The New, New Sovereigntism: How the Europe Union Became Disenchanted with International Law and Defiantly Protective of Its Domestic Legal Order

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The New, New Sovereigntism, or How the European Union Became Disenchanted with International Law and Defiantly Protective of Its Domestic Legal Order

Mark A. Pollack*

> Europe as a political entity will either be united, or will not be at all. Only a united Europe can be a sovereign Europe in relation to the rest of the world. And only a sovereign Europe guarantees independence for its nations, guarantees freedom for its citizens.
>
> – Donald Tusk[1]

Within the West, the United States of America (USA) and the European Union (EU) are often depicted as being divided in their attitudes towards international law, with a "Normative Power Europe" embracing the rule of international law while an exceptionalist and "New Sovereigntist" USA opposes any incursion of international law into the US legal order. More specifically, the new sovereigntist critique of international law, which comes primarily from the American right, can be broken down into three essential claims: first, that international legal processes are procedurally flawed, and inferior to the US democratic, constitutional system of making and interpreting law; second, that international legal norms and rules are also substantively flawed, in conflict (or at least tension) with core US values; and third, that US sovereignty and the US domestic legal order must be protected – often defiantly so – against international law, through means such as non-ratification of, reservations to, and non-self-executing status of treaties, as

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1 Donald Tusk, *Speech by President Donald Tusk at the Ceremony of the 60th Anniversary of the Treaties of Rome* (25 March 2017), www.consilium.europa.eu/en/press/press-releases/2017/03/25-tusk-ceremony-rome-speech/.

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well as refusal by Congress and the courts to give direct effect to international treaties, custom and judicial decisions in the US legal order.

In this chapter, I question this transatlantic dichotomy, documenting the rise of what one might call a "new, new sovereigntism" emanating from Europe. Contrary to what one might expect, I do not locate this new European sovereigntism on the far right. To be sure, nationalist far-right parties are resurgent across Europe, deeply attached to traditional state sovereignty, and overtly hostile to the EU's intrusions on the nation-state.[2] By and large, however, far-right parties and movements in Europe have concentrated their fire on the EU, and largely ignored the more distant body of public international law. The new sovereigntism that I trace in this chapter, rather, has arisen among *pro-European* parties and movements, and primarily on the left and center-left of the political spectrum, seeking to defend *EU* laws and the autonomy of *EU* legal order against the intrusions of a growing body of public international law to which they object.

In parallel to American sovereigntism, I argue, the new European sovereigntism makes three essential claims: first, that international lawmaking and interpretive processes are procedurally flawed, in the sense of being secretive and dominated by the USA and by corporate influence; second, that at least some international rules and norms are illiberal in their substantive content, conflicting with and threatening to destroy core principles of European fundamental rights and social and environmental regulations; and third, that the European legal order must be defiantly protected against the intrusion of illiberal international legal influences. Put simply, the European left has discovered the importance of protecting EU laws, values and legal autonomy against what is perceived to be a procedurally flawed and substantively objectionable body of international law. We see this phenomenon also in the domestic politics of individual European states, but it is most clearly manifest at the level of the EU, the institutions of which provide opponents of international law with multiple veto points through which to block the adoption of, consent to, compliance with, and internalization of international rules and norms.

Empirically, the chapter explores the rise of this new, European version of sovereigntism by tracing European responses to three recent developments in international law: (1) the Anti-Counterfeiting Trade Agreement (ACTA), which was rejected by EU institutions for failing to protect the rights of EU citizens; (2) the proposed Transatlantic Trade and Investment Partnership (TTIP) with the USA and the Comprehensive Economic and Trade

2 *See, e.g.*, CAS MUDDE, POPULIST RADICAL RIGHT PARTIES IN EUROPE (2007).

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Agreement (CETA) with Canada, both of which have been denounced by political leaders and civil society for their secrecy as well as for alleged corporate domination of investor-state dispute settlement (ISDS); and (3) the Union's long-running rejection of, and defiant noncompliance with, the World Trade Organization (WTO) rulings on hormone-treated beef and genetically modified (GM) foods, which the EU found to be inconsistent with the Union's precautionary principle as well as the will of the people.

As we shall see, the new European sovereigntism is not identical to its American cousin: coming primarily from the left and center rather than the right, the new European variant objects to different features and fields of international law, seeks to defend different bodies of domestic law, and for the most part engages with the international legal order more constructively than American sovereigntism. The point of this chapter, therefore, is not to equate the American and European versions of sovereigntism from a normative or political perspective, but rather to note that we are witnessing the emergence of a genuinely new phenomenon: for decades, Europe has been characterized by a mainstream, consensual and almost uncritical enthusiasm for international law, seen as legitimate in process as well as in content, and welcome in the EU legal order. I argue, however, that contemporary Europe, particularly on the left, has lost this uncritical acceptance of international law, replaced with a growing conviction that at least some parts of international law are objectionable both in process and in substance, and that domestic European rules and values must be defended against it. Proponents of international law, and those who would advocate its progressive development, ignore the rise of this new European skepticism at their peril.

4.1 THE ARGUMENT

Over the past several decades, it has become commonplace in both scholarly and political circles to contrast the positions of the USA and the European Union EU toward the rule of international law.[3] Especially during the years after the September 11, 2001 terrorist attacks, critics argued that the USA had abandoned its post-war role as the champion of the international legal order, being instead characterized at best by ambivalence toward legal constraints, and at worst as a "rogue nation."[4] By contrast, the EU has been seen as

[3] For an excellent discussion of transatlantic disagreements among legal scholars as well as political actors, *see* Guglielmo Verdirame, *"The Divided West": International Lawyers in Europe and America*, 18 Eur. J. of Int'l L 553 (2007).

[4] *See, e.g.*, Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 Foreign Aff. 9 (2000); Harold Hongju Koh, *On American Exceptionalism*, 55

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inherently committed to the rule of law and a strong international legal order.[5] This stark contrast has, in recent years, taken on the status of conventional wisdom, among both liberal European scholars, who present the rule of law as a cornerstone of the nascent EU foreign policy,[6] and American neoconservative commentators, who proudly defend US defiance of international law they see as illegitimate.[7]

This strong transatlantic contrast in US and EU attitudes towards international law is certainly overdrawn. In a recent, collective project on US and EU support for international law, I have argued that one can and should disaggregate the overly broad notion of "support" into four dimensions or stages – from *leadership* in the negotiation of international agreements, through *consent* to those agreements, *compliance* with legal obligations and *internalization* of international law into the domestic legal order.[8] Disaggregating support in this manner, we see a much more complex picture, with considerable variation within as well as across the USA and the EU, across dimensions, among issue-areas, and over time. The USA, for example, has indeed demonstrated considerable reluctance to commit itself to multilateral agreements though Congressional ratification, and also to internalize international law in the domestic legal order, both of which lend support to the "new sovereigntist" image of America. Yet the USA has played an important (if inconsistent) leadership role in the creation of the international legal order, and its record of compliance with international law remains strong in many areas. Empirical examination of the EU's engagement with the international legal order reveals a similarly nuanced story. On the one hand,

Stan. L. Rev. 1479 (2003); John F. Murphy, The United States and the Rule of Law in International Affairs (2004); Clyde V. Prestowitz, Rogue Nation: American Unilateralism and the Failure of Good Intentions (2004); Philippe Sands, Lawless World: The Whistle-Blowing Account of How Bush and Blair Are Taking the Law into Their Own Hands (2006); and Jens David Ohlin, The Assault on International Law (2015).

[5] *See, e.g.*, Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. of Common Mkt. Stud. 235 (2002); Liesbeth Aggestam, *Introduction: Ethical Power Europe?*, 84 Int'l Aff. 1 (2008); and Verdirame, *supra* note 3, at 576, ("Invoking a rule of international law carries, ipso facto, some weight in Europe, the normativity of international law being psychologically and politically widely accepted").

[6] *See, e.g.*, Ian Manners, *The Normative Ethics of the European Union*, 84 Int'l Aff. 45 (2008).

[7] Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005); and Eric A. Posner, The Perils of Global Legalism (2009).

[8] The discussion in this and the previous paragraph draws on Mark A. Pollack, *Who Supports International Law, and Why? The United States, the European Union, and the International Legal Order*, 13 Int'l J. Const. L. 873 (2015) (introducing a symposium of six articles, with case studies on international human rights law, trade law, criminal law, environmental law and the reception of international law in US and EU courts, respectively).

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European countries and the EU itself appear substantially more ready to consent to international legal agreements (at least until very recently), and Europe also has a strong record of compliance in most areas of international law. On the other hand, EU leadership has been selective both across issue areas and over time, and there is reason to question the image of the EU as open to internalization of international law, given evidence that European courts have increasingly sought to protect the autonomy of the EU legal order.

My aim in this chapter is not to attack, much less to debunk, the conventional dichotomy between a scofflaw America one the one hand and an international law-loving Europe on the other. The aim of this chapter, rather, is to suggest that European attitudes towards international law may be *changing*, and that the EU is developing a European variant of the American new sovereigntism, in which a growing number of critics – concentrated primarily, though not only, among the pro-European left and center-left – have raised fundamental procedural and substantive objections to international rules and norms, which they depict as hostile to European laws and values, and against which they champion a defiant resistance. In a growing number of areas of international law, including international trade, economic regulation, food safety, data privacy, and national security, the European center-left has moved towards a sharply critical view of international law, alternatively resisting consent to unwelcome agreements,[9] compliance with unwelcome international judicial decisions,[10] and internalization of international laws perceived to be in tension with domestic EU rules and rights.[11] These changing attitudes towards international law, in turn, have been magnified and translated into policy outcomes through the EU's "hyper-consensus" political institutions, which create multiple veto points allowing critics of international law to block EU consent to, compliance with, and internalization of a growing

[9] Examples include the ACTA, TTIP and CETA cases discussed below, as well as several bilateral agreements with the United States dealing with the sharing of Passenger Name Recognition flight information and SWIFT banking data. On the latter two cases, *see, e.g.*, Jörg Monar, *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications*, 15 Eur. Foreign Aff. Rev. 143 (2010); and Katharina Meissner, *Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP*, 21 Eur. Foreign Aff. Rev. 269 (2016).

[10] *See, e.g.*, the beef-hormones and GM foods cases discussed below, as well as the discussions of EU "obstructionism" and occasional noncompliance in international trade law, in Christina L. Davis, *A Conflict of Institutions? The EU and GATT/WTO Dispute Adjudication, Department of Politics*, Princeton University, March 12, 2007; and Jappe Eckhardt & Manfred Elsig, *Support for International Trade Law: The US and the EU Compared*, 13 Int'l J. Const. L. 966 (2015).

[11] Gráinne de Búrca, *Internalization of International Law by the CJEU and the US Supreme Court*, 13 Int'l J. Const. L. 987 (2015).

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number of areas of international law. Let us consider each of these two factors – changing European attitudes and EU institutions – in turn.

4.1.1 *The New, New Sovereigntism in Europe, in Three Theses*

As noted above, the new sovereigntist critique of international law in the United States can be summarized in three essential claims: that international legal processes are procedurally flawed and inferior to the US democratic, constitutional system of making and interpreting law; that international legal norms and rules are substantively flawed, in conflict with core US values; and that the US domestic legal order must therefore be protected against international law. In this section, I briefly unpack each of these three claims, and argue that a parallel set of claims is emerging in Europe. To be clear, I do not argue that these claims are substantively identical, for they are not: indeed, the "new, new sovereigntism" in today's EU emerges primarily (though not only) from the left and center-left rather than the right; it seeks to protect a different set of domestic values (centered around European conceptions of fundamental rights and the "European social model"); and it objects to different features and bodies of international law. Structurally, however, the two sovereigntisms share a similar architecture.

