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Parliamentary Involvement in European International Relations

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I. INTRODUCTION

From a historic perspective, the argument about parliamentary involvement in foreign affairs continues the struggle between the ancient prerogatives of the monarch and the novel claims for democratic self-governance. Foreign policy was one of the last strongholds of royal powers which often seemed to be beyond the reach of the democratically elected parliamentarians – as is illustrated so well by the British legal concept of foreign affairs as a ‘Crown prerogative.’¹ Surprisingly at first sight, the democratisation of our national constitutional orders and the recent parliamentarisation of the European Union have not fundamentally reversed the picture. Parliamentary oversight of foreign affairs continues to trail behind the role of parliaments in domestic policies. Within the European Union, this relates not only to the Common Foreign and Security Policy with its largely intergovernmental design, but similarly extends to various aspects of external EC policies which in many cases retain limited parliamentary involvement. Is there a monarchic relic in the Union’s supranational constitutional order? Or does the analysis of parliamentary accountability of European foreign affairs rather point at an underlying conceptual specificity of external relations which justifies and guides the special constitutional treatment of EU international relations?

Any legal analysis of parliamentary powers in foreign affairs must assign the leading part to the parliamentary control of international treaties as the international equivalent of domestic

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¹ Which corresponds to the executive prerogative in foreign affairs in many other constitutional orders and is today of course embedded in the democratic system of the Westminster Parliament; for details see AW Bradley and KD Ewing, *Constitutional and Administrative Law* (13th ed, London, Longman, 2003) chapter 15.

laws. There are however important differences between the rigidity of domestic legal rules, whose adoption, interpretation and change follows much stricter procedural patterns than the often dynamic, evolutionary and practice-dominated international legal regimes, which the scrutiny of parliamentary control of international treaties must take into account (section II). Shared competences between the Member States and the European Community are a peculiar but central feature of the European legal order which gives national parliaments an integral role in international law-making whenever the Community and the Member States act jointly through the adoption of a ‘mixed agreement.’ This well-settled practice has recently been challenged by the European Union acting under the second and third pillar, with a failed attempt to take over the traditional function of the Member States and their national parliaments (section III). The entry into force of the Constitutional Treaty would not fundamentally reverse the picture of parliamentary involvement in international treaty-making at the European and national level – despite some important new rights for the European Parliament.

International relations are much less than domestic politics dominated by rule-making. The main regulatory instrument of the Community method are legal rules adopted by the European institutions, published in the Official Journal, transposed and implemented by national legislators and administrations and interpreted uniformly by the European court system. International relations however are primarily about the political positioning in favour or against something: North Korea will not give up its nuclear weapons, only because the European Union says so in its Official Journal. Instead, foreign policy requires the identification of strategic goals, the development and constant adaptation of methods of their realisation and implementation. You may call it diplomacy, but in any case it differs substantially from domestic politics. This does not imply that parliaments should be powerless in this respect, but their channels of influence are much more indirect, centred around their control of executive actors, the tentative projection of an original ‘parliamentary diplomacy’, budgetary control and exceptional cases of direct involvement (section IV). The persistence of the special treatment of the European Parliament in foreign affairs and the identification of substantive differences between domestic policies and international relations leads us to more general considerations on the underlying conceptual specificity of the European foreign affairs constitution for which the specific role of the European Parliament is an important indicator (section V).

II. CONCLUSION OF INTERNATIONAL AGREEMENTS

The evolution of the Community’s external powers is based on the ‘parallelism paradigm’ according to which ‘the system of internal community measures may not therefore be separated from that of external relations.’² This parallelism between external and internal competences does however not extend to the institutional rules governing their exercise. While the European Parliament has been internally empowered in consecutive Treaty reforms through the introduction and extension of the co-decision procedure to ever more policy fields, the procedures for the conclusion of international agreements persistently uphold the respective prerogatives of the Commission and the Council.³ Repeated calls for the ‘parallel treatment’

² ECJ, Case 22/70 *AETR* [1971] ECR 263, para 19; for the evolution of the case law see M Cremona, ‘External Relations and External Competence: The Emergence of an Integrated Policy’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), 137-76 at 138-52.

³ For the impressive extension of parliamentary oversight of domestic European affairs see B Rittberger, ‘The

of domestic and international law-making fell on deaf ears.⁴ The Treaty of Maastricht granted the last substantial enhancement of parliamentary consent to the conclusion of international treaties – in obvious contrast to the extension of parliamentary co-decision in domestic European affairs in Amsterdam and Nice. The different treatment of international treaties may in many respects be rationalised with the specificities of the international law of treaties, while the vitality of inter-institutional relations explain other aspects of the standard case of parliamentary consultation in accordance with Article 300 EC (subsection A) and the exceptions laid down for specific policy areas (subsection B).

A. Standard Case: Article 300 EC

In its internal affairs, the European Union may autonomously invent new procedures which transcend the blueprint of domestic constitutional orders and international law, thereby enhancing its ‘sui generis’ character. When it comes to the negotiation, conclusion and evolution of international agreements, the Community is however integrated into the pre-existing framework of the legal and customary restraints of international relations.⁵ Europe may therefore not simply project its internal procedures to the international arena. More specifically, it has to take into account the customs of international diplomatic negotiations as well as the evolutionary and practice-dominated features of the international law of treaties, which contrast with the transparency of parliamentary debate and the procedural rigidity of the Community co-decision procedure. These specificities of international treaty-making provide the background of the analysis of the standard case of parliamentary involvement in Article 300 EC. It covers the life-cycle of international agreements ranging from the negotiation of new agreements (subsection i), the domestic ratification as the regular point of parliamentary involvement (subsection ii) to specific circumstances reflecting the evolutionary character of international law (subsection iii).

i. Negotiations

‘Being diplomatic’ is proverbially different from the open and frank discussions which rightly dominate our parliamentary cultures. It is therefore not surprising that the European Treaties continue the tradition of treaty negotiations as the prerogative of executive agents which are often specifically trained to manage international negotiations. Article 300(1) EC as amended in Maastricht entrusts the Commission to ‘conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.’ The official consultation of the European Parliament is not foreseen. From the sole point of view of primary law the door of the negotiation room therefore remains closed for MEPs.

In practice, the European Parliament has nonetheless got a foot in the door of the negotiation room. Based on the original 1957 version of the present Article 300 EC the Council and the

Creation and Empowerment of the European Parliament’, *JCMS* 41 (2003), 203-26 and A Maurer, *Parlamentarische Demokratie in der Europäischen Union* (Baden-Baden, Nomos, 2002).

⁴ For a summary of the EP’s call for an extension of its powers see H Krück, ‘Zur parlamentarischen Legitimation des Abschlusses völkerrechtlicher Verträge der EG’ in R Geiger (ed), *Neuere Probleme der parlamentarischen Legitimation im Bereich der Auswärtigen Gewalt* (Baden-Baden, Nomos, 2003), 161-86 at 178-82.

⁵ A survey of Europe’s law and practice in this respect is presented by D Verwey, *The European Community, the European Union and the International Law of Treaties* (Den Haag, TMC Asser Press, 2004), esp 87-153.

Commission conceded limited parliamentary involvement on various occasions. The *Luns I* procedure (1964 on association agreements), its *Luns II* or *Westerterp* expansion (1973 on commercial and economic treaties) and the *Stuttgart* declaration (1983 on all ‘significant’ international agreements) all foresee a threefold involvement of the European Parliament during the negotiation phase: (1) the option of a plenary debate before the start of the negotiations, (2) permanent contact between the European negotiators and MEPs during the negotiations and (3) the confidential information of the Parliament about their outcome before the signature of the agreement.⁶ In its own Rules of Procedure the European Parliament goes even further and claims far-reaching involvement. It postulates the right to suspend the opening of negotiations (Rule 83(2)), be ‘regularly and thoroughly’ informed (Rule 83(4)) and ‘adopt recommendations and require that these be taken into account before the conclusion of the international agreement under consideration’ (Rule 83(5)). It also brings forward the consultation or consent requirement to the end of the negotiation phase and before the signature of the agreement (Rule 83(6)).⁷

These Rules of Procedure are of course not binding on the other institutions and should therefore be read as the Parliament’s vision how it should ideally be involved.⁸ It has however tried to put these suggestions into practice within the framework of its interinstitutional relations. Since 1995 the framework agreements concluded between the Parliament and the incoming Commission have covered the negotiation of international agreements, thereby perpetuating and enhancing the interinstitutional compromise enshrined in the original *Luns*, *Westerterp* and *Stuttgart* conventions.⁹ The present Framework Agreement on relations between the European Parliament and the Commission was signed on 26 May 2005 and continues the earlier reassurances on the timely and comprehensive flow of information, including the ‘draft negotiating directives, the adopted negotiating directives (and) the subsequent conduct of negotiations’, which allow the Parliament ‘to express its point of view if appropriate’ which again shall be taken into account by the Commission ‘as far as possible’.¹⁰ MEPs shall even be included as observers in Community delegations negotiating multilateral agreements – with the Parliament calling for Commission support in realising its involvement in internal Union coordination meetings against the resistance of the Council.¹¹

From a legal perspective, the framework agreement may, as interinstitutional soft law, not change the contents of primary law and the institutions are, at least in principle, not obliged to observe, continue or enter into these conventions unless they voluntarily decide to do so.¹² It is therefore perfectly legitimate from a legal point of view, if the Council ‘recalls’ the other

⁶ The contents of the said interinstitutional arrangements is described and analysed by A de Walsche, ‘La procédure de conclusion des accords internationaux’ in M Dony and J-V Louis (eds), *Commentaire J. Mégret 12 - Relations extérieures* (2nd ed, Université libre de Bruxelles, 2005), 77-110 at 96-106 and I MacLeod, ID Hendry and S Hyett, *The External Relations Law of the European Communities* (Oxford, Clarendon Press, 1996), 98-100.

