy development process, subsidiarity aspects are analyzed through an open public consultation.¹⁸⁰ The results are then submitted to the

170. Dutch Tweede Kamer, *Ahead in Europe: On the Role of the Tweede Kamer and National Parliaments in the EU*, TWEDE KAMER (May 9, 2014), www.houseofrepresentatives.nl/sites/default/files/news_items/ahead_in_europe_tc_m181-238660_0.pdf.

171. Commission 2014 Report, *supra* note 163, at 5; BRITISH HOUSE OF LORDS, EUROPEAN UNION COMM., *THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION* (2014).

172. Commission 2014 Report, *supra* note 163, at 5.

173. Panizza, *supra* note 141.

174. Commission 2014 Report, *supra* note 163, at 5.

175. Panizza, *supra* note 141.

176. *Commission Staff Working Document on Better Regulation Guidelines*, SWD (2017) 350 final (July 7, 2017).

177. *Id.*

178. *Annual Report 2016 on Subsidiarity and Proportionality*, at 3, COM (2017) 600 final (June 30, 2017).

179. *Id.* at 2.

180. *Id.*

independent evaluation of the Regulatory Scrutiny Board.¹⁸¹ Finally, the explanatory memorandum summarizes how the respect of the principle of subsidiarity is met.¹⁸²

2. *The (Committee of the) Regions Bringing Legal Actions Before the Court of Justice*

The expression “Europe of the Regions” has been used in the EU with a broad range of meanings.¹⁸³ In general terms, “Region” refers to a geographic portion of land. However, in the European history, Regions have also assumed special features giving an area a distinct character from an economic perspective, or an administrative entity, or even a political body generating a feeling of identity – religious, ethnic, linguistic, cultural, historic – among the inhabitants.¹⁸⁴ Also their denomination varies widely: *Länder* (Germany), *Regioni* (Italy), *Comunidades Autonomas* (Spain), Regions (UK) are only some examples.

That concept basically means processes of regionalization or federalization, by which territorial entities (below the level of the nation state) have acquired a more autonomous status and wider authority within the nation state.¹⁸⁵ For others, because the nation states are no longer capable of performing their tasks and functions properly, they have been substantially replaced by smaller territorial units (Regions) as the new basic component parts of the international system “beyond the nation state.”¹⁸⁶ Whichever definition one may agree with, it seems that Regions count more than before in the EU legal system and form a separate level within its multi-level governance system.

There has been a general trend throughout Europe favoring the sub-national level over the past two to three decades, through the “top-down” or “bottom-up” regionalism.¹⁸⁷ A number of reasons

181. *Id.*

182. *Id.* at 3.

183. Hrbek, *supra* note 127, at 59.

184. *Id.* at 60.

185. Thomas Vandamme, *Still the Committee of ‘Legislative Regions’? On Heterogeneity, Representation and Functionality of the Committee of the Regions After 2004*, AMSTERDAM CTR. FOR EUR. L. GOVERNANCE 9-10 (2013).

186. See Jurgen Habermas, *Beyond the Nation State?*, 10 PEACE REV. 235, 235-39 (2008) (explaining the changing development of nation-states as no longer being relied upon for their original functionality).

187. See Hrbek, *supra* note 127, at 60-61 (pointing out, “[i]n the nineties, Belgium underwent a thorough state reform, transforming a centralist into a federal system; the new Belgian constitution, which entered into force in 1994, provides for Regions and Communities as sub-national territorial entities. The transformation in Spain (beginning in the late seventies) from an authoritarian regime to democracy was accompanied by the re-introduction of territorial units possessing particular powers and allowing for the emergence and consolidation of regional identity. Under the term ‘devolution’, the United Kingdom adopted a territorial structure (1998/99) by which Scotland and Wales were given their

may explain that trend. Solutions taken at state level, away from populations affected by them, are no longer regarded as appropriate because of their lack of democracy or legitimacy.¹⁸⁸ Input from below is seen as necessary and in most cases, implementation is done at the lower level.¹⁸⁹ This is especially true at the European level where population in smaller regions now asks for greater regional autonomy to escape from the big economic crisis, since market integration has increased disparities between different areas.¹⁹⁰

The growing role of sub-national territorial entities in their nation-states have required a principle to guide the interaction between them and the wider EU legal system. It has been a practical necessity and reflects the growing role that the Committee of the Regions¹⁹¹ has been playing over the last few years, especially

own institutions (a directly elected assembly and an executive accountable to this assembly) with genuine powers. France and Italy continue their developments towards regionalization and in an established federal system, like that of Germany, the Lander are trying to strengthen their position. Finally, one should not forget that processes of decentralization and formal regionalization have taken place in Central and Eastern European applicant countries”).

188. See Art. 114, 117 Costituzione [Cost.] (It.) (defining legislative powers in Italy and the municipalities that make up the Republic).

189. *Id.*

190. See generally GIOVANI COINU, GIANMARIO DEMURO, FRANCESCO MOLA, *La specialità sarda alla prova della crisi economica globale*, EURAC, ESI, 2017 (reporting the results of a survey showing that the best solution to exit the economic crisis that began in 2008 would be the request for greater autonomy from the National Government). In Italy, there are ongoing legislation proposals by Lombardia, Veneto and Emilia-Romagna (the three richest regions in Italy) to obtain wider autonomy for managing schools, healthcare, and justice under the provision of Article 116.3 of the Italian Constitution:

Additional special forms and conditions of autonomy, related to the areas specified in art. 117, paragraph three and paragraph two, letter l) - limited to the organizational requirements of the Justice of the Peace - and letters n) and s), may be attributed to other Regions by State Law, upon the initiative of the Region concerned, after consultation with the local authorities, in compliance with the principles set forth in art. 119. Said Law is approved by both Houses of Parliament with the absolute majority of their members, on the basis of an agreement between the State and the Region concerned.

Art. 116.2 Costituzione [Cost.] (It.). See also *Catalonia Crisis in 300 Words*, BBC (June 11, 2019), www.bbc.com/news/world-europe-41584864 (showing a good example of legislative proposals to obtain wider autonomy. During the 2017 Catalan Constitutional crisis in Spain, a referendum was held for getting the Catalan independency from the Government of Spain. Catalonia is the richest region in the country. The nationalist party won the referendum (and the subsequent regional elections in December 2017), but the Spanish Constitutional Court held that referendum illegal, notwithstanding 90% of Catalan people backed independence).

191. Enrico Borghi, *The Development of the Committee of the Regions*, in GOVERNING EUROPE UNDER A CONSTITUTION 445 (Herm.-Josef Blanke & Stelio Mangiameli Mangiameli eds., 2006); Susana Boras-Alomar et al., *Towards a Europe of the Regions? Visions and Reality form a Critical Perspective*, 4

after the entrance into force of the Lisbon Treaty in 2009.

At the beginning of the former European Economic Community it was already clear that regional policy at the European level would have had a relevant consistency, at least in terms of budgeting massive special development funds for the less developed areas.¹⁹² That was probably the main reason for regional authorities to want to be directly involved in European policy-making.¹⁹³ Some of the regions were already entitled with a high level of autonomy in their national states, where they could indeed exercise legislative authority. Thus, it is not surprising that German *Länder* and Belgians *Communautés* were the main advocates (where United Kingdom and France were instead opposed) for the institutionalization of the Committee of the Regions since the preparation of Treaty of Maastricht (1992).¹⁹⁴ This is true, even though it was done with mere advisory powers and only in limited and specific areas of the whole EU legislative authority.¹⁹⁵ With Amsterdam and Nice Treaties, the Committee's power was strengthened by expanding the EU policy areas where its advisory opinion was mandatory.¹⁹⁶

It was only with the Treaty of Lisbon that the Committee of the Regions was given a more significant role in the EU legislative process: on the one hand, through the further increasing of areas of mandatory consultation;¹⁹⁷ on the other hand, through the right granted to the Committee to bring legal actions before the Court of

REGIONAL POL. & POL'Y 1, 35-37 (1994).

192. See *History of the Policy*, EUR. COMM'N, ec.europa.eu/regional_policy/en/policy/what/history/ (last visited May 1, 2019) (setting forth a timeline of the start of the European Economic Community).

193. Peter Van Der Knaap, *The Committee of the Regions: the Outset of a 'Europe of the Regions'?*, 4 REGIONAL POL. & POL'Y 86 (1994).

194. See Art. 117 Costituzione [Cost.] (It.) (noting, "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations."); Grundgesetz [GG] [Basic Law], art. 70(1) (explaining, "The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation."); 1994 Const. art. 127-133 (Belg.) (setting forth the responsibilities of the Communities); C.E., B.O.E. n. 143, Dec. 29, 1978 (Spain) (recognizing that when self-governance is implemented, "bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status may accede to self-government and form Self-governing Communities (Comunidades Autónomas) in conformity with the provisions contained in this Part and in the respective Statutes").

195. See Vandamme, *supra* note 185, at 13 (explaining the non-binding advice that was permitted to be put forth).

196. *Id.*

197. See TFEU, *supra* note 112, at art. 91 (Transport), art. 102 (Air Transport), art. 148 (Employment Policy), art. 153, art. 164 (European Social Fund), art. 165 (Education), art. 166 (Vocational Training), art. 167(5), art. 168(4) (health care), art. 168(5), art. 172 (Trans European Networks), art. 175, art. 177 (Structural Funds), art. 178 (European Regional Development Fund), art. 192 (Environment), art. 194 (Energy).

Justice for protecting its prerogatives.¹⁹⁸ In the past this same kind of privilege was given to the EP in the Treaty of Nice; thus some have pointed out that it is likely that, “in the future, the ECJ might opt for a broader legal interpretation of this right,” as it has already occurred with the EP.¹⁹⁹

Some authors have pointed out that the EU is deeply characterized by a division of public authority alongside only two centers, the national and the supranational, and there is no room for interpreting subsidiarity as the tool by which “regional authorities are portrayed as [...] active insiders to EU affairs.”²⁰⁰ In that given context, the Committee played a very marginal role on monitoring the subsidiarity principle.²⁰¹

The higher role of the Committee after Lisbon is ensured by the new wording of Article 5.3 TEU which limits EU action if goals “cannot be sufficiently achieved by the Member States either at central or at regional and local level.”²⁰² The Committee has always favored this wider notion of subsidiarity, and the Protocol No. 2, on the application of the principle of subsidiarity and proportionality, has finally accorded to the Committee the right to initiate direct subsidiarity review before the EU Court of Justice over EU legislative acts in areas of mandatory consultation.²⁰³

In the meantime, the Committee of the Regions adopted its second “Subsidiarity Work Programme” in 2014, which included selected initiatives according to specific criteria set in environmental policies.²⁰⁴ However, “several respondents raised concerns about proportionality, questioning the feasibility of the new...targets...and highlighting the different approaches...throughout the EU.”²⁰⁵ Several opinions adopted by the Committee of the Regions raised concerns in terms of compliance of Commission proposals with the principles of subsidiarity and proportionality.²⁰⁶ Since the Commission proposals are hard to change due to the complex bicameral legislative procedure of the EU, successful influence on the Commission often would meet the goal.²⁰⁷

The actual influence of the Committee of the Regions has been largely neglected.²⁰⁸ However, those opinions do often produce

198. *Id.* at art. 263.

199. Vandamme, *supra* note 185, at 15.

200. Michèle Finck, *Challenging the Subnational Dimensions of Subsidiarity in EU Law*, 8 EUR. J. LEGAL STUD. 5, 13 (2015).

201. *Id.*

202. TEU, *supra* note 94, at art. 5(3).

203. Subsidiarity and Proportionality, *supra* note 125, at art. 8.

204. Commission 2014 Report, *supra* note 163, at 7.

205. *Id.* at 8.

206. *Id.* at 8-11.

207. *Id.* at 12.

208. Marco Brunazzo & Ekaterina Domorenok, *New Members in Old Institutions: The Impact of Enlargement on the Committee of the Regions*, 18

effects on policy-making, both on the addressee and the final policy outcome even though their recommendations are not binding.²⁰⁹ As some have pointed out, the actual influence of the Committee's advisory opinions relies on a number of variables: first, it is more influential when the recommendation comes early in the formal decision-making process, if the addressee believes that the Committee has high expertise in the subject matter and only when its position is close to the own position of the addressee.²¹⁰ Overall it is proven that the Committee exercises a stronger influence in the position of the addressee body than over the final policy outcome.²¹¹ That is, it is more likely to have a positive effect on the final policy by influencing the initial position of the Commission, or the EP and the Member States, very early in the process since the Committee has no formal vote in the legislative procedure and it is excluded from political negotiations between the EP, the Council and the Commission.²¹²

Protocol No. 2, however, now gives the Committee of the Regions a powerful tool for strengthening its own role as watchdog of the principle of subsidiarity acknowledging the Committee the right to bring legal action before the ECJ against legislative acts on which it was consulted.²¹³

3. *The Enforceability of the Principle of Subsidiarity*

The practical application of the principle of subsidiarity has been defined as “minimal”²¹⁴ or “very timid”²¹⁵ because it has “little value as a standard of scrutiny,”²¹⁶ or “largely inoperable at the stage of adjudication,”²¹⁷ or finally because subsidiarity is “essentially a political and subjective principle.”²¹⁸ Subsidiarity has

REGIONAL & FED. STUD. 429, 430 (2008); John Loughlin, *Representing Regions in Europe: The Committee of the Regions*, in *THE REGIONAL DIMENSION OF THE EUROPEAN UNION: TOWARDS A THIRD LEVEL IN EUROPE?* 147, 147-164 (Charlie Jeffery ed., 1997).

209. Milena I. Neshkova, *The Impact of Subsidiarity Interests in Supranational Regulation*, 17 J. EUR. PUB. POL'Y 1193, 1193-1211 (2010).

210. Christoph Hönnige & Diana Panke, *The Committee of the Regions and the European Economic and Social Committee: How Influential Are Consultative Committees in the European Union?*, 51 J. COMMON MKT. STUD. 452, 452-471 (2013)

211. *Id.* at 453.

212. *Id.* at 455.

213. Subsidiarity and Proportionality, *supra* note 125, at art. 8.

214. Biondi, *supra* note 114, at 213.

215. Aurelian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231, 247 (2011).

216. Christoph Ritzer, Marc Rutloff & Karin Linhart, *How to Sharpen a Dull Sword - The Principle of Subsidiarity and its Control*, 7 GERMAN L.J. 733, 760 (2006).

