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How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures

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How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures

By Christina Eckes*

Abstract

The European Parliament's public refusal to consent to several international agreements gives EU citizens a voice in international relations, which, with all its flaws, draws on a source of democratic legitimation that is independent and separate from the EU Member States. These acts of contestation vest the EU's actions under international law with a popular backing that is not ultimately rooted in the Member States. The EP's new role and visibility also creates a degree of competition between the EP and national parliaments, since the latter while they can exercise political power within the EU legal order, cannot represent EU citizens to the outside. It further gives support to the CJEU's implicit claim that the EU possesses original (sovereign) rights. This paper sheds light on how the EP's new role may strengthen the link to its citizens and influence the relationship between the EU and its Member States.

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1. Introduction

The European Union's ability to conduct its own external relations is not contested as a matter of principle. The Union is for instance the only non-state actor that participates in certain international functional regimes on equal footing with states.[1] At the same time, the Union's ability to conduct its own external relations remains under constant pressure, both from the outside and from the inside. Only states are 'primary subjects' of international law, which possess non-delegated rights.[2] And even though other international actors accept that the Union takes at times a state-like position, international law classifies it as an international organization.[3] And as such, the Union remains to be seen as exercising delegated rights and at least partially as penetrable in that behind the organization the EU Member States remain as sovereign states the ultimate point of reference.[4] This is the outside pressure. The inside pressure, which is often openly or implicitly justified with reference to sovereignty, is the Member States' explicit intention and continuous efforts to remain visible – next to, behind, and in front of the Union. This becomes apparent for example in the explicitly codified parallel nature of Common Foreign and Security Policy (CFSP) competences,[5] and in the Member States' preference for mixed agreements.[6] This is the setting, in which the EU institutions conduct the EU's external relations.

The EU's participation in international relations is conspicuously absent from the sovereignty debate within the EU. Existing inquiries focus on the EU internally, and very different conclusions are drawn whether or not Member States have lost

[1] Examples are the World Trade Organization, the Food and Agriculture Organization, and potentially in the future the European Convention on Human Rights. The EU is of course not a member of the UN, nor can it bring cases before the International Court of Justice (ICJ).

[2] ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW (2007), Chapter 3, *International Legal Personality*, 81. See also: ICJ, Reparation For Injuries Suffered In The Service Of The United Nations, Advisory Opinion, April 11, 1949 (the Reparations case, ICJ Reports, 1949, p. 174), discussed below.

[3] At best as a particular type of international organization that enjoys additional rights in certain contexts, a regional economic integration organization (REIO).

[4] Catherine Brölman, 'A Flat Earth? International Organizations in the System of International Law', in International Organizations, Series: Library of Essays in International Law, Ashgate, 2006, 183-206: 'International organizations are neither sovereign nor equal'.

[5] CFSP measures do not prevent Member States from adopting parallel policies, see Declarations 13 and 14 annexed to the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

[6] E.g. Claus-Dieter Ehlermann, 'Mixed Agreements: A List of Problems', in David O'Keeffe and Henry G. Schermers (eds.) *Mixed Agreements*, 1983, pp.4, at 6; see also: Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009), 308 et seq.

sovereignty, whether the EU has gained it, whether it can be shared in some way, or whether we have entered a 'post-sovereign' era.[7] With regard to the EU's relationship with the outer world, scholars further commonly speak of 'autonomy' rather than sovereignty.[8] On the one hand, it is sensible to strive for an alternative terminology when describing new phenomena in a different context since known concepts have developed their specific meaning and essential content within a given context, i.e. state context, and thus remain context dependent. On the other hand, sovereignty remains the ordering principle of public international law[9] and grasps the emotional and cultural dimension of the fear of losing power and ultimately relevance that is deeply rooted in national politics.[10] This continues to be the case despite all gradual changes of what being sovereign means in modern international relations.

The aim of this paper is to shed light upon two aspects of EU integration in the field of external relations: firstly, how the Union's and its institutions' participation in international relations may reflect back onto its internal constitutional landscape and secondly how this in turn may then influence the Union's external position. The paper considers the European Parliament's (EP) new role in the conclusion and negotiation of international agreements, which has allowed it to contest openly and externally the position of the other EU institutions. Parliament has at several occasions credibly given EU citizens a voice in international relations that, with all its flaws, draws on a source of democratic legitimation that is independent and separate from the EU Member States. It adds a popular sovereignty element to the CJEU's narrative that the EU possesses original rights.

The paper takes the point of view of the European Union. 'External' refers consequently to outside of the Union, i.e. in international relations and under international law. 'Internal' or 'domestic' mean within the EU and under EU law. The

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[7] See above all: NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (1999) and SOVEREIGNTY IN TRANSITION—ESSAYS IN EUROPEAN LAW, (Neil Walker ed., 2003).

[8] E.g.: Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76(2) MODERN LAW REVIEW, 254–285 (2013); BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANISATIONS (Ramses Wessel and Steven Blockmans eds., 2013), in particular: Jan Willem van Rossem, *The Autonomy of EU Law: More is Less?*.

[9] A traditional public law perspective would claim that the qualifying criterion to enjoy full international legal capacity is statehood, which then confers legal sovereignty.

[10] DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY (2000); DAVID MILLER, ON NATIONALITY (1995).

latter incudes the relationship between the Member States and the EU, as well as the relationship between the EU institutions.

Part two conducts an empirical investigation into Parliament's increased role in processes that lead to the conclusion of an international agreement. Firstly, it explains the changes of the powers and role of the EP when the EU concludes international agreements – in law (2.1) and in practice (2.2). Some examples are well-known cases such as the Terrorist Finance Tracking Program (TFTP) agreement, the Anti-Counterfeiting Trade Agreement (ACTA), and the Personal Name Record (PNR) Agreements; others are less well-known examples of ordinary practice, such as trade agreements within the framework of the WTO. The discussion goes into considerable detail to illustrate that, despite all justified criticism that international relations remain secretive and dominated by the executive, the EP has managed to effectively represent EU citizens externally and it has been able to improve its involvement in the negotiations of international agreements and access to information internally.

Part three evaluates the new powers and role of the EP in the light of what they could mean for Parliament's connection to its citizens and what they could mean for the CJEU's (often implicit) claim that the EU possesses original, i.e. sovereign, rights. Section one examines to what extent the EP meets the symbolic function of parliaments to maintain the fiction of representation (3.1). Section Two highlights the general phenomenon that executives crowd out parliaments in external relations and tentatively contrasts the EP's role to the roles of national parliaments (3.2). Section three turns to the sovereignty debate in EU law and explains how the EP's strengthened role could give support to the CJEU's position (3.3). A conclusion summarizes the main finding that Parliament's strengthened democratic representation in international relations supports the EU's claim to possess non-delegated rights and ultimately to being sovereign in some way.

2. European Parliament Claiming a Voice in External Relations

This section goes into considerable detail both on Parliament's public refusal of a number of international agreements, which has resonated on the international plane and its internal struggle to be part of the information flow and influence negotiations at an earlier stage. The former is obviously important for the present argument. The latter

and the connection of the two, in that Parliament refused consent to prod other institutions to give it the position that the Lisbon Treaty confers to it, are equally relevant. The other institutions and international players acknowledged as a result Parliament's legitimate claim of representation not only at the conclusion stage but also by engaging with its positions during the negotiations. This might in turn reduce the EP's effectiveness in contesting publicly the positions of the other institutions.

2.1 The Law: Formally Increased Powers of the European Parliament

Until the entry into force of the Lisbon Treaty, the EP's powers to participate in the conclusion of international agreements were very limited. Since Lisbon, this has changed for all policy fields governed by the ordinary legislative procedure.[11] About 80 policy fields, including the Area of Freedom, Security and Justice (AFSJ) and internal market issues, are now subject to the ordinary legislative procedure. By comparison, before Lisbon only about 40 policy fields required the old co-decision procedure (post-Lisbon renamed ordinary legislative procedure). The Council, which is a platform where intergovernmental interests are exchanged and brought to a compromise by representatives of the executives of the Member States, may remain the most powerful institution in international relations. It authorizes the opening of negotiations, adopts negotiating directives, authorizes the signing, and concludes international agreements – acting in principle by qualified majority (subject to exceptions). However, Parliament, as a formally independent voice for the EU electorate, has become an actor that cannot be ignored. It is important to distinguish between the initiation and negotiation stage on the one hand and the signing and conclusion stage on the other. Parliament is not formally involved in the negotiations, but has the right to be informed during all stages of the procedure[12] and, as we will see, has been able to assert this right. At conclusion stage, it can be involved in two ways: consultation or consent. The latter is required for policy fields falling under the ordinary legislative procedure.