First, at the most general level, the new sovereigntism on both continents manifests as a normative critique of international legal *processes*, which are depicted as inferior to domestic constitutional practices of democratic law-making (in the legislative function) and legal due process (in the executive and judicial functions). In the USA, we see a widespread view on the conservative right that international legal processes are illegitimate, seeking to replace US constitutional procedures for making, executing and interpreting the law with flawed international processes in which multilateral treaty-making (at the United Nations in particular) is driven by coalitions of illiberal states using their numbers to ride roughshod over the minority of liberal democracies, while international legal interpretation and adjudication is undertaken by unaccountable, low-quality or biased international adjudicators, with insufficient due process accorded to either state or (in the case of international criminal law) individual defendants. It is, in part, views such as these that explain domestic US opposition to the workings of UN human rights treaty bodies, interstate courts such as the International Court of Justice and the International Tribunal on the Law of the Sea, and the International Criminal Court. In Europe, we see a variant of this procedural argument emerging from the center-left. Like their American counterparts, European sovereigntists see international legal processes as flawed, threatening to replace democratically

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legitimate domestic decisions with normatively inferior international processes, but the specific criticisms are different. In the European critique, many international legal decisions, in areas ranging from international trade to international security, are taken in secret by executives of states, with inadequate or nonexistent supervision by democratically elected legislatures. These secret negotiations, moreover, disproportionally benefit great powers, most notably the United States, as well as the multinational corporations that enjoy privileged access to them. Moving from lawmaking to adjudication, and continuing the focus on secrecy and corporate power, European sovereigntists focus their procedural skepticism on the arbitral procedures of investor-state dispute settlement, which gives corporate investors a privileged right to challenge the economic policies and regulations of sovereign states before secretive arbitral tribunals.

Second, sovereigntists in Europe and the USA both stand opposed to the *substance* of many international rules and norms, which are held to contradict deeply held domestic values and/or violate fundamental rights. On the American right, the argument is that, in part because the making and interpretation of international law has been captured by illiberal and undemocratic governments, the substance of international rules is foreign to US constitutional and legal traditions, and/or harms US national interests. These substantive concerns are arguably at the heart of sovereigntist opposition to UN human rights law (which is seen to be foreign to either the US constitutional order or the Judeo-Christian tradition), environmental law (seen as imposing an unfair burden on the USA or constraining US economic growth), as well as the law of the sea, humanitarian law and criminal law. European sovereigntists similarly find substantively objectionable provisions in international law, although again the specific complaints are different. As we shall see, Europeans express an increasingly common belief that, because so much of international law has been captured by the USA and multinational corporations, much of contemporary international law represents a neoliberal assault on the social regulations and fundamental rights that together form Europe's *acquis social*.

Finally, following from these first two elements, the third common element is a commitment to protecting domestic (national or European) sovereignty against the encroachment of flawed international rules and processes, by (1) blocking agreement on or consent to objectionable international legal agreements, or, if such obstruction is impossible, then (2) blocking compliance with or internalization of international rules in the domestic legal order. Indeed, the most visible hallmark of the new sovereigntism is not just defiance, but proud defiance, of international legal rules and processes, coupled with

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a zealous effort to protect valued domestic rules and processes from their baleful effects. In the USA, conservatives defiantly and successfully block ratification of unwelcome treaties in areas as diverse as human rights, environment, law of the sea, criminal law and arms control, among others. In Congress, mostly conservative majorities ensure that many of the treaties that *are* ratified are declared non-self-executing, and/or the subject of extensive reservations. And in US courts, conservative judicial majorities frequently decline to give direct effect to international treaties and international judicial decisions. In Europe, the defiant protection of national sovereignty comes primarily from the left, seeking to protect fundamental rights and economic and social regulations from the economically liberalizing or securitizing influences of international law. Here, we find socialists, liberals and Greens (among others) defiantly opposing conclusion of TTIP, and blocking European ratification of treaties like ACTA and CETA on the grounds that they would violate the rights of European citizens. Where critics of international law fail to block the initial adoption of international legal obligations, as with the WTO and its attendant technical agreements, they may seek to obstruct compliance with unwelcome judicial rulings, as in the US/EU disputes over hormone-treated beef and genetically modified foods. Notwithstanding the long tradition of presenting the EU as valuing international law independent of content, a growing number of EU citizens and legislators now view at least some areas of international law as threatening, and to be resisted rather than welcomed.

In sum, while the American and European versions of sovereigntism may seem like opposites – coming from different ends of the political spectrum, objecting to different features of international law and seeking to protect different elements of their own domestic legal orders – they are nevertheless structurally quite similar, combining procedural and substantive critiques of international law with a determined effort to cordon off and protect the autonomy of their domestic legal orders.

4.1.2 *The Aggravating Effect of Institutions: the EU As a Separation of Powers System with Multiple Veto Points*

The emergence of a European legal sovereigntism is primarily the result of changes in European attitudes towards international law and the need to protect domestic (national or EU) sovereignty against it. As in the USA, however, attitudes are only part of the story, because in both polities, *decentralized, separation-of-powers political institutions create multiple veto points, amplifying the influence of critics of international law*.

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In principle, a huge variety of legal and constitutional features – including not least broad differences in regime type between democratic and authoritarian regimes, or legal differences between monist and dualist legal systems – might influence the approach of a given state to international law. For our purposes here, however, the most significant feature of both EU and US institutions has to do with the horizontal and vertical separation of powers, and the multiplication of veto points that allow domestic actors in both settings to block or challenge the consent to, compliance with and internalization of international law.[12] More precisely, the EU, like the USA, is characterized by both a horizontal separation of powers among the legislative, executive and judicial branches of the EU government, and a vertical separation of powers between the EU and its constituent member states. Both of these separations of powers, and the resulting multiplication of veto players, complicate the ability of the EU, like the USA, to commit to international legal agreements *ex ante*, and to comply with and internalize those agreements *ex post*. Let us consider each separation of powers in turn.

The horizontal separation of powers in the USA divides governmental authority among an executive branch that negotiates and executes international legal agreements, a legislative branch whose consent is required for ratification of most international treaties, and a judicial branch that interprets those treaties and facilitates or blocks their internalization in the domestic legal order. The result of that separation of powers for US engagement with international law is well known, perhaps most strikingly with respect to challenge of treaty ratification. Not only does the two-thirds majority requirement in the US Senate necessitate in most cases a bipartisan majority to ratify any proposed treaty, but the structure of the Senate also results in the overrepresentation of the less populous states, such that Senators representing only 17 percent of the US population are in theory capable of rejecting any international treaty.[13] Furthermore, the US presidential system, by contrast with the parliamentary systems characteristic of nearly all European countries, includes within it the prospect of divided government, in which a President is often faced with the prospect of sending a treaty to a Senate with a majority (or a blocking minority) from the opposition party. Taken together, these

[12] On the EU as system characterized by a vertical and horizontal separation of powers, *see* Mark A. Pollack, *Theorizing EU Policy-Making*, in Policy-Making in the European Union (Helen Wallace, Mark A. Pollack, Christilla Roederer-Rynning, & Alasdair Young, eds., 2020). On the significance of veto points and veto players, *see* George Tsebelis, Veto Players: How Political Institutions Work (2002).

[13] Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L. J. 1236, 1271 (2008).

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institutional rules privilege status-quo interests seeking to block the ratification of treaties to which they are opposed, and no doubt help to explain the extremely large backlog of treaties signed by the President but not subsequently approved by the Senate – a classic case of what Robert Putnam has called "involuntary defection" from international agreements as a result of failed ratification.[14]

Although the majority of European states are characterized by parliamentary systems with relatively few veto players, the EU itself strongly resembles the USA as a separation-of-powers system, with independent and powerful executive, legislative and judicial branches of government. In the EU, the Brussels-based Commission acts as the core executive, while the legislative function is shared by the intergovernmental Council of Ministers and by the directly elected European Parliament (EP), and the Court of Justice of the European Union (CJEU) acts as the independent and powerful judicial branch. Taken together, these institutions create multiple veto points and veto players, and make the Union a "hyper-consensus polity" requiring broad agreement to enact domestic and international policies and allowing multiple actors to block any unwelcome initiatives.[15]

This hyper-consensus nature of EU institutions has been studied most prominently in domestic EU rulemaking, but it is increasingly manifest in EU foreign relations as well. Under the terms of the 2009 Treaty of Lisbon, the Union as such is empowered to negotiate and act as a party to international treaties within its areas of competence (most notably trade), subject to ratification by both the Council of Ministers and the European Parliament. Indeed, it appears that the recent empowerment of the Parliament to consent to international agreements has resulted in a modest "ratification problem" for the Union, manifested in the Parliament's rejection of agreements such as the US/EU agreement on the sharing of banking data,[16] another bilateral

[14] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int'l Org. 427, 438 (1988) ("The possibility of failed ratification suggests that game theoretical analyses should distinguish between *voluntary* and *involuntary defection*. Voluntary defection refers to reneging by a rational egoist in the absence of enforceable contracts-the much-analyzed problem posed, for example, in the prisoner's dilemma and other dilemmas of collective action. Involuntary defection instead reflects the behavior of an agent who is unable to deliver on a promise because of failed ratification").

[15] On the EU as a "hyper-consensus polity," *see* Simon Hix, The EU as a Political System (2008).

[16] Stanley Pignal, *European Parliament Rejects US Data Swap Deal*, FT.com, Feb. 11, 2010, https://proxy.library.upenn.edu/login?url=https://proxy.library.upenn.edu:2072/docview/229320051?accountid=14707.

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agreement with Morocco over fisheries,[17] and the multilateral ACTA (discussed in Section 4.2). In this sense, the empowerment of the EP, which has been rightly presented as a victory for democratic accountability in the Union,[18] has also increased the incidence and the future likelihood of involuntary defection. Much the same is true of the CJEU, which is entrusted with ensuring that EU foreign policy conforms to the requirements of the Treaties, and which in that context has denied direct effect to WTO law in the EU legal order,[19] nullified the application of UN Security Council Resolutions in the EU,[20] and blocked the Union's accession to the European Convention on Human Rights.[21] More generally, the horizontal separation of powers has the effect of creating multiple veto points – the Commission, the member states in the Council, the EP and the CJEU – any of which can block the EU's consent to, compliance with, or internalization of international law.

This effect is magnified, in the EU as well as the USA, by a second separation of powers, between a federal or quasi-federal center and the constituent states. In the US context, federalism has meant in practice that the federal government must respect the rights of the various states in its negotiation of international agreements, and that individual states may complicate US compliance with such agreements by adopting policies at odds with the international legal commitments entered into by the federal government. In the EU, with its system of enumerated powers for the Union, and strong residual powers of the member states, the vertical separation of powers can similarly impair the ability of the Union to consent to international legal agreements, and to implement and internalize those agreements after the fact. The former effect is most notable in areas of "mixed competence," where the Union shares competence with the member governments. For such agreements, which include both environmental accords as well as complex trade and investment agreements (including the ACTA, TTIP and CETA

[17] Toby Vogel, *MEPs Reject EU-Morocco Fisheries Pact*, Eur. Voice, Dec. 14, 2011, www.politico.eu/article/meps-reject-eu-morocco-fisheries-pact/.

[18] Meissner, *supra* note 9.

[19] de Búrca, *supra* note 11.

[20] Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found.* v. *Council & Commission*, 2008, E.C.R I-6351. For an excellent analysis stressing the CJEU's defense of the autonomy of the EU legal order, *see, e.g.*, Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 Harv. Int'l L. J. 1 (2008).

[21] Opinion 2/13, EU:C:2014:2454, Dec. 18, 2014; Walter Michl, *Thou Shalt Have No Other Courts Before Me*, VerfBlog, Dec. 23, 2014; 2014/12/23, http://verfassungsblog.de/thou-shalt-no-courts/; Daniel Halberstam, *It's the Autonomy, Stupid: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 Ger. L. J. 105 (2015); Turkuler Isiksel, *European Exceptionalism and the EU's Accession to the ECHR*, 27 Eur. J of Int'l L. 565 (2016).