217. EUROPEAN SCRUTINY COMMITTEE, SUBSIDIARITY, NATIONAL PARLIAMENTS AND THE LISBON TREATY, 2007-8, HC 563, at Ev 3 (UK).

218. Committee of the Regions, *Subsidiarity Annual Report 2011*, 31 (2011),

been always perceived as a political or a pre-legislative principle instead of an actual legal and justiciable criterion for the allocation of law-making authorities in the EU.²¹⁹ Thus, the ECJ has exercised little judicial review on it and many consider the failure of subsidiarity as a judicial review principle *in se* because the ECJ has adopted an excessively deferential approach to its judicial enforcement, despite its well-known general judicial activism.²²⁰

On the one hand, the ECJ has confirmed that subsidiarity does not create individual rights under the Treaties, as it solely relates to the division of powers between the Union and the Member States,²²¹ and has also held that the principle of subsidiarity is justiciable (moving away from a previous contrary Advocate General's Opinion in *Germany v. Parliament and Council*²²²). Nevertheless, the Court has never held, on the other hand, that any EU legislative act was invalid for the breach of the principle of subsidiarity.²²³

However, it is possible to find some major cases involving subsidiarity which have been decided before the Lisbon Treaty was entered into force.

In the *Working Time Directive* case, for example, the EU provided for minimum working time and wages throughout the Community.²²⁴ The United Kingdom argued that the legislator did not give any evidence of how those aims were better achieved at the Community level rather than at the national level.²²⁵ The ECJ's decision, however, found it adequate because of the improvement of the level of health and safety protection for the workers.²²⁶

In the *Deposit Guarantee* case, the ECJ considered sufficient the very general reasons given in the recitals, because they showed the EU Parliament's view for better achieving the goal at the Community level since the previous action at national level proved

portal.cor.europa.eu/subsidiarity/Publications/Documents/SMN%20Report%202011/SAR_2011_EN.pdf.

219. See generally Davor Petrić, *The Principle of Subsidiarity in the European Union: 'Gobbledygook' Entrapped Between Justiciability and Political Scrutiny? The Way Forward*, 6 ZPR 287-318 (2017) (explaining the criticisms that have arisen over the functionality of subsidiarity).

220. See Pranvera Bequiraj, *Subsidiarity in the Jurisprudence of the Court of Justice European Union*, 5 MEDITERRANEAN J. OF SOC. SCI, 311, 312 (2014) (discussing the limited and detached approach the ECJ has taken with subsidiarity).

221. Case C-221/10, *Artogodan GmbH v. European Commission*, 2012 E.C.R. 3.

222. Biondi, *supra* note 114, at 216. The Advocate General's Opinion in Case C-376/98 argued that "there can be no test of 'comparative efficiency' between potential Member State and Community action." *Id.* at 216 n.10.

223. Moens & Trone, *supra* note 110, at 72.

224. Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-5758.

225. *Id.* at ¶ 46.

226. *Id.* at ¶ 47.

insufficient.²²⁷

In the *Biotechnology* case, the Court held that the consideration of subsidiarity was necessarily implicit since the different laws of the Member States, according to the need of the protection of biotechnology, were an obstacle to the internal EU market.²²⁸

In the *British American Tobacco* case, the ECJ (examining for the first time the argument on a substantive rather than procedural grounds) held that the Directive did not go beyond what was necessary to ensure the harmonization of Member states laws regarding manufacture, presentation, and sale of tobacco products.²²⁹

It was only in the *Vodafone*²³⁰ and in the *Airport Charges*²³¹ cases that the EU regulation was expressly challenged for the violation of the principle of subsidiarity. In *Vodafone*, the EU “set a ceiling for both wholesale and retail charges” on mobile phone roaming, considering it necessary for improving the internal market.²³² However, the Court, stated that the challenged provisions were consistent with subsidiarity.²³³ In the latter case, Luxembourg argued that the challenged Directive breached subsidiarity because it applied to situations that could be regulated at national level, but again, the ECJ upheld the Directive on the ground that Luxembourg had not alleged sufficient details to permit the Court to determine whether Member State laws would be adequate to achieve the aim of the Directive.²³⁴

Though the ECJ had already confirmed that the subsidiarity principle would still have been justiciable, the Lisbon Treaty and the annexed Protocol No. 2 wording nonetheless make it clear that subsidiarity is a judicially enforceable legal principle and give the right to bring legal action on the ground of a possible breach of it.²³⁵ Yet, “*defining at what level a task is better accomplished is primarily a political problem [and] it should therefore left to political process.*”²³⁶

227. Case C-233/94, *Germany v. Parliament and Council*, 1997 E.C.R. I-2405; Moens & Trone, *supra* note 110, at 74.

228. Case C-377/98, *Netherlands v. Parliament and Council*, 2001 E.C.R. I-7079; Moens & Trone, *supra* note 110, at 74.

229. Case C-491/01, *The Queen. v. Sec’y of State for Health ex parte British Am. Tobacco (Inv.) Ltd.*, 2002; Moens & Trone, *supra* note 110, at 74-75.

230. Case C-58/08, *The Queen. v. Sec’y of State for Bus., Entm’t and Regulatory Reform ex parte Vodafone Ltd.*, 2010 E.C.R. I-4999; Moens & Trone, *supra* note 110, at 75.

231. Case C-176-09, *Luxembourg v. Parliament and Council*, 2011 E.C.R. I-3727; Moens & Trone, *supra* note 110, at 76.

232. Moens & Trone, *supra* note 110, at 75.

233. *Id.*

234. *Id.* at 76.

235. Subsidiarity and Proportionality, *supra* note 125, at art. 8.

236. Renaud Dehousse, *Does Subsidiarity Really Matter?* EUI, EUI Working Papers no. 92/93, at 21 (1992) (emphasis added).

Article 8 of Protocol No. 2 now expressly provides that

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.²³⁷

On the one hand, the essential political value of the principle is clear, as subsidiarity has been confirmed, even in the Protocol wording. It provides, for instance, the right to bring legal action before the ECJ to the Member States, their national parliaments (or a chamber thereof) and the Committee of the Regions, which are obviously political institutions.²³⁸

One may observe that the Protocol does not actually give a direct right to bring judicial review proceedings for the breach of subsidiarity, but they only can do so through proceedings notified by the national government,²³⁹ and not all Member States regulate the process by positive law yet.²⁴⁰ One may also observe that the Committee of the Regions has to respect three pre-conditions in order to bring a legal action for the breach of subsidiarity.²⁴¹ Yet, the Protocol expressly devolves, for the first time, to ECJ the judicial application of subsidiarity and it has already sorted some effects. For instance, the Commission withdrew a proposed regulation on collective action and the Committee of the Regions issued an opinion which stated that

if the Commission had maintained its proposal . . . the Committee could have considered taking the necessary steps to lodge an *ex-post* appeal against it for breaching the principle of subsidiarity in terms of both the choice of legal basis and insufficient evidence of the added value of EU action in this area.²⁴²

One may reasonably expect that the ECJ would bring a quali-

237. Subsidiarity and Proportionality, *supra* note 125, at art. 8.

238. Moens & Trone, *supra* note 110, at 69.

239. *Id.* (citing Adam Cygan, *Regional Governance, Subsidiarity and Accountability within the EU's Multi-level Polity*, 19 EUR. PUB. L. 161, 169 (2013)).

240. Moens & Trone, *supra* note 110, at 70.

241. *Id.* at 71. According to Committee of the Regions Rules of Procedure R. 53(2), 2010 O.J. (L6) 14, “the act must have been subject to mandatory consultation with the Committee, the challenged act must be a legislative act, and the action must be brought within two months of the publication of the challenged legislation.” *Id.*

242. *Id.* (quoting Committee of the Regions, *The Posting of Workers in the Framework of the Provision of Services*, 2013 O.J. (C17) 67, 69).

quantitative approach in the judgments, according with Article 5 of the mentioned Protocol for evaluating whether a Union objective can be better achieved at Union level (instead of at State level) where both qualitative or, wherever possible, quantitative indicators must be met.²⁴³ That may require the ECJ to develop a new justiciability test to review whether the principle of subsidiarity has been respected or not.

Should we expect a new era of subsidiarity case-law? The ECJ has already given proof of its ability to manage vague legal concepts, making it possible for the EU to move toward a higher standard of multilevel constitutionalism.²⁴⁴ ECJ case-law had led the European integration, making it possible for the EU legal system to improve its legal nature. The ECJ has explicitly recognized the relevance of internal federal arrangements for the application of EU law.²⁴⁵ Accordingly, even the “free movement principle”²⁴⁶ is not recognized as *absolute*, but it has to be balanced with the need to guarantee certain national public aims without the need of making any reference to the principle of subsidiarity.²⁴⁷

The wording of Article 8 of the Protocol No. 2 now enhances the role of the Court, the national parliaments, and the Committee of the Regions, and they have already shown their appreciation for the opportunity to play a major role in the subsidiarity check process.²⁴⁸

The main objections to a stronger judicial enforcement of subsidiarity, as related to the ECJ, would be at “a comparative disadvantage in relation to the Union institutions in terms of legitimacy, resources, and competence.”²⁴⁹ According to its case-law however, the Court could positively strengthen the judicial review through a rigorous check on adequate reasoning along with relevant evidence which justified the EU legislative intervention rather than

243. See PAUL CRAIG, *EU ADMINISTRATIVE LAW* 428 (3d ed. 2019) (discussing judgments set forth according to Article 5).

244. Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 *COMMON MKT. L. REV.* 63, 63-64 (2006).

245. Case C-212/06, *Gov't of the French Cmty and Walloon Gov't v. Flemish Gov't*, 2008 E.C.R. I-1687; Case C-88/03, *Portugal v. Comm'n*, 2006 E.C.R. I-7119; Case T-211/04, *Gibraltar v. Comm'n*, 2008.

246. The “free movement principle” ensures the free movement of people, workers, services, goods, and capital among the Member States of the EU. They are the most influencing pillars of the historic EU integration path. See TFEU, *supra* note 112, at Title IV.

247. See Case C-36/02, *Omega* [2004] (explaining the public policy motivation behind restriction on the “free movement principle”); see also C-359-360/04, *Placanica* [2007] (discussing infringements on the freedom of movement).

248. Biondi, *supra* note 114, at 222. The former President of the Committee of the Regions said that “[w]e will exercise this right with caution, but with great conviction in cases where we feel it necessary to defend the subsidiarity principle in EU lawmaking.” *Id.* at 223.

249. Jacob Öberg, *Subsidiarity as a Limit to the Exercise of EU Competences*, 36 *Y.B. EUR. L.* 391, 406 (2016).

nation-states.²⁵⁰ The toolbox now seems to be adequate: impact assessments, explanatory memorandum, reports from national parliaments and Committee of the Regions, and amendments to the legislative proposal deriving from the EU institutions give the Court the chance to consider whether there is adequate evidence and reasoning to sustain the exercise of EU competence or not.

*B. Trilogues and Subsidiarity, A Case Study: The
Amendment of Directive 96/71 on Posting of
Workers*

The Annual Report 2016 Subsidiarity and Proportionality identified 65 opinions from national parliaments discussing subsidiarity.²⁵¹ That number is seven times higher than opinions raised in 2015, showing the increased interest by the Member States on the new checking subsidiarity mechanism.²⁵²

Whether the new early warning system along with the Commission's guidelines will be effective tools providing national parliaments with a stronger and proactive role is yet to be proven.²⁵³ Some are rather skeptical, putting in doubt the practical importance of the new powers on subsidiarity given to national parliaments: they claim that the procedure created by the Protocol is not the better way for national parliaments to make their voice heard in the Union.²⁵⁴ A better guarantee for due respect of the subsidiarity would "have been a requirement of an extra qualified majority... within the Council and the European Parliament, in case the national parliaments object on account of subsidiarity"²⁵⁵ or introducing a so-called "green card" for allowing national parliaments to propose new policies or legislation to the Commission, including amending or repealing the existing EU laws.²⁵⁶

A leading case is going to be the Commission's amending proposal of Directive 96/71 on posting of workers in 2016, since the

250. See Biondi, *supra* note 114, at 222 (presenting the caselaw that has already been set forth with the adoption of subsidiarity).

251. *Annual Report 2016 on Subsidiarity and Proportionality*, *supra* note 178, at 7.

252. *Id.*

253. M. SEROWANIEC, *Towards the Green Card – Strengthening the role of national parliaments in EU Affairs?*,—TORUŃSKIE STUDIA POLSKO-WŁOSKIE XI — STUDI POLACCO-ITALIANI DI TORUŃ XI - Toruń 2015, dx.doi.org/10.12775/TSP-W.2015.002.

254. P. DE WILDE, *Why the Early Warning System does not alleviate the Democratic deficit*, OPAL working paper, n. 6/2012.

255. Peters, *supra* note 153, at 72.

256. BRITISH HOUSE OF LORDS, *supra* note 171; SEROWANIEC, *supra* note 253; Diane Fromage, *National Parliaments in the Juncker Commission Era: The "Green Card" Initiative and Beyond*, in 35 QUADERNI COSTITUZIONALI 1024, 1024-26 (2015).

more recent “yellow card” was triggered against that.²⁵⁷ As stipulated in the Treaty on the Functioning of the EU and reinforced by the case-law of the ECJ, the freedom of establishment and the freedom to provide services guarantee the mobility of businesses and professionals within the EU.²⁵⁸ However, with regard to the posting of workers, as a specific type of cross-border labor mobility, there is a need to balance internal market freedoms with measures guaranteeing respect for the rights of workers.²⁵⁹ Currently, the 1996 Directive on the posting of workers is being revised to address unfair practices experienced during its implementation where the internal market freedoms have prevailed over the social rights of workers.²⁶⁰

In the years following the adoption of that Directive, the implementation, legal interpretation, and regulation of the special case of posted workers exposed three specific challenges. Firstly, a widening gap of wage differentials between Member States created adverse incentives: labor cost differentials between countries with the highest and lowest minimum wage levels, have changed from a factor of 1:3 in 1999 to 1:10 in 2015.²⁶¹ As wage gaps continue to widen, and the overall labor costs continue to diverge between countries, there is an increasing financial incentive, based on wage competition, for businesses to use posted workers.²⁶² This incentive is seen in practice with a 44.4% increase in the number of postings between 2010 and 2014.²⁶³

Secondly, legal uncertainties and regulatory loopholes facilitated malpractices: the Directive does not set out clear criteria to define the temporary nature of work or what constitutes a genuine posting from an ‘established’ firm in a Member State to an undertaking in a host Member State.²⁶⁴ These ambiguities have led to many concerns about the potential misuse of the Directive to circumvent employment and social security legislation through

257. *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services*, OFFICIAL J. THE EUR. CMTY, No. L 18/1 (Jan. 1, 1997), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0071&from=en.