Democratic control can only be ensured if Parliament is involved both at the negotiation and at the conclusion stage. Indeed, the rationale of Article 218 TFEU

[11] Art 218(6)(a) TFEU (explaining that 218(6)(a)(v) includes agreements that fall within the policy fields in which the ordinary legislative procedure applies).
[12] Art 218(11) TFEU.

requires an extended involvement of the EP at negotiation stage. If the EP is limited to consent or rejection at the final stage, it is not in the position to exercise one of its core parliamentary tasks of publically deliberating, in search for a majority, and of offering a window for public involvement. This is also acknowledged in the Framework Agreement on Relations between the EP and the Commission of October 2010, which strengthens Parliament's role in the negotiations of international agreements beyond the strict wording of the Treaty.[13] The Framework Agreement for example adds that 'Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, *including the definition of negotiating directives*. The Commission shall act in a manner to *give full effect* to its obligations pursuant to Article 218 TFEU, while respecting each institution's role in accordance with Article 13(2) TEU.'[14] It further specifies that the information 'shall be provided to Parliament *in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account*.'[15]

Annex III to the Framework Agreement concerns international agreements and further details that '[t]he Commission shall inform Parliament about its intention to propose the start of negotiations *at the same time* as it informs the Council;' the Commission 'shall at the same time present [draft negotiating directives] to Parliament' as to the Council; '[t]he Commission shall take due account of Parliament's comments throughout the negotiations'; and it 'shall keep Parliament *regularly* and promptly informed about the conduct of negotiations until the agreement is initialled, and *explain* whether and how Parliament's comments were incorporated in the texts under negotiation and if not why'. Furthermore, for international agreements the conclusion of which 'requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process *all relevant information that it also provides to the Council* [...]. This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council [...], *any relevant documents received from third*

[13] Framework Agreement on relations between the European Parliament and the Commission, O.J. 2010, L 304/47, Annex 11.
[14] At III (ii)(23), *emphasis added*.
[15] At III (ii)(24), *emphasis added*.

parties, subject to the originator's consent.'[16] The originator's consent rule (ORCON), which makes any further sharing of information, including with other EU institutions, dependent on the consent of the originator, becomes particularly relevant in a negotiation context, where input into the international law-making originates outside of the EU.[17]

In particular, the requirements to submit information in a timely manner and to justify why the EP's comments were not incorporated have a great practical relevance. Exclusion of effective parliamentary intervention by taking executive decisions under high time pressure has happened both when the EU acts externally (see below) and when representatives of the Member States act within and alongside the European legal order, i.e. within the Council of the European Union, within the European Council, or in meetings in the margins of official meetings of the EU institutions. Indeed, it is the strength of the executive to act quickly. This strength can be deployed to escape parliamentary influence. The requirement to *explain why* the EP's comments were not *incorporated* sets a high standard. It does not stop at asking the commission to react to the EP's views but requires justification why these comments were not made part of the negotiating directive.

2.2 The Facts: European Parliament's Involvement in Practice

2.2.1 TFTP, ACTA and PNR Agreements: Exceptionally Problematic Cases?

In the past four years since the entry into force of the Lisbon Treaty, Parliament's refusal to give consent to two high profile agreements, the Terrorist Finance Tracking Program (TFTP) agreement with the US and the multilateral Anti-Counterfeiting Trade Agreement (ACTA), has attracted much attention, both in the media and in academic circles.[18] Most voices have criticized the secretive negotiations and the exclusion of

[16] *All emphases added.*

[17] The agreement between Council and Parliament also confirms ORCON as the basic principle of handling classified information. Article 3(4) of the Agreement concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, of 13 September 2012, P7_TA(2012)0339: 'the Council may grant the European Parliament access to classified information which originates in other Union institutions, bodies, offices or agencies, or in Member States, third States or international organisations only with the prior written consent of the originator.'

[18] E.g.: http://euobserver.com/foreign/30447; http://euobserver.com/political/116866. E.g. Deirdre Curtin, *Official secrets and the negotiation of international agreements: Is the EU executive unbound?*

Parliament, as well as the potential difficulties that the Union might face as an international actor if, last minute, it cannot legally conclude a negotiated agreement. These are valid criticisms. At the same time, other institutional and constitutional dynamics and effects take place and are worth considering.

Shortly after the Lisbon Treaty entered into force, the EP showed its newly established teeth by vetoing the first EU-US TFTP agreement.[19] The agreement falls within an area where, before Lisbon, Parliament did not have any say in the process cumulating in the conclusion of international agreements, i.e. the former third pillar.[20] Since Lisbon the policies formerly falling within the third pillar are part of the Union's AFSJ,[21] and the greatest share of AFSJ provisions apply the ordinary legislative procedure, which means, as explained, that the conclusion of international agreements requires parliamentary consent and gives the Parliament a right to be informed during all stages of the negotiations. The EU-US TFTP I agreement had been signed on the eve of the entry into force of the Lisbon Treaty. It provided for the transfer of large volumes of transaction information from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) to the US for the purpose of counter-terrorist surveillance.[22] This naturally raised a multitude of data protection concerns. In the course of the negotiations of the TFTP I agreement, the EP had completely been kept out of the information flow.[23] Indeed about two and a half months before the entry into force of the Lisbon Treaty, Parliament had adopted a resolution setting out minimum conditions the agreement should satisfy, stating that it had to do so in abstract because it had been

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50:2 COMMON MARKET LAW REVIEW, 423–457 (2013); Marieke de Goede, *The SWIFT affair and the global politics of European security*, 50JOURNAL OF COMMON MARKET STUDIES (2), 214-230 (2012).

[19] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, O.J. 2010, L 8/11.

[20] Ex-Art 24 and 38 TEU. First Justice and Home Affairs and then Police and Judicial Co-operation in Criminal Matters.

[21] http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=586080#tab-0.

[22] SWIFT is an inter-service banking company, which is used in roughly 80 per cent of all international transactions. See also: Gloria Fuster, Paul De Hert, and Serge Gutwirth, *SWIFT and the vulnerability of transatlantic data transfers* 22 INTERNATIONAL REVIEW OF LAW, COMPUTERS, AND TECHNOLOGY (2008), 191-202.

[23] Christian Kaunert, Sarah Leonard and Alex MacKenzie, *The Social Construction of an EU Interest in Counter-Terrorism: US Influence and Internal Struggles in the Cases of PNR and SWIFT* 21 EUROPEAN SECURITY (2012), 474, 488.

provided with so little information that it could not engage with the existing draft.[24] Three months after the entry into force of the Lisbon Treaty (the agreement had already provisionally entered into force),[25] Parliament then refused to consent, by a vote of 378 to 196 (with 31 abstentions).[26]

Although the refusal was ostensibly aimed to protect the data protection rights of EU citizens, it was also widely seen as a political move.[27] Former President of the EP Buzek explained: 'The Lisbon Treaty [...] has given MEPs a right of veto over international agreements [...]. The same governments must accept that the EP will use this power in a way which reflects its own assessment of the concerns of Europe's citizens.'[28] There are two elements to President Buzek's statement. Firstly, he specifically calls on the Member States' governments to accept the Parliament's new role, rather than on the Council and the Commission, which were in practice the actors that had not taken sufficient note of Parliament's new powers concerning international negotiations. An opinion of the Parliament's legal service stated for example that the Council had made it 'impossible for practical reasons for Parliament to react' by delaying the formal submission of the agreement to the Parliament due to 'translation problems'.[29] Parliament was left with only one week to draft a response.[30] Secondly and in the present context most importantly, President Buzek emphasised that Parliament will act according to *its own assessment* and in order to reflect *the concerns of Europe's citizens*. This demonstrates Parliaments self-conception as an independent voice of EU citizens within the EU structures.