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agreements discussed in Sections 4.2, 4.3, and 4.4), ratification of an international agreement requires the agreement of EU institutions *as well as that of all of the individual member states*. This dramatically increases the number of veto players in the system, to include the national and even subnational parliaments of the various member states, placing further impediments to the Union's ability to consent to, comply with and internalize international law.

Taken together, the emergence of a European new sovereigntism, together with EU institutions that empower critics of international law, have resulted in a number of landmark conflicts over the EU's support for important parts of the international legal order over the past decade. I examine three such conflicts in the next three empirical sections of the chapter, summarizing the debate in each case and drawing lessons about Europe's changing relationship to public international law.

4.2 INTERNATIONAL INTELLECTUAL PROPERTY VERSUS DOMESTIC DATA PRIVACY RIGHTS: THE DEFEAT OF THE ANTI-COUNTERFEITING TRADE ACT

The Anti-Counterfeiting Trade Act, or ACTA, was a multilateral trade agreement negotiated from 2008 to 2011 among a group of mostly advanced industrial countries, which included the USA, Japan, the EU and its member states, Switzerland, Canada, Australia, New Zealand, South Korea, Singapore, Morocco and Mexico. The agreement, concluded in 2011, sought to create harmonized rules for the protection of intellectual property rights (IPR), with a focus on the digital environment of the internet, requiring all members to implement in their own domestic law a series of intellectual property protections as well as enforcement procedures and effective remedies for violations.[22]

For the EU, ACTA was a "mixed" agreement, involving the competences of both the Union and its then-twenty-seven individual member states, with the Union's interests being represented in negotiations primarily by the Commission. As a mixed agreement, ACTA would require ratification *both* by the Union, including approval by the European Council and consent of the EP, *and* by each of the member states, in order to take effect. In December 2011, the European Council unanimously endorsed the agreement. The following month, the EU and twenty-two of its member states signed ACTA in a ceremony in Japan. In an early sign of potential

[22] Ministry of Foreign Affairs of Japan, *Anti-Counterfeiting Trade Agreement*, www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

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difficulties, however, five EU member states – Germany, Cyprus, Estonia, the Netherlands and Slovakia – withheld their signatures. The subsequent ratification process, moreover, prompted vigorous opposition to the treaty, both within the EP and on the streets of many European cities, culminating in the dramatic and overwhelming rejection of ACTA by the Parliament in July 2012. For our purposes, ACTA is a case of European nonconsent to a multilateral international treaty, of a type that is commonplace in the USA but which was, at the time, relatively new for the EU. It was also, in Putnam's phrase, a case of "involuntary defection," since the EU's chief negotiator, the Commission, had negotiated and concluded a legally binding treaty with its counterparts, only to see EU and national institutions refuse to ratify the agreement after the fact.

A detailed review of the contents of ACTA, or of the debate over its ratification, is beyond the scope of this chapter,[23] yet even a brief review of the debate reveals all three of the elements discussed above, including claims that the treaty was both procedurally and substantively flawed and in conflict with core European values, as well as defiant and ultimately successful calls for the rejection of the treaty.

Procedural objections to the negotiation process for ACTA began almost immediately after the negotiations were launched. The focus at this early stage, as well as later, was on the confidential nature of the negotiations, which were conducted in secret among the delegates of the parties. In fact, the conduct of trade negotiations in secret is a long-standing tradition, designed to allow negotiators to make difficult and politically sensitive concessions in specific sectors in pursuit of an overarching agreement, yet European critics consistently referred to ACTA as a "shady back-room deal"[24] adopted behind a "veil of secrecy" under pressure from intellectual property owners, and without proper democratic oversight.[25]

[23] For useful reviews and analyses, *see, e.g.*, Kimberlee Weatherall, *Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement*, 33 Sydney L. Rev. 229 (2011); Bryan Mercurio, *Beyond the Text: The Significance of the Anti-Counterfeiting Trade Agreement*, 13 J. of Int'l Econ. L. Vol. 361 (2012); Duncan Matthews & Petra Žikovská, *The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, 44. Int'l Rev. of Intell. Prop & Competition L. 626 (2013); and Andreas Dür & Gemma Mateo, *Public Opinion and Interest Group Influence: How Citizen Groups Derailed the Anti-Counterfeiting Trade Agreement*, 21 J. of Eur. Pub. Pol'y 1199 (2014) .

[24] Danny O'Brien, *Secret Agreement May Have Poisonous Effect on the Net*, The Irish Times, Nov. 13, 2009, at 10.

[25] Eric Pfanner, *Quietly, Nations Grapple with Steps to Quash Fake Goods*, The New York Times, Feb. 16, 2010, at B6.

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These concerns about secrecy were expressed strongly in the European Parliament, which consistently sought to protect its prerogatives under the recently adopted Lisbon Treaty. In March of 2010, the EP issued a strongly worded resolution, adopted by an overwhelming vote of 663 to 13, which expressed "its concern over the lack of a transparent process in the conduct of the ACTA negotiations," and called on the Commission and the Council to grant public and parliamentary access to negotiating texts and summaries and "to engage proactively with ACTA negotiation partners to rule out further negotiations which are confidential as a matter of course."[26] Although the Commission responded by releasing a draft text of the most recent ACTA draft in April of 2010,[27] the procedural charge that the negotiations had been undertaken in secrecy, and dominated by the USA and large corporations, would continue to dog the treaty.[28]

Just as importantly for our purposes, critics of ACTA increasingly shifted from *procedural* concerns to a series of *substantive* objections centered around the claim that ACTA constituted a major threat to EU-protected rights to privacy and data protection, as well as to internet freedom. During the negotiations, amid reports that the USA was seeking strong enforcement provisions in any potential treaty,[29] critics of the proposed treaty raised the alarm about a series of rumored provisions that would criminalize individual downloading of pirated materials or make internet service providers (ISPs)

[26] *European Parliament Resolution of 10 March 2010 on the Transparency and State of Play of the ACTA Negotiations*, P7_TA(2010)0058, ¶¶ 2–4; see also *EU Parliament Warns ACTA Negotiators*, The New Zealand Herald, Mar. 11, 2010. The EP's resolution also prefigured some of the substantive concerns that would later doom the treaty, noting for example that "privacy and data protection are core values of the European Union, recognised in Article 8 ECHR and Articles 7 and 8 of the EU Charter of Fundamental Rights, which must be respected in all the policies and rules adopted by the EU," and calling for the Commission to conduct an "impact assessment of the implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise IPR enforcement measures, and ecommerce, prior to any EU agreement on a consolidated ACTA treaty text," which it indicated should be limited to "to the existing European IPR enforcement system against counterfeiting." *European Parliament Resolution of 10 March 2010*, ¶¶ 7, 9, and 12.

[27] Nathalie Vandystadt, *Trade/Intellectual Property: ACTA in Line with EU Legislation, Says Commission*, Europolitics Info. Soc'y, May 7, 2010.

[28] Nor were concerns about secrecy limited to Europe. *See, e.g.*, David Jolly, *Fresh Battle Lines Drawn over Internet Freedom: Activists in Europe Say Public Did Not Have Input on Global Copyright Pact*, The Inter'l Herald Tribune, Feb. 6, 2012, at 13, (quoting an open letter from American law professors to President Barack Obama, criticizing the "intense but needless" secrecy of the negotiations).

[29] Michael Geist, *Anti-Counterfeiting Treaty Talks Heat Up*, The Toronto Star, Mar. 30, 2009, at B02; Bobbie Johnson, *Technology: Newly Asked Questions: What Is Acta and What Should I Know About It?*, The Guardian, Nov. 12, 2009, at 2.

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criminally liable for users' illegal activities.[30] One frequently mentioned concern was that ACTA could include a "three-strikes" rule, whereby individual internet users, after multiple warnings of copyright infringement, could be temporarily suspended from internet access, violating what many Europeans considered to be a fundamental human right.[31] The Commission repeatedly sought to address such fears, assuring Parliament and the public that no such provisions would appear in the final text.[32] Testifying before Parliament in July 2010, Trade Commissioner Karel de Gucht assured MEPs that, "This is not about creating a Big Brother," and that the Commission's objective was to "keep to the Community acquis."[33]

Despite these assurances, the publication of the final draft text and the signature of the treaty by the EU and twenty-two of its member states in January 2012, prompted an eruption of procedural and substantive objections to the treaty, in the EP, in national parliaments, and on the streets of European cities.

In early February of 2012, a reported 30,000 mostly young protestors took to the streets of German cities including Munich and Berlin, while other, smaller protests sprouted in Bulgaria, Romania, the Czech Republic, Hungary, Poland, Lithuania, France and the United Kingdom – a remarkable public response to a technical trade agreement.[34] Under pressure from an increasingly hostile public, national governments, including several that had already signed the agreement, renounced their support, indicating that they would not seek ratification. In Poland, for example, protesters massed in the streets of Posnan and Lublin, and the opposition Law and Justice party called for a referendum on the agreement.[35] Several days later, then-Prime Minister Donald Tusk withdrew his support of the agreement, announcing at

[30] Vandystadt, *supra* note 27.

[31] O'Brien, *supra* note 24, at 10; Pfanner, *supra* note 25, at B6.

[32] Vandystadt, *supra* note 27 ("For the Commission . . . things are now clear: 'The ACTA will be fully in line with current EU legislation'. The aim is to combat violation of intellectual property rights 'on a commercial scale'. In other words, the agreement is not supposed to affect the peer-to-peer swapping of illegally downloaded files between two teenagers, for example. 'The ACTA will by no means lead to a limitation of civil liberties or to harassment of consumers,' adds the EU executive. It notes that none of the negotiating parties is proposing to introduce a graduated response' rule (two warnings and then cut-off of the connection) against users who download content illegally. Nor will access to generic medicines be hampered, as some fear").

[33] Vandystadt, *supra* note 27.

[34] Michael Steininger, *More Than 30,000 Germans Turn Out Against Anti-Piracy Treaty ACTA*, The Christian Science Monitor, Feb. 13, 2012.

[35] Charles Arthur, *Acta Protests Break Out as EU States Sign up to Treaty*, The Guardian, Jan. 27, 2012.

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a press conference that, "The opinion prepared by our officials in the course of the final months of our work on the ACTA was not well thought-out ... It appears unarguable that the ACTA represents an attempt to enforce property rights at the expense of Internet freedom, which is too high a price ... ."[36] Other governments followed suit in the subsequent days and weeks, including the governments of Germany, Latvia, the Czech Republic and Bulgaria.

At the EU level, ACTA sparked an equally vigorous debate, centered primarily on the EP, which would ultimately decide its fate by ratifying or rejecting the agreement. The tone was set early on when the EP's original rapporteur for the agreement, French Socialist MEP Kader Arif, resigned in protest to "denounce in the strongest manner the process that led to the signing of this agreement: no association of civil society [and] lack of transparency from the beginning." Arif also complained about the specific provisions of the treaty, which he called "very unbalanced in favour of patent holders,"[37] and "wrong in both form and substance."[38] MEPs were also under public pressure, with opponents mobilizing some 2.8 million signatures on a petition that called on the EP to reject the treaty and protect the rights of European citizens.[39]

Once again, the Commission came to the defense of the proposed treaty, reiterating its claim that no changes would be required to European legislation, and requesting an advisory opinion from the Court of Justice to assess its compatibility with European fundamental rights and freedoms.[40] Parliament's new rapporteur for the agreement, David Martin of the Socialists and Democrats group, indicated that the EP would wait for the anticipated CJEU ruling,[41] but soon the debate in the Parliament outpaced the Court, as sentiment among MEPs turned increasingly against the treaty.

