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# *How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures*

Christina Eckes\*

*The European Parliament's (EP) 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 Court of Justice of the European Union's (CJEU) implicit claim that the EU possesses original (sovereign) rights. This article 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.*

## **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.<sup>1</sup> At the same time, the Union's ability to conduct its own external relations remains under

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<sup>1</sup> 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).

constant pressure, both from the outside and from the inside. Only states can be “primary subjects” of international law, and only they possess non-delegated rights.<sup>2</sup> 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.<sup>3</sup> And as such, the Union continues to be seen as exercising delegated rights and, at least to some extent, as being penetrable since beyond the organization EU member states remain the ultimate point of reference as sovereign entities.<sup>4</sup> This is the outside pressure. The inside pressure, which is often openly or implicitly justified with reference to sovereignty, is member states’ explicit intention and continuous effort to remain visible—next to, in the background, and in the forefront of the Union. This becomes apparent, for example, in the explicitly codified parallel nature of Common Foreign and Security Policy (CFSP) competences,<sup>5</sup> and in the member states’ preference for mixed agreements.<sup>6</sup> This is the setting in which EU institutions conduct the EU’s external relations.

The European Union’s participation in international relations is conspicuously absent from the sovereignty debate within the EU. The body of scholarly literature focuses on the EU internally, and very different conclusions are drawn as to whether or not member states have lost sovereignty, whether the EU has acquired it, whether it can be shared in some way, or whether we have entered a “post-sovereign” era.<sup>7</sup> With regard to the EU’s relationship with the rest of the world, scholars often speak of “autonomy” rather than sovereignty.<sup>8</sup> 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 specific meanings 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<sup>9</sup> and grasps the emotional and cultural dimension of the fear of losing power and ultimately relevance

<sup>2</sup> ANTHONY CARTY, *PHILOSOPHY OF INTERNATIONAL LAW* 81 (2007). See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, Apr. 11, 1949, discussed below.

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

<sup>4</sup> Catherine Brölman, *A Flat Earth? International Organizations in the System of International Law*, in *INTERNATIONAL ORGANISATIONS* 183 (Jan Klabbers ed., 2006): “International organizations are neither sovereign nor equal.”

<sup>5</sup> 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*].

<sup>6</sup> See, e.g., Claus-Dieter Ehlermann, *Mixed Agreements: A List of Problems*, in *MIXED AGREEMENTS* 4, 6 (David O’Keefe & Henry G. Schermers eds., 1983). See also ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* 308 *et seq.* (2009).

<sup>7</sup> See esp. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999) and *SOVEREIGNTY IN TRANSITION—ESSAYS IN EUROPEAN LAW* (Neil Walker ed., 2003).

<sup>8</sup> See, e.g., Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76(2) *MOD. L. REV.* 254 (2013); *BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANISATIONS* (Ramses Wessel & Steven Blockmans eds., 2013), esp. Jan Willem van Rossem, *The Autonomy of EU Law: More is Less?* 13.

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

that is deeply rooted in national politics.<sup>10</sup> This continues to be the case despite all gradual changes of what being sovereign means in modern international relations.

The aim of this article is to shed light upon two aspects of EU integration in the field of external relations: first, how the Union's, and its institutions', participation in international relations may reflect back onto its internal constitutional landscape, and second, how this in turn may influence the Union's external position. The article considers the European Parliament's (EP) new role in the conclusion and negotiation of international agreements, which has allowed the EP to contest openly and externally the position of other EU institutions. The European Parliament, with regards to international relations, has on several occasions credibly given EU citizens a voice 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 Court of Justice of the European Union's (CJEU) narrative that the EU possesses original rights.

The article takes the point of view of the European Union. "External" refers consequently to the outside of the Union, i.e., international relations and international law. "Internal" or "domestic" mean within the EU and under EU law. The latter includes the relationship between the member states and the EU, as well as the relationship between the EU institutions.

Section 2 conducts an empirical investigation of the EU Parliament's increased role in processes that lead to the conclusion of an international agreement. First, it explains the changes of the powers and role of the EP when the EU concludes international agreements—in law (Section 2.1) and in practice (Section 2.2). Some examples are well-known agreements, 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 instances of ordinary practice, such as trade agreements within the framework of the World Trade Organization (WTO). The discussion goes into considerable detail to illustrate that, despite the criticism that international relations remain secretive and dominated by the executive, the EP has managed effectively to represent EU citizens externally and it has been able to improve its involvement in the negotiations of international agreements and its internal access to information.

Section 3 evaluates the new powers and the role of the EP in the light of what they might mean for the EU Parliament's relationship with its citizens and what they might mean for the CJEU's (often implicit) claim that the EU possesses original, i.e., sovereign, rights. Section 3.1 examines the extent to which the EP meets the symbolic function of parliaments to maintain the fiction of representation. Section 3.2 highlights the general phenomenon that, in external relations, executives take over powers that are internally reserved to parliaments and tentatively contrasts the EP's role to the roles of national parliaments. Section 3.3 turns to the sovereignty debate in EU law and explains how the EP's strengthened role could give support to the CJEU's position. A conclusion summarizes the main finding that Parliament's strengthened

<sup>10</sup> DAVID MILLER, *CITIZENSHIP AND NATIONAL IDENTITY* (2000); DAVID MILLER, *ON NATIONALITY* (1995).

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.<sup>11</sup> About eighty 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 forty policy fields required the old co-decision procedure (which, post-Lisbon, was renamed "ordinary legislative procedure"). The European Council, which is a platform for expressing and negotiating intergovernmental interests by the representatives of the executives of member states, may remain the most powerful institution in international relations.<sup>12</sup> It authorizes the opening of negotiations, adopts negotiating directives, authorizes the signing of, and concludes, international agreements—acting in principle by the consensus of a qualified majority (subject to exceptions). However, the EU 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. The EU Parliament is not formally involved in the negotiations, but has the right to be informed during all the stages of the procedure<sup>13</sup> and, as we will see, has been able to assert this right. At the 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.

<sup>11</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 218(6)(a), 2008 O.J. C 115/47 [hereinafter TFEU] (explaining that art. 218(6)(a)(v) includes agreements that fall within the policy fields in which the ordinary legislative procedure applies).

<sup>12</sup> See also Section 4.3(c) below, including on the role of the Commission.

<sup>13</sup> TFEU, art. 218(10).