Despite this first refusal to consent, Parliament then issued a recommendation for a negotiation mandate to the Council for the development of a long-term TFTP

[24] Resolution of 17 September 2009, European Parliament document P7_TA(2009)0016.
[25] The agreement provisionally entered into force on 1 February 2010.
[26] On 11 February 2010. See, e.g., http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20100209IPR68674+0+DOC+XML+V0//EN.
[27] See eg Jörg Monar, *The Rejection of the EU-US SWIFT Agreement by the European Parliament: A Historic Vote and Its Implications*, 15 EUROPEAN FOREIGN AFFAIRS REVIEW (2010), 143.
[28] EP Press Release, 'EP President Jerzy Buzek on the rejection of the SWIFT interim agreement by the European Parliament', 11 February 2010.
[29] EP, 'Legal Opinion of the Legal Service of the EP', D(2010)5811. Available at http://www.statewatch.org/news/2010/feb/ep-libe-cttee-opinion-legal-service-eu-usa-swift.pdf. Compare with the above discussed Framework Agreement on relations between the EP and the Commission of October 2010.
[30] This failure to involve Parliament is also the background to a legal action brought against the refusal to grant access to documents relevant to the negotiation of the TFTP I agreement: Case T-529/09 Sophie in 't Veld v Council [hereinafter Sophie in 't Veld I] [2012] ECR II-0000.

agreement and thus signalled recognition of the importance of such an agreement. It also submitted recommendations regarding the content of the TFTP,[31] and in May 2010 the Council authorized the Commission to (re-)start the negotiations on a second TFTP agreement, which was swiftly signed as a slightly amended version of the original TFTP agreement.[32] Changes introduced after Parliament voted it down include for example vetting by Europol.[33] After taking into account the considerations of the various committee opinions Parliament gave its consent to an amended TFTP II agreement on 8 July 2010,[34] with the agreement entering into force shortly thereafter.[35] Parliament's consent to an agreement that contained only very few changes seems to confirm that the original rejection was at least partially motivated by the fact that Parliament was kept out of the loop during the negotiations.

A second case where Parliament was not sufficiently included in the negotiations is the attempted conclusion of ACTA. About a year and a half after the entry into force of the Lisbon Treaty, the Commission published a proposal[36] and the Council swiftly adopted the appropriate decision to conclude ACTA.[37] As in the case of the TFTP II agreement, Parliament had to give its consent for ACTA to enter into force. Yet, even though the agreement was deemed necessary to improve the enforcement of anti-counterfeiting law internationally, the report of the parliamentary rapporteur from the committee on international trade advised Parliament to refuse its consent because of

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[31] European Parliament Resolution on the Recommendation from the Commission to the Council to authorize the opening of negotiations for an agreement between the EU and the USA to make available to the US Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing.

[32] Agreement between European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, O.J. 2010, L 195/5, signed on 28 June 2010.

[33] Oversight by Europol was accepted as a compromise. The EP originally wanted control by a public judicial body [see, Sergio Carrera, Nicholas Hernanz, Joanna Parkin, 'The 'Lisbonisation' of the European Parliament assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice, *study for the committee of civil liberties, justice and home affairs*, 2013, 18].

[34] Jörg Monar, *The Rejection of the EU-US SWIFT Agreement by the European Parliament: A Historic Vote and Its Implications*, 15 EUROPEAN FOREIGN AFFAIRS REVIEW (2010), 143.

[35] On 1 August 2010.

[36] Proposal of 24 June 2011, COM(2011) 380 final.

[37] Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, 2011.

'the potential threats to civil liberties'.[38] Furthermore, Parliament experienced unprecedented direct lobbying by thousands of EU citizens, in street demonstrations, emails to Members of the EP (MEPs), and calls to their offices, as well as by 2.8 million citizens worldwide, who signed a petition – all urging Parliament to reject the agreement. Public and parliamentary support for the agreement was dwindling.[39] After the amounting public controversy and rather late in the negotiations DG Trade recognised the need to give both the public and the EP more information. It published online a digest of all the answers that it had given to all the questions tabled by MEPs. On US Independence Day of 2012, Parliament declined to give its consent, in line with the recommendation made by its rapporteur.[40] According to the EP's legislative resolution the explicit reasons for the rejection included the failure of the Council and the Commission to inform Parliament adequately and on time. Hence, beside the issues concerning the controversial substantive content of ACTA,[41] one reason for the refusal to consent was again that Parliament had been denied access to a range of key documents. In particular, the negotiating mandate was not shared with Parliament.[42] The Union never concluded ACTA.

In the analysis of the EP's role in international negotiations it is crucial to point out that the *negotiations* to the TFTP I agreement took place *before* the entry into force of the Lisbon Treaty, while only the conclusion took place thereafter. Hence, while being a notorious case, the TFTP I agreement is not representative for the involvement of Parliament at negotiation stage *after* its increased powers under the Lisbon Treaty. It rather highlights the broader problem of parliamentary exclusion in international negotiations. The negotiations of ACTA took place both pre- and post-Lisbon. They

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[38] David Martin, Recommendation on the draft Council decision on the conclusion of the ACTA Agreement, 6. See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0204+0+DOC+PDF+V0//EN.

[39] See http://database.statewatch.org/print.asp?aid=31752&.

[40] European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, P7_TA(2012)0287. See also http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA and http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against/.

[41] Christina Eckes, Elaine Fahey and Machiko Kanetake, *International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA),* CURRENTS, INTERNATIONAL TRADE LAW JOURNAL (2013).

[42] The same MEP, who had personally challenged the secrecy surrounding the TFTP agreement, Sophie in 't Veld, challenged the refusal by the Council to give access to this mandate under the regulation on public access to documents. Case T-301/10, Sophie in 't Veld v Commission, Judgment of 19 March 2013.

demonstrate that with the entry into force of the Lisbon Treaty there was no immediate change but that Parliament had to take action to ensure that its new position under the Treaties resulted in a more meaningful inclusion in practice.

2.2.2 'Business as Usual': Concluding International Agreements in Institutional Cooperation

Parliament's role in international negotiations has changed. More recent practice seems to indicate that Parliament is involved in a more meaningful way and that the Commission informs Parliament in line with the above discussed Framework Agreement of October 2010.[43]

This is illustrated by the fourth EU-US Personal Name Record (PNR) agreement, which concerns equally controversial and rights relevant issues, but has been negotiated under different conditions. The need for a new, fourth EU-US PNR agreement arose out of the entry into force of the Lisbon Treaty, which changed the way the EU deals with counter-terrorism issues.[44] The previous, third PNR agreement dated back to 2007 and required parliamentary approval for it to remain in force. Parliament had longstanding concerns about privacy and other civil liberties, which indeed date back to the first PNR agreement in 2004. As a consequence, it postponed its vote on the fourth PNR agreement until it had explored the options for potential arrangements on the use of PNR data that were in line with EU law and met the concerns expressed by in its earlier resolutions.[45] Following this postponement, the Commission issued a recommendation to the Council for the opening of negotiations of a new EU-US *data protection* agreement.[46] Furthermore in September 2010, the Commission issued a communication on the global approach to transfers of PNR data to third countries[47] and Parliament

[43] Framework Agreement on relations between the European Parliament and the Commission, O.J. 2010, L 304/47.
[44] CIAN MURPHY, EU COUNTER-TERRORISM LAW – PRE-EMPTION AND THE RULE OF LAW (2012).
[45] See EP resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada (available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0144+0+DOC+XML+V0//EN).
[46] See, 'European Commission seeks high privacy standards in EU-US data protection agreement,' press release, IP/10/609, 26 May 2010. NB this recommendation was partly declassified on 23 July 2010, though the operative part of the recommendation is still unavailable.
[47] COM(2010) 492 final, 21 September 2010.

responded by issuing a second resolution explaining its general position on the transfer of PNR data to third countries.[48] In this second resolution concerning the fourth PNR agreement, Parliament noted that the Commission's communication and recommendation regarding PNR reflected important elements contained in previous resolutions of the EP on the subject.[49] After reiterating its position concerning proportionality, data mining and other PNR related issues Parliament addressed its own role in the forthcoming negotiations. In point 8 of the resolution it highlighted 'the need to be fully informed on all PNR related and relevant developments in order to be able to consider giving its consent.'[50] The Council authorized the Commission to negotiate the new agreement on 2 December 2010[51] and the Obama Administration agreed to renegotiate some elements of the 2007 PNR agreement, 'largely in recognition of the fact Parliament was unlikely to approve the existing 2007 agreement'.[52]

About one year later, the Commission initialled the agreement on behalf of the EU[53] and the Council signed this fourth EU-US PNR agreement in December 2011.[54] Two months after the Council's approval, the EP's rapporteur for the Civil liberties, justice and home affairs (LIBE) Committee, Sophie in 't Veld,[55] submitted her recommendation to Parliament to withhold consent to the EU-US PNR agreement.[56] She argued that the agreement did not meet the criteria set out in the two 2010