258. TFEU, *supra* note 112, at Title IV.

259. *Id.* at art. 45-48.

260. See DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY, POSTING OF WORKERS DIRECTIVE –CURRENT SITUATION AND CHALLENGES 45 (2016) [hereinafter Directorate-General] (pointing out that the Commission “highlighted in particular on the fact that the 1996 Directive no longer replies new realities within the Single Market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition”).

261. *Minimum Wage Statistics*, Eurostat Statistics Explained (Jan. 2019), ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics; Directorate-General, *supra* note 260, at 38.

262. Directorate-General, *supra* note 260, at 38.

263. *Id.* at 15-16, 38.

264. *Id.* at 28.

various loopholes such as rotational posting and letter-box companies.²⁶⁵

Thirdly,

[i]n view of the social policy provisions introduced into the European Treaties since the 2007 Lisbon Treaty revision, it is questionable whether the 1996 Directive provides an adequate legal instrument for ensuring a level playing field for free cross-border service provision while at the same time delivering an adequate foundation for the social rights of workers. In cases where the Directive leaves implementation and enforcement of minimum standards of employment to Member States, it relies on Court of Justice rulings to interpret the terminology in the Directive. However, rulings since the adoption of the Directive have not provided the necessary legal clarity. [...] In addition, with its four judgments in 2007/2008 in the cases Viking (C-438/05), Laval (C-341/05), Ruffert (C-346/06) and Commission vs. Luxembourg (C-319/06), the Court of Justice has turned the employment standards originally conceived as minimum standards in the Directive into a ‘maximum ceiling’ of terms and conditions of employment. In the meantime, though, the Court has issued two judgments with a more protective effect for posted workers: in the Sähköalojen ammattiliittory case (C-396/13), it ruled that categorizing workers in different pay groups which are universally binding and transparent in a collective agreement has to also be applied to posted workers. More recently, it ruled in the Regio-Post case (C-115/14), that Member States can require tenderers of public procurements and their subcontractors to pay their employees a set minimum wage.²⁶⁶

According to its own political guidelines promoting the principle, “the same work at the same place should be remunerated in the same manner,” and the Commission thus adopted a proposal²⁶⁷ for a targeted revision of the Directive on posting of workers.²⁶⁸ The purpose was to ensure that the implementation of the freedom to provide services in the Union would guarantee, at the same time, a level playing field for businesses and respect for the rights of workers.²⁶⁹ According to the proposal, all mandatory rules on remuneration in the host Member State should be applied

265. European Parliament, Working in the European Union, PE 600.417, at 15.

266. Susanne Kraatz, *Posting of workers*, European Parliament - Fact sheets on the European Union (Oct. 2018), www.europarl.europa.eu/factsheets/en/sheet/37/posting-of-workers.

267. *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2016) 128 final (Mar. 8, 2016).

268. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provisions of Services, 1997 O.J. (L 18), 1, 1 (EC).

269. *Id.* at 2.

to workers posted to that Member State.²⁷⁰

The Commission proposal elicited fourteen reasoned opinions from national parliaments in eleven Member States.²⁷¹ According to the Commission, these reasoned opinions represent “22 out of a total of 56 votes, more than one-third of the total, thereby triggering the procedure of the *early warning* under Article 7(2) of Protocol No. 2 to the Treaties (the so-called ‘yellow card’ procedure).”²⁷² National parliaments pointed out “(i) that existing rules were sufficient and adequate, (ii) that the Union was not the adequate level of the action, (iii) that the proposal fails to recognize explicitly Member States’ competences on remuneration and conditions of employment and, (iv) that the proposal’s justification with regard to the principle of subsidiarity was too succinct.”²⁷³

In the auspice of improving the interaction with national Parliaments, the Commission engaged directly with national Parliaments and adopted a Communication concluding that since “the proposal complies with the principle of subsidiarity it should be maintained unchanged.”²⁷⁴ In its Communication, while explaining why the rules in place are not sufficient and adequate to achieve that objective, the Commission recalled that “posting, by definition is of a cross-border nature” and workers carrying out work at the same location have to be protected by the same mandatory rules, irrespective of whether they are local or posted workers.²⁷⁵ The Communication furthermore confirms the respect of the Member States’ competences to set remuneration and conditions of employment, in accordance with national laws and practice.²⁷⁶ Finally, the Communication addressed the question of justification of the proposal’s compliance with the principle of subsidiarity, recalling the case-law of the Court of Justice and referring to the explanatory memorandum and the Impact

270. *Id.* at Article 1 Amendments to Directive 96/71/EC.

271. Before that the 2014 Enforcement Directive was an important step forward in terms of giving the Directive on posting of workers the legal certainty and structure for administrative coordination required for successful implementation. However, the Enforcement Directive did not touch on the substantive aspects of the posting of workers Directive. So, a second path to reform is specifically targeted at bolstering the social rights of workers and facilitating a better balance with economic rights of free service provision. *Id.* at 2-3.

272. *Annual Report 2016 on Subsidiarity and Proportionality*, *supra* note 178, at 14.

273. *Id.*

274. *Id.*

275. Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the Proposal for a Directive Amending the Posting of Workers Directive, with Regard to the Principle of Subsidiarity, in Accordance with Protocol No. 2, at 4, COM (2016) 505 final (July 20, 2016).

276. *Id.*

Assessment Report.²⁷⁷

This case is remarkable for at least two reasons. First, it is a good example of national parliaments' understanding and use of the early warning system as a tool for going beyond the subsidiarity scrutiny.²⁷⁸ It is worth noting that the national parliaments' understanding is founded on a substantial political basis.²⁷⁹ Second, it is meaningful that the Commission maintained the original proposal on exclusive procedural subsidiarity terms rather than the political matters addressed by national parliaments.²⁸⁰

Authors have pointed out some significant aspects of this third *yellow card*. First, the reasoned opinions come from a well-defined territorial area corresponding to ten Eastern European countries who joined the EU after 2004 enlargement.²⁸¹ Second, in this specific case, the reasoned opinions presented are equal to the political position already expressed by their Governments in the Council during the co-legislative procedure.²⁸² Finally, the reasoned opinions are founded on a solid nationalistic basis to keep minimum wages available for the (eastern) workers posted in the western and wealthier countries.²⁸³

What it is really remarkable, however, is the third reason of interest. For the first time ever, the debate about subsidiarity crossed what is proving to be the major (although informal) innovation in the law-making process in the EU institutional history: trilogue agreements.

Trilogues are tripartite meetings, that is informal negotiations on legislative proposals between the European Parliament, the Council of the European Union and the European Commission aimed at reaching early agreements on new EU legislation.

After the Commission held to maintain its proposal for the revision of the Directive on posted workers, the inconsistent positions of the EP and the Council suggested starting an informal tripartite negotiation aimed to find a compromise agreement in the first reading of the ordinary legislative procedure.²⁸⁴

277. *Id.* at 8-9.

278. Diane Fromage & Velentin Kreilinger, *National Parliaments' Third Yellow Card and the Struggle Over the Revision of the Posted Workers Directive*, 10 EUR. J. LEGAL STUD. 125, 146-147, 159 (2017).

279. *Id.*

280. *Id.* at 152. However, the Commission has sent individual answers to national parliaments, also addressing political issues. *Id.* at 159.

281. *See id.* at 126, 135 (exploring the introduction of subsidiarity through the Lisbon Treaty).

282. *Id.* at 156.

283. This same social dumping warning was the main cause for the failure of French and Dutch referendum on the approval of European Constitution Treaty in 2005. Robert Podolnjak, *Explaining the Failure of the European Constitution: A Constitution-Making Perspective*, 57 *Collected Papers of Zagreb Law Faculty*, 1-44 (Feb. 17, 2017), ssrn.com/abstract=963588.

284. *See* Marion Schmid-Drüner, *The Revision of Posting of Workers Directive*, Directorate-General for Internal Policies - Policy Department for

In the Parliament's files, it is clear its focus on the Directive's revision is strengthening the commitment to guarantee a common set of social rights in order to avoid unfair treatment by extending the legal basis to the wider provision of Article 153 TFEU (EU social policies) instead of keeping it under the freedom of services regulation principles.²⁸⁵

Its negotiating mandate²⁸⁶ was adopted by the plenary on October 23, 2017 and includes some change requests to the Commission proposal.²⁸⁷ The Council commitment has indeed two core revisions at the heart of its general approach, coming after a troubled EU Ministers meeting (which witnessed a total France defeat) aimed to reach a broad support in order to have a stronger

Economic, Scientific and Quality of Life Policies - PE 607.346 (Oct., 2017), [www.europarl.europa.eu/RegData/etudes/BRIE/2017/607346/IPOL_BRI\(2017\)607346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607346/IPOL_BRI(2017)607346_EN.pdf) (discussing the introduction of the use of the trilogues).

285. European Parliament Resolution of 16 February 2017 on *Improving the Functioning of the European Union Building on the Potential of the Lisbon Treaty*, 2014/2249 (INI).

286. European Parliament Press Release, *Posting of Workers: EP Ready to Start Negotiations with Member States* (Oct. 25, 2017), www.europarl.europa.eu/news/en/press-room/20171020IPR86571/posting-of-workers-ep-ready-to-start-negotiations-with-member-states reports. After Council's decision to start the trilogue also the plenary of the Parliament decided over the Employment Committee's mandate proposal to trigger negotiations. The rapporteurs for the issue at stake are Elisabeth Morin-Chartier (EPP, FR) and Agnes Jongerius (S&D, NL) who declared,

now that Council is ready to join the European Parliament at the negotiating table, we are very eager to finalise a Posting of Workers Directive that is up to date and fit for purpose. Things are moving in the right direction, but the devil is in the details. We will pay particular attention to the road transport issue, to make sure that the revision strikes the right balance between the freedom to provide services and better protecting workers.

Id.

287. See European Parliament Press Release, *Posted Worker: Better Protection and Fair Conditions For All*, (Oct. 16, 2017) www.europarl.europa.eu/news/en/press-room/20171016IPR86114/posted-workers-better-protection-and-fair-conditions-for-all (summarizing Parliament's amendments requests as follows: a) "all of the host country's rules on remuneration, set by law or collective agreements, should apply to posted workers," and, "[m]ember States should be obliged to publish all elements of their national remuneration policy, as well as information on collective agreements, on a special website"; b) Parliament has extended the conditions of employment posted workers enjoy on a par with workers in the host state to the conditions of workers' accommodation and allowance rates to cover travel, board and lodging expenses for workers away from their habitual place of work; c) "host[ing] Member States could opt to apply regional or sectorial collective agreements, instead of national ones, if they offer more favorable conditions for posted workers"; and d) the Commission's presumption on long-term posting is being taken up, subject to the possibility to grant extensions to undertakings based on a reasoned request made to the competent authority of the Member State where the worker is posted).

mandate for the trilogue.²⁸⁸

One of the main areas of confrontation during trilogues will be the refusal by the Council to put the directive under article 153 of the EU treaty, as required by the Parliament.²⁸⁹ The Council wants a text aiming at the good functioning of internal market while the Parliament is eager to protect workers.²⁹⁰

EU employment commissioner Marianne Thyssen said that “there are always differences at the start of trilogue negotiations, but that the institutions will sit together, exchange views and try to convince each other to find a good positive compromise.”²⁹¹

Tripartite interinstitutional negotiations (trilogues) between the Commission, Parliament and Council have started with the hopes of reaching a first-reading agreement.²⁹²

C. Trilogues: Early Informal Negotiation at any Stage of the Decision-Making Process

Since the Treaty of Amsterdam, the Council has been able to adopt a legislative act at first reading if it approves all the amendments contained in the European Parliament’s opinion.²⁹³ This formal provision has offered an informal space that decision-makers could (but need not) choose to fill.²⁹⁴

The word *trilogues* appeared for the first time in the 2007 Joint Declaration by the three mentioned institutions on practical arrangements for the codecision procedure.²⁹⁵ The declaration

288. Council of the European Union Press Release, *Posting of Workers: Council Reaches Agreement* (Oct. 24, 2017) www.consilium.europa.eu/en/press/press-releases/2017/10/24/posting-of-workers-council-reaches-agreement/.

(reporting the Council found an agreement on reducing the possible length of postings from 24 months (as proposed by the Commission) to 12 months with a possibility of a 6-month extension). Further, the Council is not going as far as Parliament in only applying universally applicable collective agreements to posted workers across all sectors. *Id.*

289. See Caterina Tani, *EU Posted Workers Face Hurdles*, EUOBSERVER (Oct. 25, 2017), euobserver.com/social/139625 (reporting on the negotiations to agree on the directive).

290. *Id.*

291. *Id.*

292. After the trilogue, the EP and the Council eventually adopted in the first reading of the ordinary legislative procedure the Directive (EU) 2018/957 on 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. *Directive (EU) 2018/957 of the European Parliament and of the Council*, 2018 O.J (L 173) 16, data.europa.eu/eli/dir/2018/957/oj.

293. TFEU, *supra* note 112, at art. 294.

294. Michael Shackleton & Tapio Raunio, *Codecision Since Amsterdam: A Laboratory for Institutional Innovation and Change*, 10 J. EUR. PUB. POL’Y 171, 173-74 (2003).

295. Joint Declaration, 2007/C 145/02, *Joint Declaration on Practical Arrangements for the Codecision Procedure (Article 251 of the EC Treaty)*, 2007 O.J. (C 145) 5, 6.

stated that the current practice (involving talks between the Council Presidency, the Commission and the chairs of the relevant committees, and/or rapporteurs of the European Parliament, and between co-chairs of the Conciliation Committee) “has proved its worth”²⁹⁶ and must “be encouraged.”²⁹⁷ General principle no. 7 states that

Cooperation between the institutions in the context of codecision often takes the form of tripartite meetings (‘trilogues’). This trilogue system has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages, as well as contributing to the preparation of the work of the Conciliation Committee.²⁹⁸

The Declaration confirms that such trilogues are usually conducted in an informal framework but then it tries to make them more formal, introducing some general rules related to any stage of the ordinary legislative procedure where the trilogues may be held.²⁹⁹ It is noteworthy that they have been subject to increasing degrees of formalization, leading to binding norms over time.³⁰⁰

296. *Id.* at General Principles n. 1.

