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Law and foreign policy

TABLE OF CONTENTS

The Legal Foundations of Foreign Policy – Mr Antonio LA PERGOLA

The constitutionalist revolution which began at the end of the 18th century has had a profound and lasting effect on the art of politics in the western world. The last two centuries have seen a radical change in political practices in terms both of the form of government and of public participation in government. Since the advent of the State governed by the rule of law, political activities have been hemmed in by legal rules depriving those in power of many of their prerogatives as regards both the form and practical scope of their actions. Citizens quickly took advantage of the greater transparency of decision-making mechanisms to take an increasingly active part in decision-making.

This change is generally regarded as a positive factor for the defence and promotion of the common good. So it is surprising that it should have taken so long for this fundamental thinking on the nature of political power to be transposed from domestic politics to foreign policy. Constitutional law seems to attach only minor importance to the way in which governments conduct foreign policy. The

consequence of this lack of interest is that modern political systems allow governments practically unlimited discretion to define and manage foreign affairs. For want of sufficient transparency in the decision-making mechanisms and a clear explanation of foreign policy issues, public participation and interest in foreign policy choices remain limited. And this does not just apply to the parts of the world where democratic principles have not been firmly secured. If any confirmation is needed of this, it is enough to look up the constitutions of the main democratic states and see how few clauses are devoted to the subject. Foreign policy is still uncharted territory for democracy and constitutional law.

This situation stems from two ideas, which are as mistaken as they are commonly held:

- the first is that a State's political activities can be divided into two entirely distinct realms, one domestic, the other foreign, separated by an impenetrable wall. According to this way of thinking, a State's foreign policy has absolutely no effect on the population's well-being.

- the second is that in foreign policy, by contrast with domestic policy, the king can do no wrong. The special nature of international relations supposedly justifies allowing governments more room for manoeuvre in this area than in domestic policy. Because relationships between States are neither regulated nor policed, they are based on fear and constraint and cunning and intimidation. This being so, limiting the power of the State is tantamount to putting the nation at risk by undermining the power of our rulers to act in its best interests on the international stage. In foreign affairs, unlike the domestic field, the public interest is held to be better served by quiescence than by meddlesome scrutiny.

These two beliefs form a barrier preventing democracy from entering into foreign policy. They demonstrate a lack of realism in response to the ever more pressing challenges that international relations pose in a huge variety of areas in a State's affairs. They also pose a threat to the further growth of democracy in the domestic field. There may have been some truth in this way of thinking at certain points in history but it has long since ceased to be valid today because of the changes in international relations in the course of the 20th century. It certainly cannot justify the silence of constitutional law with regard to the domestic control of foreign policy. Imperfect though the international community may be, Machiavelli's "realist" concept of international relations no longer provides an appropriate framework for the analysis of relationships between States.

In every area of international life, co-operation is tending to prevail over confrontation between States. The international community is no longer made up of juxtaposed national entities but of interlocking open areas, overlapping frontiers and gradually challenging the notion of national sovereignty. In this context of permeable borders, the impact of a State's international activities on the life of individual citizens should not be underestimated. Though they do not participate directly in international relations, individuals are more and more exposed to the consequences of their State's foreign policy. The public interest is all the easier to circumvent through foreign policy because there is less control of the State's activities in this area. There is a great temptation for governments to frame foreign policy in favour of particular groups to the detriment of the common good. This situation is particularly obvious in the area of trade policy, which is currently one of the fields in which barriers are falling most spectacularly. A lack of control over the conduct of trade policy can for instance enable certain lobbies to put forward their particular interests and demand protection against imports. The result is to place a financial burden on domestic consumers (caused by increases in the price of domestic goods and the cost of protection itself) which is totally out of proportion to the benefits gained by the protected industries.

This example shows how important it is for constitutional theory and practice to keep pace with present-day changes in the area of international relations. The need for increased transparency in the framing and implementation of foreign policy will become one of the major challenges for constitutional theory in the next century. If this vital issue is not addressed successfully, the struggle for democracy and the common good, which has been taking place over the last few centuries, will have been in vain.

In this publication, the Venice Commission wishes to contribute to the debate on the role of law in the framing and implementation of foreign policy by presenting an overview of the legal principles underlying the foreign policy of the participating states, followed by two contributions to the study of the machinery of the European Union's common foreign and security policy (CFSP). Quite apart from its academic interest in terms of comparative law, this study has enabled the Venice Commission to identify a number of principles (see page 13) which it believes must for the basis of a foreign policy founded on the values which it aims to promote, namely democracy and the rule of law.

INTRODUCTION

1. This report was adopted by the Sub-Commission on International Law at its meeting in Venice on 11 June 1998, and was approved by the Commission at its 35th meeting (Venice, 12–13 June 1998).

2. The purpose of the report is to present the legal foundations of foreign policy in a large number of States with different legal cultures, in order to show their diversity and identify the main trends in this sphere. It primarily consists of replies to the sub-committee's questionnaires, received from the following countries: Albania, Armenia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine and United States of America.