[48] EP resolution of 11 November 2010 on the global approach to transfers of passenger name records (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorize the opening of negotiations between the European Union and Australia, Canada and the United States (available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0397+0+DOC+XML+V0//EN).
[49] Under indent 7, the EP lists its previous resolutions on previous PNR agreements.
[50] Ibid.
[51] See, 'New EU-US agreement on PNR improves data protection and fights crime and terrorism', press release, IP/11/1368, of 17 November 2010.
[52] Kristin Archick, 'The European Parliament', Congressional Research Service 7-5700, 29 July 2013, p. 13.
[53] See press release IP/11/1368, n 139.
[54] Council press release, 184454/11, presse 490, 13 December 2011. Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126892.pdf.
[55] Appointed 5 December 2011.
[56] See S in 't Veld, 'Draft recommendation on the draft Council decision on the conclusion of the agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security' 2011/0382NLE and ALDE press release, available at http://www.alde.eu/nc/key-priorities/civil-liberties/single-news/article/ep-rapporteur-in-t-veld-set-to-reject-new-eu-us-passenger-name-records-agreement-pnr-37871/.

resolutions of the EP and was contrary to existing EU law.[57] In particular, the agreement infringed EU and national data protection legislation. However, the rapporteur did not criticise the involvement of Parliament in the negotiations of the fourth EU-US PNR agreement. The committee departed from the rapporteur's recommendation and suggested to Parliament to give its consent.[58] Parliament approved the agreement, by a vote of 409 to 226, with 33 abstentions.[59]

Besides the specific acknowledgement of the Obama Administration that the position of the EP had played a role in the negotiation, the absence of criticism by the rapporteur, who had demonstrated in the past her concern for transparency and Parliament's involvement, is an indication that Parliament could exercise democratic control over the negotiation of the fourth EU-US PNR agreement. This conclusion is confirmed by the 2011 permanent[60] PNR agreement with Australia.[61] After a Commission recommendation to authorize the opening of negotiations, the Council quickly adopted its authorization and after equally swift negotiations, the Council signed the EU-Australia PNR agreement on 29 September 2011.[62] Following a positive recommendation by the LIBE Committee, Parliament consented on 27 October 2011.[63] With regard to the involvement of Parliament, rapporteur in 't Veld noted that cooperation between the Parliament, Commission and Council worked well. She stated that 'this example demonstrated that if the institutions work together, Europe is a force

[57] ibid., and http://www.statewatch.org/news/2012/mar/eu-usa-pnr-study-green-group.pdf for more detailed arguments.
[58] Recommendation of 3 April 2012 on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (17433/2011 – C7-0511/2011 – 2011/0382(NLE)).
[59] See, 'Parliament gives green light to air passenger data deal with US,' EP press release, 19 April 2012 (available at http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20120419IPR43404&secondRef=0&language=EN).
[60] In 2008 a provisional agreement had been signed.
[61] See also COM(2010) 492 final, 21 September 2010 on the importance of a global approach to PNR data transfers with third countries.
[62] See, 'Signature of the EU-Australia agreement on Passenger Name Records (PNR), 14664/1, PRESSE 330.
[63] European Parliament legislative resolution of 27 October 2011 on the draft Council decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service.

to be reckoned with.'[64] She saw the agreement with Australia as a possibility to establish a new trend, hoping to reach better agreements also with the US and with Canada.

Furthermore, the regular conclusion of other international agreements, such as (often less controversial) trade agreements, illustrates that the cooperation between Parliament, Council and Commission can work much more effectively than in the problematic cases discussed above. As examples may serve several agreements with the Russian Federation, which are all part of the bilateral agreements concluded in anticipation of Russia's accession to WTO[65] and which members of the EP explicitly welcomed.[66] The package is meant to secure better terms for EU firms doing business in Russia. On 9 December 2011, the Council for instance concluded an agreement with the Russia on trade in parts and components of motor vehicles.[67] The deal protects EU auto-parts companies hit by restrictive Russian measures that will remain in force even after Russia joins the WTO. These measures give foreign motor vehicle manufacturers incentives to relocate to Russia, and could discriminate against Russian imports of foreign car components. Under the agreement, if EU exports of car-parts fall by three per cent a year, Russia will reduce its import duties for EU car-parts by a commensurate amount.[68] The agreement needed the consent of Parliament to enter into force. The rapporteur of the committee on international trade recommended that Parliament consented to the agreement.[69] Parliament duly followed this recommendation and gave its consent to the agreement on 4 July 2012.[70] Neither the Parliament's report nor the

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[64] See interview, available at http://www.alde.eu/press/press-and-release-news/press-release/article/eu-australia-pnr-agreement-to-get-green-light-37708/.

[65] E.g. agreements on car parts, on wood exports, on raw materials and on services.

[66] See e.g. http://www.europarl.europa.eu/news/en/pressroom/content/20120529IPR45935/html/Trade-MEPs-back-deals-with-Russia-that-improve-trade-terms-for-the-EU.

[67] Council Decision on the conclusion of the Agreement between the European Union and the Government of the Russian Federation on trade in parts and components of motor vehicles between the European Union and the Russian Federation, 16806/11, 2011.

[68] http://sofiaglobe.com/2012/07/04/european-parliament-approves-better-terms-for-eu-firms-doing-business-with-russia/

[69] Paweł Zalewski (EPP, PL), Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the Government of the Russian Federation on trade in parts and components of motor vehicles between the European Union and the Russian Federation (16806/2011 – C7-0517/2011 – 2011/0324(NLE)). See also: http://www.europarl.europa.eu/news/en/pressroom/content/20120704IPR48264/html/Better-terms-for-EU-firms-in-trade-deals-with-Russia.

[70] European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Agreement between the European Union and the Government of the Russian Federation

final legislative resolution of Parliament indicate concerns over lack of Parliament's involvement in the negotiations of the EU-Russia agreements.

At the same time, an assessment of Parliament's strengthened role in law and in practice in the negotiation and conclusion of international agreements cannot ignore the broader issue of Parliament's limited access to confidential information and how this restraints in the context of external relations its ability to deliberate as an institution and conduct a public debate. As we have seen, the Framework Agreement on Relations between the EP and the Commission of October 2010 has given Parliament *inter alia* a right to be fully and timely informed that goes beyond what is codified in the European Treaties. Such an agreement is an expression of what is required by the duty of sincere cooperation and could be enforced before the Court of Justice of the European Union (CJEU).[71] However, the Council's insistence that public awareness of internal, i.e. inter-institutional, disputes can negatively influence international negotiations and its emphasis on the discretion of the executive to decide whether access to information may harm international relations[72] is not unreasonable. The debate illustrates that transparency requirements and judicial safeguards, which a democratic society offers with regard to the internal law-making process, cannot be taken for granted when such law-making is moved outside of the domestic framework. Furthermore, when access is granted only to a few MEPs and under very restrictive circumstances this is very problematic for the EP's core role as a window to the public. It divides MEPs into 'ins' and 'outs' and gives the former a sense of inclusion and power. The problems are comparable to agreements hammered out behind closed doors that then pass at first

on trade in parts and components of motor vehicles between the European Union and the Russian Federation (16806/2011 – C7-0517/2011 – 2011/0324(NLE)).

[71] Case C-25/94 Commission v Council (FAO), [1996] ECR I-1469, 49-50. The Council and the Commission had concluded an inter-institutional agreement that regulated the exercise of voting rights within FAO, which was found to be binding on the EU institutions. The Court deduced the binding force of this agreement from the intention of the parties and from the duty of sincere cooperation. See on the relevance on intention: T. Beukers, Law, Practice and Convention in the Constitution of the European Union, doctoral thesis, defended on 21 April 2011, 212 and 242.

[72] Case T-301/10, Sophie in 't Veld v Commission, Judgment of 19 March 2013.

reading within the ordinary legislative procedure.[73] This practice has indeed been severely criticized for lack of openness.[74]

By way of conclusion, the Lisbon Treaty has done much to ensure parliamentary involvement and consent in the negotiation and conclusion of international agreements and the EP has externally established its new powers with prominent acts of contestation and internally consolidated better involvement. The former can be contrasted with the latter in that Parliament externally disputes the EU position (contestation), rather than engaging (being able to engage) internally in the political process. In high profile cases Parliament has been able to call the executives position into question and take an active stand against the (secretly) agreed international agreement. The notorious cases of parliamentary exclusion and the veto of the TFTP agreements and ACTA have attracted most attention, both in the media and by scholars. Parliament has put itself on the map of international relations. Yet above all, these cases illustrate the limited role of Parliament before the entry into force of the Lisbon Treaty and its effective way of bringing its strengthened post-Lisbon powers to the attention of the other institutions. Indeed, it has been able to effectively claim an internal and external role in the negotiation and conclusion of international agreements.