297. *Id.* at General Principles n. 2.

298. *Id.* at General Principles n. 7.

299. *Id.* at Part II (Information).

300. Christilla Roederer-Rynning & Justin Greenwood, *The Culture of Trilogues*, 22 J. EUR. PUB. POL’Y 1148, 1149-50 (2015). The authors point out,

A first attempt to regulate the procedure took place in 2004 with the adoption of non-binding EP Guidelines for First and Second Reading Agreements (European Parliament 2004), though to little avail. Committees continued to display a patchwork of different practices, often leaving rapporteurs considerable freedom to make deals. This raised ‘serious concerns ... about the potential lack of transparency and democratic legitimacy inherent in the first reading negotiations, but also about the quality of the adopted legislation. In 2007, a Working Party for Parliamentary Reform set up by the Conference of Presidents advocated a more detailed set of rules. These were adopted as the EP’s Code of Conduct in 2008 and annexed to the EP’s Rules of Procedure (RoP) in 2009 (European Parliament 2008). However, the code did little to ease the tide of criticism owing to its lack of binding status. In 2011, the Constitutional Affairs Committee, at the request of the Conference of Presidents, drafted recommendations to give a legal status to the Code provisions. This new wave of reform led to the revision of Rule 70 (now 73) of the RoP on ‘Interinstitutional negotiations in legislative procedures,’ which incorporated key provisions of the Code into the Rules and introduced the possibility of making the opening of trilogue negotiations conditional upon a mandate delivered by the EP’s Plenary (Rule 70a, now 74).

The 2011 revisions also involved specification of the composition of the EP negotiating team and their obligations for reporting back during the course of trilogue negotiations. The chair or designated vice-chair nominee and the shadow rapporteurs and/or political group coordinators (or designated alternative) of the lead committee became de jure members of the EP negotiating team besides the rapporteur. Negotiators

Since their first appearance, trilogues have developed in practice from the need of the two branches of the legislature to manage their interdependence.³⁰¹ Such inter-institutional negotiations have now become standard practice for the adoption of EU legislative acts. In 2014, around ninety percent of EU laws were passed at first reading of the ordinary legislative procedure,³⁰² with research by the Parliament estimating that the average law agreed at first reading takes seventeen months from start to finish.³⁰³

The EU Treaties already contain detailed rules governing the conciliation procedure between the co-legislators.³⁰⁴ In the ordinary legislative procedure, Article 294 of the TFEU inserted the so-called conciliation procedure before the third reading of the decision-making process.³⁰⁵ The aim was precisely to find a solution when the positions of the Parliament and the Council had proved to be irreconcilable in the first two readings. The Treaty of Lisbon has therefore introduced into the community law a conciliation procedure that would allow a joint solution to be reached to overcome the paralysis determined by the opposing and irreconcilable positions of the main bodies of the European Union.³⁰⁶

A conciliation committee, composed of an equal number of members of the Parliament and Council representatives, is convened if the Council does not approve all of the Parliament's amendments at the second reading.³⁰⁷ If the committee does not agree on a joint text, the legislative act is not adopted, and the

are required to report back to the Committee after each trilogue meeting, with opportunities to report back to their political group, for the renewal of a mandate. Meanwhile, the political groups themselves also observe the trilogue negotiations directly. Where there is no scheduled meeting of the Committee to report back to, the Committee chair is required to convene a meeting of the designated political coordinators within each committee.

Id.

301. *See id.* (developing a whole picture on cultural institutionalization of trilogues).

302. Gianni Pittella et al., *Activity Report on Codecision and Conciliation: 7th parliamentary term 14 July 2009-30 June 2014 (7th Parliamentary Term)*, www.epgencms.europarl.europa.eu/cmsdata/upload/859059d1-8a65-4f20-a17a-6c2baa7984aa/activity_report_2009_2014_en.pdf (last accessed May 23, 2019). [hereinafter 14 July 2009 Activity Report].

303. *Id.* That trend is confirmed by EU Vice-Presidents responsible for Conciliation. *Activity Report on the Ordinary Legislative Procedure 4 July 2014-31 December 2016 (8th parliamentary term)*, DV\111217EN, www.epgencms.europarl.europa.eu/cmsdata/upload/7c368f56-983b-431e-a9fa-643d609f86b8/Activity-report-ordinary-legislative-procedure-2014-2016-en.pdf.

304. TFEU, *supra* note 112, at art. 294, ¶ 10-12.

305. *Id.*

306. *Id.*

307. *Id.* at ¶ 10. *See also* European Parliament, *Rules of Procedure*, 8th Parliamentary term, January 2017, Section 3, *Interinstitutional negotiations during the ordinary legislative procedure* where negotiations are specifically provided in different stages of the ordinary legislative procedure.

procedure is ended.³⁰⁸ If a joint text is agreed, that text is forwarded to the Parliament and the Council for a third reading, and the wording of the joined text cannot be changed by the two institutions.³⁰⁹

The codecision procedure became the ‘ordinary legislative procedure’ of the EU with the Treaty of Lisbon and has been the subject of a number of adaptations during its relatively short history.³¹⁰ The formal process by which agreement is reached has proved to be, however, complex and time-consuming. It involves, potentially, multiple stages of deliberations and votes. Formal meetings between the co-legislators (carried out in a “Conciliation Committee”) can occur, but only after the second reading, at the very end of the process.³¹¹ This can make for a lengthy and difficult process.

In the post-Lisbon Treaty era, in which lawmakers are actively encouraged to go faster in agreeing on legislation, the conciliation process has been almost eliminated in recent years.³¹² In the 1999-2004 term, eighty-nine of the four hundred EU legislative acts were completed after conciliation.³¹³ In the first half of the current term, the figure was down to zero because there have been no conciliation procedures yet.³¹⁴ This is the first time it has been zero since the Treaty of Maastricht and it is “one of the most distinctive legislative features of the current parliamentary term so far, it is not wholly unexpected, given the trend over recent years towards more early agreements between the co-legislators.”³¹⁵

Despite the conciliation procedure, trilogues enable the co-legislators to reach agreement at any stage of the legislative procedure, once the Commission has presented a proposal, even with no express reference in the EU Treaties.³¹⁶ If the negotiations are successful, a compromise text is presented to the plenary of

308. TFEU, *supra* note 112, at art. 294, ¶ 12.

309. *Id.* at ¶ 13.

310. See CRAIG & DE BÚRCA, *supra* note 116, at 123 (explaining that the co-decision procedure led to “[t]he most significant increase in the power of the EP”).

311. TFEU, *supra* note 112, at art. 294, ¶ 10.

312. See generally Antonio Tajani et al., *Activity Report on the Ordinary Legislative Procedure 4 July 2014-31 December 2016 (8th Parliamentary Term)*, www.epgencms.europarl.europa.eu/cmsdata/upload/7c368f56-983b-431e-a9fa-643d609f86b8/Activity-report-ordinary-legislative-procedure-2014-2016-en.pdf (last accessed May 23, 2019) (pointing out the lack of conciliation during the period of the report).

313. Pittella et al., *supra* note 302.

314. Tajani et al., *supra* note 312, at Foreword.

315. *Id.*

316. See European Parliament, *Rules of Procedure*, 8th Parliamentary term, January 2017, Section 3, *Interinstitutional negotiations during the ordinary legislative procedure* [hereinafter Parliament Rules of Procedure] (setting forth where negotiations are specifically provided in different stages of the ordinary legislative procedure).

Parliament and the Council.³¹⁷ If each co-legislator formally approves the compromise text, it becomes law.³¹⁸

According to Reh, trilogues differ from the EU's formal legislative procedure mainly in four ways.³¹⁹ "First, membership in trilogues is restricted and non-codified. [...] Trilogues involve a limited group of actors, and the boundaries of participation are neither codified nor publicly known."³²⁰ People attending trilogues may vary from file to file. Each institution designates its negotiators and defines its negotiating mandate.³²¹ Trilogues may be organized at any stage of the legislative procedure (first, second or third reading) and any provisional agreement reached in trilogues is informal and has therefore to be approved by the formal procedures applicable within each of the two institutions.³²²

The Parliament reformed its Rules of Procedure in 2017, introducing Section 3, entitled *Interinstitutional negotiations during the ordinary legislative procedure*, where general rules on negotiations at any stage of the ordinary legislative procedure were provided.³²³ In the Parliament, for example, Rule 69f(1) states that "Parliament's negotiating team shall be led by the rapporteur and shall be presided over by the Chair of the committee responsible or by a Vice-Chair designated by the Chair. It shall at least consist of the shadow rapporteurs from each political group that wishes to participate."³²⁴ The trilogue's format, however, remains the same: together with Parliament's negotiation team, "around the table are officials from the European Commission and either the minister or senior civil servants from the country holding the EU Council presidency."³²⁵

"Second, trilogues are secluded, and their seclusion has neither been formally decided nor publicly justified. Access is highly restrictive and information on the decision-process is limited to feedback given by negotiators to their respective committees, and documentation on the decision-process is not publicly available."³²⁶

317. See European Parliament, *Ordinary Legislative Procedure - Interinstitutional negotiations for the adoption of EU Legislation*, www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html (last visited Apr. 18, 2019) [hereinafter Ordinary Legislative Procedure] (outlining the approval process for the compromise text).

318. *Id.*

319. Christine Reh, *Is Informal Politics Undemocratic? Trilogues, Early Agreements and the Selection Model of Representation*, 21 J. EUR. PUBL. POL'Y 822, 825 (2014).

320. *Id.*

321. *Id.* at 828.

322. Ordinary Legislative Procedure, *supra* note 317.

323. European Parliament, *Rules of Procedure*, 8th Parliamentary term, January 2017.

324. *Id.* at rule 69f(1).

325. Benjamin Fox, *Secret EU Lawmaking: The Triumph of the Trilogues*, EUOBSERVER (Apr. 4, 2014), euobserver.com/investigations/123555.

326. Reh, *supra* note 319, at 825.

The participants are invariably armed with four-columned documents representing the starting position of the three institutions, with the fourth column left for the compromise text that is meant to emerge.³²⁷ According to Parliament's Rules of Procedure, "[a]ny document intended to be discussed at a meeting with the Council and the Commission ('trilogue') shall be circulated to the negotiating team at least 48 hours or, in cases of urgency, at least 24 hours in advance of that trilogue."³²⁸ The Parliament's Rules of Procedure also state,

After each trilogue, the Chair of the negotiating team and the rapporteur shall, on behalf of the negotiating team, report back to the next meeting of the committee responsible. Where it is not feasible to convene a meeting of the committee in a timely manner, the Chair of the negotiating team and the rapporteur shall, on behalf of the negotiating team, report back to a meeting of the committee coordinators.³²⁹

"Third, the rules specifying what is 'requested, prohibited, or permitted' in trilogues are informal; as such, they are 'created, communicated and enforced outside the officially sanctioned channels.'³³⁰ Specifically, Parliament's Rule 69f(4) reads,

If negotiations lead to a provisional agreement, the committee responsible shall be informed without delay. Documents reflecting the outcome of the concluding trilogue shall be made available to the committee responsible and shall be published. The provisional agreement shall be submitted to the committee responsible, which shall decide, by way of a single vote by a majority of the votes cast, whether to approve it. If approved, it shall be tabled for consideration by Parliament, in a presentation which clearly indicates the modifications to the draft legislative act.³³¹

Since former Rule 70 (2013) generally stated that "documents reflecting the outcome of the last trilogue shall be made available to the committee," one may pay attention on how much room has been taken away from the informality of the whole process, at least at the Parliament's ground.³³²

"Finally, the political process cannot be concluded in the informal arena; any agreement reached in trilogue is intermediate

327. Roederer-Rynning & Greenwood, *supra* note 300, at 1158.

328. Parliament Rules of Procedure, *supra* note 316, at Rule 69f(2).

329. *Id.* at Rule 69f(3).

330. Reh, *supra* note 319, at 825 (quoting Elinor Ostrom, *An Agenda for the Study of Institutions*, 48 PUB. CHOICE 3 (1986)); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPECTIVES ON POL. 725 (2004).

331. Parliament Rules of Procedure, *supra* note 316, at Rule 69f(4).

332. European Parliament, *Amendment of Rule 70 on interinstitutional negotiations in legislative*, Rule 70(2b) (Nov. 20, 2012), www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0422+0+DOC+XML+V0//EN.

until formalized by the EP's plenary and a Council meeting."³³³

There is a clear benefit to reaching an early deal. This avoids the legislative proposal going back around the Parliament and Council for a second or even a third reading, which can add years to the decision-making process.

However, trilogues are problematic from a democratic perspective: they are secluded; involve a restricted number of participants selected according to unclear criteria; and produce intermediary outcomes that have to be sanctioned by formal decision-making processes. Scholars and professionals have inquired if trilogues weaken the democracy and transparency of the EU law-making procedure and, definitely, of the EU action.³³⁴

The core issue is about the democratic accountability of trilogues. As the EU Ombudsman pointed out:

In a representative democracy, citizens elect representatives to act on their behalf in decision-making processes, most importantly, in the process of making laws. Citizens then hold their representatives to account for how they perform, most notably at elections. This applies equally to Members of the European Parliament [...] and to Member States' Ministers (who can be held to account through national elections or via their national Parliaments). [...] The legislative process in a representative democracy therefore requires, if the representative democracy is to function properly, a high level of transparency.³³⁵

According to that, European citizens, businesses, and organizations should be able to follow each stage of the law-making procedure and to understand how the negotiators arrive at the endpoint, because the Treaties provide for legislating as openly as possible to maintain public trust.

In 2015 such critical issues went under the attention of the European Ombudsman, who opened an investigation focused on the right balance between the public interest in transparency and the public interest in an effective and efficient legislative process.³³⁶ As

333. Reh, *supra* note 319, at 826.

334. Hans-Joachim Lauth, *Informal Governance and Democratic Theory*, in INT'L HANDBOOK ON INFORMAL GOVERNANCE, 40-64 (Thomas Christiansen & Christine Neuhold, eds. 2012); Anne Rasmussen & Christine Reh, *The Consequences of Concluding Codecision Early: Trilogues and Intra Institutional Bargaining Success*, 20 J. EUR. PUB. POL'Y 1006-24 (2013); Reh, *supra* note 319, at 837 (2014); Christopher Lord, *The Democratic Legitimacy of Codecision*, 20 JUR. EUR. PUB. POL'Y 1056-73 (2013); ANNE ELIZABETH STIE, *DEMOCRATIC DECISION-MAKING IN THE EU, TECHNOCRACY IN DISGUISE?* (Routledge 2013).