Democratic control can only be ensured if the EU Parliament is involved both at the negotiation and at the conclusion stage. Indeed, the rationale of article 218 of the Treaty on the Functioning of the European Union (TFEU) requires an extended involvement of the EP at negotiation stage. Advocate-General Bot seemed to make a similar point, when he argued that the EP's right to be informed during all stages of the procedure (art. 218(10) TFEU) exists across all policies, including CFSP, but is particularly extensive where the EP's consent is required for the conclusion of the agreement (art. 218(6) TFEU).<sup>14</sup> 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 publicly 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 the Parliament's role in the negotiations of international agreements beyond the strict wording of the Treaty.<sup>15</sup> The Framework Agreement adds, for example, that the "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."<sup>16</sup> 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.*"<sup>17</sup>

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 well 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 initialised, 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 parties*, subject to the originator's consent.<sup>18</sup>

<sup>14</sup> C-658/11, Parliament v. Council, op. AG Bot Jan. 30, 2014, ¶¶ 142–144.

<sup>15</sup> Framework Agreement on relations between the European Parliament and the Commission, 2010 O.J. L 304/47, Annex II [hereinafter Framework Agreement].

<sup>16</sup> *Id.* Annex III(ii)(23) (emphases added).

<sup>17</sup> *Id.* Annex III(ii)(24) (emphasis added).

<sup>18</sup> *Id.* Annex III(iii) (emphases added).

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.<sup>19</sup>

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 time pressure happens both when the EU acts externally (*see infra*) 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, the strength of the executive lies in its ability 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. Not only is the commission asked to react to the EP's views but it is required to justify the reasons why these comments were not made part of the negotiating directive.

## 2.2. The facts: the European Parliament's involvement in practice

### (a) *The TFTP, ACTA and PNR Agreements: exceptionally problematic cases?*

In the four years following the entry into force of the Lisbon Treaty, the EU 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.<sup>20</sup> Most voices have criticized the secretive negotiations and the exclusion of Parliament, as well as the potential difficulties that the Union might face as an international actor if, at the last minute, it is unable to 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 had entered into force, the EP showed its teeth by vetoing the first EU-US TFTP agreement.<sup>21</sup> The agreement falls within an area where, before

<sup>19</sup> The agreement between Council and Parliament also confirms ORCON as the basic principle of handling classified information. See 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, Sept. 13, 2012, P7\_TA(2012)0339, art. 3(4): "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."

<sup>20</sup> See, e.g., Valentina Pop, *Sighs of Relief as EU Parliament Approves "Swift" Deal*, EU OBSERVER (July 8, 2010, 3:35pm), available at <http://euobserver.com/foreign/30447>; Benjamin Fox, *Acta in Tatters after MEPs Wield Veto*, EU OBSERVER (July 4, 2012, 7:47pm), available at <http://euobserver.com/political/116866>; Deirdre Curtin, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, 50(2) COMM. MKT L. REV. 423 (2013); Marieke de Goede, *The SWIFT Affair and the Global Politics of European Security*, 50(2) J. COMM. MKT STUD. 214 (2012).

<sup>21</sup> 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, 2010 O.J. L 8/11 (hereinafter TFTP I).



Lisbon, the EU Parliament did not have any say in the process that cumulated in the conclusion of international agreements, i.e., the former third pillar.<sup>22</sup> Since Lisbon, the policies formerly falling within the third pillar are part of the Union's AFSJ, and the greatest share of AFSJ provisions apply the ordinary legislative procedure, which means, as previously explained, that the conclusion of international agreements requires parliamentary consent and gives the EU Parliament a right to be informed during all stages of the negotiations. The EU–US TFTP I agreement was 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.<sup>23</sup> 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.<sup>24</sup> Indeed, about two and a half months before the entry into force of the Lisbon Treaty, the EU 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 provided with so little information that it could not engage with the existing draft.<sup>25</sup> Three months after the entry into force of the Lisbon Treaty (the agreement had already provisionally entered into force),<sup>26</sup> the EU Parliament then refused its consent, by a vote of 378 to 196 (with 31 abstentions).<sup>27</sup>

Although the refusal was ostensibly aimed to protect the data protection rights of EU citizens, it was also widely seen as a political move.<sup>28</sup> 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.”<sup>29</sup> There are two elements to President Buzek's statement. First, he specifically calls on the member states' governments to accept the EU 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 the Parliament's new powers concerning international

<sup>22</sup> Maastricht Treaty Establishing the European Union, arts. 24 and 38, 1992 O.J. C 191/1; 31 I.L.M. 253 [hereinafter TEU]. The former third pillar first covered ‘Justice and Home Affairs’ and later ‘Police and Judicial Co-operation in Criminal Matters’.

<sup>23</sup> SWIFT is an inter-service banking company, which is used in roughly 80 percent of all international transactions. See also Gloria Fuster, Paul De Hert, & Serge Gutwirth, *SWIFT and the Vulnerability of Transatlantic Data Transfers* 22 INT'L REV. L., COMPUTERS & TECH. 191 (2008).

<sup>24</sup> Christian Kaunert, Sarah Leonard, & 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 EUR. SECURITY 474, 488 (2012).

<sup>25</sup> EU Parliament Resolution of Sept. 17, 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing, Doc. No. P7\_TA(2009)0016.

<sup>26</sup> The TFTP I agreement, *supra* note 21, provisionally entered into force on Feb. 1, 2010.

<sup>27</sup> On Feb. 11, 2010. See, e.g., European Parliament, *SWIFT: European Parliament Votes Down Agreement with the US*, Press Release (Feb. 11, 2010).

<sup>28</sup> See, e.g., Jörg Monar, *The Rejection of the EU–US SWIFT Agreement by the European Parliament: A Historic Vote and Its Implications*, 15 EUR. FOREIGN AFF. REV. 143 (2010).

<sup>29</sup> European Parliament, EP President Jerzy Buzek on the Rejection of the SWIFT Interim Agreement by the European Parliament, Press Release (Feb. 11, 2010).