An important note of caution is in order. It remains open whether and to what extent Parliament will be able to profile itself as the voice of EU citizens in the international context in the future. Better inter-institutional arrangements have been agreed and when Parliament has the opportunity to participate fully in the negotiation stage, it is better positioned to fulfil its core function of deliberating and framing the issues in internal political arena. Much of Parliament's great visibility in the examined examples was triggered by its earlier exclusion. It could *legitimately* take a public stance against international agreements at the final stage *because* it was excluded from their negotiation. This was a visible and public rejection of what the other institutions and the involved third countries had agreed, which will become much less likely if Parliament is involved and listened to behind the scenes. Also, journalists report conflict situations

[73] See for more details: *Guide to the ordinary legislative procedure*, October 2010, available at: http://consilium.europa.eu/uedocs/cmsUpload/QC3109179ENC.pdf.

[74] See e.g. Recently and with many references: Sergio Carrera, Nicholas Hernanz, Joanna Parkin, 'The 'Lisbonisation' of the European Parliament assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice, *study for the committee of civil liberties, justice and home affairs*, 2013, 24-31.

more easily and extensively than consensual situation.[75] However, there are signs that the EP will keep up its new visible role in external relations. The LIBE Committee for example published in December 2013 a report on the US NSA surveillance programme.[76] The report is a proposal made to the EP, which will debate it and vote on in the next few weeks. In the meantime, LIBE has asked Edward Snowden to testify by video link.[77] The report expresses strong condemnations of bulk surveillance and proposes much stronger EU privacy protections, including halting agreements on personal data sharing with the US. Both the report and the invitation of Snowden have been picked up by the US media.[78]

The following part three reflects on the broader consequences of the EP's newly found international voice. Assuming that Parliament's external acts of contestation were not only a byproduct of the internal power game between the institutions, they may be relevant for the ongoing debate of original rights within the EU. The EP may vest the EU's position in international relations with a popular backing that goes beyond the popular backing of the international positions of the Member States.

3. Evaluating the European Parliament's Acts of Contestation as Claim to External Representation

3.1 The Fiction of Sovereign Control of the People: the European Parliament's Symbolic Function

Parliaments have institutional and symbolic functions.[79] Their institutional function relates to their effectiveness: Parliaments justify their existence when they are effective and useful. The symbolic function focusses on the imagined link with their electorate. It is the institutionalization of the above described fiction of internal sovereignty that

[75] Bo Laursen, *Transparency in the Council of the European Union: Why Journalists Don't Get the Full Picture*, 14 JOURNALISM (2012), 771-789.
[76] Committee on Civil Liberties, Justice and Home Affairs, draft report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)), of 23.12.2013.
[77] http://euobserver.com/justice/122687.
[78] http://www.nytimes.com/2014/01/10/world/europe/eu-panel-invites-snowden.html?_r=0.
[79] MARCUS OBRECHT, NIEDERGANG DER PARLAMENTE? TRANSNATIONALE POLITIK IM DEUTSCHEN BUNDESTAG UND DER ASSEMBLÉE NATIONALE (2009), 16 with reference to WERNER PATZELT, EINFÜHRUNG IN DIE POLITIKWISSENSCHAFT (2003), 63.

creates an imagined link of power and people. Parliaments meet the symbolic function if they can create and maintain a fiction of representation and legitimacy.[80]

The EP is since 1979 directly elected and is formally independent from national democratic representation. Article 10(1)2 TEU expresses *tout court*: 'Citizens are directly represented at Union level in the EP.' At the same time, the EP struggles to connect to its electorate. This struggle is reflected both in opinion polls and in the tragically low turnout in the elections to the EP, which has been on the decline ever since 1979.[81] While the problem is nearly universally accepted the evaluation differs: Both an emerging *demos* or 'sovereign people' of Europe, and hence a change in the future, and the impossibility to ever establish any such collectivity have been diagnosed.[82] At the same time, a sovereign European people may not be the aim and the EP may not endeavour to replace national parliaments but rather cooperate with them. Yet, the argument here is that if the EP could successfully claim to represent EU citizens as a group in external relations this might indeed be relevant for the EP's symbolic function. Citizens may *feel* better represented though the EP than through their national parliaments.

The powers of the EP have increased with every Treaty amendment, which often reflected incremental changes in practice. Formally important leaps were the introduction of the co-decision procedure in the Treaty of Maastricht, its elevation to the ordinary legislative procedure and its extension to international relations in the Lisbon Treaty. Furthermore, Parliament has not only become formally empowered. It has also effectively shown its teeth in internal institutional battles. Moreover, the EP is the institution that offers real European politics, rather than bargains based on national interests (like the Council). Party cohesion is the most significant factor. Most MEPs

[80] 'Repräsentations- und Legitimations*glaube*'.
[81] 1979: 61.99 %; 1984: 58.98 %; 1989: 58.41 %; 1994: 56.67 %; 1999: 49.51 %; 2004: 45.47 2009: 43 %; 2014: ?, available at: http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html. Some theories of democracy consider the opportunity to vote as sufficient to ensure democratic legitimacy.
[82] Neil MacCormick, *Sovereignty and After*, in SOVEREIGNTY IN FRAGMENTS—THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT (Hent Kalmo and Quentin Skinner *eds.*, 2011),Chapter 8, 167. JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS – EIN ESSAY (2011). Very different: GFCC, Maastricht and Lisbon Treaty decisions.

vote along transnational European parties lines rather than on the basis of nationality.[83] Much has also been done to improve the accountability link between the Parliament and the Commission. However, neither increased powers nor political debate have so far solved the problem of alienation between the EP and the citizens that it represents. At least at present, the EP cannot be said to fulfil the symbolic function to the same extent as national parliaments. At the same time, the EP has recently voiced in the external context a strong claim of representation that may convince in a different way because it does not oppose European and national democratic representation, which overlap in the sense that the same individual is represented in both contexts. Internally, the EU context, including the EP, is often perceived as the 'other' opposing the national context, with which individuals identify more strongly when this opposition is put to the test. Externally, the EP offers effective European representation in a context, where individuals are largely unrepresented through their national democratic vote. The EP's claim is formally institutionally backed and intrinsically legitimised by limits of public authority in a Union of law, *i.e.* human rights, procedural principles, and judicial review. While the Council is a platform where intergovernmental interests are represented and the Commission exercises delegated powers in external relations, the EP is elected by and represents EU citizens. Both the role of the EP and national parliaments has been strengthened under the Lisbon Treaty, largely for the same reason: to increase democratic control and legitimacy of EU decision-making. Yet, only the EP has been able to establish an external voice, i.e. speak for the EU citizens in the EU's external relations, while the improved position of national parliaments is limited to the internal sphere, i.e. internal EU decision-making. Parliament credibly gives EU citizens a voice in international relations that, with all its flaws, draws on a source of democratic legitimation that is independent and separate from the EU Member States.

Parliament's new external role raises questions as to how international recognition and effective external representation of EU citizens interacts with the continuing internal symbolic weakness. Can the former compensate for the latter? Will citizens *feel* better represented? At present there is a mismatch between the weak fiction

[83] SIMON HIX, ABDUL G. NOURY AND GERARD ROLAND, DEMOCRATIC POLITICS IN THE EUROPEAN PARLIAMENT (2007), 3-5. Yet, an increase of MEPs coming from anti-European national parties is also perceivable in the EP.

and Parliament's strong external acts of contestation, i.e. its claim to give an external voice to EU citizens. Power without fiction may be potentially unstable and require a qualitative change. Edmund Morgan eloquently explained the tension between fiction and the real world in his influential book *Inventing the People*: 'The political world of [fictions] mingles with the real world in strange ways, for the [fictitious] world may often mould the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelieves collapses. And conversely, it may collapse if facts stray too far from the fiction that we want them to resemble.'[84] Fiction and reality must hence sufficiently resemble and confirm each other to be both maintainable. Where they differ to the extent that one challenges and undermines the other, a qualitative transformation is looming. There are two potential ways of adjust the mismatch. Either EP's influence on the EU's external relations will generate greater popular interest and a sense of being represented remains to be seen or the tension between the weak internal fiction of popular sovereignty through the EP and its assertion of external representation may at some point become so great that it requires a legal adjustment. What might, on the one hand, work in favour of a sense of being represented is that in the external sphere there is no longer a notion of 'we', the national self, against 'them', the bigger European collective. An effective external representation creates the 'we' as the European collective,[85] which is confronted with the other bargaining powers. And by that, it may have a different influence on the perception of the 'human figuration', i.e. the structured and changing pattern of interdependence and collectivity within Europe.[86] This may be particularly relevant in the external context because, as will be addressed in the following section, in the international context the EP seems to offer greater visibility and influence that is directly linked back to citizens than national parliaments. On the other hand, as will be explored in section 3.3 below,

[84] EDMUND S. MORGAN, INVENTING THE PEOPLE – THE POPULAR RISE OF SOVEREIGNTY IN ENGLAND AND AMERICA (1988), 14.
[85] See on the broader point of a duality of identity which allows individuals to feel allegiance to several groups: Jürgen Habermas, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*
10/2 PUBLIC CULTURE (1998), 397-416, at 404 'double coding of citizenship'; see also: JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS – EIN ESSAY (2011).
[86] Compare ABRAM DE SWAAN, IN CARE OF THE STATE (1988), 2.

national courts, politicians and the media have in the recent past placed a new emphasis on the state sovereignty of the EU Member States. This turn towards a more national perspective stands in contrast with an EP that self-confidentially claims to represent EU citizens as a whole.