MEPs brought up familiar procedural and substantive criticisms against the treaty, while also raising new and additional objections familiar from many US

[36] BBC, *Polish Premier Urges European Parliament to Vote against ACTA*, BBC Worldwide Monitoring, Feb. 22, 2012.

[37] Charles Arthur, *Acta Goes Too Far, Says MEP*, The Guardian, Feb. 1, 2012.

[38] Quoted in David Jolly, *Fresh Battle Lines Drawn over Internet Freedom: Activists in Europe Say Public Did Not Have Input on Global Copyright Pact*, The Int'l Herald Tribune, Feb. 6, 2012, at 13.

[39] Avaaz, *ACTA: The New Threat to the Net*, https://secure.avaaz.org/en/eu_save_the_internet/?pv=412&rc=fb.

[40] The Commission's question to the Court, submitted on 4 April 2012, read, "Is the Anti-Counterfeiting Trade Agreement (ACTA) compatible with the European Treaties, in particular with the Charter of Fundamental Rights of the European Union?" European Commission, Press Release: "Update on ACTA's Referral to the European Court of Justice," 4 April 2012, at http://europa.eu/rapid/press-release_IP-12–354_en.htm?locale=en.

[41] *Id.*

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ratification debates. Critics, including Martin, argued that the provisions of the treaty were vague, and could potentially be interpreted in ways that could violate EU laws and EU citizens' fundamental rights. "The EP's goal and mine is to protect intellectual property rights in Europe," argued Martin, but "the problem with ACTA is its consequences. They say that the devil is in the details, but there aren't enough details in the text."[42] This view was shared by other critics, and endorsed in the Opinion of the European Data Protection Supervisor (EDPS), which criticized the treaty for the vagueness of its provisions, and noted that those provisions, "if not implemented properly," might interfere with the fundamental rights and freedoms of EU citizens.[43] Commissioner De Gucht responded forcefully to the EDPS opinion, noting that the implementation of those provisions would be left to the EU itself, and that there was no reason to assume that the Union would implement them in a way that violated fundamental rights.[44] Nevertheless, the EDPS report proved influential with MEPs, and the argument about the treaty's vagueness was widely cited in Parliament. Yet another argument familiar to veterans of US ratification debates came from European Socialists & Democrats group leader Hannes Swoboda, who objected to the treaty on the grounds that other relevant countries, like China and India, would remain outside the agreement.[45]

Gradually, over the course of multiple committee hearings and debates, MEPs and their political groups turned decisively against the agreement. On the left and center-left, the Green, Socialist and Liberal party groups in the EP all came out against the treaty, while the center-right European People's Party was divided, with many MEPs defending ACTA as a necessary agreement to protect intellectual property in the internet age.[46] Finally, in early July, 2012,

[42] David Martin, quoted in Manon Malhère, *Anti-Counterfeiting Trade Agreement: MEPs Concerned About ACTA's Vagueness*, Europolitics Info. Soc'y, Mar. 19, 2012.

[43] European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and Its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America*, April 24, 2012, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12–04-24_ACTA_EN.pdf, paras. 33–35, 69.

[44] Manon Malhère, *Anti-Counterfeiting Trade Agreement: De Gucht Finds Supervisor's Opinion "Unfounded"*, Europoltics Info. Soc'y, June 11, 2012.

[45] Manon Malhère, *Anti-Counterfeiting Trade Agreement: S&D May Reject ACTA*, Europoltics Info. Soc'y, Mar. 5, 2012.

[46] On the divisions within the EPP, and the party's efforts to delay a vote, *see* Manon Malhère, *Anti-Counterfeiting Trade Agreement: Parliament Throws Out ACTA*, Europoltics Info. Soc'y, July 9, 2012.

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the European Parliament voted in plenary to reject the treaty, by a lopsided vote of 478 MEPs voting against the agreement, with only 39 in favor and 165 abstentions.[47] Opponents of the treaty were both jubilant and defiant. "It's a crushing victory," said the spokesman for La Quadrature du Net, a Paris-based nonprofit group advocating internet rights and freedoms. "It's a political symbol on an enormous scale, in which citizens of the world, connected by the Internet, have managed to defeat these powerful, entrenched industries."[48] Leaders in the EP were similarly celebratory. "Acta is now dead in the EU thanks to the European Parliament," said rapporteur David Martin. "I am very pleased that the parliament has followed my recommendation and rejected Acta. The treaty is too vague and is open to misinterpretation. I will always support civil liberties over intellectual property rights protection in the EU."[49] EP President Martin Schultz, for his part, celebrated ACTA's rejection as "a milestone for European democracy."[50]

Whatever one's views on the merits of ACTA, the European debate about the treaty was a watershed, not only in the EP's powers to reject international treaties, but also as the first widespread expression of a new European sovereigntism, with its deep skepticism of the process and substance of international law and its determination to defend the European legal order against intrusions that could undermine European rights, European regulations and European sovereignty. It would not, however, be the last such expression.

4.3 INTERNATIONAL TRADE AND INVESTMENT LAW: THE CAMPAIGNS AGAINST TTIP, ISDS AND CETA

The Transatlantic Trade and Investment Partnership is a proposed economic agreement, the first of its kind, between the European Union and the United States. Negotiations on the terms of an agreement began in mid-2013, with the aim of concluding an agreement before the end of President Barack Obama's final term of office in January 2017 – a deadline that was clearly missed. As its name suggests, the proposed agreement was envisioned as a comprehensive

[47] European Parliament Press Release, *European Parliament Rejects ACTA*, July 4, 2012, www.europarl.europa.eu/news/en/news-room/20120703IPR48247/european-parliament-rejects-acta.

[48] Jeremie Zimmermann, quoted in Eric Pfanner, *Europeans Reject Treaty to Combat Digital Piracy*, The New York Times, July 5, 2012, at B5.

[49] Quoted in Charles Arthur, *Anti-Piracy Agreement Rejected by European Parliament, but Acta Could Be Revived by European Commission*, The Guardian, July 4, 2012.

[50] Martin Schultz, *European Democracy's Victory in a Treaty's Defeat*, Project Syndicate, July 5, 2012, www.project-syndicate.org/commentary/european-democracy-s-victory-in-a-treaty-s-defeat?barrier=true.

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one, incorporating both trade and investment. On the trade side, the proposed agreement would not only reduce tariffs, which were already low between the EU and the USA, but also seek to remove nontariff barriers to trade through transatlantic regulatory cooperation. On the investment side, the agreement would join a growing number of comprehensive free trade agreements and bilateral investment treaties that included protections for investment, and in particular provisions for investor-state dispute settlement, whereby investors would gain the right to challenge host-state practices that negatively impacted investment profitability.[51]

Unlike traditional trade agreements, to which opposition might take the form of old-fashioned protectionism objecting to lower tariffs and foreign competition, much of the opposition to the TTIP centered on the fear that regulatory harmonization and ISDS would undermine EU regulatory standards in areas such as the food safety, environmental and consumer protection, labor and social rights.[52] Put differently, the prospect of TTIP implicated not only external tariffs but also EU regulatory sovereignty – and it was this second feature that was central to the wave of popular opposition to TTIP that flared across Europe from 2014, manifested in demonstrations across the continent as well as a "Stop TTIP" petition that secured over three million signatures.[53] Soon, the cause of opposition to TTIP was taken up by European politicians, particularly on the center-left, in both national parliaments and the EP. These opponents successfully tarred the agreement as the embodiment of American and corporate power and neoliberal values threatening EU regulations, rights,

[51] For general introductions to the TTIP proposals and negotiations, *see, e.g.*, Shayerah Ilias Akhtar, *Transatlantic Trade and Investment Partnership (T-TIP) Negotiations*, *Congressional Research Service Report*, Feb. 29, 2016; Alasdair R. Young, *Not Your Parents' Trade Politics: The Transatlantic Trade and Investment Partnership Negotiations*, 23 Rev. of Int'l Pol. Econ. 345 (2016). On the prospects for regulatory cooperation under TTIP, *see* Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. of Int'l Econ. L. 625 (2015); and Gregory Shaffer, *Alternatives for Regulatory Governance under TTIP: Building from the Past*, 22 Colum. J. of Eur. L. 403 (2016).

[52] *See, e.g.*, Philip Stephens, *US Politics Is Closing the Door on Free Trade*, Fin. Times, Apr. 8, 2016, at 9 ("The nature of free trade deals has changed. They used to be about tariffs. Now they focus on regulatory standards and norms, intellectual property rights, data privacy and investment protection. These are issues that cut deep across national political and cultural preferences. Lowering import duties is one thing; persuading voters to relax the rules on data protection or accept new rules on food safely is another"). See also the comprehensive list of grievances against TTIP on the website of the Stop TTIP Campaign, at https://stop-ttip.org/what-is-the-problem-ttip-ceta/.

[53] Stop TTIP: European Initiative Against TTIP and CETA, "Success for Stop TTIP: 3,263,920 Signatures," Oct. 7, 2015, https://stop-ttip.org/success-for-stop-ttip-3263920-million-signatures/.

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sovereignty and democracy.[54] A brief survey of this opposition reveals, once again, the three elements of the new sovereigntist critique of international law.

First, as with ACTA, opponents of TTIP assailed the agreement on procedural grounds, claiming that the negotiations were being undertaken in secrecy, insulating the negotiators from either parliamentary or democratic accountability and allowing American and corporate interests to dominate. "The harsh reality," as British Labour MP Geraint Davies argued in the House of Commons, "is that this deal is being stitched up behind closed doors by negotiators, with the influence of big corporations and the dark arts of corporate lawyers." These negotiators, Davies argued further, were "stitching up rules that would be outside contract law and common law, and outside the shining light of democracy, to give powers to multinationals to sue governments over laws that were designed to protect their citizens."[55]

This last quote points to a second procedural complaint, namely that the agreement's proposed ISDS provisions would allow foreign investors to challenge and potentially overturn democratically adopted EU regulations designed to protect the citizens of Europe. European as well as American negotiators defended the inclusion of ISDS in the agreement, arguing that any comprehensive economic treaty between the EU and the USA required institutional protection of investors' rights. Opponents, however, seized upon recent ISDS challenges to national regulations, including the high-profile challenge by Swedish industrial group Vattenfall to Germany's moratorium on nuclear power, to depict investor-state dispute resolution as a corrupt practice granting extraordinary power to investors, and to unelected and nontransparent arbitral tribunals, at the expense of democratically elected parliaments. ISDS, in the eyes of its critics, "would sacrifice sovereignty on the altar of unfettered free trade, with big corporations calling the shots,"[56] transferring regulatory authority from EU institutions and governments to secretive and unelected arbitral tribunals.[57] Reflecting such concerns,

[54] *See, e.g.*, Georges Monbiot, *Taming Corporate Power: The Key Political Issue of Our Age*, The Guardian, Dec. 8, 2014.

[55] Quoted in "TTIP Talks Expose 'Dark Arts' of Corporate Lawyers," Legal Monitor Worldwide, Jan. 17, 2015.

[56] Frank McDonald, *Deal, or No Deal? What the Transatlantic Trade Deal Would Mean for Ireland*, Irish Times, Oct. 14, 2014.