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."<sup>30</sup> The Parliament was left with only one week to draft a response.<sup>31</sup> Second, and in the present context most importantly, President Buzek emphasized that the Parliament will act according to *its own assessment* and in order to reflect *the concerns of Europe's citizens*. This demonstrates the Parliament's 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 agreement, and thus signaled the recognition of the importance of such an agreement. It also submitted recommendations regarding the content of the TFTP,<sup>32</sup> and in May 2010 the Council authorized the Commission to (re)start the negotiations on a second TFTP agreement, which was swiftly signed in a slightly amended version of the original TFTP agreement.<sup>33</sup> Changes introduced after the Parliament had voted it down include, for example, the vetting of information requests by Europol.<sup>34</sup> After taking into account the considerations of the various committee opinions the Parliament gave its consent to an amended TFTP II agreement on July 8, 2010,<sup>35</sup> with the agreement entering into force shortly thereafter.<sup>36</sup> The EU 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 the 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,<sup>37</sup> and the Council

<sup>30</sup> European Parliament, *Legal Opinion of the Legal Service of the EP*, Doc. No. D(2010)5811, available at <http://www.statewatch.org/news/2010/feb/ep-libe-cttee-opinion-legal-service-eu-usa-swift.pdf>. Compare Framework Agreement.

<sup>31</sup> 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, 2012 E.C.R. II-215.

<sup>32</sup> 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, of May 5, 2010, Doc. No. P7\_TA(2010)0143.

<sup>33</sup> 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, 2010 O.J. L 195/5, signed June 28, 2010.

<sup>34</sup> 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), at 18.

<sup>35</sup> Monar, *supra* note 28, at 143.

<sup>36</sup> On 1 August 2010.

<sup>37</sup> Commission Proposal for a 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, of June 24, 2011, COM(2011) 380 final.

swiftly adopted the appropriate decision to conclude ACTA.<sup>38</sup> As in the case of the TFTP II agreement, the 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 the Parliament to refuse its consent because of “the potential threats to civil liberties.”<sup>39</sup> Furthermore, the Parliament experienced an unprecedented direct reaction of 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.<sup>40</sup> After the amounting public controversy and rather late in the negotiations, the Directorate-General for Trade (DG Trade) recognized the need to give both the public and the EP more information. It published an online digest of all the answers that it had given to all the questions tabled by MEPs. On US Independence Day in 2012, Parliament declined to give its consent, in line with the recommendation made by its rapporteur.<sup>41</sup> According to the EP’s legislative resolution, the explicit reasons for the rejection included the failure of the Council and the Commission to inform the Parliament adequately and on time. Hence, beside the issues concerning the controversial substantive content of ACTA,<sup>42</sup> one reason for the refusal to consent was again that the Parliament had been denied access to a range of key documents. In particular, the negotiating mandate had not been shared with the Parliament.<sup>43</sup> 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* of the TFTP I agreement took place *before* the entry into force of the Lisbon Treaty, while only the conclusion took place thereafter. Hence, while it is a notorious case, the TFTP I agreement is not representative of the involvement of the Parliament at the negotiation stage *following* the increase of its powers under the

<sup>38</sup> 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.

<sup>39</sup> David Martin, *Recommendation on the Draft Council Decision on the Conclusion of the ACTA Agreement*, Doc. No. A7-0204/2012, June 6, 2012, at 6, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0204+0+DOC+PDF+V0/EN>.

<sup>40</sup> See ‘Support for ACTA wanes following mass protests, by Max Rowlands’, 21(4) STATEWATCH J. (2011), available at <http://database.statewatch.org/print.asp?aid=31752&>.

<sup>41</sup> European Parliament legislative resolution of July 4, 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, P7\_TA(2012)0287. See also European Parliament, European Parliament rejects ACTA, Press Release (July 4, 2012) and Charles Arthur, *Acta Down, But Not Out, as Europe votes Against Controversial Treaty*, THE GUARDIAN (July 4, 2012).

<sup>42</sup> Christina Eckes, Elaine Fahey, & Machiko Kanetake, *International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)*, CURRENTS: INT’L TRADE L.J. 20 (2013).

<sup>43</sup> 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. See Case T-301/10, Sophie in ‘t Veld.

Lisbon Treaty. The agreement highlights the broader problem of parliamentary exclusion in international negotiations. The negotiations of ACTA took place both pre- and post-Lisbon. They 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.

**(b) “Business as usual”: concluding international agreements in institutional cooperation**

The EU Parliament's role in international negotiations has changed. Recent practice seems to indicate that the 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.<sup>44</sup>

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 than ACTA. The need for a new EU–US PNR agreement arose out of the entry into force of the Lisbon Treaty, which had changed the way the EU deals with counter-terrorism issues.<sup>45</sup> The third PNR agreement dated back to 2007 and required parliamentary approval for it to remain in force. The Parliament had longstanding concerns about privacy and other civil liberties, which indeed date back to the first PNR agreement of 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 in its earlier resolutions.<sup>46</sup> Following this postponement, the Commission issued a recommendation to the Council for the opening of negotiations of a new EU–US *data protection* agreement.<sup>47</sup> Furthermore, in September 2010, the Commission issued a communication on the global approach to transfers of PNR data to third countries,<sup>48</sup> and the Parliament responded by issuing a second resolution explaining its general position on the transfer of PNR data to third countries.<sup>49</sup> In this second resolution concerning the fourth PNR agreement, the Parliament noted that the Commission's communication and recommendation regarding PNR reflected important elements contained in previous resolutions of the EP on the subject.<sup>50</sup> After reiterating its

<sup>44</sup> See Framework Agreement.

<sup>45</sup> CIAN MURPHY, *EU COUNTER-TERRORISM LAW—PRE-EMPTION AND THE RULE OF LAW* (2012).

<sup>46</sup> See EP Resolution of May 5, 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, Doc. No. P7\_TA(2010)0144.

<sup>47</sup> See European Commission, *European Commission Seeks High Privacy Standards in EU–US Data Protection Agreement*, Press Release, IP/10/609, May 26, 2010. NB: This recommendation was partly declassified on July 23, 2010, though the operative part of the recommendation is still unavailable.

<sup>48</sup> European Commission, *On the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries*, Communication No. COM(2010) 492 final, Sept. 21, 2010.

<sup>49</sup> EP Resolution of Nov. 11, 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, Doc. No. P7\_TA(2010)0397.