3.2 European Parliament in External Relations: Still, the Better Alternative?

The EP has found its voice in the context of external relations. It has asserted a meaningful role in the conclusion of international agreements – arguably more meaningful and certainly more visible than national parliaments.

Parliamentary participation in the negotiations and conclusion of international agreements is decisive for any democratic control over external relations. The position and influence of the EP can be contrasted with the involvement of national parliaments in concluding international agreements.[87] The general understanding is that national parliaments lose control through Europeanisation and globalization ('*Entparlamentarisierung*').[88] The debate has so far given more attention to Europeanisation processes than to international law.[89] Indeed, within the internal sovereignty discussion the focus has been on the decrease of Member States' powers as a result of Europeanisation and in particular the steady empowerment of the EP.[90] This may also explain the strengthened position of national parliaments under the Lisbon Treaty and the fact that some of them have actively claimed greater influence, e.g. the

[87] In depth: MARCUS OBRECHT, NIEDERGANG DER PARLAMENTE? TRANSNATIONALE POLITIK IM DEUTSCHEN BUNDESTAG UND DER ASSEMBLÉE NATIONALE (2009).

[88] ANNETTE ELISABETH TÖLLER: EUROPAPOLITIK IM BUNDESTAG. EINE EMPIRISCHE UNTERSUCHUNG ZUR EURO-PAPOLITISCHEN WILLENSBILDUNG IM EG-AUSSCHUß DES 12. DEUTSCHEN BUNDESTAGES (1995), 50.

[89] E.g.: PHILLIP DANN, PARLIAMENTE IM EXEKUTIVFÖDERALISMUS (2004); JOHN O'BRENNAN AND TAPIO RAUNIO (EDS.), NATIONAL PARLIAMENTS WITHIN THE ENLARGED EUROPEAN UNION – FROM 'VICTIMS' OF INTEGRATION TO COMPETITIVE ACTORS? (2007); Philip Giddings and Gavin Drewry (eds.), BRITAIN IN THE EUROPEAN UNION LAW, POLICY AND PARLIAMENT (2004).

[90] E.g.: MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION – TOWARDS A POST-HOBBESIAN ORDER (2001), 159. See also for a concern about the erosion of sovereign power, including because of the involvement of Parliament: HM Government, Review of the Balance of competences between the United Kingdom and the European Union – Foreign Policy, available at: https://gcn.civilservice.gov.uk.

Finish and Dutch parliament.[91] In Germany, the *Lisbon Treaty* decision of the GFCC also prodded the national parliament to take up a more active participant in the EU context.[92] Yet, when national parliaments exercise indirect influence by holding accountable their representative in the European Council and in the Council or even direct influence by controlling compliance with the subsidiarity principle this takes place *within* the EU legal order. It has a much more limited effect of enhancing the visibility of national parliaments publicly. If there is any public debate it often does not go beyond that particular Member State. The public international law instruments adopted by the Member States of the Eurozone to mitigate the crisis of the common currency may have recently shifted some of the focus on national parliamentary influence from EU law towards international law.[93] Yet, while these instruments are formally international law, the ESM Treaty and the Fiscal Compact should for the present discussion be considered a category apart because of their institutional and substantive entanglement with EU law.

In most states, ratification of international agreements requires parliamentary approval. The US is a conspicuous exception where certain comprehensive international agreements are negotiated as executive agreements.[94] In Germany for example, the parliament (*Bundestag* and depending on the subject matter also the *Bundesrat*) has to approve the conclusion of international agreements in the legislative procedure if these

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[91] See e.g. Article 10(2) TEU, which emphasizes national parliaments' role in legitimizing the national representatives in the European Council and the Council and Protocol 1 to the Lisbon Treaty, which gives national parliaments as a collective a control function over the correct interpretation of subsidiarity in the EU legislative process.

[92] See the most recent legislative implementation oft the GFCC's guidelines: Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union (EUZBBG), of 4.07.2013 (BGBl. I S. 2170). This law repeals the EUZBBG of 12.03.1993 (BGBl. I S. 311, 1780), which had been changed three times to extend the control powers of the German parliament, including after the GFCC's Lisbon Treaty decision and after the GFCC's ESM Decision, see Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion vom 13. September 2012 (BGBl. II S. 1006) and Gesetz zur Änderung des EUZBBG vom 22. September 2009 (BGBl. I S. 3026). For an English translation of the current version see: http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg.html.

[93] See e.g.: Kristin Rohleder, *Möglichkeiten der Beendigung des Vertrages über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion nach der Wiener Vertragsrechtskonvention*, WISSENSCHAFTLICHE DIENSTE DES DEUTSCHEN BUNDESTAGES, WD 11 – 3000 – 62/12, 20 March 2012.

[94] This was the case for the TFTP agreement, the PNR agreement and ACTA, see: Kristin Archick, *The European Parliament*, CONGRESSIONAL RESEARCH SERVICE 7-5700, 29 July 2013, 15 and Christina Eckes, Elaine Fahey and Machiko Kanetake, *International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)* CURRENTS, INTERNATIONAL TRADE LAW JOURNAL (2013).

agreements govern the political relations of the German Federation or concern a subject matter that falls under federal competence.[95] Similarly, the ratification of international agreements in France requires parliamentary approval.[96] The actual control in practice and the ability to contest the actions of the executive however differ. In parliamentary democracies, the particular relationship between governments and parliaments is characterized by support of the majority of parliamentarians for the government in office. This is not necessarily the case in presidential systems. In both systems parliaments legally are in the same position: they can deny approval to an international agreement. However, in the parliamentary system effective control by the majority is politically less likely and the majority logic of parliaments makes it difficult for the opposition to exercise effective control. A strict application of the majority rule in committees and rapporteur allocation for example marginalizes the minority parties behind the scenes.[97] Parliamentary inclusion, information sharing with Parliament, and a more open debate remain problematic in both systems. Furthermore, limited resources in the national context place great constraints on parliaments' involvement in foreign policy making.[98] A comparison of the ratification processes of the Constitutional Treaty and of the Lisbon Treaty seems to indicate that national parliamentary approval to comprehensive and controversial international agreements does not usually pose problems (as opposed to the popular rejection in referenda).

In the EP by contrast, majorities and minorities form according to the outcome of direct elections. These elections happen every five years and are formally entirely unconnected to national elections, even if in practice they take place on the basis of national lists and voters might use them to punish national parties. The political powers in the EP are unrelated to the spreading of political powers in the Council, which shifts more frequently. Parliament offers a true political counter-weight. Furthermore, its

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[95] Article 59(2) GG: ‚1.a) für Verträge, welche die politischen Beziehungen des Bundes regeln und 2.b) für Verträge, die sich auf Gegenstände der Bundesgesetzgebung beziehen.'

[96] Article 53 C of the French Constitution. The constitutional amendment of 1992 has improved the position of the *Assemblée nationale*, see: MARCUS OBRECHT, NIEDERGANG DER PARLAMENTE? TRANSNATIONALE POLITIK IM DEUTSCHEN BUNDESTAG UND DER ASSEMBLÉE NATIONALE (2009), p. 177 et seq. The amendment has also strengthened the role of Parliament in the EU decision-making process, see Article 88-4 C.

[97] *Assemblée Nationale* Statistiques, 1990 et seq.

[98] MARCUS OBRECHT, NIEDERGANG DER PARLAMENTE? TRANSNATIONALE POLITIK IM DEUTSCHEN BUNDESTAG UND DER ASSEMBLÉE NATIONALE (2009), 264-265.

connection to the the Commission remains loose. Elections to the EP are taken account of but they do not directly determine the composition of the Commission.[99] After a proposal by the European Council,[100] the EP elects the President of the Commission[101] and the Commission as a whole is responsible to Parliament.[102] It must for example reply to questions of Parliament or individual MEPs.[103] For the 2014 elections to the EP, the European political parties will for the first time nominates their frontrunners and candidates for Commission President.[104] The Lisbon Treaty has hence strengthened EP's control over the Commission but the two remain less intimately connected as in parliamentary democracies.