[57] *See, e.g.*, James Kanter, *Trade Chief for EU Calls for Prudence on U.S. Pact*, Int'l New York Times, Jan. 14, 2015, at 13, ("For European opponents of the investment guarantee, the concern is that if it became part of a trade agreement, it would give companies a legal opening to erode European standards in environmental protection, food quality and labor rights"); Jim Armitage, *US Firms Could Make Billions from Britain via Secret Tribunals*, The Independent, Oct. 10, 2014 ("Critics say the tribunals, held under the so-called investor-

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European politicians, particularly on the center-left, turned sharply against ISDS, with the EP's Socialists and Democrats group calling in March of 2015 for the removal of ISDS from any transatlantic agreement.[58]

European concerns about ISDS shade into a second set of suspicions, namely that TTIP provisions on regulatory cooperation and harmonization, as well as ISDS, would produce lowest-common-denominator standards and undermine the EU's high regulatory standards in areas such as food safety, environmental and consumer protection, labor and social rights.[59] With respect to food safety, for example, grass-roots organizations mobilized, claiming that TTIP would result in the Union's forced adoption of regulations allowing for such American horrors as hormone-treated beef, chlorine-washed chicken, and genetically modified vegetables.[60] Others worried that either regulatory cooperation or ISDS rulings would lead Europe to harmonize down to US standards on the environment or labor rights, while British opponents of TTIP feared that agreement would force the privatization of the National Health Service, or block future efforts to renationalize privatized industries such as the railways.[61]

Reflecting these concerns and suspicions of the TTIP, opponents also displayed the third hallmark of the new sovereigntism, namely a belief that domestic sovereignty, domestic democracy and domestic laws had to be defiantly protected against TTIP, which should be comprehensively rejected. In response to these concerns and demands, the Commission, together with national governments, sought to respond to concerns about secrecy by releasing documents about the ongoing negotiations, as well as by explaining their positions and dispelling misinformation about the proposed agreement.[62] In

state dispute settlement (ISDS) system, subvert democratic justice, giving power over foreign citizens to big companies. Hearings are held in private, in international courts at the World Bank in Washington DC, bypassing the legal system of the country being sued, meaning details are often impossible to uncover. In some cases the very existence of the case is not made public. . . .. Unions and NGOs have claimed that TTIP will open the floodgates for ISDS cases that will overturn the decisions of democratically elected governments in Western Europe").

58 Andrew Gardner, *Socialists Struggle over Protection for Investors*, Eur. Voice, Mar. 15, 2015.

59 Emily Beament, *US Trade Deal "Could Weaken EU Regulation,"* The Independent, March 10, 2015.

60 *Free Trade with US: Europe Balks at Chlorine Chicken, Hormone Beef*, US Official News, Dec. 6, 2014.

61 George Monbiot, *The British Government Is Leading a Gunpowder Plot Against Democracy: This Bill of Corporate Rights Threatens to Blow the Sovereignty of Parliament Unless It Can Be Stopped*, The Guardian, Nov. 4, 2014.

62 *See, e.g.*, Suzanne Lynch, *Staying Positive in Maelstrom of EU-US Trade Negotiations: Trade Commissioner Cecilia Malmstrom Has Her Work Cut Out as She Tries to Conclude the Controversial TTIP Deal with the US*, Irish Times, 4, March 27, 2015.

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doing so, moreover, they underlined their firm commitment to protecting existing EU regulations and regulatory sovereignty. The Junker Commission and its ambassador to the USA, for example, drew clear red lines around EU regulatory policies in areas such as hormone-treated beef and genetically modified organisms, noting that the EU would keep these issues off the table of the transatlantic negotiations.[63] The governments of France and Germany, for their part, issued periodic, weak defenses of TTIP, but they also withdrew their support for ISDS, with the French Minister of State for Foreign Trade noting that, "We have to preserve the right of the state to set and apply its own standards, to maintain the impartiality of the justice system and to allow the people of France, and the world, to assert their values."[64] In Britain, the government assured citizens that the UK would not sign up to a TTIP that undermined the National Health Service, and that "it cannot, must not, and will not happen at the expense of our sovereign right to run the NHS the way we want."[65]

In the most substantive response to the growing anti-TTIP sentiment, the new European Trade Commissioner, Cecelia Malmström, conceded that "there is a huge skepticism about the ISDS instrument," and announced a suspension of talks about ISDS pending further EU consultations.[66] Later that year, the Commission proposed, in place of traditional, rotating three-member arbitral tribunals, a standing "Investment Court System" to adjudicate investment disputes. By contrast with the dominant investment arbitration system, the EU proposal envisaged a two-tiered court, including a fifteen-judge Tribunal of First Instance and a separate six-judge Appeal Tribunal. One third of the judges on each tribunal would be "nationals of" (and presumably appointed by) the United States, the EU and third countries, respectively.[67] The Commission proposal stimulated a major debate over the wisdom and

[63] David O'Sullivan, *Why the Transatlantic Trade Deal Will Benefit Ireland*, Irish Times, Oct. 17, 2014.

[64] Patrick Harvie, *More and More People Are Becoming Aware of the Dangers of This Agreement; Why TTIP Spells Danger for Us*, Evening Times (Glasgow), Nov. 26, 2014.

[65] Deputy Prime Minister Nick Clegg, quoted in Rowena Mason & Nicholas Watt, *Nick Clegg Attempts to Calm NHS Worries Over EU-US Trade Deal*, The Guardian, Dec. 17, 2014.

[66] Quoted in Andrew Grice, *Activists Triumph as Contentious US Free Trade Deal Clause Is Suspended*, The Independent, Jan. 14, 2015, p. 6.

[67] For the original text of the Commission proposal, *see Transatlantic Trade and Investment Partnership, TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, CHAPTER II – INVESTMENT*," Nov. 12, 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf. For an excellent analysis of the proposal, *see* Athina Fouchard Papaefstratiou, *The EU Proposal Regarding Investment Protection: The End of Investment Arbitration as We Know It?*, Kluwer Arbitration Blog, Dec. 29, 2015, http://kluwerarbi

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the design of its proposed Investment Court,[68] but it was not enough to calm the boil of opposition to TTIP across Europe, much less the paralysis caused by the November 2016 US presidential elections, and TTIP negotiations stalled in the second half of the year, with at best uncertain prospects under a Trump Administration.

In the interim, the TTIP was leapfrogged by a similar agreement, the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. After years in the shadow of the larger, more high-profile and controversial TTIP, CETA rose to political prominence after 2014, when the EU and Canada reached a tentative agreement on the terms of a similar trade and investment partnership. The draft agreement bore strong resemblances to the stalled EU-US pact, yet it was also shaped in part by the controversy over TTIP, most notably in the agreement to create an alternative investor-state dispute settlement mechanism, replacing the traditional arbitral tribunals with a standing Investment Court.[69]

Despite these changes to accommodate European sovereignist concerns, CETA met with multiple legal and political challenges on its way to signature in the second half of 2016. In Germany, a group of NGOs sought an emergency injunction from the German Constitutional Court to block the government from signing the treaty, arguing that it represented an immediate threat to German constitution, the rule of law and parliamentary democracy.[70] Although the German Constitutional Court declined to block the government's signature of the treaty, it set a series of conditions on the provisional application of the treaty, and reserved the

trationblog.com/2015/12/29/the-eu-proposal-regarding-investment-protection-the-end-of-investment-arbitration-as-we-know-it/.

68 On the controversial issue of investor-state dispute settlement in TTIP, *see, e.g.*, Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, ESIL Reflections, Vol. 4, No. 3, May 25, 2015; Gisèle Uwera, *Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?*, 15 The Law and Practice of International Courts and Tribunals 102 (2016); Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 Journal of World Investment & Trade 374 (2016); and Joseph H. H. Weiler, *European Hypocrisy: TTIP and ISDS*, EJIL Talk!, Jan. 21, 2015, www.ejiltalk.org/european-hypocrisy-ttip-and-isds/.

69 For a good analysis, *see* Blake Cassels & Graydon LLP, *Dispute Resolution under CETA: A New Investment Court for Canada and Europe*, Dec. 15, 2016, www.lexology.com/library/detail.aspx?g=e46e5848-0761-468e-ac02-64d7a03c4edd.

70 Stefan Wagstyl, *Protest Against EU-Canada Deal Heads to German Court*, Fin. Times, 4, May 31, 2016.

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right to revisit the compatibility of CETA with the constitution in future cases.[71]

An equally serious and more acute challenge to CETA came during the ratification process. Following the initial signing of the treaty, the Commission had suggested that CETA fell entirely within the EU's common trade policy, which meant that the EU would have exclusive competence and ratification would involve approval by the Council and the EP, bypassing the twenty-eight individual member states and their thirty-eight national and regional parliaments.[72] In the face of considerable backlash from national parliaments and interest groups[73], however, the Commission succumbed to public pressure in July 2016, announcing that CETA would be adopted as a "mixed" agreement, requiring approval from national parliaments in all twenty-eight member states.[74] In federal Belgium, moreover, ratification would require further approval from regional parliaments in Brussels, Flanders and Wallonia.

The latter requirement nearly doomed the agreement when, in early October, the Walloon Parliament voted by a large majority (forty-six to sixteen) to reject the agreement, citing multiple objections, including most notably the provisions for ISDS, but also concerns about the impact of CETA's regulatory provisions on the right of the Union and its member states to regulate in the public interest. With the power of a veto player, the Walloon Parliament, and its Minister-President Paul Magnette, held up the treaty for weeks, demanding substantial concessions in return for its agreement.[75] The EU and Canada responded by negotiating an eleven-page "Joint Interpretive

[71] For a good discussion, *see* Editor Borderlex, *The EU-Canada Trade Deal and the German Constitutional Court*, Oct. 19, 2016, http://borderlex.eu/national-courts-eu-trade-policy-powers-eu-canada-trade-deal-german-constitutional-court/. For a pessimistic reading of the judgment for the future of CETA, *see* Wolfgang Münchau, *The Monstrous Battle to Secure a Trade Deal*, Fin. Times, Oct. 17, 2016, 11.

[72] *EU Commission to Opt for Simple Approval for Canada Deal*, Reuters, June 28, 2016.

[73] Jim Brunsden & Duncan Robinson, *EU Spat Threatens Canada Trade Deal That Took 5 Years to Negotiate; Ratification Dispute*, Fin. Times, July 4, 2016.

[74] *EU Trade Deal Bows to the Power of Parliaments; Brussels Cedes Ratification of Pact with Canada to its Member States*, Fin. Times, July 6, 2016. *See also* Janyce McGregor, *Canada Gets Clarity on How Europe Will Ratify Trade Deal*, CBC News, July 5, 2016, www.cbc.ca/news/politics/ceta-european-commission-ratification-mixed-competency-1.3664884 (quoting EU Trade Commissioner Cecelia Malmström suggesting that, "From a strict legal standpoint, the commission considers this agreement to fall under exclusive EU competence. However, the political situation in the council is clear, and we understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature").

[75] The Walloon position to the agreement reflected both local concerns, including a 16 percent regional unemployment rate, a steady stream of industrial plant closings, and the growing appeal of the Marxist Worker's Party eating into the support of the governing Socialist

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Instrument"[76] which included *inter alia* detailed provisions protecting the right of each side to regulate its domestic economy[77] and to provide public services[78] as well as placing limits on regulatory cooperation[79] and detailing a variety of procedural guarantees for the investor-state dispute settlement provisions of the treaty.[80] Taken together, these provisions, and others in the

majority, and broader European concerns, with First Minister Magnette publicly calling for the European left to stand up to creeping neoliberalism. For good discussions, *see*, *e.g.*, Barrie McKenna, *CETA, Explained*, The Global and Mail (Canada), Oct. 25, 2016; and Konrad Yakauski, *The Walloon that Roared; Paul Magnette Didn't Set Out to Anger Canada. He Has a Much Bigger Plan – Saving the European Union from Itself*, The Globe and Mail (Canada), A13, Oct. 27, 2016.

[76] *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and Its Member States*, on-line at http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf.

[77] *Ibid.* para 2 ("CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity").