<sup>50</sup> *Id.* under indent 7 the EP lists its previous resolutions on previous PNR agreements.

position concerning proportionality, data mining, and other PNR related issues the 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.”<sup>51</sup> The Council authorized the Commission to negotiate the new agreement on December 2, 2010,<sup>52</sup> 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.”<sup>53</sup>

About a year later, the Commission initialed the agreement on behalf of the EU,<sup>54</sup> and the Council signed the fourth EU–US PNR agreement in December 2011.<sup>55</sup> 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,<sup>56</sup> submitted her recommendation to Parliament to withhold consent to the EU–US PNR agreement.<sup>57</sup> She argued that the agreement did not meet the criteria set out in the two 2010 EP resolutions and was contrary to the existing EU law.<sup>58</sup> In particular, the agreement infringed EU and national data protection legislation. However, the rapporteur did not criticize the involvement of the Parliament in the negotiations of the fourth EU–US PNR agreement. The committee departed from the rapporteur’s recommendation and suggested to the Parliament to give its consent.<sup>59</sup> The Parliament approved the agreement by a vote of 409 to 226, with 33 abstentions.<sup>60</sup>

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

<sup>51</sup> *Id.*

<sup>52</sup> See European Commission, New EU–US Agreement on PNR Improves Data Protection and Fights Crime and Terrorism, Press Release IP/11/1368 (Nov. 17, 2010).

<sup>53</sup> Kristin Archick, *The European Parliament*, Congressional Research Service 7-5700 (July 29, 2013), at 13.

<sup>54</sup> See European Commission, Press Release IP/11/1368, *supra* note 52.

<sup>55</sup> European Council, Council Gives Green Light for the New EU–US Agreement on Passenger Name Records (PNR), Press Release No. 184454/11, Presse 490 (Dec. 13, 2011).

<sup>56</sup> Sophie in ‘t Veld was appointed as rapporteur on December 5, 2011.

<sup>57</sup> 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, of 3 April 2012, A7-0099/2012. See also ALDE press release of 1 February 2012, EP Rapporteur In ‘t Veld set to reject new EU-US Passenger Name Records Agreement (PNR), 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/>.

<sup>58</sup> S in ‘t Veld, Draft recommendation, *supra* note 57 and, for more details, see Gerrit Hornung & Franziska Boehm, Comparative Study on the 2011 draft 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, European Free Alliance (Mar. 14, 2012), available at <http://www.statewatch.org/news/2012/mar/eu-usa-pnr-study-green-group.pdf>.

<sup>59</sup> Recommendation of Apr. 3, 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, Doc. 17433/2011–C7-0511/2011–2011/0382(NLE).

<sup>60</sup> See European Parliament, Parliament Gives Green Light to Air Passenger Data Deal with US, Press Release Apr. 19, 2012.

the rapporteur, who had demonstrated in the past her concern for transparency and Parliament's involvement, is an indication that the Parliament was able to exercise democratic control over the negotiation of the fourth EU–US PNR agreement. This conclusion is confirmed by the 2011 permanent PNR agreement with Australia.<sup>61</sup> After a Commission recommendation to authorize the opening of negotiations, the Council quickly issued its authorization, and after equally swift negotiations, the Council signed the EU–Australia PNR agreement on September 29, 2011.<sup>62</sup> Following a positive recommendation by the LIBE Committee, the Parliament consented on October 27, 2011.<sup>63</sup> With regard to the involvement of Parliament, rapporteur in 't Veld noted that cooperation between the Parliament, the Commission, and the Council worked well. She stated that “this example demonstrated that if the institutions work together, Europe is a force to be reckoned with.”<sup>64</sup> She saw the agreement with Australia as a possibility of establishing a new trend, in the hope to reach better agreements with the US and Canada, as well.

Furthermore, the regular conclusion of other international agreements, such as (often less controversial) trade agreements, illustrates that the cooperation between the Parliament, the Council, and the Commission can work much more effectively than in the problematic cases discussed above. Several agreements with the Russian Federation, which are all part of the bilateral agreements concluded in anticipation of Russia's accession to WTO<sup>65</sup> and which were explicitly welcomed by MEPs, may serve as examples.<sup>66</sup> The package is meant to secure better terms for EU firms doing business in Russia. On December 9, 2011, for instance, the Council concluded an agreement with Russia on trade in parts and components of motor vehicles.<sup>67</sup> The deal protects EU auto-parts companies hit by restrictive Russian measures that will remain in force even after Russia has joined 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 3 percent a year, Russia will reduce its import duties for EU car parts by a commensurate

<sup>61</sup> See also European Commission, On the Global Approach, *supra* note 48, on the importance of a global approach to PNR data transfers with third countries.

<sup>62</sup> See Council of the European Union, Signature of the EU–Australia agreement on Passenger Name Records (PNR), Press Release No. 14664/11, PRESSE 330 (September 29, 2011).

<sup>63</sup> European Parliament legislative resolution of Oct. 27, 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, P7\_TA(2011)0470.

<sup>64</sup> See Alliance for Liberals and Democrats for Europe Group, EU–Australia PNR agreement to get green light, Press Release (Oct. 27, 2011), available at <http://www.alde.eu/press/press-and-release-news/press-release/article/eu-australia-pnr-agreement-to-get-green-light-37708/>.

<sup>65</sup> For example, agreements on car parts, on wood exports, on raw materials, and on services.

<sup>66</sup> See, e.g., European Parliament, Trade MEPs Back Deals with Russia that Improve Trade Terms for the EU, Press Release (May 30, 2012).

<sup>67</sup> 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.

amount.<sup>68</sup> The agreement needed the consent of the Parliament in order to enter into force. The rapporteur of the committee on international trade recommended that the Parliament consent to the agreement.<sup>69</sup> Parliament duly followed this recommendation and gave its consent on July 4, 2012.<sup>70</sup> Neither the Parliament's report nor the final legislative resolution of the Parliament indicates concerns over the lack of the Parliament's involvement in the negotiations of the EU–Russia agreements.

At the same time, an assessment of the EU Parliament's strengthened role, in law and in practice, in the negotiation and conclusion of international agreements cannot ignore the broader issue of the Parliament's limited access to confidential information and how this restraints its ability to deliberate as an institution and conduct public debates in the context of external relations. As we have seen, the Framework Agreement on Relations between the EP and the Commission of October 2010 has given the 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 CJEU.<sup>71</sup> 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,<sup>72</sup> are not unreasonable. The debate illustrates that transparency requirements and judicial safeguards, offered in a democratic society with regard to the internal law-making process, cannot be taken for granted when such law-making is moved outside 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 "insiders" and "outsiders" and gives the former a sense of inclusion and power. The problems are comparable to agreements hammered out behind closed doors that

<sup>68</sup> *European Parliament Approves Better Terms for EU Firms Doing Business with Russia*, THE SOFIA GLOBE (July 4, 2012), available at <http://sofiaglobe.com/2012/07/04/european-parliament-approves-better-terms-for-eu-firms-doing-business-with-russia/>.