The EP has achieved an exceptional visibility and influence in external relations within the past four years. It has established itself as an independent and influential political force in the conclusion of international agreements. Several reasons can be pointed out that contributed to Parliament's ability to establish visibility in external relations. Firstly, within the European legal order, people seem to feel more naturally that they belong to their national group and are represented by their national political forces, heads of government, ministers, and national parliaments. Externally, the opposition of the national context of one EU Member State versus that of another falls away. Without that opposition and with an outward looking perspective, citizens may feel represented by the different groups they belong to, which is as much the EU as it is their Member State.

Secondly, even though the EU is in a similar position as its Member States as regards executive dominance and secrecy in external relations, post-Lisbon, ordinary practice and the recognition by third countries confirms that Parliament exercises significant democratic control over the EU's external relations. It works in the EP's favour that it is not directly intertwined with the political composition of the Commission and Council. This gives it greater independence from the EU executive.

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[99] Article 17(7) TEU.
[100] Ibid.
[101] Article 14(1) TEU.
[102] Article 17(8) TEU.
[103] Article 230(2) TFEU.
[104] The 2013 report on the NSA affair (mentioned above) comes at a crucial time. The EP might make the position on data protection of the candidates for Commission President a relevant factor in its choice.

Thirdly, in the examined instances of the TFTP agreement and ACTA, Parliament was placed in the position to either vote ay or nay. It chose to confront the other EU institutions in public with the real life consequence that the agreements could not be concluded. Rejecting high profile international agreements at conclusion stage is highly visible. It has allowed Parliament to step out of the shade of inter-institutional cooperation and take the position of an internationally visible player. However, with the improved cooperation arrangements Parliament may lose part of its newly established external visibility. Participating in the negotiations and being involved before a deal is struck with the third country involved, remains internal and hence is by definition less visible. When Parliament is involved behind the scenes all participants – at least on the EU side – have often reached a joint position by the time the agreement appears in the media. How this will play in the future remains to be seen.

Fourthly, Parliament is strongest when an institutional issue is concerned (asserting its strengthened role in external relations) and when MEPs feel that they can politically profile themselves with a politically salient issue. The majority within the EP depends after all on the political issue (party cohesion, discussed above). This was the case in the data protection issues that were at stake in the most visible instances of Parliamentary contestation. If, by contrast, Parliament acts motivated by petty institutional concerns (only), rather than substantive reasons, it may be more difficult for it to connect with its electorate. A democratic voice still needs to make a substantive point. Much depends on the arguments – how the Parliament presents them and how they are picked up by the media.

3.3 Potential Influence of the European Parliament's New Role on the Sovereignty Debate in the EU

The EP's effect external claim to representation may not only strengthen for EU citizens the fiction that they are represented through the EP but also have additional qualitative effects on the legitimacy of the EU's claim to exercise original (sovereign) rights. It could

lend a popular backing to the CJEU's construction of EU law as a sovereign legal order.[105]

The EU was created as a construction of public international law. In its internal foundations, it consequently embraces the logic of state sovereignty, as it is inherent in modern international law.[106] Originally largely motivated by internal reasons, the CJEU distinguishes EU law from a very traditional image of public international law. Indeed, by depicting international law as traditional inter-states law and by ignoring already existing international mechanisms that immediately determined the legal heritage of individuals,[107] the Court was able to differentiate its own 'new legal order of international law'.[108] The European Treaties do not explicitly refer to the concept of sovereignty, either for the Member States or their Union. Yet, the Treaties determine the framework for the division of powers between the Union and its Member States and 'sovereignty' and 'sovereign rights' play a central role in the debate on the division of powers. The concept of sovereignty even seems to celebrate a recent revival in the internal EU context. The CJEU, without mentioning sovereignty or sovereign rights often, grounds its basic understanding of EU law in a sovereigntist self-conception. It openly speaks of the 'autonomy´ of the EU legal order. In order to establish its own source of power, separate from the Member States, the Court used sovereigntist language both explicitly ('a transfer of powers from the States to the Community, the Member States have limited their *sovereign rights*, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves'[109]) and implicitly ('the law stemming from the treaty, an *independent source of law*, [that] could not because of its [...] *original* nature, be overridden by domestic legal provisions,

[105] Most explicitly making the link to sovereignty: FRANCIS JACOBS, THE SOVEREIGNTY OF LAW – THE EUROPEAN WAY, The Hamlyn Lectures 2006 (2007). See the lecture version at: http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/9780521878876_HAML_Jacobs.pdf.

[106] See recently: AG Kokott, View in Case C-370/12, *Pringle*, para 137: 'The first issue here is the protection of the sovereignty of Member States. The Union was established by still sovereign States. The principle stated in the first sentence of Article 5(1) TEU of conferred powers in order to define the competences of the Union is both an expression of that sovereignty and a safeguard of it'. A remarkable use of 'sovereignty' for an AG.

[107] Public law that aims at regulating the activities and determine the legal position of individuals have increased tremendously since the 60s but the ECHR is an example of a prominent instrument that existed at the time the CJEU made its argument.

[108] Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1, at 12.

[109] Case 6/64 Flaminio Costa v. ENEL, 593-4, emphasis added.

however framed, without being deprived of its character as Community law and without the *legal basis of the Community itself* being called into question'[110]). The Court left hence no doubt about the separate independent origin of EU law that is not rooted in the sovereignty of the Member States. It further explicitly established the link to the nationals of the Member States, which has been further strengthened throughout the EU's internal constitutional development. Nationals of the Member States became EU citizens and the electorate of the EP.[111]

As is well known, national perspectives on the separate independent origin of EU law differ from the described perspective of the CJEU.[112] The isolated basic fact that the EU is vested with transferred sovereign rights is in principle accepted under national constitutional law, implicitly or explicitly.[113] The controversy relates to who is the sovereign that has authority over people and territory, rather who exercises sovereign rights, which are accepted to be transferred or shared in some way. Examples of national perspectives are the United Kingdom and Germany. Traditionally there have been no legal limits on the sovereignty of the UK Parliament, which 'can, if it chooses, legislate contrary to fundamental principles of human rights'.[114] From the perspective of EU law one could argue that 'the only exceptions are those entailed by membership of the EU'.[115] Recently, the UK adopted the European Union Act 2011 in order to clarify its relations with the European Union. The EU Act 2011 contains *inter alia* a so-called 'sovereignty' clause (Section 18), intended to reaffirm the sovereign character of the legislative power of the UK Parliament. Section 18 explains what has all along been the

[110] *Id.* at 585, emphasis added.
[111] See in particular Article 10(2) TEU: Citizens are directly represented at Union level in the European Parliament.
[112] See most prominently in recent times the GCC's Lisbon Treaty ruling, which mentions 'sovereign' or 'sovereignty' in the substantive grounds 73 times (paras 207-419); and in the UK the EU Act 2011, see Section 18: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.'
[113] See explicitly e.g. Article 23 German Constitution/ GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I (Ger.).
[114] Under UK law the so-called Simms principle [R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, at 131, *per* Lord Hoffmann]; see however under international law: Tinoco Claims Arbitration (Great Britain v. Costa Rica), (1923) 1 R.I.A.A. 369: International law looks to the State, not the governing entity within the state. As long as an authority is the government of a certain state it binds this state, including future governments.
[115] FRANCIS JACOBS, THE SOVEREIGNTY OF LAW, p. 7.

position of the UK:[116] that EU law is 'recognised and available' 'only by virtue of' the EC Act 1972.[117] The title of Section 18 is: 'status of EU law dependent on continuing statutory basis'. 'Continuing statutory basis' implies that this status could be taken away by a future act of Parliament. The German Federal Constitutional Court (GFCC), while always presupposing that the conferral of 'sovereign powers' is conditioned by and dependent on the German Constitution, has in more recent years increasingly turned to the concept of sovereignty in its case law on European integration. As is well-known, in *Solange I* and *Solange II*, the GFCC insisted that it continues to hold the ultimate power to review whether EU law is compatible with the German Constitution, and in particular the human rights protection under the German Constitution. As in all constitutional complaints (*Verfassungsbeschwerden*) under the German Constitution,[118] the starting point for the *Lisbon Treaty* decision (2009) was an alleged violation of individual rights.[119] However, the focus of the debate has shifted from individual rights in the earlier decisions[120] towards the national collective and more specifically towards *state sovereignty*. Indeed in the *Lisbon Treaty* decision, sovereignty was a theme that dominated the substantive grounds in an unprecedented form.[121] The GFCC expressed more clearly than before that the concept of sovereignty lies at the core of its understanding of the relationship between German law and EU law and of the limits of European integration. It argued that sovereign statehood is exclusive (only states can be sovereign) and that any sovereign rights exercised within the EU legal order are of a derivative character.[122] Indeed, the GFCC does not use 'sovereign' in the EU context but