⁷ Rules of Procedure of the European Parliament, 16th edition, July 2004 (OJ 2005 L 44/1).

⁸ As emphasised by the Parliament’s former legal advisor Krück, *supra* note 4, at 175.

⁹ On the earlier rules see Annex 2 to the Framework Agreement of 2000 (OJ 2001 C 121/128) and the Code of Conduct signed in 1995, cited by I Bosse-Platière, ‘Le Parlement européen et les relations extérieures de la Communauté européenne après le Traité de Nice’ (2002) 39 RTD eur. 527-53 at 532.

¹⁰ Framework Agreement on relations between the European Parliament and the Commission, Annex to the EP Decision, EP doc P6_TA(2005)0194, para 19.

¹¹ See para 21 of the framework agreement and *ibid* para 4.

¹² On interinstitutional agreements the forthcoming special issue of the (2007) 13 European Law Journal, Issue 1.

institutions after the signature of the 2005 agreements ‘that the procedures enabling the European Parliament to be involved in international negotiations are governed by Article 300 of the EC Treaty.’¹³ Since the framework agreement was concluded between the Commission and the Parliament, the Council is similarly right to ‘stress that the undertakings entered into by these institutions cannot be enforced against it in any circumstances’ and that it reserves its right to take appropriate measures, such as the initiation of legal proceedings, ‘should the application of the provisions of the framework agreement impinge upon the Treaties’ allocation of powers to the institutions or upon the institutional equilibrium that they create.’¹⁴

It is not immediately clear why the Council publicly stated its objections in 2005 given that it continues a long tradition of informal parliamentary involvement in international negotiations dating back to the 1964 *Luns I* procedure.¹⁵ Probably, its opposition is best understood against the background of the repeated attempts by the European Parliament to use interinstitutional arrangements as an instrument for the incremental change of the living constitution with a view to permanently enhance its role in international relations.¹⁶ Moreover, the Council was in parallel to the public statement of 2005 engaged in a protracted dispute with the European Parliament about the financing of the Common Foreign and Security Policy (CFSP), where the Parliament similarly tried to enhance its involvement in CFSP decision-making – and largely failed, since the Council maintained a firm approach and refused to give way.¹⁷ The Council’s renewed opposition against parliamentary involvement in the negotiation phase of international agreements reflects a similar firmness and may even turn the institutional clock back before the time of the original *Luns*, *Westerterp* and *Stuttgart* conventions.

The *Luns*, *Westerterp* and *Stuttgart* conventions were concluded on the basis of the original 1957 version of Article 228(1) EEC which simply stated on the negotiation phase that ‘agreements shall be negotiated by the Commission.’ When the Treaty of Maastricht codified some aspects of the *Stuttgart* declaration in the consent requirement of the present Article 300(3) EC, it deliberately refrained from foreseeing a role for the European Parliament during the negotiation phase.¹⁸ Instead, it explicitly enshrined the executive prerogatives of the Council in the present version of Article 300(1) EC which until today does not mention the European Parliament. The Amsterdam IGC confirmed the Parliament’s exclusion from the decision on the signature of the agreement.¹⁹ Whenever the Council confronts the Parliament’s renewed attempts to change the constitutional practice through interinstitutional reassurances, it is from a legal perspective worth remembering that the wording of the Treaty prevails over the unilateral claims by the European Parliament. Legally, the negotiation room

¹³ Council Statement (OJ 2005 C 161/1).

¹⁴ *Ibid.*

¹⁵ P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2006), at 149 suggests that it might be concerned by the disclosure of confidential documents, which the framework agreement however tries to safeguard with various special procedures.

¹⁶ As illustrated by A Maurer, D Kietz and C Völkel, ‘Interinstitutional Agreements in CFSP: Parliamentarisation through the Backdoor’ (2005) 10 EFA Rev 175-95 with a view to the budgetary disputes of the 1990s.

¹⁷ For more details see D Thym, ‘Beyond Parliament’s Reach? The Role of the European Parliament in the Common Foreign and Security Policy’ (2006) 11 EFA Rev 109-27 at 113-7.

¹⁸ An overview of the evolution of the former Art 228 EEC and present Art 300 EC is provided by de Walsche, *supra* note 6, at 100-6.

¹⁹ Art 300(2) EC again excludes the Parliament, whose consultation is only required before the adoption of the agreement – in contrast to an ongoing legal debate at the time and the former and present Rule 83(6) of the Parliament’s Rules of Procedure cited above.

remains closed for MEPs – as enshrined in Article 300(1) EC and, *de constitutione ferenda*, Article III-325(2)-(4) ConstEU.

ii. Conclusion

An international treaty may only bind the Community after it has established on the international scene its consent to be bound, an act which Article 300(2) EC calls ‘conclusion’ and which is generally referred to as ‘ratification.’ In most constitutional orders, this process of domestic ratification is the regular point for parliamentary involvement.²⁰ The EC Treaty does insofar not differ from the common constitutional tradition of western European democracies. It differs however on the degree of parliamentary participation, which arguably constitutes a ‘significant departure from the traditional parliamentary right of assent to international agreements.’²¹ More specifically, the Treaty foresees the mere consultation of the European Parliament as the standard case, while its consent is only required in the specific situations enumerated in the second subparagraph of Article 300(3) EC. This system was introduced in Maastricht, thereby codifying a modified version of the interinstitutional convention established by the *Stuttgart* declaration of 1983 mentioned above.²² Before Maastricht, the original EEC Treaty had in most cases foreseen no parliamentary consultation at all.²³ In Article 300(3) EC, the persistence of the consultation procedure is therefore no relic of the early days of European integration, but a deliberate decision of the Maastricht IGC.

Consultation gives the Parliament the right to be officially informed on the substance of the agreement, debate its pros and cons and state its opinion; only thereafter may the Council proceed with its conclusion.²⁴ The procedure infringes an essential procedural requirement, if the Council goes ahead without parliamentary consultation, but it is not obliged to follow the parliamentary opinion in substance.²⁵ That is the obvious reason, why the European Parliament has long demanded an extension of the consent requirement to all areas which fall within its domestic co-decision powers.²⁶ Instead, the areas of parliamentary consent under Article 300(3)(2) EC generally trail behind its powers in the respective internal decision-making procedures. The only field in which the European Parliament has gained considerable authority in theory and practice are association agreements, where it has withheld its consent on a number of occasions, thereby exercising real influence on the orientation of European foreign policy. Most prominent in this respect is the customs union with Turkey, where the MEPs achieved at least some symbolic improvements of the human rights situation in Turkey after their majority had repeatedly threatened to reject the agreement.²⁷

²⁰ See the comparative survey by S Riesenfeld and F Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Den Haag, Kluwer, 1994).

²¹ M Krajewski, ‘Foreign Policy and the European Constitution’ (2003) 22 *Yearbook of European Law* 435-62 at 445.

²² For similarities and differences between pre- and post-Maastricht rules see de Walsche, *supra* note 6, at 99-100.

²³ Art 228(1) EEC foresaw no parliamentary involvement at all, while Art 238 EEC on association agreements originally required consultation and consent after the Single European Act.

²⁴ Except in cases of urgency, as foreseen in the last sentence of Art 300(3)(1) EC.

²⁵ Cf Case 138/79 *Roquette Frères v Council* [1980] ECR 3333.

²⁶ For repeated calls for the ‘parallel treatment’ of domestic and international law-making see Krück, *supra* note 4, at 178-82.

²⁷ See the case study by S Krauss, ‘The European Parliament in EU External Relations: The Customs Union with Turkey’ (2000) 5 *EFA Rev* 215-37 at 223-35. Other cases of rejection are listed by K. Lenaerts and P Van Nuffel.

In contrast, the European Parliament's role as budgetary authority and co-legislator in internal Community policies is not mirrored by Article 300(3) EC. Its consent is only required for agreements having 'important budgetary implications' which the Court has moreover interpreted narrowly in the case of a fisheries agreement with Mauritania which implied payments of app 250 million euro over five years on the politically sensitive topic of purchasing fishing rights for the European fishing industry in the Mauritanian exclusive economic zone.²⁸ The asymmetry between the EP's internal and external powers is however most evident in the rule that its consent is only required for agreements 'entailing *amendment* of an act adopted under the (co-decision) procedure'. Even if an agreement lays down detailed rules which bind the Community and preclude the *later* adoption of a different internal regulatory regime, the European Parliament is only consulted and has therefore no substantial influence on the contents of the international rules.²⁹

With a view to these constraints there is indeed 'no compelling logic for limiting the assent requirement to such cases, as one does not see on what grounds the Parliament should be less involved in the conclusion of agreements laying down, for the first time, rules which in the internal decision-making process require co-decision.'³⁰ It should therefore be welcomed that the European Convention and the subsequent IGC agreed to an extension of the consent requirement to all 'agreements covering fields to which the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required' (Article III-325(6)(a)(v) ConstEU). Since the logic of this change, which is complemented by a consent requirement for the accession to the European Convention on Human Rights, is rather compelling, it must be expected that it will survive a possible renegotiation of the Constitutional Treaty. This would align the Parliament's internal and domestic powers, while maintaining the present structure of the consent requirement, which takes place after the signature of the agreement and does not grant the Parliament the right to amend individual provisions.³¹

Indeed, the binary character of the consent requirement leaves the Parliament with the choice of consent or rejection which considerably limits its room of manoeuvre. It presents the Parliament with the outcome of the negotiations behind the closed doors of the diplomatic negotiation room as a 'fait accompli.'³² This constraint on the parliamentary policy-shaping powers is particularly disappointing for the euro-parliamentarians, which are as a 'working parliament' arguably at their best when they embark upon the technical debates which dominate

fel, *Constitutional Law of the European Union* (2nd ed, New York, Thomson, 2005), at 890-1 and C Tomuschat, 'Artikel 300 EG' in H. von der Groeben and J. Schwarze (eds), *EU/EG-Vertrag-Kommentar* (6th ed, Baden-Baden, Nomos, 2004), para 40.