335. European Ombudsmen, *Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues* ¶¶ 15-16 (Jul. 12, 2016), www.ombudsm an.europa.eu/en/decision/en/69206 [hereinafter OI/8/2015/JAS]; see also *Sweden and Turco v Council*, joined cases C-39/05 P and C-52/05 P, ¶ 46 (stating the ability of EU citizens "to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights").

336. OI/8/2015/JAS, *supra* note 335, at ¶ 68.

a result, the Ombudsman identified three core issues institutions have to face for making trilogues more respondent to the democratic principle. They are all related to the transparency of trilogues that arise for citizens: “citizens need to know if trilogue negotiations are taking place on a legislative proposal; they need general information about the content of those negotiations; and they need to know who is taking part in the negotiations.”³³⁷

The Ombudsman made also a list of her own proposals to Parliament, Council, and Commission to solve the critical issues of the trilogue agreements,³³⁸ generally based on an improved circulation of information about trilogues agenda and participants, along with a wider document availability.³³⁹

D. Trilogues and the Separation of Powers in the EU

It would be of great interest to investigate if an actual separation of powers is really provided in the EU legal context, whether in the Treaties or in the daily practice of the EU. Also, it would be worth inquiring whether trilogues exist because there is separation of powers or, by contrast, because that separation is not part of the very nature of EU legal system.³⁴⁰

What seems more relevant for the purpose of this article, however, is how trilogues are shaping the institutional relationships between the Parliament, the Council, and the Commission. Since trilogues appeared, it is indeed possible to see

337. *Id.* at ¶ 32.

338. It is worth noting that the EU institutions presented a united front against the Ombudsman, challenging the admissibility of her inquiry. They argued that the organizational aspects of the legislative procedure fall outside of her mandate because the way these meetings are organized pertain to the Council’s and the Parliament’s political responsibilities as the EU co-legislators, and not to their administrative activity.

339. OI/8/2015/JAS, *supra* note 335 (proposing that the institutions: “[1] make proactively available, before trilogue negotiations begin, their positions on the Commission proposal; [2] make available general summary agendas before or shortly after trilogue meetings; [3] make proactively available four-column documents, including the final agreed text, as soon as possible after the negotiations have been concluded; [4] include, in legislative databases and calendars covering trilogues, links to any minutes or videos of the institutions’ public meetings where a trilogue has been discussed; [5] make proactively available a list of the representatives who are politically responsible for decisions taken during a Trilogue, such as the MEPs involved, the responsible Minister from the Council Presidency and the Commissioner in charge of the file. If the power to take decisions is delegated to civil servants, their identities should also be disclosed proactively; [6] make available as far as possible lists of documents tabled during trilogue negotiations; [7] to work together to make as much trilogue information and documentation as possible publicly available through an easy-to-use and easy-to-understand joint database”).

340. Those relevant issues are worthy to be deeply analyzed in the wider joint research program with the Center for International Law at the UIC John Marshall Law School mentioned at footnote n. 1.

an evolution of the roles respectively played by the three institutions in the legislative process.

Some believe that trilogues have been upgraded to the rank of *institutionalized* tools, because they “have moved away from being simple technical devices for managing the interdependence of the co-legislators, to become cultural constructs crystallizing different conceptions of institutional design” of the EU institutions.³⁴¹

Institutionalization of trilogues brought some critical changes. On the one hand, it resulted in a classification of different kind of trilogue meetings; on the other, it significantly changed the Parliament’s and Council’s weighted powers in the legislative procedure.³⁴²

Trilogues originally emerged as a means to facilitate the ‘conciliation procedure’ envisioned in the Maastricht Treaty (1992), which obliged the Council and Parliament to meet (subject to strict institutional requirements) in order to reach an agreement.³⁴³

The Council soon learned the new realities of being a co-legislator, in that Parliament would veto any attempt by the Council to reintroduce its common position.³⁴⁴ The Council understood that legislative efficiency under codecision required early inter-institutional confidence-building measures.³⁴⁵ As Roederer-Rynning & Greenwood observe “[s]ince the early days of codecision, trilogues have become the way of making EU laws after the Amsterdam Treaty (1999) making it possible for EU legislation to be passed at first reading, [...] thereby extending their use beyond that of the very conciliation procedure.”³⁴⁶

In the beginning of trilogues era, the Council seemed to play a stronger role during informal negotiation phases.³⁴⁷ Its superior organization adaptation, the chance to get much more information, and the expertise of national administrations made it easy for the Council to play a very influential role in early trilogues.³⁴⁸ The Parliament was instead a weaker player, having a marginal role in the informal – as in the formal – legislative process.³⁴⁹

341. Roederer-Rynning & Greenwood, *supra* note 300, at 1153.

342. See TFEU, *supra* note 112, at art. 294-295 (setting forth the change of power dynamics for both Parliament and the Council).

343. TEU, *supra* note 94, at art. 189b.

344. Michael Shackleton, *The Politics of Codecision*, 38 J. OF COMMON MKT. STUD. 325-342 (2000).

345. *Id.*

346. Roederer-Rynning & Greenwood, *supra* note 300, at 1149.

347. Maja Kluger Dionigi & Christel Koop, *Investigation of Informal Trilogue Negotiations Since the Lisbon Treaty-Added Value, Lack of Transparency and Possible Democratic Deficit*, EUROPEAN ECON. & SOC. COMMITTEE 54 (July 2017), www.eesc.europa.eu/sites/default/files/files/qe-01-17-783-en-n.pdf.

348. See Roederer-Rynning & Greenwood, *supra* note 300, at 1160-1161 (concluding that Council gained a more powerful role in the trilogues, when compared to Parliament).

349. Reh, *supra* note 319, at 835.

By contrast, a more structured shaping of trilogues follows. Trilogues are actually made of three different kind of meetings: bilateral meetings, technical trilogues and political trilogues.³⁵⁰ They all begin after the Commission has made its proposal.³⁵¹

Bilateral meetings work as the first and interlocutory place to check if there is any ground of general and potential agreement between the Council Presidency and the Parliament's representatives, and their respective technical assistants, over the Commission's proposal.³⁵² Technical and political trilogues then begin and meetings are run with a rigid separation between technical and political sessions.³⁵³ No politicians are admitted in the technical trilogues, however assistants and counselors are allowed in political trilogues.³⁵⁴ Institutions do not want it to be possible for a technical meeting to become hybrid unless explicitly agreed.³⁵⁵ Several rounds of sessions may be necessary to draft a compromise text.

Some logistical aspects could be useful to deeply understand how trilogues have changed traditional roles in the law-making procedure.

All political trilogues are held in the Parliament facilities and they are presided by Parliament's committee chairs involved depending on the topic at stage.³⁵⁶ The trilogues Presidency decides about meetings' convening and duration and keeps the fourth-column document updated.³⁵⁷ Institutions' delegations are not evenly constituted. The Parliament normally has the biggest representation (about thirty people, made up of politicians and staff), while the Council has the smallest (usually one to three people from the Presidency staff).³⁵⁸ The Commission's delegation is made up of about eight to twelve people (and always at the highest level of hierarchy).³⁵⁹

As Roederer-Rynning and Greenwood find,

Whilst formal rules of the game place Parliament at a disadvantage *viz.* the Council (the higher threshold for a majority in second reading, etc.), Parliament has acquired leverage over Council through the routines established by the CCC or its secretariat on a cross-committee basis, dominance of logistical arrangements in trilogues,

350. See Roederer-Rynning & Greenwood, *supra* note 300, at 1153 (contextualizing the three different types of meetings that make up trilogues).

351. *Id.*

352. TEU, *supra* note 94, at art. 17; TFEU, *supra* note 112, at art. 234, 244-50, 290-91.

353. Roederer-Rynning & Greenwood, *supra* note 300, at 1153

354. *Id.* at 1157.

355. *Id.*

356. Dionigi & Koop, *supra* note 347, at 55.

357. *Id.* at 52.

358. Roederer-Rynning & Greenwood, *supra* note 300, at 1154.

359. *Id.* at 1155

and the advantage conferred by numbers in full political trilogues.³⁶⁰

Parliament's delegation is bigger³⁶¹ and used to driving political-based discussion: the size of the group matters and "the enlargement of the group favors the transitions of its norms to the form of law."³⁶²

E. Criticizing Trilogues: The Widening of the Democratic Deficit of EU Institutions

Trilogues are a successful strategy that discharge a potentially cumbersome procedure, reduce transaction costs, and increase the speed of decision-making. They make EU legislation more efficient and promote interinstitutional co-operation.³⁶³

Yet, some scholars maintain that whereas the efficiency of these meetings is undeniable, the necessary balance between cost-time efficiencies and the principles of accountability, transparency and public participation remains to be determined.³⁶⁴

Critics of trilogues have focused on three major democratic challenges. First, the way the co-legislators come to decisions is undocumented and thus there is a lack of transparency of the legislative process³⁶⁵ and where Parliament and Council collude, they weaken public and minority control through mutual checks and balances taking the debate into secluded places of negotiation.³⁶⁶

360. *Id.* at 1159.

361. GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 87 (Kurt H. Wolff, trans., The Free Press 1950).

It will immediately be conceded on the basis of everyday experiences, that a group upon reaching a certain size must develop forms and organs which serve its maintenance and promotion, but which a smaller group does not need. On the other hand, it will also be admitted that smaller groups have qualities, including types of interaction among their members, which inevitably disappear when the groups grow larger.

Id.

362. *Id.* at 103.

363. The codecision statistics support this view: more than 1,000 legislative acts have been passed since 1999; in the first half of the 2009-2014 EP, a first reading dossier took on average merely 14.4 months to conclude, and only 4 percent of files went up to conciliation. European Parliament, Delegations to the Conciliation Committee, *Activity Report 14 July 2009–31 December 2011*, 2012, 4-6.

364. Rasmussen & Reh, *supra* note 334, at 1007-1008.

365. Renzo Imbeni et al., *Improving the Functioning of the Codecision Procedure*, 2 (2001); Tony Bunyan, *Secret Trilogues and the Democratic Deficit*, 7 (2007); Christine Reh, *Informal Politics: The Normative Challenge*, in *INT'L HANDBOOK ON INFORMAL GOVERNANCE*, 65-84 (Thomas Christiansen & Christine Neuhold, eds. 2012); Reh, *supra* note 319, at 826; STIE, *supra* note 334.

366. Christopher Lord, *The Democratic Legitimacy of Codecision*, 20 *JUR. EUR. PUB. POL'Y* 1059-63 (2013).

In addition, those authors have highlighted the constraints on political inclusion, public justification, and parliamentary deliberation where “debate in the plenary with the full participation of all political groups and members” is “reduced in importance by informal negotiations taking place elsewhere,” which reduce access opportunities for wider political debate.³⁶⁷

Finally, trilogues would differentiate access to, and control over, decision-making, while seclusion would reduce access to information. Such differentiations disproportionately empower big political parties (and their rapporteurs in particular) as well as big Member States (and their Presidencies in particular) at the expense of small political groups and rank-and-file parliamentarians.³⁶⁸

It is worth adding that trilogues have also raised the concerns of a broad spectrum of civil society and EU citizens, whose right to participate in the democratic life of the Union is being infringed.³⁶⁹ Public discussion of legislative proposals is the essence of any democratic decision-making process, they say.³⁷⁰ This is why EU citizens must be directly involved during the legislative process and be able to scrutinize the performance of their representatives, as the Ombudsman argued.³⁷¹ Most of the trilogue negotiations begin before the Parliament has adopted its first reading position officially, whereas the Council and the Parliament have already agreed on the final text of the legislation.³⁷² As a result, the whole debate shifts from the plenary to closed-door meetings where only very few members of the Parliament take part.³⁷³ This would prevent an in-depth discussion of proposals by the elected representatives.

Thus, trilogues profoundly undermine and weaken the position of the only directly democratically-elected institution in the EU, the European Parliament. Furthermore, it means that the public cannot scrutinize the positions held in the course of the meetings by the rapporteur and shadow rapporteur, the Commission, and the

367. Imbeni et al., *supra* note 365, at 2; Christopher Lord, *The Democratic Legitimacy of Codecision*, 20 JUR. EUR. PUB. POL'Y 1059-63 (2013); Anne Elizabeth Stie, *Democratic Decision-Making in the EU, Technology in Disguise?*, in TECHNOLOGIES IN DISGUISE? (1st ed. 2013).

368. Henry Farrell & Adrienne Héritier, *The Invisible Transformation of Codecision: Problems of Democratic Legitimacy*, SIEPS Report No 7 (2003); Henry Farrell & Adrienne Héritier, *Interorganizational Cooperation and Intraorganizational Power: Early Agreements under Codecision and Their Impact on the Parliament and the Council*, 37 COMPARATIVE POL. STUD. 37(10) 1184-1212 (2004).

369. Open Letter to Martin Schulz, President of European Parliament, Jean-Claude Juncker, President of European Comm'n, Jeppe Tranholm-Mikkelsen, Secretary-General of the Council, & Emily O'Reilly, European Ombudsmen (Sept. 30, 2015), edri.org/files/Transparency_LetterTrilogues_20150930.pdf.

370. *Id.*

371. OI/8/2015/JAS, *supra* note 335, at ¶ 20.

372. *Id.* at ¶ 43.

373. Dionigi & Koop, *supra* note 347, at 53-54.

Member States within the Council.

The disclosure policy of trilogue-related documents is also being contested. Contrary to the general rule of openness in legislative activity, neither the position of the three institutions nor the minutes of trilateral negotiations are disclosed to the public while the legislative process is ongoing.³⁷⁴ This would prevent public participation from taking place.