[78] *Ibid.* para 4, noting that (a) "The European Union and its Member States and Canada affirm and recognise the right of governments, at all levels, to provide and support the provision of services that they consider public services including in areas such as public health and education, social services and housing and the collection, purification and distribution of water." (b) "CETA does not prevent governments from defining and regulating the provision of these services in the public interest. CETA will not require governments to privatise any service nor prevent governments from expanding the range of services they supply to the public." (c) "CETA will not prevent governments from providing public services previously supplied by private service suppliers or from bringing back under public control services that governments had chosen to privatise. CETA does not mean that contracting a public service to private providers makes it irreversibly part of the commercial sector."

[79] *Ibid.* para 3 ("CETA provides Canada and the European Union and its Member States with a platform to facilitate cooperation between their regulatory authorities, with the objective of achieving better quality of regulation and more efficient use of administrative resources. This cooperation will be voluntary: regulatory authorities can cooperate on a voluntary basis but do not have an obligation to do so, or to apply the outcome of their cooperation").

[80] *Ibid.* para. 6, calling *inter alia* that: (a) "CETA will not result in foreign investors being treated more favourably than domestic investors." (b) "CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits." (f) "CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems in the European Union and its Member States and Canada, as well as and international courts such as the International Court of Justice and the European Court of Human Rights. Accordingly, the members of these Tribunals will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada for a fixed term. Cases will be heard by three randomly selected members. Strict ethical rules for these individuals have been set to ensure their independence and impartiality, the absence of conflict of interest, bias or

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document, sought to safeguard EU regulatory sovereignty against intrusion from CETA's provisions on nontariff barriers, regulatory cooperation and ISDS.

On the basis of these undertakings, the Walloon parliament finally signaled its approval for the Belgian government to sign the agreement,[81] and CETA was formally signed with much fanfare by Canadian and EU leaders on October 30, 2016.[82] The European Parliament followed suit in February 2017, approving the agreement by a vote of 408 to 254, with 33 abstentions, following a vigorous debate and amidst vocal protests outside the Parliament's doors.[83] Within the EP, the center-right European People's Party voted overwhelmingly in favor of the agreement, while the center-left Socialists & Democrats were split, and far left and the far right party groups remained staunchly opposed.[84] Unlike either ACTA or TTIP, therefore, CETA was allowed to pass into provisional application, although its long-term fate remained dependent on further ratification votes in the member states as well as further legal challenges before the German Constitutional Court, the CJEU and perhaps elsewhere.[85]

More importantly for our purposes here, the internal debate over CETA, and the strident European opposition to the likely dead TTIP, reveal a rising tide of suspicion towards international trade agreements, regulatory cooperation and ISDS – not only among fringe groups, but in the political center of the Union.[86] Here again, as in ACTA, we see Europeans suspicious of both the

appearance of bias. The European Union and its Member States and Canada have agreed to begin immediately further work on a code of conduct to further ensure the impartiality of the members of the Tribunals, on the method and level of their remuneration and the process for their selection. The common aim is to conclude the work by the entry into force of CETA."

[81] Mike Blanchfield, *Still Many Steps to Be Taken; Minister Cautious on Apparent Breakthrough on Canada-EU Trade Deal*, Barrie Examiner, Oct. 28, 2016.

[82] Jason Thomson, *EU, Canada Sign Landmark Trade Deal*, The Christian Science Monitor, Oct. 31, 2016.

[83] James Kanter, *E.U. Parliament Votes to Ratify Canada Trade Deal and Send Trump a Message*, The New York Times, Feb. 15, 2017.

[84] Daniel Boffey, *European Parliament Passes EU-Canada Free Trade Deal amid Protests*, The Guardian, Feb. 15, 2017.

[85] *See* Catherine Stupp, *After Parliament Approval, Final Ratification Could Still Put CETA in Legal Limbo*, Euractiv.com, Feb. 15, 2017; and European United Left/Nordic Green Left, *The Battle over CETA Will Continue: Next, National Parliaments and Citizens Must Decide*, press release, Feb. 15, 2017, www.guengl.eu/news/article/the-battle-over-ceta-will-continue-next-national-parliaments-and-citizens-m.

[86] Writing amidst the controversy in the autumn of 2016, no less an establishment figure than Financial Times columnist Wolfgang Münchau wrote: "I would welcome the demise of Ceta and the Transatlantic Trade and Investment Partnership, a similar US-EU trade deal still under negotiation, for two reasons. First, these agreements are a focus for anti-globalisation

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procedure and the substance of international law, and protective of their domestic policies, democracy and sovereignty. These concerns manifest themselves, furthermore, not only in the ratification of *new* agreements like ACTA, TTIP and CETA, but also in the implementation of and compliance with existing agreements, most notably within the World Trade Organization, as we shall see presently.

4.4 International Trade Law, WTO Dispute Settlement and EU Obstructionism: From Hormone-Treated Beef to GMOs

If the first two cases examined above concerned the EU and its member states refusing to conclude or consent to multilateral or bilateral treaties, the third set of cases examined here represents *extended, defiant noncompliance* with international judicial rulings adopted under existing international agreements. As we have already seen in the TTIP case, food safety regulation is one of the most politically sensitive and closely guarded areas of EU policy, and where EU domestic regulations run afoul of international trade law, the EU has found itself repeatedly defending those regulations before international tribunals – and, in the high-profile cases of hormone-treated beef and genetically modified foods, failing to comply with the rulings of those tribunals.

Food safety regulation falls under the broad rubric of risk regulation, whereby governmental actors are called upon to adopt regulations regarding the acceptable degree of risk posed to society by products or by industrial processes.[87] In principle, regulators faced with a novel product or process – such as hormone-treated beef, or GM foods and crops – need to ascertain the potential harm caused by such activities, as well as the probability of such harm, before deciding on the legality or illegality of a product or process. In practice, however, regulators often take *precautionary* measures, regulating or even banning products or activities, in the presence of uncertainty about the risks posed. In areas such as food safety and environmental regulation, the EU has, in recent decades, adopted a strong version of the precautionary principle, justifying strong regulations or bans on particular products or processes, even in the absence of clear scientific evidence of risk. Much of this precautionary

protests. After Brexit, this is not the best time for Europe's liberal elites to double down. Second, I believe some aspects of the deals, like investor tribunals, are undemocratic and at odds with European constitutional principles." Wolfgang Münchau, "The Monstrous Battle to Secure a Trade Deal," Fin. Times, Oct. 17, 2016.

[87] Jonathan B. Wiener & Michael D. Rogers, *Comparing Precaution in the United States and Europe*, 5 Journal of Risk Research 317 (2002).

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regulation has been driven by European public opinion, which, following a series of food-safety scandals in the 1980s and 1990s, has been strongly averse to potential food-safety risks.

Such highly precautionary domestic regulations, however, can act in practice as nontariff barriers to trade, perhaps most famously in the aforementioned examples of hormone-treated beef and GM foods. In both of these cases, EU authorities, under pressure from a strongly risk-averse public opinion, adopted domestic regulations that had the effect of banning the importation of products that had been approved as safe by US and other regulators. Under the terms of WTO law, however, and in particular under the WTO Sanitary and Phytosanitary (SPS) Agreement, the EU and other WTO signatories are required to base domestic food-safety regulations on a scientific risk assessment, so as to avoid national regulations serving as disguised restrictions on trade, and in both cases the USA challenged EU regulations for violations of WTO and SPS rules. In both cases, WTO panels ruled against the EU, but the Union failed to comply, in some cases for decades, with international legal rulings.

The US-EU dispute over hormone-treated beef can be traced back to 1989, when the EU, acting under the terms of a 1988 directive, instituted a ban on the use of synthetic growth hormones in beef cattle, and prohibited the import of animals, or meat from animals, that had been treated with these hormones.[88] Although the EU directive had been adopted primarily on the grounds of European consumer concerns about the safety of hormone-treated beef, the ban had an immediate and dramatic impact on beef producers in the United States, where some 90 percent of all beef cattle are treated with synthetic growth hormones, and where FDA studies have consistently found that hormone-treated beef is safe for human consumption.

In 1995, after the entry into force of the SPS Agreement and the Dispute Settlement Understanding, the USA initiated legal action against the EU, alleging that the EU ban on hormone-treated beef was inconsistent with the terms of the SPS Agreement because it was not based on a scientific risk assessment or agreed international standards. The EU, in response, argued that the SPS Agreement acknowledges the right of states to determine the appropriate level of health protection for their consumers, and that the ban was justified under the precautionary principle. A WTO dispute settlement

[88] This section draws upon a more detailed discussion in Mark A. Pollack & Gregory C. Shaffer, *The Challenge of Reconciling Regulatory Differences: Food Safety and GMOs in the Transatlantic Relationship*, Transatlantic Governance in the Global Economy (Mark A. Pollack & Gregory C. Shaffer, eds.), 153–78 (2001).

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panel was established in May 1996, and issued its report in favor of the USA in August 1997. The EU appealed the panel's decision, and the WTO Appellate Body issued a second report in January 1998, once again in favor of the United States.

The WTO panel and appellate decisions were both complex, with the Appellate Body narrowing the scope of the panel's initial decision, but in the end it agreed with the complainant that the EU had failed to base its beef-hormone ban on a scientific risk assessment, undermining EU claims that the ban was adopted to protect human health. In response to the EU's invocation of the precautionary principle, moreover, both the panel and the Appellate Body found that the precautionary principle could not override the express requirement of a risk assessment under Article 5.1 of the SPS Agreement. In accordance with the Appellate Body's findings, the Dispute Settlement Body ruled in February 1998 that the EU ban was inconsistent with the terms of the SPS Agreement, and instructed the EU to bring its regulations into compliance by no later than May 13, 1999.

Facing continuing pressure from its own consumers, however, and hopeful of producing additional scientific findings that might justify the ban, the EU failed to act, and the USA retaliated on May 17, 1999, applying tariffs in the amount of $116.8 million targeted against specific EU products such as foie gras, Roquefort cheese and Dijon mustard. These US tariffs in turn sparked a wave of protests among French and other European farmers, including an attack in August 1999 by a group of French farmers on a McDonald's restaurant, selected as the symbol of the threat of globalization, and more specifically of American food culture, to French traditions. "McDonald's encapsulates it all," said one commentator. "It's economic horror and gastronomic horror in the same bun."[89] Although the leader of the farmers group, Jose Bové, was jailed for his part in the attack, he was later hailed as a hero in the French press for his opposition to American efforts to force upon Europeans foods that were widely seen as unwanted and unsafe, and in 2009 he was elected to the European Parliament.

EU noncompliance with the WTO ruling continued for over a decade, during which time the USA continued to apply and ratchet up its retaliatory tariffs. On January 16, 2009, for example, on the heels of an October 2008 WTO ruling that the EU had still failed to comply with the ruling and just four days before the transition to the new administration, the outgoing US Trade

[89] Guillaume Parmentier, quoted in J. Henley, *McDonald's Campaign Spawns French Hero: Political Activist Turned French Peasant Has Fast Food on the Run*, The Guardian, Sept. 11, 1999, at 14.

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Representative, Susan Schwab, announced a change in the structure of US retaliatory tariffs, which would be altered to impose a targeted 300 percent tariff on Roquefort cheese, widely seen as an effort to pressure France, and 100 percent tariffs on thirty-four other products produced by various other member states.[90] The eventual settlement of the case came only later in 2009, when the incoming Obama administration announced a delay in the imposition of tariffs, to give time for US and EU diplomats to negotiate a solution to the dispute.[91] On May 6, 2009 US and EU negotiators announced a memorandum of understanding that would lead, in three phases, to an ultimate settlement of the dispute, in which the USA would drop its retaliatory tariffs in return for the EU granting a new, duty-free quota of 45,000 tons of so-called high-quality, hormone-free beef.[92] Although the 2009 agreement formally settled the case, the decade-long delay, and the Union's ultimately successful refusal to amend its domestic legislation, both point to the sensitivity of food safety regulation in the Union, and the difficulty it faces in complying with domestically unpopular international legal rulings.