²⁸ ECJ, Case C-189/97 *Parliament v Council* [1999] ECR I-4741 and the more detailed analysis by Koutrakos, *supra* note 15, at 145-7. The issue has recently gained renewed significance after some development and human rights NGOs blamed EC policy to be partly responsible for the decline of the Mauritanian fishing industry, thereby supporting diversification into the alternative income of shipping clandestine immigrants to the Canary Islands.

²⁹ A recent example how prior international agreements may restrict the regulatory autonomy of the Community institutions under the co-decision procedure is provided by ECJ, Case C-344/04 *International Air Transport Association et al* [2006] ECR I-403, paras 34-48, where *in casu* the Court however finds no substantial conflict between international and Community rules.

³⁰ P Eeckhout, *External Relations of the European Union* (Oxford University Press, 2004), at 177.

³¹ Cf Art 300(2) EC and Art III-325(5) ConstEU.

³² C Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (1978) 36 *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* 7-63 at 28.

many aspects of the day-to-day management of European affairs.³³ More generally, the exclusion of parliamentary influence on the formulation of individual treaty provisions ‘neither requires nor fosters a process of open deliberation and debates about policy alternatives’,³⁴ thereby impeding the emergence of a meaningful democratic debate as the main advantage of enhanced parliamentary involvement. Of course, the European Parliament may use the threat of veto inherent in the consent requirement to bring the debate forward and influence the negotiations independent of its presence in the negotiation room.³⁵ But such ultimate threats may only be effective in special cases and cannot replace the regular influence on individual policy-choices under the co-decision procedure.

Of course, one could theoretically extend the co-decision procedure to the conclusion of international agreements or grant the European Parliament the right to select, reject or modify individual treaty provisions. But this would not abide by the customs and laws of international relations which still consider treaty negotiations as inter-state bargaining whose compromises, especially in a multilateral context, cannot easily be unravelled. This is best illustrated with the example of the US Congress which constitutionally holds the right to amend individual treaty provisions for purposes of domestic application. The experience of world trade negotiations however shows that effective multilateral bargaining only succeeds when the US Congress voluntarily surrenders its amendment rights and restricts itself to the binary assent–rejection option which characterises the parliamentary consent requirement under Article 300(3) EC.³⁶ Similarly, most national parliaments may only ratify or reject an international treaty as a whole and do not hold the right to amend individual provisions for purposes of domestic application.³⁷

Comparing the European Parliament to the US Congress enhances our argument in another respect: Like the US Congress and contrary to the national parliaments in most EU Member States, the European Parliament enjoys wide-spread political autonomy from the Commission and the Council which together form the executive of European international relations. In contrast, the parliamentary systems of most EU Member States are founded upon close cooperation between the parliamentary majority and the government with the former usually refraining from any action which would undermine the political authority of the latter. In international relations, this support is even more pronounced than in domestic policies, where parliamentarians are more inclined to stand up for the specific interests of their constituency or social support groups.³⁸ The relative importance of interinstitutional control mechanisms in the European constitutional order therefore holds the potential of rendering the Parliament’s consent requirement to international agreements more effective than in our domestic parliamentary systems³⁹ – even if the European Parliament may be inclined not to stand in the way

³³ As shown convincingly by P Dann, ‘European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy’ (2003) 9 ELJ 549-74 at 561-69.

³⁴ Krajewski, *supra* note 21, at 440.

³⁵ As underlined by R Bieber, ‘Democratic Control of European Foreign Policy’ (1990) 1 EJIL 148-73 at 161 and illustrated by Krauss, *supra* note 27, with the example of the customs union with Turkey.

³⁶ Cf on the current ‘fast track’ which Congress narrowly agreed upon in 2002 and which expires in 2007 H Shapiro and L Brainard, ‘Trade Promotion Authority, formerly known as Fast Track’ (2003) 35 The George Washington International Law Review 1-53.

³⁷ See the different contributions to Riesenfeld and Abbott, *supra* note 20.

³⁸ For a classical analysis of parliamentary control of foreign policy in parliamentary systems see H Treviranus, *Außenpolitik im demokratischen Rechtsstaat* (Tübingen, Mohr Siebeck, 1966), at 88-122.

³⁹ As highlighted by R Bieber, ‘Democratic Control of International Relations of the European Union’ in E Can-

of any agreement enhancing Europe's role in the world due to its institutional self-interest in deepening integration and the predominance of consensus-politics.⁴⁰

iii. Evolution

As mentioned at the outset, the international law of treaties is much more evolutionary and practice-dominated than our domestic legal systems with their rather strict procedures for the adoption, interpretation, implementation and change of parliamentary statutes. The most prominent expressions of this dynamic character of international treaties are their provisional application (Article 25 Vienna Convention on the Law of Treaties, VCLT), the suspension in response to the material breach by the other party or a fundamental change of circumstances (Articles 60, 62 VCLT) and the interpretation in the light of subsequent practice (Article 31(3)(c) VCLT). All these specificities enhance the influence of the actor which determines the position of a party in this respect. It is therefore important to note that the Amsterdam IGC decided to end the original silence of the European Treaties and introduce procedural requirements for the definition of the Community's position in these circumstances. A closer look at Article 300(2) EC shows that the Parliament is deliberately only 'immediately and fully informed of any decision' in retrospect. The decision instead rests with the Council.

Again, the position of the European Parliament does not differ from the position of most national parliaments. The provisional application of international agreements in particular has long been criticised for circumventing the constitutional prerogatives of national parliaments.⁴¹ The provisional application may legally be terminated at any time and does insofar not compromise the consent requirement from a dogmatic point of view; but factually the provisional application creates a momentum in favour of the continued application of the treaty, thereby rendering the parliamentary rejection more difficult.⁴² Similarly, the suspension of an agreement usually involves sensitive political decisions which are often closely related to a situation of international crisis or tension, be it due to a fundamental change of circumstances, such as in the *Racke* case,⁴³ or due to a material breach by the other party, possibly of a human rights clause.⁴⁴ It is obvious that the European Parliament deplores that such fundamental foreign policy questions are being decided by the Council without any formal parliamentary involvement.⁴⁵ Its exclusion is another illustration of the EC Treaty intention-

nizzaro (ed), *The European Union as an Actor in International Relations* (Den Haag, Kluwer Law, 2002), 105-16 at 107. In the US, the Versailles Treaty, the Nuclear Test Ban Treaty and the repeated debates about the ratification of trade agreements, including the GATT 1947, are the most prominent examples of the Congress refusing the ratification of treaties which had the support of the US President. Tellingly in Europe amendments to the founding Treaties have only failed in referenda, not in national parliaments (with the exception of the EDC during the French IVth Republic).

⁴⁰ Cf Krauss, *supra* note 27, at p 219 and C Harlow, *Accountability in the European Union* (Cambridge University Press, 2002), at 101-7.

⁴¹ Eg by D Vignes, 'Une notion ambiguë: la mise en application provisoire des traités' (1972) 18 AFDI 181-99.

⁴² As is rightly remarked by de Walsche, *supra* note 6, at 105.

⁴³ ECJ, Case C-162/96 *Racke* [1998] ECR I-3655 where the suspension was, before the introduction of Article 300(3) EC, decided by means of an autonomous Council Regulation to which the regular domestic decision-making procedure applied.

⁴⁴ Cf the contribution by Päivi Leino-Sandberg in this volume.

⁴⁵ Before the introduction of Art 300(2) EC the Parliament had interpreted the Treaty as requiring its involvement mirroring its rights in the conclusion procedure; cf Krück, *supra* note 4, at p 167.

ally limiting the role of the European Parliament, while preserving and extending the prerogatives of the Council.⁴⁶

International treaty regimes establishing an institutional framework for their gradual development also remain the executive prerogative of the Commission and the Council. The prominent example of association councils adopting legally binding decisions which are directly applicable in the European legal order illustrates that such international decisions may have far-reaching legislative effects.⁴⁷ It is therefore another considerable limitation of parliamentary involvement, when Article 300(2) EC excludes the European Parliament from the definition of the European position. Although not explicitly mentioned the rationale behind this rule suggests that it similarly applies to the position the Community adopts within international organisations, such as the FAO or the WTO.⁴⁸ The European Parliament has a right to consent to the original conclusion of such agreements under Article 300(3) EC, but the definition of the European positions in the institutions or bodies thus established remains beyond Parliament's reach. The example of national parliamentary oversight of European affairs shows that alternative modes of control could be achieved without undermining the effectiveness of European foreign policy.⁴⁹

International treaty regimes and international organisations are not only evolving through 'decisions having legal effects' (Article 300(2) EC), but similarly advance on the basis of subsequent practice and, in some cases, through international jurisprudence. Against the background of the aforementioned exclusion of the European Parliament from all evolutionary specificities of the international law of treaties, it is not surprising that international courts and subsequent practice also remain the prerogative of the Council and the Commission. Thus, the European Parliament is for example not involved in cases brought before the WTO Dispute Settlement Mechanism⁵⁰ and is similarly not heard before the Community agrees to summit communiqués, joint political declarations or any other form of international soft law, which by its very nature defies easy legal categorisation.⁵¹ Only on exceptional occasions may the evolution of international treaties on the basis of subsequent practice be qualified as a substantial amendment of that treaty from the perspective of Article 300 EC and therefore require renewed parliamentary involvement under Article 300(3) EC.⁵² In such an exceptional situa-

⁴⁶ See Eeckhout, *supra* note 30, at 186. However, the need for swift decisions in times of crisis argues against time-consuming parliamentary involvement, as underlined by A Dashwood, 'External Relations Provisions of the Amsterdam Treaty' (1998) 35 CML Rev 1019-45 at 1025 and section V.