In its case-law regarding Article 4(2) of Regulation 1049/2001 on public access, the European Court of Justice since *Turco* stressed that openness

enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity [...]. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.³⁷⁵

In the post-Lisbon era, ECJ case-law has emphasized the formal division between legislative and non-legislative documents. In legislative acts the openness principle applies according to Article 15 TFEU³⁷⁶ thus in the ECJ case-law the right to access to documents relating trilogues has become particularly topical.³⁷⁷

In a nutshell, for critics of trilogues, openness and transparency constitute the best means to overcome the “democratic deficit” and to make the EU closer to citizens.

F. Advocating Trilogues: Efficiency, Democracy, and Legitimacy

Starting from the famous Lincoln declination of democracy,³⁷⁸ there have been three main normative criteria through which the dimension of the democratic deficit that invests the European

374. OI/8/2015/JAS, *supra* note 335, at ¶¶ 56-57.

375. Grand Chamber, joined cases C-39/05 P and C-52/05 P., *Kingdom of Sweden and Maurizio Turco v. Council*, 2008, ¶¶ 45-46.

376. TFEU, *supra* note 112 at art. 15 (stating “1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act”).

377. Päivi Leino, *Secrecy, Efficiency, Transparency in EU Negotiations: Conflicting Paradigms?*, 5 POL. & GOVERNANCE 6-15 (2017).

378. President Abraham Lincoln, *The Gettysburg Address*, in AM. HERITAGE BOOK OF GREAT AM. SPEECHES 91-92 (Suzanne McIntire, ed. 2001) “[...] this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth.” *Id.*

institutions was measured in literature. On the one hand, output effectiveness for the people; on the other hand, input participation by (and of) the people.³⁷⁹

Those arguments have to be addressed to ensure that the trilogues enhance democracy, legitimacy, and efficiency.

1. *Do Trilogues Strengthen EU Efficiency?*

The process of European integration has proceeded on the presumption that the legitimacy of the EU emanates from its capacity to deliver the wanted results.³⁸⁰ In other words, one of the strongest rationales to advocate legitimacy in EU institutions (and actions) has been based on its effectiveness. As already argued before in this article, it is widely known and acknowledged by both scholars and professionals that trilogues enhance effectiveness. Small delegations, with a strong legislative mandate by their sending institutions, are more capable of finding early agreements. If a compromise text is accomplished, it is more likely that it may encounter the favor of people whom are going to be affected by it.³⁸¹ Trilogues meet output legitimacy, strengthening the role of the EU institutions, which are perceived as more effective and thus closer to the needs of the people.³⁸²

In addition to the EU's action efficiency, trilogues also reinforce everything in between the inputs and outputs, which is referred to as *throughput legitimacy*.³⁸³

379. Schmidt, *supra* note 122, at 4 (arguing “[t]he concepts of output and input legitimacy as applied to the EU have their origins in the work of Scharpf [F.W. SCHARPF, *Demokratiethorie zwischen Utopie und Anpassung*. Konstanz 1970], who delineated ‘output-oriented’ legitimization as centering on the ability of EU institutions to govern effectively for the people and ‘input-oriented’ legitimization as involving political participation by the people”).

380. Karl-Oskar Lindgren & Thomas Persson, *Input and Output Legitimacy: Synergy or Trade-Off? Empirical Evidence From an EU Survey*, 17 J. OF EUR. PUB. POL’Y, 449, 450 (2010).

381. Roederer-Rynning & Greenwood, *supra* note 300, at 1149-50; 14 July 2009 Activity Report, *supra* note 302302, at 19, 43.

382. Roederer-Rynning & Greenwood, *supra* note 300, at 1149-50.

383. Schmidt, *supra* note 122, at 5,

‘Throughput’ legitimacy concentrates on what goes on inside the ‘black box’ of EU governance, in the space between the political input and the policy output, which has typically been left blank by political systems theorists. It focuses on the quality of the governance processes of the EU as contributing to a different kind of normative legitimacy from both the performance-oriented legitimacy of output and the participation-oriented legitimacy of input. Throughput is process-oriented, and based on the interactions – institutional and constructive – of all actors engaged in EU governance.

2. *Is Democracy Actually Affected by Trilogue Delegations' Size, as Most Critics Affirm?*

There are many arguments that can be used against that assertion. First, such delegations are normally exploited in any democratic system in order to find early agreements at any given level where majority decisions have to be taken, well before those decisions must formally be taken. Second, despite what happened in early trilogues, Parliament's delegations are now appointed according to the Rules of Procedure as amended in 2017; along with the Chair of the Committee responsible, the majority is also represented in EP delegations as well as minority or any political group which wish to participate in the informal negotiations.³⁸⁴ Third, delegations receive a clear negotiating mandate during plenary sessions and bilateral talks do not start before both Parliament and Council mandates are in place.³⁸⁵ Furthermore, respective delegations cannot depart from the given mandates during negotiations.³⁸⁶ The Council, as an institution participating in trilogues, should be less affected by that kind of criticism because the Council's law-making process always used to be secret and not transparent.³⁸⁷ However, the Council has traditionally conditioned the opening of trilogue negotiations to the support of substantive majority, elaborated through an open (although not public) process allowing each national delegation to annotate a draft proposal circulated by the Presidency and Secretariat.³⁸⁸

Fourth, any compromise text agreed during trilogues is then subject to the final vote of the plenary in the Parliament and the Council, according to general rules provided in the Treaties: procedures, voting, and majority thresholds remain those of the ordinary legislative procedure along with the guarantees thereof.³⁸⁹

Moreover, all the procedural guarantees discussed in the first part of this article, as an early warning system, have increased involvement of national parliaments and regions. Further, ECJ authority over subsidiarity and proportionality may be activated immediately after the Commission has made its new legislative proposal; therefore, well before the trilogues start.³⁹⁰

Finally, scholars generally agree that the Parliament's role in the legislative process has improved since trilogues have been institutionalized.³⁹¹ Since the Parliament is the unique institution

384. Parliament Rules of Procedure, *supra* note 316, at Rule 69f(1).

385. *Id.* at Rules 69(c)-69(e).

386. *Id.* at Rules 69(d)-69(e).

387. See CRAIG & DE BÚRCA, *supra* note 116, at 41-46 (discussing the make-up and composition of the Council, along with its dynamics).

388. See Roederer-Rynning & Greenwood, *supra* note 300, at 1159-1160 (explaining the process by which the trilogues begin through open means).

389. TFEU, *supra* note 112, at art. 294.

390. Subsidiarity and Proportionality, *supra* note 125, at art. 8.

391. See Roederer-Rynning & Greenwood, *supra* note 300, at 1159 (pointing

directly elected by the people, a Parliament-driven trilogue model offers major guarantees in terms of democracy, legitimacy and representation.

3. *Does Legitimacy Really Depend on Openness and Transparency?*

As long as treaties and regulations provide for the general rule of working as openly as possible, they also provide derogations and exclusions as well. For example, Article 4(3) of Regulation 1049/2001 set a meaningful exception:

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.³⁹²

Article 4(3) has been used irrespectively of the distinction between legislative and non-legislative actions, which does not reflect the realities of EU decision-making, where many procedures do not fall clearly under either of these two categories.³⁹³

The European Ombudsman has recently closed a strategic inquiry concerning the proactive transparency of trilogues, stressing their role as the forum where the deals are done.³⁹⁴ The issue at stake was the correct trade-off between transparency and efficiency of trilogues: which information and documents could be made available to the public, and when.³⁹⁵ Also, the Ombudsman maintained that “[i]t is arguable that the interest in well-functioning trilogue negotiations temporarily outweighs the interest in transparency for as long as the trilogue negotiations are ongoing,”³⁹⁶ recommending, however, that the four-column documents should be made proactively available as soon as possible after the negotiations have been concluded.³⁹⁷

Finally, some recent Court cases³⁹⁸ on the neglected disclosure

out that “Parliament has acquired leverage over Council through the routines established by the CCC or its secretariat on a cross-committee basis, dominance of logistical arrangements in trilogues, and the advantage conferred by numbers in full political trilogues”).

392. *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*, 2001 O.J., art. 4(3).

393. Case C-612/13 P, *ClientEarth v. Commission*, 2015; Case T-402/12, *Schlyter v. Commission*, 2015 (confirmed by European Court of Justice (fourth chamber) C-331/15 P, 2017).

394. OI/8/2015/JAS, *supra* note 335, at ¶¶ 4-5.

395. *Id.*

396. *Id.* at ¶ 54.

397. *Id.* at ¶ 56.

398. *Herbert Smith Freehills LLP v. Commission* (2016); *Herbert Smith*

of documents relating to the trilogue stage of negotiations confirm that the argument based on transparency is

necessary for the legislative process to be understood, constitutes in itself a public interest that must be protected [...], cannot provide an appropriate basis for establishing that the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusals to grant access to the requested documents.³⁹⁹

The institution concerned has to weigh the particular interest to be protected through non-disclosure and “[t]he exchanging of legal views between the legal services of three institutions in order to reach a compromise regarding a legislative text in the context of a trilogue may, where appropriate, be described as legal advice and, as a result, may fall under the exception relating to legal advice.”⁴⁰⁰ Further, “[t]he legal services act under a mandate and with the aim of reaching an agreement.”⁴⁰¹ “They thus simultaneously act as negotiators and advisers with regard to legal matters.”⁴⁰² It is worth noting that the concept of ‘legal advice’ is not defined in Regulation No 1049/2001 and it is apparent from the case-law in *Turco* that the concept of ‘legal advice’ relates to the content of a document and not to its author or its addressees.⁴⁰³

As is apparent from a literal interpretation of the words ‘legal advice’, this is a question of advice relating to a legal issue, regardless of the way in which that advice is given. In other words, it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process. In the same way, the fact of the advice having been given in a formal or informal context has no effect on the interpretation of those words.⁴⁰⁴

The most recent jurisprudence of the Court, therefore, definitely supports arguments in favor of trilogues, not only over their valuable contribution to the efficiency of the EU law-making process, but even over the sustainable trade-off between their legitimacy and democracy shape over critics’ openness and transparency claims.

Freehills LLP v. Council (2016); Philip Morris Ltd v. Commission (2016). The pending case T-540/15 *De Capitani v. European Parliament*, 2015 concerns especially the four-column documents used as a basis for trilogues and will be delivered (supposedly) in March 22 2018.

399. Case T-710/14, *Herbert Smith Freehills LLP v. Council* (2016), ¶ 72 [hereinafter Case T-710/14].

400. *Id.* at ¶ 59.

401. *Id.* at ¶ 60.

402. *Id.* at ¶ 60.

403. *Sweden and Turco v. Council*, joined cases C-39/05 P and C-52/05 P, cit., ¶¶ 38-39.

404. Case T-710/14, *supra* note 399, at ¶ 48.

IV. THE ENVIRONMENT AND REGULATION WITHIN THE UNITED STATES

A. *The Current Context*

Four years after President Obama announced that the Environmental Protection Agency (“EPA”) would design a regulatory strategy to reduce carbon emissions, in what would form the basis of the Clean Power Plan,⁴⁰⁵ President Trump announced his intention to eliminate American involvement in the Paris Agreement.⁴⁰⁶ The resulting change in American policy has been dramatic. The rollbacks began almost immediately.

Within four months of inauguration, for example, changes were made to eliminate protection for streams, fuel efficiency regulations had been called into question, a basic re-write of the Clean Power Plan had been ordered, and requirements forbidding the dumping of toxic chemicals had been altered.⁴⁰⁷ The results were the largest rollback in such a limited time-frame in the EPA’s history.⁴⁰⁸ By December 2018, according to The New York Times, seventy-eight environmental rules had either been eliminated since Trump became president or were on their way to elimination, covering such areas as air pollution and emissions, water pollution, and drilling and extraction.⁴⁰⁹

405. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60).

406. Trump stated:

Therefore, in order to fulfill my solemn duty to protect America and its citizens, the United States will withdraw from the Paris Climate Accord — (applause) — thank you, thank you — but begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers. So we’re getting out. But we will start to negotiate, and we will see if we can make a deal that’s fair. And if we can, that’s great. And if we can’t, that’s fine.

President Donald J. Trump, Statement on the Paris Climate Accord (June 1, 2017), perma.cc/6GZ7-GJXP.

407. Juliet Eilperin & Darla Cameron, *How Trump is Rolling Back Obama’s Legacy*, WASH. POST (Jan. 20, 2018), www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?noredirect=on&utm_term=.bab12161ea44; see also Lisa Friedman & Brad Plumer, *E.P.A. Drafts Rule on Coal Plants to Replace Clean Power Plan*, N.Y. TIMES (July 5, 2018), www.nytimes.com/2018/07/05/climate/clean-power-plan-replacement.html (describing Trump Administration’s drafting of far less stringent rules to regulate carbon dioxide emissions from coal-fired power plants).

408. James L. Gattuso, *Trump’s Red Tape Rollback*, HERITAGE FOUND. (Dec. 12, 2017), www.heritage.org/government-regulation/commentary/trumps-red-tape-rollback.

409. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, 78

As the American federal government systematically began eliminating the methodologies designed to ensure American compliance with the Paris Agreement, other parties – state governments, municipal governments, private enterprises – began to step forth and assert their role in combatting climate change.⁴¹⁰ Climate change is global, and it involves basic questions of international relations, traditionally the realm of the federal government. As non-federal actors have increasingly asserted themselves, basic questions of federalism in the environmental context have increasingly arisen.⁴¹¹ One issue is the question of preemption, that is whether federal climate change legislation (or lack thereof) should preempt state and local laws.⁴¹² Thus Part IV of this article first provides a brief overview of federalism concepts in the United States, second examines the role of environmental protection within the federalism debate, and finally examines some of the non-federal responses to the need for action related to climate change.

B. American Federalism and the Environment

The issue of federalism in the United States is complex. While there is a host of regulations at each of the federal, state, and local levels, the interplay between them is not always clear. In the United States, the federal government's power is enumerated in the Constitution, and it can only exercise those powers granted to it.⁴¹³

While the United States Constitution provides the federal government with numerous exclusive powers, such as dealing with foreign relations, the military, trade across national and state

Environmental Rules on the Way Out Under Trump, N.Y. TIMES (Dec. 28, 2018), www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html.

410. Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

411. This topic has been debated for some time. See, e.g., Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (discussing Translocal Organizations of Government Actors); Benjamin K. Sovacool & Marilyn A. Brown, *Scaling the Policy Response to Climate Change*, 27 POL'Y & SOC'Y 317 (2009) (reviewing strategies for addressing climate change and noting the importance of state and global action); David M. Konisky & Neal D. Woods, *Exporting Air Pollution? Regulatory Enforcement and Environmental Free Riding in the United States*, 63 POL. RES. Q. 771 (2010) (questioning the Clean Air Act and free-riding behavior).