The transatlantic dispute over the EU's policies regarding GM varieties is analytically similar to the dispute over beef hormones, but on a far larger scale. Genetic engineering is a technology used to isolate genes from one organism, manipulate them in the laboratory, and inject them into another organism. This technology first emerged in the 1970s, and by the mid-1980s, scientists and biotechnology firms were developing, patenting, growing and marketing a growing varieties of GM foods and crops. In the USA, these new technologies were generally welcomed by farmers and by the federal government, which regulated them under existing statutes through existing agencies such as the Environmental Protection Agency and the Food and Drug Administration.[93]

In Europe, by contrast, GM foods and crops were generally met with public suspicion, often flaring into hostility, and by the early 1990s the EU had

[90] Brian Beary, *EU/US: No End in Sight to Beef Hormone Dispute*, Europolitics, Jan. 27, 2009.

[91] Brian Beary, *EU/US: Top Trade Officials Pledge to Resolve Bilateral Disputes*, Europolitics, March 23, 2009; Brian Beary, *EU/US: Washington Postpones Sanctions in Beef Hormone Dispute*, Europolitics, April 24, 2009.

[92] Office of the United States Trade Representative, *USTR Announces Agreement with European Union in Beef Hormones Dispute*, Press Release, www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones, accessed on 9 July 2013; Council of the European Union, *The Transatlantic Trade Dispute on "Hormones" in Beef Comes to an End*, Press Release, Luxembourg, April 26, 2012, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/129788.pdf.

[93] The narrative in this section is drawn from the far more extensive discussion in Mark A. Pollack & Gregory C. Shaffer, When Cooperation Fails: The Global Law and Politics of Genetically Modified Organisms (2009).

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developed a framework of highly precautionary and restrictive regulatory procedures for assessing and approving new GM varieties. In the first or risk assessment stage, a manufacturer or importer seeking permission to market or grow GM crops in Europe must submit an application and a risk assessment, which is examined by scientists at the European Food Safety Authority (EFSA), which in turn issues its findings to the European Commission. In the second or risk management stage, the Commission is then tasked with reviewing the EFSA findings and taking a draft decision on whether to allow the importation, sale or cultivation of the crop within the Union. The Commission is not, however, free to do as it likes at this stage, because it is supervised by representatives of the EU's intergovernmental Council of Ministers, who can object to and, by a qualified majority, potentially overturn Commission approvals of specific crops. Even after the approval of a particular food or crop, moreover, member states can, on the basis of new evidence about risks to human health or the environment, provisionally restrict or prohibit the importation, sale or cultivation of specific varieties on their territories.

As it happened, the implementation of these rules in the 1990s took place in the context of a major food safety scandal over bovine spongiform encephalopathy (or mad cow disease), followed immediately by the beef-hormones dispute, which together generated extraordinary public awareness of food safety issues and widespread public distrust of regulators and scientific assessments. In this context, the implementation of the EU's already strict regulatory system became highly politicized. Governments across Europe, under heavy public pressure to block the marketing and cultivation of GM crops even after EU scientists had pronounced them safe, repeatedly attempted to block or slow down the approval of new varieties. In June of 1999, for example, the governments of Denmark, France, Greece, Italy and Luxembourg declared the need to impose a moratorium on all approvals of GM products, and for nearly six years, from October 1998 to May 2004, no GM varieties were authorized for sale in the EU market. Furthermore, a growing number of EU member states declared national "safeguard bans" on already approved foods and crops, claiming with little or no scientific evidence that they posed a risk to human health or the environment.

As in the case of hormone-treated beef, these highly precautionary and politicized EU regulations came into tension with international trade law, by effectively banning imports of GM soybeans and corn that had been found by both US and EU scientists to be safe for human consumption. Finally, in May 2003, the USA, joined by Argentina and Canada, brought a WTO complaint against the EU, alleging that its de facto moratorium on new approvals, as well as the national bans on approved varieties, constituted

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a violation of WTO law, and specifically of the SPS Agreement. The USA and other complainants did not challenge the EU's legislative framework for GM foods as such. Instead, the complaints focused on the EU's implementation of its own regulatory framework, challenging three specific actions: (1) the EU's de facto "general moratorium" on new approvals; (2) "product-specific moratoria," or failure to approve particular GM varieties found to be safe by the relevant EU scientific bodies; and (3) the persistent use of "safeguard bans" by some EU member states to ban GM varieties that had been approved as safe by the EU's own scientific experts. In all three cases, the complainants argued, the EU had failed to base its regulatory decisions on scientific risk assessments as required by the SPS Agreement, and those decisions were therefore inconsistent with EU obligations under WTO law.

In September 2006, the WTO dispute-settlement panel issued its decision.[94] The panel expressly avoided deciding several controversial questions, including "whether biotech products in general are safe or not." On the specific questions raised in the complaints, however, the panel found in favor of the complainants. It held that the EU had engaged in "undue delay" in its approval process in violation of the SPS Agreement. Regarding safeguards enacted by EU member states, the panel ruled that all of the national safeguard bans violated the EU's and member states' substantive obligations under the SPS Agreement because they were "not based on a risk assessment." It noted in particular that the EU's "relevant scientific committees had evaluated the potential risks … and had provided a positive opinion" on the GM varieties.

The WTO panel ruling put the EU in an awkward position. On the one hand, the European Commission, eager to comply with the ruling and to regularize a regulatory process that had become highly politicized and dysfunctional, sought to move ahead on three fronts: first by speeding up the approval of long-blocked GM varieties for import and marketing; second by unblocking the even more challenging process of approving GM crops for cultivation; and third by challenging the national safeguard bans that had been found to be illegal by the WTO. European public opinion, however, remained implacably hostile to GM foods and crops, and national governments channeled this opposition into the EU policy process by slowing down approvals and maintaining national safeguard bans in defiance of both the Commission and the WTO.[95]

[94] *Ibid.* 177–234.

[95] *Ibid.* 245–61. For an update on these efforts up to 2013, *see* Mark A. Pollack, A *Truce in the Transatlantic Food Fight: The United States, the European Union, and Genetically Modified*

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With respect to approving new varieties of GM crops, the Commission finally brought an end to the six-year moratorium in May 2004, and by 2013 it had approved some thirty-seven new crops, including several of commercial significance to the USA.[96] It did so, however, only in the face of vociferous opposition from a substantial number of EU member states, and the approval process continued to lag in subsequent years, leaving dozens of GM foods and crops stuck in the regulatory pipeline even after approval by EU scientists, and potentially opening the Union to further charges of "undue delay."

On the issue of cultivation, EU policy has been even more politicized, and arguably noncompliant with WTO law. Prior to the 2006 WTO ruling, the EU had approved only a single GM crop – MON810, Monsanto's YieldGard corn – for cultivation in the EU. Other applications for cultivation of GM crops, by contrast, remained blocked in the EU's regulatory process, with member state committees and the Council unable to come to agreement, and the Commission reluctant to push through approvals on such a sensitive issue. It was not until 2011 that the Commission approved a second crop for cultivation, a genetically modified potato engineered by German chemicals firm BASF that had been blocked in the regulatory process for five years. BASF's regulatory victory, however, proved pyrrhic. Despite its formal approval, the so-called Amflora potato was deeply controversial among the member states and in public opinion, leading several member states to declare safeguard bans on cultivation, and in 2011 BASF announced that it would totally halt the test planting and marketing of the potato.[97] The following year, BASF withdrew its previous applications for EU cultivation of three other GM potato crops.[98]

Finally, in addition to the continuing delays in the approval of new GM crops for marketing and cultivation, multiple member states continued to adopt national bans on the cultivation of approved GM crops. The Commission attempted on four occasions to challenge national bans on cultivation of MON810 (which were found by EFSA to be groundless in scientific terms), but in each case a large majority of the member states supported the banning states against the Commission.[99] In March 2009, for

Foods in the Obama Years, (Aug. 8, 2013). Available at SSRN: https://ssrn.com/abstract=2295197 or http://dx.doi.org/10.2139/ssrn.2295197.

96 Pollack, *A Truce in the Transatlantic Food Fight*, *supra* note 95 at 34–35.

97 *See* Eric van Puyvelde, *Genetically Modified Organisms: BASF Halts GMO Development in Europe*, Europolitics, Jan. 18, 2012.

98 Joanna Sopinska, *GMOs: BASF Drops EU Potato Bid*, Europolitics, Jan. 31, 2013.

99 European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions on the*

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example, the Commission attempted to challenge and overturn Austria's and Hungary's bans on the cultivation of MON810, but was supported by only five of the twenty-seven environment ministers.[100] With the Commission unable to challenge them, by early 2013 eight EU member states retained national safeguard bans on the cultivation of one or both of the two approved GM crops.[101] Faced with continuing member-state hostility toward new approvals for cultivation, as well as continuing national bans, the Commission in 2010 proposed a draft regulation, eventually adopted as Directive 2015/412, giving EU member states full control over the cultivation of GM crops on their territories, including the right to declare national bans on the cultivation of GM crops for any reason, no longer limited to the health and environmental grounds set out in existing legislation.[102]

Despite its continuing concerns, the United States has not sought to escalate the conflict by pressing for sanctions for EU noncompliance with the 2006 WTO ruling, nor has it indicated any serious intention to bring suit against the EU for its "commercially infeasible" traceability and labeling rules. Instead, as the USTR's 2013 report on SPS measures concludes, "The United States continues to engage the European Commission in an effort to normalize trade in GE products,"[103] and the two sides continued to meet in regular technical discussions of the dispute.[104]

In both the beef-hormones and GMO cases, therefore, we find an EU committed in principle to compliance with its legal obligations, including under the WTO – yet we also find a Union whose citizens and governments express a defiant critique of and resistance to international law and

Freedom for Member States to Decide on the Cultivation of Genetically Modified Crops, COM (2010) 380 final, Brussels, July 13, 2010.

[100] Mark A. Pollack & Gregory C. Shaffer. *Biotechnology Policy: Between National Fears and Global Disciplines*, in POLICY-MAKING IN THE EUROPEAN UNION, 6th edition 327–51 (Helen Wallace, Mark A. Pollack & Alasdair Young, eds., 2010).

[101] Joanna Sopinska, *GMOs: BASF Drops EU Potato Bid*, EUROPOLITICS, Jan. 31, 2013.

[102] European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions on the Freedom for Member States to Decide on the Cultivation of Genetically Modified Crops*, COM (2010) 380 final, Brussels, July 13, 2010; and Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory.

[103] United States Trade Representative, *USTR Announces Agreement*, *supra* note 92 at 44.

[104] *See, e.g.*, the discussion of the US/EU consultation on 20 March 2012, in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products. Status Report by the European Union. Addendum*, WORLD TRADE ORGANIZATION, WT/DS291/37/Add.51, April 13, 2012, online at: http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149347.pdf.

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international judicial decisions. We have seen how, for figures like José Bové, international trade law is portrayed as being procedurally flawed due to its dominance by the USA and large corporations like Monsanto as well as its secretive system of dispute settlement by unelected panelists. In substantive terms, WTO law is seen as flawed due to its rigid insistence on scientific risk assessment as the basis for every domestic regulation, and for its inadequate recognition of the precautionary principle as a principle of customary international law.[105] Finally, while the Commission has made repeated efforts to comply with WTO rulings, we find in civil society and among the member governments a much greater willingness to openly defy the legally binding rulings of the WTO Dispute Settlement Body.