⁴⁷ On the direct applicability of such decisions ECJ, Case C-192/89 *Sevinçe* [1990] ECR I-3461, paras 13-26.

⁴⁸ Cf Tomuschat, *supra* note 27, at para 41 and MacLeod, Hendry and Hyett, *supra* note 6, at 101. an international organisation is more than a treaty regime. Moreover, for the WTO the relationship between Art 133 EC and 300(2), (3) EC remains unclear insofar as the establishment of international bodies and not mere trade agreements in general are concerned. Again, the introduction of Article 300(2) EC falls behind earlier practice, see Bosse-Platière, *supra* note 9, at 549-52.

⁴⁹ See the comparative survey by A Maurer and W Wessels (eds), *National Parliaments and their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos, 2001).

⁵⁰ M Hilf and F Schorkopf, 'Das Europäische Parlament in den Außenbeziehungen der Europäischen Union' (1999) 34 *Europarecht* 185-202 at 192 deplore this exclusion.

⁵¹ Such as the declarations during the European-Israeli dispute on the application of the association agreement with Israel to the import of farm products from the occupied territories, described in the case study by L Zemer and S Pardo, 'The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute' (2003) 8 *EFA Rev* 51-75. While the EP had rejected the conclusion of a protocol to the earlier EC-Israel association agreement (see the references *supra* note 28), it was not involved in the dispute surrounding the application of the new agreement.

⁵² As argued by the minority opinion of the German Constitutional Court in Case 2 BvE 3/92, 5, 7 & 8/93, judg-

tion, the gradual evolution of an international treaty might be linked back to the only hard constitutional right of the European Parliament in the life-cycle of international agreements: its consultation or consent to its domestic ratification.

B. Exceptions: Exclusion of Parliamentary Involvement

The standard case of parliamentary involvement under Article 300 EC does not extend to the Common Commercial Policy CCP, agreements in the field of Economic and Monetary Union EMU and the second and the third pillar of the EU Treaty, which fully exclude the European Parliament from the European decision-making procedure.⁵³ There is no inherent logic underlying the exclusion of parliamentary involvement in these policy fields. One possible explanation are considerations of the political influence with the Member States maintaining the control over the direction of European foreign policy to the detriment of the supranational Parliament.⁵⁴ Moreover, the intergovernmental nature of the second and third pillar in particular may be described as a ‘mal nécessaire’ without which the previous IGCs would not have reached a compromise on their establishment and reform.⁵⁵ One should however refrain from generalised conclusions and take into account the specific circumstances of the different policy fields.

In the CCP, the persistent exclusion of the European Parliament is arguably a historic relic, since the provisions of the present Art 133 EC can be directly traced back to the original 1957 version of the EEC Treaty, when the parliamentary ‘Assembly’ was generally no important institutional actor. The difficult negotiations on the extension of the CPP after the landmark Opinion 1/94 of the Court of Justice in Amsterdam and Nice were dominated by the differences among Member States with France defending its influence on the course of the CCP. Faced with such a critical guardian of national interests, the Parliament was not heard with its call for an involvement in the CPP and the new rules in the present Article 133(5)-(7) EC do in some areas even curb its earlier powers.⁵⁶ The increased importance of international trade deals however gave the European Parliament a powerful argument for its involvement in the ratification procedure, since its exclusion appeared more and more ‘unjustifiable and stems from pre-globalization times.’⁵⁷ It is therefore not surprising and should be welcome that the Constitution Treaty abolishes the special treatment of the CCP and aligns the procedure with

ment of 12 July 1994, *Auslandseinsätze*, BVerfGE 90, 286 on the Petersberg missions of NATO and WEU in line with the subsequent interpretation of their respective founding treaties which had clearly not been foreseen when the German Parliament agreed to their ratification in 1955.

⁵³ See for the CCP Art 133 EC, for EMU Art 111 EC and for the second and third pillar Art 24, 38 EU.

⁵⁴ Cf. A Moravcsik, ‘Reassessing Legitimacy in the European Union’, in JHH Weiler, I Begg and J Peterson (eds), *Integration in an Expanding European Union* (New York, Blackwell Publishing, 2003), 77-97.

⁵⁵ Convincingly, B de Witte, ‘The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?’ in T Heukels, N Blokker and M Bruns (eds), *The European Union after Amsterdam* (Den Haag, Kluwer Law, 1998), 51-68 at 53. Similarly, W Schroeder, ‘Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften’ in A von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Berlin, Springer, 2003), 373-414 at 414.

⁵⁶ Insofar as the subject matters of Art 133(5)-(7) EC have hitherto been covered by the AETR principle and Art. 300 EC; for more details see C Herrmann, ‘Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job’ (2002) 39 CML Rev 7-29 at 25; Insofar as 133(6)(2) and Bosse-Platière, *supra* note 9, at 533.

⁵⁷ Eeckhout, *supra* note 30, at 188.

the regular rules of Article III-325 ConstEU, which require parliamentary consent in areas which domestically fall under the ordinary legislative procedure.⁵⁸

In Economic and Monetary Union the Parliament's consultative function is taken over by the European Central Bank ECB, which is heard before the Council concludes agreements on exchange rate systems with third countries or determines the Community position in international financial fora.⁵⁹ Of course, one may have additionally foreseen the consultation or consent of the European Parliament. But the decision not to do so reflects the general conceptualisation of EMU as a technical issue with a primary focus on price stability whose oversight is entrusted upon the independent ECB, which shall remain beyond direct political influences and largely escapes parliamentary control.⁶⁰

Under the EU Treaty the limited role of the European Parliament reflects and underlines the intergovernmental orientation of the second and third pillar. This applies to domestic decision-making and external representation alike and it is therefore not surprising that Articles 24, 38 EU on the conclusion of international agreements do not foresee the involvement of MEPs. The Member States are not been willing to give the supranational European institutions more control in their international relations, which illustrates their desire to maintain their ultimate sovereignty as original subjects of international law.⁶¹ Moreover, agreements in the field of CFSP and ESDP do usually not affect the position of individuals and may therefore not be qualified as being legislative in character.⁶² In contrast, international agreements concluded under the third pillar, such as the EU-US extradition agreement,⁶³ mandate state action within a core area of legislative activity whose exercise usually requires parliamentary involvement. The exclusion of the European Parliament from these areas is therefore regrettable. It should however be noted that national parliaments continue to exercise at least a rudimentary control function in these cases. The EU treaty-making practice shows that most agreements have been scrutinised by national parliaments after the signature and before ratification on the basis of the national constitutional scrutiny reserve of Article 24(5) EU.⁶⁴ This might not be an ideal solution, but guarantees at least formal control powers for parliamentarians in areas which directly affect the rights of individuals.

⁵⁸ Cf M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CML Rev 1348-66 at 1364, M Krajewski, 'External Trade Law and the Constitution Treaty' (2005) 42 CML Rev 91-127 at 124 and B de Witte, 'The Constitutional Law of External Relations' in I. Pernice and M. Poiares Maduro (eds), *A Constitution for Europe. First Comments on the 2003 Draft Constitution for Europe* (Baden-Baden, Nomos, 2003), 95-106 at 105: 'quite remarkable change.'

⁵⁹ On the unclear scope of Community competence see J-V Louis, 'Les relations extérieures de l'Union économique et monétaire' in Cannizzaro, *supra* note 39, at pp 77-104.

⁶⁰ Cf P Leino, 'The European Central Bank and Legitimacy: Is the ECB a Modification of or an Exception to the Principle of Democracy?', Harvard Jean Monnet Working Paper 1/01, at 30-1.

⁶¹ E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at 19.

⁶² H-J Cremer, 'Anmerkungen zur GASP' (2004) 31 Europäische Grundrechte-Zeitschrift 587-91 at 589-90.

⁶³ Agreement on extradition between the European Union and the United States of America (OJ 2003 L 181/27)

⁶⁴ See the analysis of the recent treaty-making practice in D Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 Heidelberg Journal of International Law / Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 863-925 at 889-98 and 905-8 (available online at <http://www.zoerv.de> two years after print publication).

III. MIXITY: ROLE OF NATIONAL PARLIAMENTS

National parliaments have a double control function in European international relations: First, they hold their respective national governments to account for their actions within the Council. Second, they exercise original parliamentary rights regarding the autonomous foreign policy of the Member States. Since neither the European Community nor the European Union has an all-embracing 'federal' competence for foreign affairs, the exercise of the national and European foreign policy powers are inherently interwoven at the international level. The infamous mixed agreements are the most renowned expression of this complementary parallelism.⁶⁵ Despite the wide-spread dislike of mixed agreements for blurring the separation of powers between the Community and its Member States they have proven surprisingly resilient in practice and have long dominated the treaty-making practice of the Community and its Member States.⁶⁶ Indeed, mixity may positively be regarded as a tool to protect the Member States' legitimate interests and autonomy by preventing a gradual usurpation of their external competences by the Community without weakening the strength inherent in united action.⁶⁷ From the point of view of parliamentary accountability, they prominently involve the national parliaments in the ratification.