412. See, e.g., Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in a National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y 231, 236 (2009) (describing preemption and the importance of states in combatting climate change).

413. RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 307 (3d ed. 2017) (citations omitted).

borders, and the monetary system,⁴¹⁴ other powers exist concurrent with the states, such as regulating elections, taxing, borrowing money, and establishing a system of courts.⁴¹⁵ Finally, the federal government is given implied powers that are “necessary and proper” to allow it to execute its enumerated powers.⁴¹⁶

Among those powers granted to the federal government is the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴¹⁷ In addition to regulating interstate commerce, Congress may also “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁴¹⁸ That is, Congress may tax and spend. The power to tax gives the government an element of control over activities it cannot directly regulate. Further, the power to spend means that funding may come only with conditions attached.⁴¹⁹ And of course, the extent of the government’s powers is broader than those enumerated, as the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁴²⁰

The States are not limited by enumerated powers. Their powers arise elsewhere. The powers of states were not clearly delineated until 1791 with the passage of the 10th Amendment, which states that “powers not delegated to the United States ... nor prohibited by [the Constitution] to the States, are reserved to the States ... or to the people.”⁴²¹ Thus, the states can and do perform many of the vital functions of modern government through the police power,⁴²² including criminal laws, running local public schools, and zoning.

The issue of the interplay between the overlapping area of regulatory competency is the question at the heart of federalism. At its most basic, federalism is the allocation of powers and responsibilities among the national, state, and local governmental powers.⁴²³ While all levels of government participate in the governing process, each operates independent of the others to some degree. America has a system of dual sovereignty, where sovereign power is recognized both in the individual states and in the federal government.⁴²⁴ Federalism deals with the question of which level of

414. U.S. CONST. art. I, §§ 8, 10.

415. U.S. CONST. amend. X.

416. U.S. CONST. art. I, § 8, cl. 18.

417. *Id.* at art. I, § 8, cl. 3.

418. *Id.* at art. I, § 8, cl. 1.

419. BARNETT & BLACKMAN, *supra* note 413, at 308 (citations omitted).

420. U.S. CONST. art. I, § 8, cl. 18.

421. U.S. CONST. amend. X.

422. BARNETT & BLACKMAN, *supra* note 413, at 307-08 (citations omitted).

423. William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1047 (2017).

424. 4 UNITED STATES SUPREME COURT CASES AND COMMENTS § 28.08

government can deal with regulatory issues, and its framework is directly integrated into the United States Constitution.

American federalism is designed to achieve a number of core values of good governance. These include maintaining checks and balances of power to protect individuals, preserving governmental accountability and transparency, maintaining local autonomy to enable innovation and competition and to protect local interests, keeping a centralized authority to address collective action issues, and maintaining the benefits in problem solving offered by the joint action of local and federal governments.⁴²⁵

But federalism issues are complicated in the area of the environment. There are both practical and legal impediments to state and local regulations related to climate change in the United States. Climate change is global in nature, not local. Global warming and greenhouse gas emissions are felt everywhere, as are changes in the sea level and sea temperatures and countless other atmospheric concerns.⁴²⁶ As a practical matter, these climate-related issues have international repercussions well beyond the scope and scale of what is typically addressed through state or municipal legislation. As noted, the Constitution charges the federal government, rather than the states and localities, with managing international relations.⁴²⁷ A clear benefit of delegating this to the federal government, is presumably the creation of a unified national position. This is done without the concern that state or municipal action could lead to policies that are at odds with those of the federal government. Climate change is obviously a global problem that will ultimately require concerted international action, but what this means as to the authority and ability of local actors to engage in proactive action to combat climate change is a different question.

Thus, a critical question in relation to American federalism is the question of preemption. The Supremacy Clause of the Constitution makes clear that the United States Constitution and laws and treaties made pursuant to it are the supreme law of the

(2018). And of course, in addition to this duality, municipalities, counties, and other local forms of government may also assert regulatory rights. *See, e.g.*, Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237, 280, 284 (2011) (describing role of non-state or federal governments); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PENN. L. REV. 1929, 1931-32 (2008) (discussing the role of local actors in federalism dilemmas).

425. *See* Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635 (2006) (discussing the evolving values of federalism).

426. Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. ENVTL. L. POL'Y. 1, 2-3 (2014).

427. U.S. CONST. art. I, cl. 8, 10, art. II, cl. 2.

land.⁴²⁸ Yet, despite the breadth of the Constitutional mandate, most legal areas are governed concurrently by federal and state law.⁴²⁹ The question thus is when preemption would be appropriate in the environmental context and when it serves to defeat the core values federalism is designed to achieve. Much of the argument for preemption stems from the enormous economic importance of maintaining a single national economy. Preemption on this ground is usually linked to the Commerce Clause, and it too could have major implications for state programs.⁴³⁰ In theory, state climate change initiatives could impede national markets via the implementation of local regulations.⁴³¹

Yet, in the area of climate change, even before the past few years when the federal government has either failed to act or has acted to de-regulate the environment, state and local governments have been proactive. For example, regulation of environmental injury to specific lands is done through local legislation.⁴³² In fact, every American state has enacted legislation to address climate change.⁴³³ California has lead the way, with legislation aimed, among other areas, at reducing greenhouse emissions from automobiles and electrical generators.⁴³⁴ Given both global and local concerns, a dual approach seems desirable. Yet when the national and the local approaches to environmental control diverge, federalism issues rise to the forefront. These issues are not new to the Supreme Court, which has addressed federalism concerns in numerous contexts related to the environment.⁴³⁵

428. *Id.* at art. VI, cl. 2.

429. Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2038 (2016).

430. See Daniel A. Farber, *Climate Change, Federalism and the Constitution*, 50 ARIZ. L. REV. 879 (2008) (discussing, inter alia, the Dormant Commerce Clause as it relates to State climate activity and preemption doctrine).

431. Carol M. Rose, *Federalism and Climate Change: The Role of the States in a Future Federal Regime—An Introduction*, 50 ARIZ. L. REV. 673, 676 (2008).

432. *Land Use*, ENVTL. LAW INST., www.eli.org/keywords/land-use (last visited Aug. 20, 2019).

433. *State Climate Policy Maps*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, www.c2es.org/content/state-climate-policy/; 5 Treatise on Environmental Law § 10.03 (2018).

434. Editorial Board, *California Shows How States Can Lead on Climate Change*, N.Y. TIMES (July 24, 2017), www.nytimes.com/2017/07/24/opinion/california-climate-change-cap-trade.html.

435. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 324 (1981) (discussing mining); *New York v. United States*, 505 U.S. 144, 149 (1992) (addressing nuclear waste); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 173-74 (2001) (discussing water pollution); *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (addressing water pollution); *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 534, 537 (2007) (discussing climate change and raising the question of whether environmental protection is the primary prerogative of the state or federal government).

Special problems arise when states do not have consistent policies (though the issue is analogous when countries lack consistent policies as well). The problem is one of “leakage,” and the problems internationally and domestically are analogous.⁴³⁶ Internationally, the leakage phenomenon occurs when Country *A* limits greenhouse gas emissions, resulting in the offending producers of greenhouse gases moving or “leaking” into unregulated (or less regulated) Country *B*.⁴³⁷ The result potentially is the weakening of environmental legislation. Not only is the global effectiveness of Country *A*’s regulations undercut, but Country *A* will be put at a competitive disadvantage as well.⁴³⁸ And just as leakage creates problems between Countries *A* and *B*, leakage can create analogous problems when adjacent states have differing levels of environmental regulation in place.

Other issues confront the states as well. For example, a potential practical constraint on states could be their limited technical capacity for dealing with the enormous complexity of climate change.⁴³⁹ Many have argued that the federal level might be the most efficient venue for scientific inquiry into environmental concerns, because national agencies could take advantage of scale economies in research and could act as central clearing houses for information.⁴⁴⁰

On the other side, state regulation may provide opportunities which the federal government lacks. For example, in the realm of adaptation—that is, efforts designed to deal with the consequences of global warming instead of the cause — the use of forestry and vegetation to combat greenhouse gases seems to readily fall within the realm of state regulations, as they require land use controls, an area regularly regulated by the states.

C. Non-Federal Responses to Climate Change

In light of these concerns, non-federal actors have responded in a myriad of ways, ranging from coalitions to action by the states to municipal responses to business-lead initiatives.⁴⁴¹ A brief overview of some prominent responses suggest the seriousness with which the issue is being addressed.

436. Carol McAusland & Naouri Najjar, *The WTO Consistency of Carbon Footprint Taxes*, 46 *GEO. J. INT’L L.* 765, 767 (2015).

437. *Id.*

438. *Id.* at 800.

439. Brad Plumer, *How Can U.S. States Fight Climate Change if Trump Quits the Paris Accord?*, *N.Y. TIMES* (Sept. 20, 2017), www.nytimes.com/2017/09/20/climate/paris-climate-accord-trump.html.

440. National Research Council, *Informing an Effective Response to Climate Change*, *THE NAT’L ACAD. PRESS* 3 (2010), doi.org/10.17226/12784.

441. Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, *N.Y. TIMES* (June 1, 2017), www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

To begin with, a number of coalitions have emerged. For example, America's Pledge, launched by Michael Bloomberg and Jerry Brown, is designed to aggregate and quantify the activity of states, cities, and businesses toward limiting greenhouse gas emissions consistent with the Paris Agreement.⁴⁴² The Pledge aims to “[c]ollect data on non-national climate action to quantify and report on progress made towards the US pledge (Nationally Determined Contribution) under the Paris Agreement[,] [c]ommunicate the findings and results of [their] research and data collected from non-national actors to the international community and the United Nations,” and “[c]atalyze further climate action in the near term by providing detailed roadmaps for similar business-level, city, and state action in the US and, potentially, in other countries around the world.”⁴⁴³

At the 2017 Bonn Conference on Climate Change, 20 U.S. states, more than 50 major American cities, and more than 60 of the country's largest businesses pledged to meet emission reduction goals.⁴⁴⁴ Added together, the economic power of these entities would be the third biggest economy in the world, trailing only the U.S. and China.⁴⁴⁵ The commitment, however, is unlikely to satisfy the pledges necessary to achieve the American obligations under the Paris Agreement.⁴⁴⁶

A similar approach has been developed by the We Are Still In Coalition.⁴⁴⁷ The Coalition, formed in direct response to President

442. *About America's Pledge*, AMERICA'S PLEDGE, www.americaspledgeonclimate.com/about/ (last visited Mar. 22, 2019).

443. *Id.*

444. Fiona Harvey & Jonathan Watts, *US Groups Honouring Paris Climate Pledges Despite Trump*, *GUARDIAN* (Nov. 11, 2017), www.theguardian.com/environment/2017/nov/11/us-groups-honouring-paris-climate-pledges-despite-trump. These numbers have since grown, and as of this writing, the numbers are at least 10 states, 248 cities, and 2162 businesses. *Who's In*, WE ARE STILL IN, www.wearestillin.com/signatories (last visited Mar. 22, 2019). Twenty-four companies headquartered in the U.S. have set science-based targets on their emissions. *100+ Global Corporations Commit to Science-Based Targets Aligned with Paris*, UNITED NATIONS CLIMATE CHANGE (Apr. 17, 2018), unfccc.int/news/100-global-corporations-commit-to-science-based-targets-aligned-with-paris-agreement; see *State and Local Climate*, CTR. FOR CLIMATE STRATEGIES, www.climatestrategies.us/policy_tracker/state (last visited March 22, 2019) (indicating climate action activities at a number of governmental levels); see *U.S. State Climate Action Plans*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS (Dec. 2018), www.c2es.org/document/climate-action-plans/ (describing state climate action plans).

445. Harvey & Watts, *supra* note 444.

446. Brad Plumer & Nadja Popovich, *Here's How Far the World is From Meeting Its Climate Goals*, *N.Y. TIMES* (Nov. 6, 2017), www.nytimes.com/interactive/2017/11/06/climate/world-emissions-goals-far-off-course.html; see also Matt McGrath, *Small Steps Forward as UN Climate Talks End in Bonn*, *BBC NEWS* (Nov. 18, 2017), www.bbc.com/news/science-environment-42032229 (noting that the COP23 meeting did not address the Parties' inability to lower emissions in order to meet the Paris target).

447. See generally WE ARE STILL IN, www.wearestillin.com/ (last visited

Trump withdrawing from the Paris Agreement, is comprised of cities, states, businesses, and other organizations who remain committed to complying with the Paris Agreement and to helping America reach its Paris targets.⁴⁴⁸ The main function of the coalition is to connect all the individuals, companies, and organizations who are committed to climate action and help pool all the resources and actions to share knowledge to achieve the common goal.⁴⁴⁹ As of this writing, signatories include 2,162 businesses and investors, 282 cities and counties, 348 colleges and universities, 55 cultural institutions, 28 health care organizations, 43 faith groups, 10 states, and 9 tribes.⁴⁵⁰

Significant state action pre-dates America's withdrawal from the Paris Agreement. By 2006, every state had taken steps of some kind to address climate change.⁴⁵¹ Currently, 33 states have implemented comprehensive plans devoted to climate change.⁴⁵² It is estimated that the benefits of these measures will result in a 17% decrease in emissions by 2025 as compared to 2005 levels.⁴⁵³

California has been particularly proactive. In addition to enacting legislation aimed at reducing greenhouse emissions from automobiles and electrical generators, with an eye on Paris Agreement targets, California recently extended a program first enacted in 2006 until 2030 which established a cap-and-trade emissions system.⁴⁵⁴ The goal is to achieve a 40% cut in climate-warming emissions by 2030, when compared to 1990 levels.⁴⁵⁵ The

Mar. 22, 2019) (explaining the We Are Still In initiative and identifying active participants).

448. *Id.*

449. Zeke Hausfather, *Analysis: US States and Cities Could Meet Paris Climate Goals Without Trump*, CARBON BRIEF (June 15, 2017), www.carbonbrief.org/analysis-us-states-cities-could-meet-paris-climate-goals-without-trump.

450. *Who's In*, *supra* note 444.

451. Christopher Mahoney, *The Geopolitical Implications of the United States of America's Withdrawal from the Paris Agreement*, 2 CARDOZO J. INT'L & COMP. L. 282, 303 (2018).