One might plausibly object at this stage that beef-hormones and GMO are uniquely sensitive issues for Europeans, outliers in an otherwise unblemished pattern of EU support for and compliance with international law. Several recent studies, however, suggest that these two cases represent the tip of the iceberg, the most visible of a broader set of cases in which EU agricultural and food safety regulations fall regularly afoul of international law, and in which the Union engages in rare but extended acts of noncompliance with international treaties and international judicial rulings. In a 2015 study, for example, Jappe Eckhardt and Manfred Elsig find that, while the USA is the subject of a disproportionate number of WTO complaints relating to trade remedies such as anti-dumping and safeguard measures, the EU is disproportionately targeted for purported regulatory violations, in which the Union is accused of adopting regulatory barriers to trade in violation of the Technical Barriers to Trade (TBT) and SPS Agreements. Indeed, the authors find that "the EU accounts for 84 percent of all SPS claims that are brought," which they take as evidence that the EU is particularly prone to violate WTO law through the application of discriminatory domestic regulations.[106]

A similarly suggestive study of WTO dispute settlement in the area of agriculture by Christina Davis finds that the EU "ranks among the least cooperative trading entities across the record of legal adjudication of trade disputes." The Union, she demonstrates, "is notorious for delaying tactics,"

[105] Indeed, this latter concern has led the Union to engage in an ongoing campaign of institutional proliferation and forum shopping, seeking to establish counter-norms in settings such as the Convention on Biodiversity, the Codex Alimentarius Commission, and the Organization for Economic Cooperation and Development. For a detailed exploration of this strategy in the GMO case, *see, e.g.*, Gregory C. Shaffer & Mark A. Pollack, *Hard Law vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 Min. L. Rev. 706, 743–65 (2010).

[106] Jappe Eckhardt & Manfred Elsig, *Support for International Trade Law: The US and the EU Compared*, 13 Int'l J. Con. L., 966, 975 (2015).

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blocking or delaying panels under the pre-WTO GATT dispute settlement system, dragging out the time to settlement of disputes (forty-six months on average when the EU is a defendant, as opposed to thirty-four months for all defendants), and facing sanctions for years rather than comply with decisions in the infamous bananas case as well as beef-hormones and GMOs.[107] Davis's explanation for this outcome stresses the ways in which EU institutions diffuse responsibility for WTO violations among multiple member states, as well as the number of veto players who can block compliance with WTO rulings.[108] Davis's findings are limited to the issue-area of agriculture, and her account does not, like this one, emphasize partisan factors; but her emphasis on the large number of EU veto points, and her depiction of the long-standing, de facto legal obstructionism by a Union that prides itself on its commitment to international law, both suggest that the compliance problems manifested in beef-hormones and GMOs have broader and deeper roots in the nature of the EU as an institution.

4.5 CONCLUSIONS

What I have called the new, new sovereigntism comes primarily from the European left, rather than from the right as in the USA. Both the values it defends, and those it rejects, are different from its American variant. And yet, from a structural perspective, the same three elements are present, revealed in each of the three case studies reviewed in this chapter: first, the notion that existing international legal processes are flawed or inferior to EU processes, marred by secrecy, corporate and/or American dominance and lack of fundamental rights protection; second, the related notion that the substantive content of current or proposed international laws privileges neoliberal, free-market ideology and national security over the EU's social model and fundamental rights; and third, the concomitant, defiant rejection of at least some international laws through non-consent, noncompliance or refusal to internalize international law in the EU legal order.

The *causes* of the new European sovereigntism are complex, arising in part from developments in Europe and in part from the changing nature of the international legal order itself. Within Europe, the EU has, over the past several decades, constitutionalized a commitment to fundamental human rights, broadly conceived to include rights such as data privacy, as well as an increasingly strict regulatory *acquis* in areas such as food safety and the

[107] Davis, *A Conflict of Institutions*, *supra* note 10 at 2–4.
[108] *Ibid.* 8–13.

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environment, that are increasingly in tension with proposed or established provisions of international law. The EU has thus joined the USA in being "exceptionalist" in the sense of embracing a distinctive set of domestic laws and policies which it seeks to protect from outside interference.[109] A parallel development, starting in the 1990s and escalating in the 2000s, is the rise in Europe of anti-globalist, anti-American and anti-corporatist sentiment, which sees globalization, American imperialism and neoliberal, free-market ideology as a threat not only to European laws and regulations but more broadly to the European social model and the European way of life.[110] EU institutions, meanwhile, have amplified the voices of the rising chorus of European critics, by granting veto power to a growing number of actors in Brussels, Strasbourg, Luxembourg, and in national and regional capitals to block EU consent to, compliance with, or internalization of public international law. Finally, concurrent with these developments inside Europe, public international law has famously become more comprehensive, and more intrusive, moving from a law of world order among states to a law that constrains the domestic laws and policies of its members.[111] In this sense, the growing European resistance to public international law seems overdetermined, both by changing attitudes and sclerotic institutions inside Europe and by a more intrusive body of international law outside.

There are, of course, differences between the "old" new sovereigntism coming out of the USA and the "new" new sovereigntism emerging from

[109] *See, e.g.*, Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 Harv. Int'l L. J. 1 (2011) (arguing that all major powers are exceptionalist, "in the sense that they take distinctive approaches to international law that reflect their values and interests," and that the EU is similarly exceptionalist, seeking and insisting upon the universalization of its domestic values and interests, such as human rights and social welfare, in international law, while failing to comply with international law where it conflicts with strongly held domestic values). *See also* Magdalena Ličková, *European Exceptionalism in International Law*, 19 European Journal of International Law 463 (2008); Sabrina Safrin, *The Un-exceptionalism of US Exceptionalism*, 41 Van. J. Transnati'l L. 1307 (2008); and Georg Nolte & Helmut Philipp Aust, *European Exceptionalism?*, 2 Global Constitutionalism 407 (2013).

[110] On the rise of European resistance to globalization, Americanization, neoliberalism and corporate influence, *see, e.g.*, Wade Jacoby & Sophie Meunier, *Europe and Globalization*, in Research Agendas in EU Studies: Stalking the Elephant 354–74 (Michelle Egan, Neill Nugent, & William Patterson, eds., 2009); Peter J. Katzenstein & Robert O. Keohane, Anti-Americanisms in World Politics (2006); and Michaela DeSoucey, *Gastronationalism: Food Traditions and Authenticity Politics in the European Union*, 75 Am. Sociological Rev. 432 (2010).

[111] For foundational discussions of this transformation of international law, and its implications for domestic sovereignty, *see, e.g.*, Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. Int'l L. & Pol. 527 (2001); and Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. Int'l Econ. L. 841 (2003).

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Europe, and the differences are telling. First, and most obviously, European sovereigntism comes, by and large, from the left, and seeks to defend domestic rules and values very different from those of American sovereigntists, who come disproportionately from the right. Second, the targets of European sovereigntism are different, focusing primarily on international economic law and to a lesser extent security law, not environmental or human rights or criminal law as in the US case. Third, European sovereigntism is more selective, with European sovereigntists more likely to embrace the project of international law rhetorically, while identifying *specific* bodies of international law and *specific* law-making processes as threats to European values and to the European legal order. Fourth and finally, because of this feature, European sovereigntism is arguably more constructive than its American counterpart, taking the form, not (or not always) of a thorough-going rejection of international law but rather of an emerging agenda for change in international law and legal practices.

In the end, it seems clear that European opposition to substantial bodies of international law is rising, and with it a growing determination to protect the autonomy of the European legal order from the purportedly baleful effects of that law. One could object that, strictly speaking, the EU itself lacks sovereignty to protect, yet the quote from European Council President Donald Tusk that opened this chapter suggests that pro-European sentiment increasingly sees European unity as bulwark to protect the collective sovereignty of Europe against unwelcome intrusions from outside. This sentiment, together with the ability of a large number of actors to frustrate European accession to, compliance with and internalization of international law, promises to make the European Union at best an awkward participant in the international legal order in the years to come.

To this argument, the reader may raise the objection that European sovereigntism is not only newer but narrower than its American cousin, since its targets thus far have been concentrated in international trade and investment law, and its focus has been on protecting EU social and environmental regulation and fundamental rights. European sovereigntism, if it exists, does not represent an across-the-board rejection of public international law per se. Indeed, such is the optimistic interpretation of the evidence presented in this chapter, namely that the European center-left has turned its ire only on a relatively small slice of international economic law, leaving the Union's broader commitment to the international legal order intact. If this is correct, then the EU is indeed on its way to becoming an awkward international partner, but only in isolated, ring-fenced areas of economic law.

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There are, however, three good reasons to believe that the new and thus-far limited European sovereigntism sketched out here may be of greater import in the future. First, while the changing European attitudes have been focused thus far primarily on trade and investment law, it seems likely that an aroused European electorate, interest groups, and parliaments are likely to rise up against the intrusions of other bodies of law that are perceived to threaten the *acquis communautaire* of EU social regulation and fundamental rights. In the cases of the SWIFT banking agreement with the USA, as well as the EU/US Passenger Name Recognition agreement, EU data privacy regulations came into conflict with bilateral counterterrorism treaties, leading to political and legal challenges to both agreements.[112] In the European Court of Justice's 2008 *Kadi* decision, moreover, EU fundamental rights appeared to clash with the international security and counterterrorism resolutions of the United Nations Security Council, and the Court responded forcefully by disallowing the implementation of Security Council rules in the EU legal order.[113] The new European sovereigntism is therefore *not* limited to international economic law, but increasingly manifests itself as resistance to international security and counterterrorism agreements as well.

Second, as the *Kadi* case suggests, opposition to the intrusion of international law may arise not only from the partisan and parliamentary actors emphasized here, but also from European courts. Within the EU, traditional scholarship has suggested that the European Court of Justice stands in marked contrast to the US Supreme Court in its openness to international law, and its willingness to accept international law as an integral part of the EU legal order. As Gráinne de Búrca has recently argued,[114] however, the ECJ has manifested a gradual hardening of its position towards public international law, and an increasing willingness to defend the autonomy of the EU legal order, beginning with its rejection of direct effect for WTO law, continuing with its defiantly dualist approach in *Kadi*, and culminating in its infamous *Opinion 2/13* which blocked EU accession to the European Convention on

[112] On the SWIFT agreement and its rejection by the European Parliament, *see, e.g.*, Jörg Monar, *The Rejection of the EU-US SWIFT Interim Agreement*, and Katharina Meissner, *Democratizing EU External Relations*, *supra* note 9. On the European Court of Justice's invalidation of the first PNR agreement, *see, e.g.*, Javier Argomaniz, *When the EU Is the "Norm-taker": The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms*, 31 J. Eur. Integration 119 (2009); and Arthur Rizer, *Dog Fight: Did the International Battle over Airline Passenger Name Records Enable the Christmas-Day Bomber?*, 60 Cath. U. L. Rev. 77 (2010).

[113] de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, *supra* note 20.

[114] de Búrca, *Internalization*, *supra* note 11.

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Human Rights in an opinion widely interpreted as an effort to defend the autonomy of the EU legal order.[115] The new European sovereignty is therefore not limited to the partisan and parliamentary arenas, but is increasingly manifest in the judicial arena as well.

Third and finally, the analysis in this paper has focused primarily on resistance to public international law within the mainstream, pro-European center-left, which has led the charge against selected international legal agreements, while generally supporting European legal integration. By contrast, the European right, and in particular the extreme right whose influence is increasing rapidly in an era of rising populism, has taken the opposite tack, concentrating its opposition on *European* law and institutions in defense of *national* sovereignty, and largely ignoring, thus far, the provisions and procedures of public *international* law. Should the populist right turn its wrath on the international legal order, as Eric Posner has recently suggested it might,[116] the resulting European hostility to international law is likely to be far more virulent and less constructive than the more moderate, center-left phenomenon depicted in this chapter. What is certain is that, in these difficult times, European support for international law is being tested, and will continue to be tested, as never before.

[115] Halberstam, *It's the Autonomy, Stupid*, *supra* note 21; Isiksel, *European Exceptionalism*, *supra* note 21.

[116] Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, Chicago Public Law and Legal Theory Working Paper No. 606, Jan. 2017.

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