Against this background, recent developments in Brussels deserve our particular attention, since they call into question the long-established practice of the joint conclusion of mixed agreements by the Community and the Member States, thereby also challenging the corresponding prerogatives of national parliaments. The issue first surfaced between the autumn of 2005 and the spring of 2006 on the occasion of the negotiations on a new partnership and co-operation agreement with Thailand⁶⁸ and most recently with a view to the potential accession of the European Union to the ASEAN Treaty of Amity and Cooperation (TAC).⁶⁹ In both cases not the substance of the agreement caused a protracted interinstitutional debate, but the question of whether and, if yes, under which circumstances the European Union should be a party to the agreement on the basis of Article 24 EU.⁷⁰ The motivation underlying some of the options discussed links the debate directly back to the role of national parliaments, whose necessary involvement in the ratification procedures of mixed agreements regularly entails a long waiting period before the entry into force of any mixed agreements, which extends even further with the involvement of more Member States after the recent enlargements.⁷¹

To my knowledge four options have been discussed within the Relex working group of the Council, the PSC and Coreper with a view to the Thai case: (1) The conclusion of a cross-

⁶⁵ On mixed agreements Eeckhout, *supra* note 30, at 190-223, Koutrakos, *supra* note 15, at 150-82 and the classic collection by D O'Keefe and H Schermers (eds), *Mixed Agreements* (Den Haag, Kluwer, 1983).

⁶⁶ Cf Cremona, *supra* note 2, at 154; a survey of recent EC treaty-making practice indicates that mixed agreements are losing their momentum: B de Witte, 'The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects' in de Wet, Nollkaemper and Wouters (eds.), *The Europeanisation of Public International Law* (2007), section 3, forthcoming.

⁶⁷ As proposed by JHH Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in *ibid*: *The Constitution of Europe* (Cambridge University Press, 1999), 130-87 at 185.

⁶⁸ On the political background see the Communication from the Commission: A New Strategic Partnership with South East Asia, COM(2003) 399 final.

⁶⁹ The political context is described in the Chairman's Statement of the Sixth Asia-Europe Meeting, Helsinki, 10 & 11 September 2006, Council doc of 12 Sep 2006 12775/06 (Press 253; publicly accessible).

⁷⁰ For EU agreements under Article 24 EU see already section II.B above.

⁷¹ Notwithstanding the option of provisional application or the conclusion of an interim agreement covering only fields of Community competence, which is then concluded without Member State participation.

pillar mixed agreement between the EC and the EU following the example of the agreement between the EC, the EU and Switzerland on the latter's association with the Schengen Acquis; (2) the conclusion of separate agreements between Thailand on the one side and the EC and the EU on the other side which are legally connected through a joint declaration; (3) the conclusion of a traditional mixed agreement between the EC, the Member States and Thailand; (4) a novel tripartite mixed agreement between the EC, the EU, the Member States and Thailand.⁷² Obviously, only options three and four would maintain an original role for the Member States and their parliaments, while options one and two would imply a fundamental conceptual reorientation of the constitutional law of European international relations. For the time being, Germany and the United Kingdom have resisted the pressure from the Council Secretariat, the Commission and many Member States to agree to option one or two with the eventual compromise opting for the last option of EC, EU and (optional) Member State participation.⁷³

Legally, the usual treaty provisions on political dialogue argue for the inclusion of the European Union as a separate party to future partnership and cooperation agreements – although the Union's participation is not mandatory, if one maintains that no competences have been transferred to the European Union in CFSP, thereby excluding the pre-emption of national competences and the application of the AETR doctrine.⁷⁴ But if the Union fully replaced the Member States as a party to most mixed agreements under options one or two mentioned above, it would not only cover the political dialogue clauses, but rather all Member State competences under the current mixed agreements. Their reach is notoriously difficult to define, but from a dogmatic perspective it remains doubtful whether the EU competences under the second and third pillar would extend to all areas covered by partnership and cooperation agreements beyond the reach of the EC Treaty.⁷⁵ Besides these dogmatic caveats, the principled departure from the long-standing tradition of Member State participation raises the conceptual question about the character of national and European international relations.

The replacement of the Member States by the European Union in mixed agreements would be an important step down the federalising avenue, further limiting the Member States' independence in their international relations as a precondition for their sovereignty in the era of advanced Europeanisation.⁷⁶ The wide-spread frustration with tardy ratification procedures in national parliaments for most mixed agreements is certainly understandable and it is probably also correct that national parliaments do not even exercise their constitutional scrutiny powers in practice, effectively nodding through most mixed agreements without substantive scrutiny or debate. But from a theoretical perspective, the continued practice of mixed agreements with their original role for national parliaments is an important expression for Europe's principled ambiguity between federal- and confederalism which not even the Constitutional Treaty

⁷² See on Thailand: Council docs 12798/05, 14093/05, 9288/06 & 9745/06 and on the ASEAN TAC: Council doc 13384/06 (all not publicly accessible).

⁷³ Cf. the Draft Council authorization, Council doc. 16042/06 (not publicly accessible).

⁷⁴ For more details on this question see Thym, *supra* note 64, at 900-12.

⁷⁵ What about potential treaty provision on culture, education, health or any other policy where the EC Treaty lays down rather strict limits on EC competence?

⁷⁶ See Denza, *supra* note 61, at 19 and C Hillgruber, 'Der Nationalstaat in der überstaatlichen Verflechtung' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts, Band II* (3rd ed, Heidelberg, CF Müller, 2004), chapter 32 para 91.

would have altered.⁷⁷ Against this background, the continued participation of the Member States and their parliaments in mixed agreements is an important expression of the unique character of European international relations with complementary roles for the Community, the Union and the Member States based on cooperation instead of subordination.

IV. DIPLOMACY

The development of European foreign policy during the past 35 years has rightly been described as a process of legalisation or judicialisation whereby foreign policy formulation is gradually integrated into formalised standards of behaviour and ultimately subject to judicial review.⁷⁸ Indeed, the experience of external Community policies suggests that the Treaties' institutional rules are an important framework and catalyst for the progressive realisation of common policies.⁷⁹ Conceptually, this extends to the development of the Community's external powers based upon the 'parallelism paradigm' which construes European's role in the world as the other side of its internal development.⁸⁰ The success of the Community method over the past fifty years argues strongly for its extension to most areas of Union activity, including foreign affairs. But a closer look at the constitutional role of the European Parliament in the Common Foreign and Security Policy CFSP reveals a continuous special treatment. Here, the role of the European Parliament lags even further behind its already limited involvement in international treaty-making. This does not imply that the MEPs are powerless, but their channels of influence are much more indirect, centred around their influence on the relevant executive actors, the tentative projection of an original 'parliamentary diplomacy' and budgetary control powers, which shall be considered more closely in this section.

I suggest that the special institutional structure of the CFSP does not contradict the supranational structure of Community integration, but complements it with a sector-specific adaptation. The CFSP is, much less than the external policies of the first pillar, dominated by rule-making. Instead, foreign policy and international relations are by nature strategic. They require the identification of strategic goals and the development and constant adaptation of methods of their realization and implementation. The main regulatory instrument of the Community method are legal rules adopted by the European institutions, published in the Official Journal, transposed and implemented by national legislators and administrations and interpreted uniformly by the European court system. But foreign policy is primarily about political positioning in favour or against something: North Korea will not give up its nuclear weapons, only because the European Union says so in its Official Journal. You may call it diplomacy, but in any case it differs substantially from domestic politics. Moreover, the lim-

⁷⁷ The European Convention considered a codification of the practice of mixed agreements (see the Final Report of Working Group III 'Legal Personality', 1 Oct 2002, CONV doc 305/02, paras 22-8), but eventually decided to continue the present silence of the primary law; de Witte, *supra* note 58, at 101 contrasts this silence with the elaborate provisions of Art III-227 ConstEU (formerly Art 300 EC) on the conclusion of international EC agreements.

⁷⁸ See the analytical account by M Smith, *Europe's Common Foreign and Security Policy* (Cambridge University Press, 2004) and, similarly, *ibid*, 'Diplomacy by Decree: The Legalization of Foreign Policy' (2001) 39 JCMS 79-104.

⁷⁹ On domestic EC policies the classic standpoint by A Sweet Stone, *The Judicial Construction of Europe* (Oxford University Press, 2004).

⁸⁰ Cf ECJ, Case 22/70 *AETR* [1971] ECR 263 and the analysis of the Court's case law by Cremona, *supra* note 2, at 138-52.

ited foreign policy resources of the European Union, besides the financial and human resources of the Community budget and administration, calls for the integration of the experiences, contacts and clout of national foreign ministries and the hardware of national military and civilian personnel for ESDP missions, leaving an original sphere of influence for national parliaments.