<sup>69</sup> Pawel 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, Doc. No. 16806/2011—C7-0517/2011—2011/0324(NLE). See also *European Parliament Approves Better Terms*, *supra* note 68.

<sup>70</sup> European Parliament legislative Resolution of July 4, 2012 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, Doc. No. P7\_TA(2012)0285.

<sup>71</sup> Case C-25/94, *Commission v. Council* (EAO), 1996 E.C.R. I-1469, ¶¶ 49–50. The Council and the Commission had concluded an inter-institutional agreement that regulated the exercise of voting rights within EAO, 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: Thomas Beukers, *Law, Practice and Convention in the Constitution of the European Union* (unpublished Ph.D. dissertation, University of Amsterdam, Apr. 21, 2011) (on file with the university archive), at 212 and 242.

<sup>72</sup> Case T-301/10, *Sophie in 't Veld*.



then pass at first reading within the ordinary legislative procedure.<sup>73</sup> This practice has indeed been severely criticized for lack of openness.<sup>74</sup>

In short, 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 by means of prominent acts of contestation and internally consolidated better involvement. The two forms of actions can be distinguished in that the Parliament externally disputes the EU position (contestation), rather than engaging (being able to engage) internally in the political process. In high profile cases, the EU Parliament has been able to call the executives' position into question and take an active stand against (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 in the academia. The Parliament has put itself on the map of international relations. Yet above all, these cases illustrate the limited role of the Parliament prior to 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, the EP has been able to effectively claim an internal and external role in the negotiation and conclusion of international agreements.

We must sound a note of caution. It remains open to question whether and to what extent the 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 the Parliament has the opportunity to participate fully in the negotiation stage, it is better positioned to fulfill its core function of deliberating and framing the issues in internal political arena. Much of the 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 had been excluded from their negotiation. This was a visible and public rejection of what the other institutions and the involved third countries had agreed, and such a stance will become much less likely if the Parliament is involved and listened to behind the scenes. Further, journalists report conflict situations more readily and more extensively than they do consensual situations.<sup>75</sup> However, there are signs that the EP will keep up its new visible role in external relations. In December 2013, the LIBE Committee, for example, published a report on the US National Security Agency (NSA) surveillance program.<sup>76</sup> The report is a proposal made to the EP, which will debate it and vote on it. In the meantime, LIBE has asked Edward Snowden to testify by video link.<sup>77</sup> The report

<sup>73</sup> For more details, see European Council, Guide to the Ordinary Legislative Procedure (Oct. 2010), available at <http://consilium.europa.eu/uedocs/cmsUpload/QC3109179ENC.pdf>.

<sup>74</sup> See, e.g., recently and with many references, Carrera et al., *supra* note 34, at 24–31.

<sup>75</sup> Bo Laursen, *Transparency in the Council of the European Union: Why Journalists Don't Get the Full Picture*, 14 JOURNALISM 771 (2012).

<sup>76</sup> 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, Doc. No. 2013/2188(INI), (Dec. 23, 2013).

<sup>77</sup> Nikolaj Nielsen, *Snowden Set for EU Parliament Video Link*, EU OBSERVER (Jan. 10, 2014), available at <http://euobserver.com/justice/122687>.

expresses a strong condemnation 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.<sup>78</sup>

The following section reflects on the broader consequences of the EP's newly found international voice. Assuming that the 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.<sup>79</sup> Their institutional function relates to their effectiveness: parliaments justify their existence when they are effective and useful. The symbolic function focuses on the imagined link with their electorate. The institutionalization of the above-described fiction of internal sovereignty creates an imagined link of power and people. Parliaments fulfill the symbolic function if they can create and maintain a fiction of representation and legitimacy (*Repräsentations- und Legitimationsglaube*).

Since 1979, the EP has been directly elected and formally independent from national democratic representation. Article 10(1)2 TEU puts it simply: "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 since 1979.<sup>80</sup> While the problem is nearly universally accepted, the interpretation differs. Both an emerging *demos* and the impossibility to ever establish any such collectivity have been diagnosed.<sup>81</sup> At the same time, a sovereign European people may not be the aim, and the EP may not endeavor to replace national parliaments, but rather to cooperate with

<sup>78</sup> Dan Bilefsky, *E.U. Panel Invites Snowden to Testify on Privacy Breaches*, N.Y. TIMES (Jan. 9, 2014).

<sup>79</sup> MARCUS OBRECHT, NIEDERGANG DER PARLAMENTE? TRANSNATIONALE POLITIK IM DEUTSCHEN BUNDESTAG UND DER ASSEMBLÉE NATIONALE 16 (2009), with reference to Werner Patzelt, *Einführung in die Politikwissenschaft* 63 (2003).

<sup>80</sup> 1979: 61.99%; 1984: 58.98%; 1989: 58.41%; 1994: 56.67%; 1999: 49.51%; 2004: 45.47; 2009: 43%. See European Parliament, *Turnout at the European Elections (1979–2009)*, available at [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](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.

<sup>81</sup> Neil McCormick, *Sovereignty and After*, in *SOVEREIGNTY IN FRAGMENTS—THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT* 167 (Hent Kalmo & Quentin Skinner eds., 2011). JÜRGEN HABERMAS, *ZUR VERFASSUNG EUROPAS—EIN ESSAY* (2011). *Contra* GFCC, Maastricht Treaty Decision, judgment of Oct. 12, 1993, BVerfGE 89, 155, Cases 2 BvR 2134/92, 2 BvR 2159/92 and GFCC, Lisbon Treaty Decision, judgment of June 30, 2009, BVerfG, 2 BvE 2/08.

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 through the EP than through their national parliaments.

The powers of the EP have increased with every EU Treaty amendment, which often reflected incremental changes in practice. Formally, important leaps include 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, the Parliament has not only become formally empowered; it has also effectively shown its teeth in internal institutional battles. Moreover, the EP is an 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 vote along transnational European parties lines rather than on the basis of their nationality.<sup>82</sup> Much has also been done to improve the accountability link between the Parliament and the Commission. However, neither the increased powers nor political debate have so far solved the problem of alienation between the EP and the citizens whom it represents. At least at present, the EP cannot be said to fulfill the symbolic function to the same extent as national parliaments do. At the same time, in an external context, the EP has recently voiced a strong claim of representation that may convince its electorate 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, in 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 legitimized by the 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 inter-governmental interests are represented, and the Commission exercises delegated powers in external relations, the EP is elected by and represents EU citizens. The roles of both the EP and of national parliaments have 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., to speak for EU citizens in the EU's external relations, whereas the improved position of national parliaments is limited to the internal sphere, i.e., internal EU decision-making. The Parliament credibly 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.