452. *State and Local Climate*, *supra* note 444; *U.S. State Climate Action Plans*, *supra* note 444.

453. Tom Cyr et al., *U.S. States, Cities and Businesses Are Cutting Emissions, and Poised to Do Even More. New Report Does the Math*, WORLD RES. INST. (Sept. 12, 2018), www.wri.org/blog/2018/09/us-states-cities-and-businesses-are-cutting-emissions-and-poised-to-do-even-more. The U.S. pledge is to reduce emissions by 26 to 28 percent. *Id.* 2015 emissions were reduced by 11.5% of 2005 levels; projected to be reduced by 14.1% to 17.8% without the extra efforts. Doug Vine, *Projecting and Accelerating U.S. Greenhouse Gas Reductions*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS (Sept. 2017), www.c2es.org/site/assets/uploads/2017/09/projecting-accelerating-us-greenhouse-gas-reductions.pdf.

454. Oliver Milman, *California Lawmakers Extend Program to Cut Emissions in Bipartisan Vote*, GUARDIAN (July 18, 2017), www.theguardian.com/us-news/2017/jul/18/california-extend-carbon-emissions-climate-change-program.

455. Cal. Exec. Order No. B-55-18 (2018). A notable change in policy. For

program requires emitters to either reduce emissions or purchase permits allowing emissions from those who have.⁴⁵⁶ With approximately 39 million people and the world's sixth largest economy, and with an economic output of \$2.4 trillion, these programs can make a profound difference.⁴⁵⁷

In addition, California has a “decarbonization” program that creates numerous jobs and helps the State move away from the use of fossil fuels.⁴⁵⁸ It also recently approved a requirement that nearly all new homes be equipped with solar panels by 2020.⁴⁵⁹ California also plans to adhere to the Obama-era requirement that the average mileage for a truck or car be 54.5 miles per gallon by 2025.⁴⁶⁰

Washington Governor Jay Inslee has been trying to institute the country's first tax on carbon dioxide pollution for a number of years.⁴⁶¹ Opponents' concerns center on the issue of whether the tax would increase the price of both gasoline and electricity.⁴⁶²

In Colorado, then-Governor John Hickenlooper (a former candidate for President in 2020)⁴⁶³ issued an executive order on July 11, 2017 regarding Colorado's plan to use cleaner energy resources.⁴⁶⁴ The following goals were laid out: first, to reduce

example, between 1990 and 2001, California emissions, the second largest in the country, increased by 85%. Daniel A. Farber, *The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World*, 2008 UTAH L. REV. 377, 385 (2008). The state with the largest percentage of emissions, Texas, increased its emissions by 178%. *Id.*

456. O. Nilay Manzogol, *California Plans to Reduce Greenhouse Gas Emissions 40% by 2030*, U.S. ENERGY INFO. ADMIN. (Feb. 2, 2018), www.eia.gov/todayinenergy/detail.php?id=34792.

457. Coral Davenport & Adam Nagourney, *Fighting Trump on Climate, California Becomes a Global Force*, N.Y. TIMES (May 23, 2017), www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html.

458. Justin Gerdes, *California Regulators Get Serious About Building Decarbonization*, GREENTECH MEDIA (Feb. 15, 2019), www.greentechmedia.com/articles/read/california-regulators-get-serious-about-building-decarbonization; see also Ralph Cavanagh, *Historic California Climate Protection Bill Advances*, NRDC (July 3, 2018), www.nrdc.org/experts/ralph-cavanagh/historic-california-climate-protection-bill-advances (describing California climate bill and projected benefits).

459. Froma Harrop, *Harrop: California Leads Way on Environment in Trump's Absence*, HERALDNET (May 15, 2018), www.heraldnet.com/opinion/harrop-california-leads-way-on-environment-in-trumps-absence/.

460. *Id.*

461. Coral Davenport, *In a Gamble to Make Climate Change a Political Win, a Governor Pursues a Carbon Tax*, N.Y. TIMES (Mar. 3, 2018), www.nytimes.com/2018/03/01/climate/jay-inslee-carbon-tax.html.

462. *Id.* Carbon tax bills have also been introduced in the legislatures of Utah, Maryland, New York, Hawaii, Rhode Island, Vermont, Maine and Washington, D.C. *Id.*

463. Matt Stevens & Matt Flegenheimer, *John Hickenlooper, Ending Presidential Bid, Will Give Senate 'Serious Thought'*, N.Y. TIMES (Aug. 15, 2019), www.nytimes.com/2019/08/15/us/politics/john-hickenlooper-drop-out-senate.html.

464. Colo., Exec. Order No. D 2017-15, at 2 (2017).

greenhouse gas emissions by more than 26% of 2005 levels by 2025; second, to reduce carbon dioxide emissions from electricity by 25% of 2012 levels by 2025 and 35% by 2030; and third, by 2020 to have saved 2% of total electricity sales by utilizing cost-effective electricity.⁴⁶⁵ In order to achieve those goals, Colorado agencies will team up with electric utilities or cooperatives and increase their use of renewable energy, as long as it does not increase the cost of electricity to consumers or cause service to be unreliable.⁴⁶⁶ The Colorado Energy Office, the Regional Air Quality Council, and the Colorado Department of Public Health and the Environment are charged with developing the plan to reduce air pollution.⁴⁶⁷ The Colorado Department of Public Health and the Environment is also charged with developing an approach to addressing state greenhouse gas emissions.⁴⁶⁸

New Jersey passed two bills on April 12, 2018, each requiring power companies to generate 50 percent of their electricity from renewable sources and to subsidize existing nuclear power plants by 2030.⁴⁶⁹ Assembly Bill 3723, introduced on March 22, 2018, lays out New Jersey's clean energy and energy efficiency programs and modifies the solar renewable energy portfolio standards.⁴⁷⁰ Forty percent of New Jersey's electricity comes from nuclear energy and an annual subsidy of \$300 million for existing nuclear plants was announced with the bills.⁴⁷¹ Although nuclear energy is not favored by some because of safety and disposal concerns, it is considered a clean energy because it emits no greenhouse gases.⁴⁷² Nuclear energy, although not without faults, is a stepping stone to continue the transition away from fossil fuels to cleaner energy.

As for cities, the Climate Mayors Initiative is a group of 407 mayors who have agreed to adhere to the Paris Agreement by adopting and intensifying existing efforts to reduce greenhouse gas emissions and switch to clean energy.⁴⁷³ It was founded in 2014, and

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. A.B. No. 3723, 218th Leg. (N.J. 2018) (enacted).

470. *Id.*

471. Nick Corasaniti, *New Jersey Takes a Big Step Toward Renewable Energy (and Nuclear Gets Help, for Now)*, N.Y. TIMES (Apr. 12, 2018), www.nytimes.com/2018/04/12/nyregion/new-jersey-renewable-energy.html.

472. *Id.*

473. *407 US Climate Mayors Commit to Adopt, Honor and Uphold Paris Climate Agreement Goals*, CLIMATE MAYORS (June 1, 2018), climatemayors.org/actions/paris-climate-agreement/. This response has been global. By June of 2017, mayors of more than 7,400 cities across the globe had vowed to combat President Trump's decision to withdraw from the Paris Agreement. Daniel Boffey, *Mayors of 7,400 Cities Vow to Meet Obama's Climate Commitments*, GUARDIAN (June 28, 2017), www.theguardian.com/environment/2017/jun/28/global-covenant-mayors-cities-vow-to-meet-obama-climate-commitments.

it has gained even more traction in light of the withdrawal of the United States from the Paris Agreement by President Trump.⁴⁷⁴ Like the We Are Still In Coalition, the Climate Mayors Initiative serves as a platform and network for mayors who want to share resources and other advances they are making related to climate change.

At the conclusion of the December 2017 North American Climate Summit, 57 mayors signed the Chicago Climate Charter, representing their commitment to the Paris Agreement.⁴⁷⁵ The main commitments include the following: first, to reduce greenhouse gas emissions to a level consistent with the Paris Agreement; second, to measure, track, and report emissions; third, to request more authority for cities to create laws and policies; fourth, to ensure diversity in opinions and ideas when establishing goals, policies, procedures; fifth, to develop plans that address adaptation and remediation, not just reduction; sixth, to work on a city, state, and federal level to incentivize all actors; and seventh, to consult with experts and others who can help foster solutions.⁴⁷⁶

And, of course, numerous individual cities have acted on climate change. Los Angeles has launched the Sustainable City pLAn, providing, among other things, for the launching of a green technology incubator, for building public transit, for adding charging stations for electric vehicles, and for reducing carbon dioxide emissions at the port of Los Angeles.⁴⁷⁷ San Francisco has announced the goal of being a net-zero greenhouse gas emissions city by 2050.⁴⁷⁸ Chicago has vowed to reduce GHG emissions by 25% of 1990 levels by 2020 and by 80% by 2050 and to complete an energy efficiency retrofit in 23,000 homes and 132 buildings spanning over 70 million square feet, saving nearly \$17 million/year and over 91,000 metric tons of avoided GHG emissions.⁴⁷⁹ It has also proposed a policy known as “Building on Burnham,” which is a comprehensive strategy to invest in Chicago’s lakefront, natural areas, and recreational areas across the city.⁴⁸⁰ Salt Lake City officials have established goals of “relying on renewable energy for

474. CLIMATE MAYORS, climatemayors.org/ (last visited Mar. 22, 2019).

475. CHICAGO CLIMATE CHARTER, www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/December/ChicagoClimateCharter.pdf (last visited April 30, 2019).

476. *Id.*

477. Daniel C. Vock, *Mayors Vow Not to Let Feds Trump Their Climate Change Fight*, GOVERNING (Dec. 19, 2016), www.governing.com/topics/transportation-infrastructure/gov-climate-change-trump-mayors.html.

478. Office of the Mayor, *Mayor Mark Farrell Announces Historic Commitment to Net-Zero Emissions by 2050*, CITY AND CTY. OF S.F. (Apr. 19, 2018), sfmayor.org/article/mayor-mark-farrell-announces-historic-commitment-net-zero-emissions-2050.

479. CLIMATE MAYORS, CITIES CLIMATE ACTION COMPENDIUM, climatemayors.org/actions/climate-action-compendium/ (last updated Jan. 5, 2018).

480. *Id.*

50% of municipal operations by 2020 and [of] generating 100% of the community's electric supply through renewable energy by 2032.”⁴⁸¹ “Washington, D.C. has set a goal of using renewables to meet 50% of its energy supply by 2032.”⁴⁸² And there are many more such efforts.

As for businesses, it is clear that successfully combatting climate change will have to result from a public-private partnership. The financial strength of many multi-national corporations necessitates their involvement, and numerous corporations have stepped up with plans to address these issues. To date, over two thirds of publicly traded companies have pledged to reduce GHG emissions, and 36% of those companies have set deadlines to do so.⁴⁸³ Approximately one third of these businesses have made commitments to transition to renewable energy.⁴⁸⁴ A few examples suffice. General Mills has reported a goal of reducing greenhouse gas emissions 28% by 2025 and to eventually be in line with the Paris Agreement by 2050.⁴⁸⁵ One hundred percent of Apple's facilities are powered with clean energy, including retail stores, offices, data centers, and co-located facilities.⁴⁸⁶ Moreover, 23 of its suppliers have also committed to use 100% clean energy.⁴⁸⁷ Apple has 25 global renewable energy projects with 626 megawatts of generation capacity and 286 megawatts of solar photovoltaic generation.⁴⁸⁸ Since 2011, Apple's projects have reduced greenhouse gas emissions by 54% and prevented 2.1 million metric tons of carbon dioxide equivalent.⁴⁸⁹ Walmart has launched Project Gigaton to eliminate one gigaton of greenhouse gases from 2015 to 2030.⁴⁹⁰ Project Gigaton focuses on six areas: energy, agriculture, deforestation, packaging, waste, and product use.⁴⁹¹ Walmart has

481. Aamer Madhani, *Forget Paris: U.S. Mayors Sign Their Own Pact After Trump Ditches Climate Accord*, USA TODAY (Dec. 4, 2017), www.usatoday.com/story/news/2017/12/04/u-s-mayors-sign-pact-track-progress-paris-agreement/920305001/.

482. *Id.*

483. Georgina Gustin, *Which U.S. Industries Are Setting the Strongest Climate Goals?*, INSIDE CLIMATE NEWS (Apr. 24, 2018), insideclimatenews.org/news/24042018/american-companies-leaders-greenhouse-gas-targets-renewable-energy-ceres-study.

484. *Id.*

485. *Id.*

486. Press Release, *Apple Now Globally Powered by 100 Percent Renewable Energy* (Apr. 9, 2018), www.apple.com/newsroom/2018/04/apple-now-globally-powered-by-100-percent-renewable-energy/.

487. *Id.*

488. *Id.* Solar photovoltaic generation is essentially turning light into electricity through the use of solar panels.

489. *Id.*

490. *Walmart Announces 20 MMT of Supplier Emission Reductions through Project Gigaton*, BUSINESSWIRE (Apr. 18, 2018), www.businesswire.com/news/home/20180418005917/en/.

491. *Walmart Makes Bold Climate Commitments and Delivers*, WE ARE STILL IN, www.wearestillin.com/success/walmart-makes-bold-climate-commit

become one of the country's leading commercial solar and on-site renewable energy users, obtaining approximately a quarter of its global energy from renewable sources.⁴⁹² In 2017, Google purchased energy from renewable resources sufficient to power 100% of its energy consumption.⁴⁹³

D. Conclusion

If climate change is going to be successfully addressed in a meaningful fashion and the targets of the Paris Agreement are to be met, it is clear that all levels of government must exercise their powers, whether exclusive or concurrent, and all varieties of businesses must contribute to the cause. The division of authority among overlapping competencies can work to aid, rather than detract from, the achievement of the goal as each actor can address those aspects of the problem it is best situated to address.

ments-and-delivers (last visited March 22, 2019).

492. *Id.*

493. Julia Pyper, *Google Officially Hits Its 100% Renewable Energy Target*, GREENTECH MEDIA (Apr. 5, 2018), www.greentechmedia.com/articles/read/google-officially-hits-100-renewable-energy-target#gs.2ng8fm; Brad Plumer, *A Year After Trump's Paris Pullout, U.S. Companies Are Driving a Renewables Boom*, N.Y. TIMES (June 1, 2018), www.nytimes.com/2018/06/01/climate/companies-renewable-energy.html.