A. Formal Control Powers

Article 21 EU upholds the intergovernmental nature of the CFSP when it limits the involvement of the European Parliament to being ‘regularly informed’ and ‘consulted on the main aspects and basic choices’ of the CFSP – with an additional obligation of the Council Presidency to ‘ensure that the views of the European Parliament are duly taken into account.’ It should be noted that these information and consultation rights do not cover individual common positions or joint actions, but only the ‘main aspects and basic choices’, thereby trailing behind the consultation procedure under the first pillar as the standard case for the conclusion of international agreements under Article 300(2) EC – even if the European Parliament maintains that it should generally be informed about future projects and was considering a legal challenge before the Council agreed to forward-looking reporting in 2006.⁸¹ Independent of the outcome of this renewed interinstitutional quarrel, the Parliament’s general exclusion from individual CFSP measures is no coincidence, but the deliberate decision of various IGCs which consciously refrained from any extension of parliamentary oversight. The present ‘parliamentary vacuum’ dates back to the Single European Act, which already contained a corresponding provision and kept the adoption of individual foreign policy decisions beyond the Parliament’s reach.⁸²

Not even the entry into force of the Constitutional Treaty would change much in this respect, since it continues the custom of almost exclusive deliberation and decision-making in the Council without direct parliamentary participation.⁸³ Rather surprisingly, not even the Convention’s working group on external action with its primarily parliamentary composition proposed substantial changes, but concluded that the present rules ‘were satisfactory.’⁸⁴ Anticipatory obedience towards the presumed wishes of the ultimate decision-takers in the IGC may have played a role in this respect, with the Convention trying to avoid any proposal which might have served as a pretext for the IGC to depart substantially from its draft; but the parallel extension of the parliamentary consent requirement to international agreements indicates that the EP’s consistent exclusion from the CFSP over the past 20 years is also based on un-

⁸¹ Cf the Report on the Main Aspects and Basic Choices of CFSP (Rapporteur: Elmar Brok), 1 Dec 2005, EP doc A6-0389/2005, para 2 and the explanatory statement. The Treaty does not specify whether the information and consultation on major developments in the field of CFSP under Art 21 TEU concerns *past* actions or *future* projects. The 2006 IIA now foresees a regular *a priori* consultation in line with the Parliament’s demands; see section IV.B below.

⁸² Art 30(4) of the Single European Act and the additional Decision of the Foreign Ministers of the Member States meeting within the European Political Cooperation on the Occasion of the Signature of the Single European Act on 28 February 1986 already comprised the features of the present Art 21 TEU, which is identical with Maastricht’s Art J.7 EU.

⁸³ Art I-40 VIII, I-41 VIII, III-304 ConstEU officially extend parliamentary consultation to defence policy, establish the foreign minister as the institutional interface between Council and Parliament and double the number of general debates.

⁸⁴ Recommendation 10 of Working Group VII ‘External Action’, Final Report, 16 Dec 2002, doc CONV 459/02.

derlying conceptual considerations.⁸⁵ Indeed, the European Convention refrained from any substantive ‘supranationalisation’ of the CFSP and focused on practical arrangements through the merger of both the pillars and the executive functions of the Commission and the Council, while maintaining the specificity of its competences, procedural rules and legal instruments.⁸⁶

Parliamentary accountability of governmental action does of course transcend the involvement in the decision-making process. Instead, the primary elective function and the secondary control powers culminating in the right to recall the government or its ministers through a motion of censure are crucial components of parliamentary accountability of executive actors.⁸⁷ The political dramas over the departure of the Santer and the nomination of the Barroso Commission are good illustrations of the effectiveness of the Parliament’s powers vis-à-vis the Commission in this respect. With a view to the CFSP, the Commission’s limited role as an associate actor within the CFSP under Article 27 EU however entails a corresponding weakness of the Parliament’s elective and control functions – even if the Commissioner for external relations, Benita Ferrero-Waldner, promised to ‘develop the closest possible working relations with the EP’ and ‘to pay very careful attention to all observation and recommendations of the EP (in the field of CFSP)’ during her nomination hearing in the EP.⁸⁸ Instead, the Parliament will set its sight at the control of the CFSP executive dominated by the Council’s Secretary General/High Representative (SG/HR) and the respective Council Presidency.

Javier Solana, the current SG/HR, does however evade parliamentary scrutiny insofar as his election and possible recall is concerned. He is appointed unanimously by the Council in accordance with Article 207(2) EC without prior consultation of the EP, let alone its consent mirroring the Commission investiture. The EP’s Rules of Procedure may self-consciously foresee a hearing of the candidate designate, but his renomination in June 2004 and identification as future foreign minister took place behind the closed doors of the Council’s Justus Lipsius building frustrating the Parliament’s pretension of influence.⁸⁹ Interestingly, the IGC drafting the final version of the Constitutional Treaty even detached the institutional fate of the future foreign minister from the political survival of the Commission by making clear that only the European Council, not Parliament, may officially end its tenure as far as his ‘CFSP hat’ is concerned, even if the foreign minister has to lay down its Community hat as Commissioner for external relations after a successful motion of censure by the EP.⁹⁰ This exclusion of parliamentary appointment and recall powers extends to EU Special Representatives and heads of Commission delegations, where both the Council and the Commission reject the EP’s call for the introduction of appointment hearings reflecting US-style senatorial hearings of future ambassadors.⁹¹

⁸⁵ On various proposals to strengthen the parliamentary oversight in the CFSP see J Mittag, ‘Die Parlamentarische Dimension der ESVP: Optionen für den Verfassungsvertrag’ (2003) 26 *Integration* 152-62 at 157-60 and D Thym, ‘Reforming Europe’s Common Foreign and Security Policy’ (2004) 10 *ELJ* 5-22 at 13-5.

⁸⁶ Cf de Witte, *supra* note 58, at 97-9, Cremona, *supra* note 58, at 1352-9 and Thym, *ibid* at 6-8.

⁸⁷ Cf Dann, *supra* note 33, at 557-61 and Harlow, *supra* note 40, at 94-6.

⁸⁸ See her answers to the general question no. 7 and the specific question no. 4 in deliberate avoidance of the promise to act as a spokesperson for the EP’s CFSP proposals in the Council, online3 at http://www.europarl.eu.int/press/audicom2004/index_en.htm.

⁸⁹ See Art 85 of the EP’s Rules of Procedure in contrast to the Council Press Release on the meeting of Heads of State or Government on 29 Jun 2004, Council doc 10995/04.

⁹⁰ Art I-26(7), I-28(1) ConstEU; on the ‘double-hatted’ structure of the foreign minister Thym, *supra* note 85, at 18-22.

⁹¹ Art 86 of the EP’s Rules of Procedure foresees a hearing of EU Special Representatives in contrast to Art

The absence of an parliamentary participation in the nomination procedure for the SG/HR and other senior CFSP personnel does of course not exclude regular contact and debate, be it on the basis of the Parliament's information and consultation rights under Article 21 EU or through voluntary cooperation schemes. During the fifth legislature from 1999-2004 the SG/HR Solana attended 10 meetings of the Committee on Foreign Affairs AFET (French acronym for *affaires étrangères*), including a high-profile debate on the draft European Security Strategy, and complemented by 11 appearances of the SG/HR before the EP plenary. Besides, the former Commissioner for external relations Christ Patten appeared 22 times before AFET, as well as national foreign or defence ministers on 54 occasions and EU Special Representatives on 8 circumstances. A closer look at the frequency of hearings and debates shows increased activities towards the end of the legislature, signalling a reinforced focus on the CFSP. This trend will be further enhanced by the creation of a new AFET Sub-Committee for Security and Defence SEDE. Even if officially the MEPs only hold information and consultation rights, the intensity and regularity of debate ideally results in effective scrutiny through intensity⁹² – although the exact degree of influence is of course difficult to measure.

B. Budgetary Blackmail?

Budgetary powers are the European Parliament's only 'hard powers' in the CFSP. According to Article 28 EU administrative CFSP expenditure shall be charged to the EC budget, while the Council may decide to finance operative expenditure by alternative means, in particular national contributions. It is not surprising that the EP tried to use its budgetary prerogatives as a leverage for more influence on CFSP decision-making. It has indeed obtained some minor improvements as the result of an protracted quarrel with the Council in the 1990s.⁹³ In 1997, the Parliament, the Council and the Commission signed an interinstitutional agreement (IIA) on the issue, which was later integrated into the 1999 IIA on the last financial perspective. On both occasions, the Parliament conceded modest financial resources for the CFSP in return for a reinforcement of its information rights.⁹⁴ In 2002 and 2003, the rapid realisation of the ESDP and the corresponding calls for an increase of the CFSP budget caused renewed interinstitutional tensions, with the European Parliament obtaining further minimal concessions from the Council.⁹⁵ Most recently, the IIA of 17 May 2006 on the next financial perspective codified and further extended the Parliament's respective powers. The MEPs are still not consulted before the adoption of individual CFSP measures, but are promised a 'forward-looking Council document' on the main aspects and basic choices of the CFSP and regular joint con-

18(5) EU; Commissioner Ferrero-Waldner rejected the EP's plea for parliamentary hearings of the heads of Commission delegations in her answer to specific question no 3, *supra* note 88.

⁹² Various commentators underline the importance of parliamentary influence on ministers through personal contact and debate, *eg* Denza, *supra* note 76, at 323-4, J Mittag, 'Escaping the Legitimacy-Accountability-Trap?', ZEI Discussion Paper C161 2006 at 17-8 and U Diedrichs, 'The European Parliament in CFSP: More than a Marginal Player?', *The International Spectator* 2/2004, 31-46 at 36-8.

⁹³ See J Monar, 'The Finances of the Union's Intergovernmental Pillars – Tortuous Experiments with the Community Budget' (1997) 35 *JCMS* 57-78, E Dardenne, 'Le Parlement européen et le financement de la PESC' in M Dony (ed), *L'Union européenne et le monde après Amsterdam* (Université libre de Bruxelles, 1999), 291-313, R Wessel, *The European Union's Foreign and Security Policy* (Den Haag, Kluwer Law, 1999), 220-3 and Maurer, Kietz and Völkel, *supra* note 16, at 175-95.

⁹⁴ See points 39-40 of the 1999 IIA (OJ 1999, C 172/1) and its analysis in Thym, *supra* note 17, at 114-5; the 1997 IIA may be found in OJ 1997, C 286/80.