Parliament's new external role raises questions as to how international recognition and effective external representation of EU citizens interact with the continuing internal symbolic weakness. Can the former compensate for the latter? Will citizens

<sup>82</sup> SIMON HIX, ABDUL G. NOURY, & GERARD ROLAND, *DEMOCRATIC POLITICS IN THE EUROPEAN PARLIAMENT* 3–5 (2007). Yet, an increase in MEPs coming from anti-European national parties is also perceivable in the EP.

feel better represented? At present, there is a mismatch between the weak fiction and the 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 disbelief collapses. And conversely, it may collapse if facts stray too far from the fiction that we want them to resemble.<sup>83</sup>

Fiction and reality must hence sufficiently resemble and confirm each other for both to be 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 adjusting the mismatch. Either the EP's influence on the EU's external relations will generate greater popular interest and a sense of being represented, or the tension between the weak internal fiction of popular sovereignty through the EP and the EP's 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 favor 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 a "we" as the European collective,<sup>84</sup> which is confronted with the other bargaining powers. And by extension, 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.<sup>85</sup> This may be particularly relevant in the external context because, as will be seen in the following section, in the international context, the EP seems to offer greater visibility and influence that are directly linked back to citizens rather than to national parliaments. On the other hand, national courts, politicians, and the media have in the recent past placed a new emphasis on the sovereignty of EU member states. This turn towards a more national perspective stands in contrast to an EP that self-confidently claims to represent EU citizens as a whole.

### 3.2. European Parliament in external relations: is it 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 the conclusion of international agreements is decisive for the democratic control over external relations. The

<sup>83</sup> EDMUND S. MORGAN, *INVENTING THE PEOPLE—THE POPULAR RISE OF SOVEREIGNTY IN ENGLAND AND AMERICA* 14 (1988).

<sup>84</sup> On the broader point of a duality of identity which allows individuals to feel allegiance to several groups, see Jürgen Habermas, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, 10 (2) *PUB. CULTURE* 397, 404 (1998) ("double coding of citizenship"). See also HABERMAS, *supra* note 81.

<sup>85</sup> Compare ABRAM DE SWAAN, *IN CARE OF THE STATE* 2 (1988).

position and influence of the EP can be contrasted with the involvement of national parliaments in concluding international agreements.<sup>86</sup> The general understanding is that national parliaments lose control through Europeanization and globalization (*Entparlamentarisierung*).<sup>87</sup> The debate has so far given more attention to Europeanization processes than to international law.<sup>88</sup> Indeed, within the internal sovereignty discussion, the focus has been on the decrease of member states' powers as a result of Europeanization and in particular the steady empowerment of the EP.<sup>89</sup> 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 Finnish and Dutch parliament.<sup>90</sup> In Germany, the *Lisbon Treaty* decision of the German Federal Constitutional Court (GFCC) also prodded the national parliament to take up a more active participant in the EU context.<sup>91</sup> Yet, when national parliaments exercise indirect influence by holding their representative accountable in the European Council and in the Council of the European Union 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 public visibility of national parliaments. If there is any public debate, it often does not go beyond a particular member state. Public international law instruments adopted by state members 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.<sup>92</sup> Yet, while these instruments are formally international law, the Treaty

<sup>86</sup> For more details, see OBRECHT, *supra* note 79.

<sup>87</sup> ANNETTE ELISABETH TÖLLER, EUROPAPOLITIK IM BUNDESTAG. EINE EMPIRISCHE UNTERSUCHUNG ZUR EUROPAPOLITISCHEN WILLENSBILDUNG IM EG-AUSSCHUSS DES 12. DEUTSCHEN BUNDESTAGES 50 (1995).

<sup>88</sup> See, e.g., PHILIP DANN, PARLIAMENTE IM EXEKUTIVFÖDERALISMUS (2004); NATIONAL PARLIAMENTS WITHIN THE ENLARGED EUROPEAN UNION—FROM "VICTIMS" OF INTEGRATION TO COMPETITIVE ACTORS? (John O'Brennan & Tapio Raunio eds., 2007); BRITAIN IN THE EUROPEAN UNION LAW, POLICY AND PARLIAMENT (Philip Giddings & Gavin Drewry eds., 2004).

<sup>89</sup> See, e.g., MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION—TOWARDS A POST-HOBBSIAN ORDER 159 (2001). For a concern about the erosion of sovereign power, including because of the involvement of Parliament, see HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union—Foreign Policy* (July 22, 2013), available at <https://gcn.civilservice.gov.uk>.

<sup>90</sup> See, e.g., TEU, art. 10(2), 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.

<sup>91</sup> For the most recent legislative implementation of the GFCC's guidelines, see Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union (EUZBBG), BGBl. I S. 2170, July 4, 2013. This law repeals the EUZBBG—BGBl. I S. 311, 1780, Mar. 12, 1993, which had been changed three times to extend the control powers of the German parliament, including after the GFCC's *Lisbon Treaty* decision, *supra* note 81, and after the GFCC's ESM Treaty decision, judgement of September 12, 2012, 2 BVR 1390/12, see Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, BGBl. II S. 1006, Sept. 13, 2012 and Gesetz zur Änderung des EUZBBG, BGBl. I S. 3026, Sept. 22, 2009. For an English translation of the current version see Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union, available at [http://www.bundestag.de/htdocs\\_e/bundestag/committees/a21/legalbasis/euzbbg.html](http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg.html).

<sup>92</sup> 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, Mar. 20, 2012.

Establishing the European Stability Mechanism (ESM Treaty) and the Fiscal Compact should, for the purposes of the present discussion, be considered to be 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 notable exception, since certain comprehensive international agreements are negotiated as executive agreements.<sup>93</sup> 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 a legislative procedure if these agreements govern the political relations of the German Federation or concern a subject matter that falls under federal competence.<sup>94</sup> Similarly, the ratification of international agreements in France requires parliamentary approval.<sup>95</sup> In practice, however, the actual control and the ability to contest the actions of the executive differ. In parliamentary democracies, the particular relationship between governments and parliaments is characterized by the support of the majority of parliamentarians for the government in office. This is not necessarily the case in presidential systems. In both systems, parliaments are legally in the same position: they can deny their approval of 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, marginalize the minority parties behind the scenes.<sup>96</sup> Parliamentary inclusion, information sharing with the 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.<sup>97</sup> A comparison of the ratification processes of the Treaty establishing a Constitution for Europe (Constitutional Treaty)<sup>98</sup> 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 are formed depending on the outcome of direct elections. These elections are held every five years and have no formal connection 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

<sup>93</sup> This was the case for the TFTP agreement, the PNR agreement, and ACTA. See Archick, *supra* note 53, at 15 and Eckes et al., *supra* note 42.