[116] Lord Bridge in Factortame (No. 2) [1991] 1 A.C. 603.
[117] Section 18 EU Act 2011: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.'
[118] Article 93(1)(4a) German Constitution.
[119] The right to cast a meaningful vote within the meaning of Article 38 German Constitution.
[120] See also: Maastricht Treaty decision (1993).
[121] Both qualitatively and quantitatively: *Lisbon*: 73 times 'sovereign' or 'sovereignty' in the substantive grounds (paras 207-419); *Maastricht*: 54 times 'sovereign responsibilities', 'sovereign powers', 'sovereign rights', 'sovereign territory', 'sovereign State', and 'sovereign equality with other States'.
[122] Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MARKET LAW REVIEW, 1795-1822, at 1798-1799 (2009).

speaks of 'autonomy' and emphasises that the Member States 'permanently remain the masters of the Treaties'.[123]

Scholars of EU law have long written about 'divided' or 'pooled' sovereignty.[124] Indeed, since this original conception of permanently transferred sovereign rights, the Court and the Treaties, have hand in hand, pushed forward a process of fortifying the European construction. By contrast, sovereignty remains and has arguably become a more a central argument in the 'more or less Europe' debate in the national media.[125] Over time, more and more nuanced safeguards are built into the Treaties to maintain a division of powers between the Member States and the Union, often in the name of protecting or restraining the sovereignty of the Member States.[126]

Neil Walker identifies sovereignty 'as a speech act' and argues that 'its capacity to make a difference to the world depends upon its plausibility and its acceptance as a way of knowing and ordering the world, which in turn depends upon its status as an "institutional fact" – a fact whose authenticity and credibility depends upon the internalisation by key actors of a complex of rules and expectations which support an subscribe to the sovereign claim.'[127] By refusing consent to international agreements at conclusion stage, the EP took a stand outside the exclusive interpretative authority of both the Member States and the European Union. External relations are outside of the realm, in which both the Member States in the national context and the EU, notably the CJEU, have for many years interpreted the sovereignty relations in their own constitutional terms. In the *Lisbon Treaty* ruling, the GFCC effectively denied as recently as 2009 that the EP could (ever) make any meaningful claim to represent EU

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[123] Para 231.
[124] ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM (2009); Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUROPEAN LAW JOURNAL 259 (1995). See also NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH (1999). Ingolf Pernice, *Die Europäische Verfassung*, 1 WALTER HALLSTEIN-INSTITUT PAPERS (2012), 5.
[125] Recently with regard to the ECHR: http://www.bbc.co.uk/news/uk-politics-25535327; with regard to the EU: news.bbc.co.uk/hi/english/.../the_countries.stm; see also the Economist's briefing 'Europe's populist insurgents – Turning rights' of 4 January 2014.
[126] See e.g. the documents submitted, considered, and drafted by the Convention on the Future of Europe. According to a search by the author on http://european-convention.eu.int/, 2,050 of these documents refer to the terms 'sovereign' or 'sovereignty'.
[127] Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION – ESSAYS IN EUROPEAN LAW (Neil Walker (ed.), 2003), 3-32, at 7.

citizens.[128] By involving additional key actors, *i.e.* other international actors, the EP brings an external arbiter into the game. This is a way of consolidating and perpetuating its position beyond the reach of the Member States. Parliament's strategy seems to work. The US has demonstrated an increased interest in the EP that comes with its power to stop international agreements.[129] Not only the above-discussed TFTP (up for renewal in 2015), the PNR agreement (up for renewal in 2019), and ACTA, but also the Transatlantic Trade and Investment Partnership (TTIP), for which negotiations started in July 2013, and the US-EU Data Privacy and Protection agreement (DPPA), under negotiation since 2011, are subject to consent by Parliament. With the US accepting Parliament's relevance in international relations one key actor has adapted its expectations and confirms the credibility of the claim of the EP. Furthermore, having a voice in external relations has become more and more important to maintain effective representation of citizens in an interconnected world, where internationally agreed decisions directly determinate the position of individuals.

Until the EP's refusals, the most well debated act of contestation of an EU institution with external consequences has been the CJEU's rulings in the first *Kadi* appeal of 2008.[130] In *Kadi*, the Court annulled the EU legal instruments that gave effect to a UN Security Council Resolution. It was an act to protect the rule of law within the EU legal order, but it was not backed by democratic will. The EP's acts of contestation are of a different order. They are a claim to represent EU citizens. Furthermore, they are not aimed at protecting specific individuals, but assert the right to engage in general policy making. The link between the EU and its citizens has since the beginning been central to the CJEU's narrative of original rights. In a very positive reading of this narrative, direct effect and primacy have taken 'Community law out of the hands of the politicians and bureaucrats and to give it to the people' and to 'enable ordinary men and women to savour the fruits of integration'.[131] Only this has remained largely a legal

[128] GFCC, Lisbon Treaty decision.
[129] Kristin Archick, *The European Parliament*, CONGRESSIONAL RESEARCH SERVICE 7-5700, 29 July 2013; see also: http://euobserver.com/economic/120604.
[130] Case C-402/05 P & C-415/05 P Kadi and Al Barakaat v Council and Commission, recently confirmed in Case C-584/10 P, C-593/10 P & C-595/10 P, Commission, Council and UK v Kadi, judgment of 18 July 2013.
[131] GIUSEPPE FEDERICO MANCINI and DAVID T. KEELING,– Language, Culture and Politics in the Life of the European Court of Justice, 1 Colum. J. Eur. L. 397 (1994-1995). At the same time, it is worth acknowledging that in practice few private individuals (or public interest groups) bring direct actions

narrative. If the EP was able to strengthen in particular the fictitious link which has in many ways been lagging behind the CJEU's legal construction of an autonomous (sovereign?) legal order this would give true popular dimension to that construction.

4. Conclusions: External Contestation and its Internal Consequences

The EU differs from international organisations not only internally with regard to the intensity with which it determines the legal heritage of its subjects (both in scope and in quality), but also with regard to the quality of its international presence, confirmed by its state-like position in certain functional legal regimes. Since Lisbon, the EP has voiced for the first time on the international plane a (subjective) claim to speak for 'a European polity'.

Despite the above-discussed limitations of the legitimacy of the EP, within the EU it is *the* formal institutional manifestation of the European polity. Substantive rights under EU law combined with internal and external judicial control offer sophisticated mechanisms against abuse and confer certain legitimacy despite the low score as regards the symbolic function. Yet, while constitutional constraints in the EU Charter of Fundamental Rights and in the ECHR back Parliament's claim to be a legitimate actor and contribute to its institutional capacity to represent its citizens they cannot replace either political participation or democratic representation. Similarly, the CJEU's claim that the EU legal order is founded on original rights, albeit since the beginning based on a direct connection with individuals through directly effective supreme rights under EU law, remains a legal constructions without the popular backing of EU citizens. The EP's external acts of contestation may strengthen the fictional link between the EP and the EU citizens. They have a qualitative effect on the legitimacy of the CJEU's claim that the EU is different and has a connection with its citizens different from international legal constructions. They also take this differentness beyond the internal debate to be experienced by external actors. The US as an important third country has already demonstrated an increased interest in the position of the EP.

When the EP, with its formally independent source of democratic legitimacy, exercises effective control over the EU's external relations. This may, on the one hand,

against the EU institutions and that preliminary references depend on the goodwill of national courts and do not allow for third party interventions.

create tension with the recent reemphasis of state sovereignty in the national context. On the other, it may lead EU citizens to feel represented by the EP in the international relations context. In an positive reading, the EP could offer external political liberty to EU citizens and give them a hitherto lacking ability to contest international law-making. The link between EU citizens and the EP may in particular be reinforced by the relative absence of representation by national parliaments in the international context and by the absence of opposing national contexts, which may allow individuals to identify with their 'Europeanness'. Ultimately, this strengthens the popular element in the CJEU's narrative that the EU possesses original sovereign power. It is one among many steps that contribute to a better identification of citizens with the EP. Yet, external visibility should not be underestimated; it has always been a core concern within the EU sovereignty debate.