⁹⁵ More details in Thym, *ibid* at 115-6.

sultation meetings at least five times a year in the framework of the regular political dialogue on the CFSP.⁹⁶

In return for the consolidation of its information and consolidation rights the Parliament agreed to a considerable increase in the CFSP budget.⁹⁷ However, the CFSP budget will still amount to only 3,5 % of the EC's overall budget for external action, reflecting that the external EC policies with the corresponding institutional prerogatives of the Parliament remain the financial backbone of European foreign policy.⁹⁸ Arguably, this indirect financial weakening of the CFSP to the benefit of external Community policies with a potential thematic overlap with the CFSP is the main success of the EP's budgetary power game.⁹⁹ Within the CFSP however the Parliament's 'democratic blackmail' provoked counter-reactions by the Council. Being frustrated with the tardy and scarce flow of financial resources, the Council reinforced extra-budgetary means of financing, in particular through recourse to separate national contributions (e.g. for the European Defence Agency) and new budgetary Union instruments (such as the ATHENA mechanism for military operations).¹⁰⁰ Arguably, the European Parliament's financial 'greed' even played a role in the decision of the European Convention and the subsequent IGC not to extend the Parliament's formal powers in the CFSP. A closer look at Article III-313(3) ConstEU reveals that the Constitutional Treaty even limits the Parliament's budgetary powers by granting the Council a right of unilateral recourse to the EC budget without parliamentary veto rights for 'urgent financing of (CFSP) initiatives.'

C. Projection of 'Parliamentary Diplomacy'

No constitutional document is set in stone, but evolves dynamically in the course of time. Foreign policy is no exception in this respect. Indeed, the European Parliament has always played an original role in foreign policy independent of its information, consultation and control rights under the EC and the EU Treaty. The effective use of its regular dialogue with the political actors of the CFSP, such as Javier Solana, is a first illustration of its attempt to reach beyond its formal powers.¹⁰¹ Its impact on the real world is moreover reinforced by the projection of a tentative 'parliamentary diplomacy' in its own right through the public debate of important foreign policy developments and the periodic contact with representatives of third countries and international organisations. For third country politicians, media representatives and citizens which are not fully aware of the idiosyncrasies of the EU's institutional balance with its asymmetric distribution of parliamentary powers in different policy areas, the influence of the European Parliament in foreign policy issues is arguably even more accentuated.

Indeed, a closer survey of the Parliament's activities during the past legislature shows numerous senior representatives of third states and international organisations appearing before the

⁹⁶ Cf point 43 of the 2006 IIA (OJ 2006 C 139/1).

⁹⁷ Point 42 of the 2006 IIA, *ibid*, foresees at least EUR 250 mio per annum on average, considerably more than the EUR 63 mio in 2005.

⁹⁸ Annex 1 to the 2006 IIA, *ibid*, apportions EUR 49,463 bn to the budget heading 'EU as a Global Player.'

⁹⁹ The adoption of the EC policies on the promotion of human rights and democracy is an excellent example of the Commission and the Parliament using the financial muscle to extend their reach to areas which had temporarily become important fields of CFSP activities; cf Pernice and Thym, 'A New Institutional Balance for European Foreign Policy?' (2002) 7 EFA Rev 369-400 at 387.

¹⁰⁰ Thym, *supra* note 17, at 116-7 for more details.

¹⁰¹ See section IV.A above.

EP plenary or exchanging their political views with AFET. The Parliament's guests include the NATO Secretary General on three occasions, the UN High Commissioner for Human Rights and the President of the International Criminal Court. On 26 October 2006, the annual Sakharov Prize for freedom of thought was awarded to Alexander Milinkevich, the leader of the political opposition in Belarus.¹⁰² Mirroring diplomatic relations in the narrow sense, the interparliamentary delegations even constitute a genuine element of 'parliamentary diplomacy', in whose context MEPs feel free to voice their opinion plainly without being constrained by the diplomatic customs or the prior, and often cumbersome, alignment of national positions in the Council. The 'Taiwan policy' of the EP is a telling example in this respect.¹⁰³

Any citizen or journalist visiting the AFET website will come across the Parliament's various policy reports, which covered Europe's strategic relations with all important international actors in 2006: Russia, China, the US and Latin America.¹⁰⁴ Legally speaking, most of these reports are own-initiative reports and therefore not part of a formal consultation procedure.¹⁰⁵ One may insofar speak of a 'virtual' parliamentary foreign policy, since AFET reports on CFSP-related policy topics are not officially linked to Council decision-making. In practice however, the foreign policy positions of the Parliament carry the weight of its institutional legitimacy.¹⁰⁶ They may be taken into account by the civil servants in the Council Secretariat, national foreign ministers and the Commission's directorates general dealing with external relations and therefore have an indirect impact on CFSP decision-making. Parliament's influence in the real world is further increased by the publicity of its debates and the easy electronic accessibility of its reports which contrasts with the 'secretive' decision-making in the Council. Thus 'parliamentary diplomacy' may in reality reach further than the rules of the European Treaties suggest.

D. Defence: Cooperation with National Parliaments

From a traditional intergovernmentalist standpoint, the persistent limitations of the role of the European Parliament in foreign policy follow the intergovernmental integration logic, which regards national parliaments to be better positioned to scrutinise national foreign ministers on the basis of their respective constitutional control powers.¹⁰⁷ But even if one does not subscribe to this argument in general, the present Treaty regime clearly follows the intergovernmental path in questions of 'war and peace' related to the realisation of the European Security and Defence Policy ESDP. Here, the exclusion of the European Parliament is at least partly

¹⁰² On the development of the EP's 'human rights diplomacy' see Smith, *supra* note 78, at 171 and Bieber, *supra* note 35, at 166-7.

¹⁰³ See the case-study by Y Lan, 'The European Parliament and the China-Taiwan Issue: An Empirical Approach' (2004) 9 EFA Rev 115-40.

¹⁰⁴ Online at http://www.europarl.europa.eu/committees/afet_home_en.htm. Mittag, *supra* note 92, at 18-20 and Diedrichs, *supra* note 92, at 36-8 underline the influence of quality reports.

¹⁰⁵ Own initiative reports are not explicitly foreseen in the Treaty and one might argue from the strict point of view of delegated powers that these reports have no legal base, but it is nowadays accepted that such autonomous initiatives fall within the wider political responsibilities of the EP; cf Hilf/Schorkopf, *supra* note 50, at 197-8.

¹⁰⁶ As emphasised by de Witte, *supra* note 58, at 104 and T Grunert, 'Die verfassungsvertragliche Rolle der Organe der Europäischen Union in den Außenbeziehungen' in P-C Müller-Graff (ed), *Die Rolle der erweiterten Europäischen Union in der Welt* (Baden-Baden, Nomos, 2006), 25-42 at 32.

¹⁰⁷ See amongst others A Moravcsik, 'Reassessing Legitimacy in the European Union' in Weiler, Begg and Peterson, *supra* note 54, 77-98 and with a view to the second pillar Denza, *supra* note 76, at 325.

compensated by national parliamentary prerogatives for the deployment of military personnel in many Member States.¹⁰⁸ In ESDP, national parliamentary powers are particularly effective, since the general public will usually pay close attention to any parliamentary debate and, moreover, the launch of an ESDP mission does not legally prejudge the autonomous national decision (not) to second military personnel, since any rejection by a national parliament does not block the mission as long as other Member States provide enough troops.

National parliaments also retain the primary responsibility over national defence spending which remains outside the realm of the EC budget under Article 28(3) EU – even if the reinforced coordination of public defence procurement and armaments policy at European level through the European Armament Organization OCCAR and the European Defence Agency EDA constrains the practical autonomy of national parliaments which are confronted with intergovernmental defence deals which may not be legally binding on them but nonetheless exercise pressure to pay the bill in order not to stand in the way of the joint undertaking.¹⁰⁹ In exercising their control functions, national parliaments may of course agree on various forms of horizontal and vertical cooperation with the parliaments of other Member States and the European Parliament, building upon the cooperation among national European affairs committees in COSAC.¹¹⁰ But eventually their combined influence will legally not transcend their cumulative powers under the European Treaties and the national constitutions.

V. CONCEPTUAL FOUNDATIONS OF EU INTERNATIONAL RELATIONS

The special treatment of the European Parliament in Europe's international relations is an important indicator for the underlying conceptual specificities of the European foreign affairs constitution. Its limited role in the negotiation, conclusion and evolution of international agreements and the wide executive prerogatives in non-contractual international diplomacy stand in obvious contrast to the Parliament's empowerment in domestic European policies in recent years. Why did the Parliament not become an equal player in the interinstitutional decision-making in foreign affairs? Based on the preceding analysis of the Parliament's role in the different categories of external action this section focuses on the conceptual foundations of the role of the European Parliament in the European foreign policy constitution. Its origins are either specific to the European model of government as laid down in the European Treaties or reflect the abstract character of international relations in general terms. As a sketch of ideas flowing from the analysis of the Parliament's constitutional powers this section makes no claim to completeness.

As mentioned at the outset, the argument about the parliamentary accountability of foreign affairs continues, from a historic perspective, the struggle between the ancient prerogatives of the monarch and the novel claims for democratic self-governance. In the 19th century, more parliamentary involvement in foreign affairs indeed implied an original enhancement of democratic legitimacy to the detriment of hereditary monarchy. This led many observers to the conclusion that only the unlimited parliamentary hold over foreign affairs completes the proc-

¹⁰⁸ For more details see Thym, *supra* note 17, at 121-3.

¹⁰⁹ On the protracted procurement of the A400M military transport aircraft see again Thym, *ibid*, at 122.