<sup>94</sup> Grundgesetz für die Bundesrepublik Deutschland, Bundesgesetzblatt Teil III, 100–1, zuletzt durch Artikel 1 des Gesetzes vom 11. Juli 2012 (BGBl. I S.1478) geändert (GG), art. 59(2): "(1)(a) für Verträge, welche die politischen Beziehungen des Bundes regeln und (2)(b) für Verträge, die sich auf Gegenstände der Bundesgesetzgebung beziehen."

<sup>95</sup> 1958 CONST., art. 53.C (Fr.). The constitutional amendment of 1992 has improved the position of the Assemblée Nationale, see OBRECHT, *supra* note 79, at 177 *et seq.* The amendment has also strengthened the role of Parliament in the EU decision-making process, see 1958 CONST., art. 88-4.C (Fr.).

<sup>96</sup> See, e.g., for France: *Assemblée Nationale Statistiques*, available at: <http://www.assemblee-nationale.fr/14/seance/statistiques-14leg.asp>.

<sup>97</sup> OBRECHT, *supra* note 79, at 264–265.

<sup>98</sup> Treaty establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. C 310/01.



EP are unrelated to the spread of political powers in the Council, which shift more frequently. The Parliament offers a true political counterweight. Furthermore, its connection to the Commission remains loose. Elections to the EP are taken into account, but they do not directly determine the composition of the Commission.<sup>99</sup> After a proposal by the European Council,<sup>100</sup> the EP elects the President of the Commission,<sup>101</sup> and the Commission as a whole is responsible to Parliament.<sup>102</sup> For example, the Commission must answer the questions raised by the Parliament or individual MEPs.<sup>103</sup> For the 2014 elections to the EP, the European political parties for the first time nominated their frontrunners and candidates for Commission President.<sup>104</sup> The Lisbon Treaty has hence strengthened the EP's control over the Commission, but the two remain less intimately connected than in parliamentary democracies.

The EP has achieved an exceptional visibility and influence in external relations since the entry into force of the Lisbon Treaty. 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 the Parliament's ability to establish visibility in external relations. First, 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 states.

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

Third, in the examined instances of the TFTP agreement and ACTA, the EU Parliament was placed in the position of voting either aye 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 the conclusion stage is highly visible. It has allowed the Parliament to step out of the shadow of inter-institutional cooperation and take the position of an internationally visible player. However, with the improved cooperation arrangements, the Parliament may lose part of its newly established external visibility. Participating in the negotiations remains internal, and hence by definition is less visible. When the Parliament is

<sup>99</sup> TEU, art. 17(7).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* art. 14(1).

<sup>102</sup> *Id.* art. 17(8).

<sup>103</sup> *Id.* art. 230(2).

<sup>104</sup> The 2013 report on the NSA affair, *supra* note 76, came 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.

involved behind the scenes, all the participants—at least on the EU side—will 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.

Fourth, the Parliament is the strongest where an institutional issue is concerned (asserting its strengthened role in external relations) and when MEPs feel that they can politically benefit by taking a clear position on a salient issue. The majority within the EP depends after all on the political issue (party cohesion, as 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, the Parliament is (only) motivated by petty institutional concerns, 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, in the eyes of 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 the exercise of original (sovereign) rights. It could lend a popular backing to the CJEU's construction of EU law as a sovereign legal order.<sup>105</sup>

The EU was created as a construction of public international law. Consequently, in its internal foundations, it embraces the logic of state sovereignty which is inherent in modern international law.<sup>106</sup> 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-state law and by ignoring pre-existing international mechanisms that immediately determined the legal heritage of individuals,<sup>107</sup> the Court was able to differentiate its own “new legal order of international law.”<sup>108</sup> The European Treaties do not explicitly refer to the concept of sovereignty, either with regards to member states or to the Union. However, 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 enjoy a

<sup>105</sup> Most explicitly making the link to sovereignty, see FRANCIS JACOBS, *THE SOVEREIGNTY OF LAW—THE EUROPEAN WAY* (2007), available at [http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/9780521878876\\_HAML\\_Jacobs.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/9780521878876_HAML_Jacobs.pdf).

<sup>106</sup> See Case C-370/12, Pringle, 2012 E.C.R. I-756, ¶ 137 (per AG Kokott): “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.” This is a remarkable use of “sovereignty” for an AG.

<sup>107</sup> Public law that aims at regulating the activities and determine the legal position of individuals have increased tremendously since the 1960s but the ECHR is an example of a prominent instrument that existed at the time the CJEU made its argument.

<sup>108</sup> Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. I, at 12.

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”<sup>109</sup>) 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, however framed, without being deprived of its character as Community law and without the *legal basis of the Community itself* being called into question”<sup>110</sup>). Hence, the Court has left no doubt as to 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.<sup>111</sup>

As is well known, national perspectives on the separate, independent origin of EU law differ from the described perspective of the CJEU.<sup>112</sup> The isolated basic fact that the EU is vested with transferred sovereign rights is, in principle, implicitly or explicitly, accepted under national constitutional law.<sup>113</sup> The controversy relates to who is the sovereign that has authority over people and territory, rather than to 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.”<sup>114</sup> From the perspective of EU law one could argue that “the only exceptions are those entailed by membership of the EU.”<sup>115</sup> 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*

<sup>109</sup> Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 593, at 593–594, emphasis added.

<sup>110</sup> *Id.* at 585, emphasis added.

<sup>111</sup> *See esp.* TEU, art. 10(2): Citizens are directly represented at Union level in the European Parliament.

<sup>112</sup> Most prominent in recent times, see the GFCC's Lisbon Treaty ruling, *supra* note 81, which mentions “sovereign” or “sovereignty” in the substantive grounds 73 times (¶¶ 207–419); and in the UK, the EU Act 2011, § 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.

<sup>113</sup> Explicitly, *see, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 23 (Ger.) (hereinafter GG).

<sup>114</sup> 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]. *But see* 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.