¹¹⁰ As foreseen by Art 10 of the Protocol (No. 1) on the Role of National Parliaments annexed to the ConstEU; for COSAC see online at <http://www.cosac.org>.

ess of democratisation.¹¹¹ But this correlation is not imperative. The dual claims for legitimacy underlying the monarchic-parliamentary standoff have given way to the uniform democratic justification of public authority, at least in Europe. Parliamentarians may well be more directly linked back to the citizens, but the executive agents in the Council and the Commission are nonetheless democratically elected and controlled – independent of how we position ourselves in the dispute over the democratic legitimacy of the different European institutions.¹¹² Enhancing the role of the European Parliament in foreign affairs may therefore entail a strengthening of democratic legitimacy, but its continued limitation on the contrary no longer implies undemocratic standards. The argument about parliamentary involvement in foreign affairs is therefore not only about democratic legitimacy, but also about the effective exercise and control of state functions.

In this respect, the European situation does not differ from the national context where the same arguments underlie the limited role of most national parliaments in foreign policy. The example of Germany and Italy deserve particular attention in this respect, since both countries re-drafted their constitutions after the traumatic experience of the Nazi and fascist period in a deliberate attempt to establish the institutional foundation of a viable democracy – and refrained from a wide-spread parliamentarisation of foreign affairs.¹¹³ In the same vein, the new constitutions of the Central and Eastern European states after the fall of the Berlin wall have not embarked upon a full-scale parliamentarisation of foreign policy.¹¹⁴ Of course, a rough comparative survey of positive constitutional rules does not give any definitive answers about the underlying constitutional concepts for foreign relations, but it nonetheless indicates that the European model follows the constitutional mainstream. At the same time, the variety of detailed rules on the role of parliaments in foreign affairs shows that the common thread of limited parliamentary involvement does not translate into an institutional blueprint which the European Union might follow indiscriminately.¹¹⁵ Instead, the EU also needs to develop its specific and unique interinstitutional system and the respective provisions of the Treaty have to be interpreted autonomously.¹¹⁶

The preceding analysis has shown that the EU's specific constitutional model of parliamentary involvement in foreign affairs laid down in the European Treaties is the result of recurring debates. Various IGCs and the European Convention deliberately refrained from a substantial enhancement of parliamentary powers in foreign affairs, in obvious contrast to its continued empowerment in domestic policy areas. As a result, both Article 300 EC on the conclusion of international agreements and Article 24 EU on the CFSP maintain a decidedly executive orientation (sections II and IV). Similarly, the Parliament's attempt to change the institu-

¹¹¹ See in the German context the famous dispute between W Grewe and E Menzel in 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 129-220.

¹¹² With the intergovernmentalist standpoint arguing that the Council, not the European Parliament, enjoys greater democratic legitimacy through its direct integration in our national political systems; cf *supra* note 107.

¹¹³ For Germany, the historic Menzel v Grewe dispute, *ibid*, and, most recently, C Calliess, 'Auswärtige Gewalt' in Isensee and Kirchhof, *supra* note 76, § 589.

¹¹⁴ See the comparative survey of judicial control with corollary remarks on parliamentary accountability by T Giegerich, 'Verfassungsgerichtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat' (1997) 57 ZaöRV 409-564, available online at <http://www.zaoerv.de>.

¹¹⁵ See on the international agreements again the study by Riesenfeld and Abbott, *supra* note 20.

¹¹⁶ ECJ, Case C-189/97 *Parliament v Council* [1999] ECR I-4741, para 34 rejects the argument of a wide interpretation of the EP's powers under the present Art 300(3) EC, whose interpretation cannot 'be affected by the extent of the powers available to national parliaments.'

tional practice in its favours have largely been unsuccessful despite repeated endeavours to get a foot in the negotiation room of international agreements and use its budgetary powers as a leverage to be involved in the elaboration of the CFSP (sections II.A.i and IV.B). Generally speaking, these developments show that the ‘parallelism paradigm’ of EU external relations does not extend to the institutional involvement of the European Parliament. As lawyers we have to accept this constitutional status quo as a legal fact of life – whether we like it or not.

I suggest that there is a conceptual logic underlying the current constitutional role of the European Parliament in EU international relations – even if many Treaty rules and the pillar structure are the result of political compromises rather than the realisation of a constitutional master plan.¹¹⁷ More specifically, we should complement the ‘parallelism paradigm’ which continues to dominate the academic analysis of EU external relations and embed Europe’s foreign policy constitution into the international context. The international relations of the European Union are no mere continuation of its internal integration process, which project its domestic competences, procedures and integration method to the external dimension. Instead, the analysis of the Treaty provisions on parliamentary involvement in Europe’s international relations illustrates the need to combine the internal perspective with the external viewpoint. Parliament’s role in Europe’s foreign affairs constitution combines the constitutional essentials of Europe’s domestic system of government with the requirements of the laws and customs of international relations. In this respect Parliament’s role in foreign affairs is a generic expression of Europe’s foreign affairs constitution.

Four findings of the preceding analysis support this argument: First, the Treaty rules governing the negotiation, conclusion and evolution of international agreements repeatedly take into account the customs of diplomatic relations and the evolutionary and practice-dominated features of the international law of treaties (section II.A). Second, foreign policy in general and the CFSP in particular are by nature strategic, dominated much less than domestic politics by rule-making with the corresponding rights of parliaments (section IV). Third, the realisation of the ESDP requires Union access to civilian and military personnel of the Member States whose organisation and deployment remains a constitutional prerogative of the Member States, controlled primarily by national parliaments (section IV.D). Eventually, the continued statehood of the Member States under international law argues for their original place at the international level besides and together with the wide-spread powers of the European Community – as illustrated by the maintenance of Member State participation in mixed agreements with an original role for national parliaments (section III).

My theses on the conceptual specificity of Europe’s foreign affairs constitution are based on the current provisions of the European Treaties. I do not imply that the Parliament’s current constitutional status is or should be set in stone. The reform steps envisaged in the Constitutional Treaty indicate that there is room for change within the above-mentioned conceptual understanding of Europe’s foreign affairs constitution.¹¹⁸ Moreover, the international context itself is undergoing a fundamental transformation which might lead to a conceptual reassessment of parliamentary involvement in foreign affairs and eventually translate into new constitutional rules: International law, not only within the WTO, is increasingly effecting the posi-

¹¹⁷ As remarked by de Witte, *supra* note 55, at 51.

¹¹⁸ On Article III-325(6) ConstEU see sections II.A.ii and II.B.

tion of individuals, reinforcing the call for more parliamentary accountability.¹¹⁹ Sovereign nation states are losing their monopoly as the principle actors in international relations with the emergence of non-state actors, which facilitate a pluralist representation of public interests through parliamentary involvement.¹²⁰ International law has abandoned its neutrality towards the internal system of government and the EU itself is actively promoting the spread of democracy, which again argues for more parliamentary rights in foreign affairs.¹²¹ Europe's repeated call for 'effective multilateralism' might eventually also lead towards more parliamentary rights, effectively exporting some features of the European supranational model to the international level.¹²²

VI. CONCLUSION

Europe's international relations continue the tradition of executive dominance in foreign affairs. The impressive empowerment of the European Parliament in domestic policies does not extend to the external activities of the European Union. Instead, repeated calls for an enhancement of parliamentary involvement fell on deaf ears. This is apparent in the rules governing the negotiation, conclusion and evolution of international agreements, where the standard case of parliamentary involvement is limited to parliamentary consultation or consent under Article 300(3) EC. In obvious contrast to the parliamentary policy-shaping powers under the co-decision procedure the diplomatic negotiation room remains closed for MEPs whose options are limited to the binary rejection or approval of the agreement. Evolutionary features of the international law of treaties, such as the suspension of rights or the adoption of implementing decisions, are even fully beyond the Parliament's reach, as are some policy areas such as the Common Commercial Policy. The Constitutional Treaty would not fundamentally reverse this picture of limited parliamentary involvement in international law-making despite some important new rights for the European Parliament.

Limited parliamentary involvement extends to the non-contractual 'diplomatic' dimension of foreign policy, which is particularly pronounced under the CFSP with its almost complete exclusion of formal parliamentary oversight – which is in practice however complemented by the tentative projection of an original parliamentary diplomacy with the European Parliament trying to influence foreign affairs as an foreign policy actor in its own right. It corresponds to the constitutional character of the European Union that national parliaments maintain an original function in European foreign affairs with a view to defence policy and the ratification of mixed agreements whose maintenance despite recent calls for their replacement by cross-pillar EU/EC agreements should be welcomed as a principled expression of Europe's consti-

¹¹⁹ See R Uerpmann-Witzack, 'The Constitutional Role of Multilateral Treaty Systems' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006), 145-82 and E-U Petersmann, 'Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy' in *Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Den Haag, Kluwer Law, 2002), 383.

¹²⁰ If national governments lose their former monopoly as primary agents of international relations through the increased importance of NGOs and multilateral companies, it becomes easier for national parliaments to complement the unitary position of the executive with pluralistic parliamentary debate.

¹²¹ See de Witte, *supra* note 58, at 105 and P Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Leuven, Europa Law Publishing, 2005), at 4.

¹²² Cremona, *supra* note 2, at 148 and L Azoulay, 'The Acquis of the European Union and International Organisations' (2005) 11 ELJ 196-231.

tutional singularity. The persistence of the special treatment of the European Parliament is an important indicator for the specificities of Europe's foreign affairs constitution. The EU's international relations are no mere continuation of its internal integration process, which project its domestic integration method to the external dimension. Instead, the analysis of the Treaty provisions on parliamentary involvement illustrate the accommodation of Europe's domestic constitutional model with the requirements of the laws and customs of international relations.