<sup>115</sup> JACOBS, *supra* note 105, at 7.

*alia*, a so-called “sovereignty” clause (§ 18), intended to reaffirm the sovereign character of the legislative power of the UK Parliament. Section 18 explains what has all along been the position of the UK:<sup>116</sup> that EU law is “recognised and available” “only by virtue of” the EC Act 1972.<sup>117</sup> The title of § 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 the EU Parliament. The German Federal Constitutional Court, 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,<sup>118</sup> the starting point for the *Lisbon Treaty* decision (2009) was an alleged violation of individual rights.<sup>119</sup> However, the focus of the debate had shifted from individual rights in the earlier decisions<sup>120</sup> 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.<sup>121</sup> The GFCC expressed more clearly than ever 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 (i.e., only states can be sovereign), and that any sovereign rights exercised within the EU legal order are of a derivative character.<sup>122</sup> Indeed, the GFCC does not use “sovereign” in the EU context but speaks of “autonomy” and emphasizes that the member states “permanently remain the masters of the Treaties”.<sup>123</sup>

Scholars of EU law have long been writing about “divided” or “pooled” sovereignty.<sup>124</sup> Indeed, since this original conception of permanently transferred sovereign

<sup>116</sup> Factortame (No. 2) [1991] 1 A.C. 603 (*per* Lord Bridge).

<sup>117</sup> EU Act 2011, § 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.

<sup>118</sup> GFCC, *Solange I*, judgment of May 29, 1974, BVerfGE 37, 271 2 BvL 52/71; GFCC, *Solange II*, judgment of October 22, 1986, BVerfGE 73, 339 2 BvR 197/83; GG, art. 93(1)(4a).

<sup>119</sup> The right to cast a meaningful vote within the meaning of *id.* art. 38.

<sup>120</sup> See also GFCC, *Maastricht Treaty* decision, *supra* note 81.

<sup>121</sup> Both qualitatively and quantitatively: GFCC, *Lisbon Treaty* decision, *supra* note 81: 73 times “sovereign” or “sovereignty” in the substantive grounds (paras 207–419); GFCC, *Maastricht Treaty* decision, *supra* note 81: 54 times “sovereign responsibilities,” “sovereign powers,” “sovereign rights,” “sovereign territory,” “sovereign State,” and “sovereign equality with other States”.

<sup>122</sup> Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT L. REV. 1795, 1798–1799 (2009).

<sup>123</sup> GFCC, *Lisbon Treaty* decision, *supra* note 81, ¶ 231.

<sup>124</sup> SCHÜTZE, *supra* note 6; Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259 (1995). See also MACCORMICK, QUESTIONING SOVEREIGNTY, *supra* note 7; Ingolf Pernice, *Die Europäische Verfassung*, 1 WALTER HALLSTEIN-INSTITUT PAPERS 5 (2012).

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, an increasingly central argument in the “more Europe or less Europe” debate in the national media.<sup>125</sup> 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.<sup>126</sup>

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 and subscribe to the sovereign claim.<sup>127</sup>

By refusing consent to international agreements at the 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. As recently as 2009, in the *Lisbon Treaty* ruling, the GFCC effectively denied that the EP could (ever) make any meaningful claim to representing EU citizens.<sup>128</sup> 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. The EU Parliament's strategy seems to work. The US has demonstrated an increased interest in the EP that comes from its power to stop international agreements.<sup>129</sup> Not only the above-discussed TFTP (up for renewal in 2015), the PNR agreement (up for renewal in 2019), and ACTA are subject to the EP's approval, but so are 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. With the US accepting the 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 in maintaining effective representation of citizens in an interconnected world, where internationally agreed decisions directly determine the position of individuals.

<sup>125</sup> Recently with regard to the ECHR, see *European Court of Human Rights “Risk to UK Sovereignty”*, BBC NEWS (Dec. 28, 2013), available at <http://www.bbc.co.uk/news/uk-politics-25535327>. See also *Europe's Populist Insurgents—Turning Rights*, THE ECONOMIST (Jan. 4, 2014).

<sup>126</sup> See, e.g., the documents submitted, considered, and drafted by the Convention on the Future of Europe (<http://european-convention.eu.int/>). According to a search by the author on the Convention's website, 2,050 of these documents refer to the terms “sovereign” or “sovereignty.”

<sup>127</sup> Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION, *supra* note 7, 3, at 7.

<sup>128</sup> GFCC, *Lisbon Treaty decision*, *supra* note 81.

<sup>129</sup> Archick, *supra* note 53. See also Benjamin Fox, *US Enthusiastic About Trade Deal Despite Culture Opt-out*, EU OBSERVER (June 24, 2013), available at <http://euobserver.com/economic/120604>.

Until the EP's refusals, the best-debated act of contestation of an EU institution with external consequences had been the CJEU's rulings in the first *Kadi* appeal of 2008.<sup>130</sup> 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 from the start 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 . . . to give it to the people" and to "enable ordinary men and women to savour the fruits of integration."<sup>131</sup> However, this has remained largely only a legal narrative. If the EP were able, in particular, to strengthen the fictional link that had 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 organizations 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 European Parliament 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 are 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 European Convention on Human Rights back the Parliament's claim to being 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—although based, from the beginning, on a direct connection with individuals through directly effective supreme rights under EU law—remains a legal

<sup>130</sup> Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat v. Council and Commission*, 2007 E.C.R. I-6351, *conf'd* Case C-584/10 P, C-593/10 P & C-595/10 P, *Commission, Council and UK v. Kadi*, E.C.R., July 18, 2013.

<sup>131</sup> Giuseppe Federico Mancini & 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 against the EU institutions and that preliminary references depend on the goodwill of national courts and do not allow for third-party interventions.



construction 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 that its relationship to its citizens is different from international legal constructions. The EP's acts of contestation also take this difference outside the internal debate, and bring to bear on external actors. As an important third country, the US has already demonstrated an increased interest in the position of the EP.

On the one hand, when the EP, with its formally independent source of democratic legitimacy, exercises effective control over the EU's external relations, this stands in sharp contrast with the recent emphasis of national sovereignty. On the other hand, EU citizens may feel represented by the EP in the international relations context. On a 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 relationship 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, the EP's role in the international relations context strengthens the popular element in the CJEU's narrative that the EU possesses original sovereign power. This may be one among many steps that contribute to a better identification of citizens with the EP. However, external visibility should not be underestimated; it has always been a core concern within the EU sovereignty debate.