3. Foreign policy unquestionably serves the national interest in the broadest sense. However, nowadays it is no longer left entirely to the discretion of governments. It has ceased to be uncontrollable. On the contrary, it obeys certain legal rules which are, in a sense, its foundations and which act as curbs on States' freedom of action, in the interests of the international community and of all the countries belonging thereto. The legal foundations of foreign policy are therefore made up of both rules of international law and rules of domestic law.

4. Although the report was above all intended to be a study of the aspects of domestic law that affect foreign policy, it very quickly became apparent that a comparative study confined to domestic law alone would be incomplete, so closely do national legal systems mesh with the international one, in particular in the context of European integration. It therefore proved necessary to take into consideration the cardinal principles of international law and certain facets of the European Union's common foreign policy. The Sub-Committee consequently devoted part of the round-table on the legal foundations of foreign policy, held on Santorin on 26 and 27 September 1997, to those matters.

5. It is only natural that foreign policy concerning relations between States should, first and foremost, be governed by international law, the very purpose of which is to regulate inter-State relations. As members of the international community, States enter into an obligation to conduct their foreign policy with due regard for and in full compliance with international law, that is to say treaties binding them, international custom, the general principles of law, the binding decisions of international organisations and even, under certain conditions, unilateral decisions by States, which may also give rise to international obligations. To be more precise, States must observe the three cardinal principles of the present international system instituted by the Charter of the United Nations: the principle of settlement of international disputes solely by peaceful means (Article 2, paragraph 4), the principle of refraining from the threat or use of force in international relations (Article 2, paragraph 4), and the obligation to comply with resolutions passed by the Security Council in matters of international security under Chapter VII of the Charter of the United Nations. In their mutual relations States are likewise required to observe the principles and rules of good-neighbourliness. These obligations, incumbent on all States, serve a higher legal interest of the international community, that of restoring global peace and security. At a time when the spectre of war has again begun to haunt Europe, posing a threat to democratic societies and to the process of European integration, the European Commission for Democracy through Law cannot overstate the need for scrupulous observance of these fundamental obligations arising from the present international system, which should moreover constitute the main thrust of States' foreign policy.

6. The primary focus of the foreign policy of Council of Europe member States, and of other States sharing the same values, should be to defend the democratic ideal and all that it entails: the rule of law and protection of human rights and individual freedoms. These objectives are not just pursued and developed within States' national legal systems under the supervision of the judiciary, in particular the constitutional courts, but also increasingly at an international level, above all in the context of European integration. It is the very same principles, which make up the common constitutional heritage on which the European integration process is founded. In its 1993 study on the relationship between international and domestic law, the Venice Commission recommended that "more encouragement should be given … to the incorporation of the principles of democracy, human rights and the rule of law in the international legal system" (recommendation 7.5.e). It can but reiterate that recommendation, while stipulating that these values must also be reflected in States' foreign policy.

7. As to national law, the main focus of the study, the report sets out the rules applicable, country by country. The aim is to make it easier to compare different countries' legal systems and to allow an assessment of present trends in this sphere. It was decided to present the legal foundations of foreign policy in each of the different States according to a standard layout, corresponding to the main themes addressed. Therefore, for each country, a first section describes the principles observed when defining foreign policy (A. Principles). The aim is, firstly to identify those principles (1. Identification), their sources, their scope and their substance, and, secondly, to consider their effectiveness, in particular by examining the control mechanisms guaranteeing their observance (2. Control mechanisms). Since this facilitates comparisons between the different countries' legal systems, conclusions might be drawn as to the existence of higher legal principles binding on the public authorities, which lead them to define foreign policy not only with regard to political considerations but also in the light of legal constraints. A second section describes the legal standards governing the implementation of foreign policy (B. Implementation). It deals with the respective responsibilities of the legislature (1.), the executive (2.), the people (3.) and decentralised authorities (4.).

8. By analysing the replies it is possible to make an inventory of the legal foundations of foreign policy and, hence, to bring to light a dual trend.

9. Firstly, there are a growing number of increasingly tangible rules governing who is responsible for foreign policy, how it is implemented and the options taken. At the same time, a certain tendency to enforce compliance with the rules in question is becoming perceptible. The judiciary was long reluctant to review decisions taken by the public authorities in the foreign policy sphere. In a number of countries the "Actes de Gouvernement" theory has meant that action taken by the public authorities in foreign policy matters lies outside the courts' supervision. Under that theory, where the government takes action at an international level which is recognised as coming within its prerogative it is not fulfilling administrative functions, and the exercise of governmental authority therefore does not fall under the supervision of the courts, but under the political supervision of parliament. This applies in France, Greece, Croatia and Slovenia, for instance. In yet other countries judicial review of action taken by certain organs is banned. This is the case in Finland with regard to presidential decisions and Acts of Parliament. In the Netherlands, the constitution forbids the courts to rule on the constitutionality of international treaties. In Switzerland, they are prohibited from performing any constitutional review of federal laws and international treaties.

10. However, the ban on judicial review is becoming less absolute in nature. Firstly, it is open to review whether in taking a foreign policy decision a given organ of the State exceeded the powers conferred on it by the constitution. The case-law of the United States Supreme Court is of significance here (see the US contribution in section 38 of the report). Secondly, certain constitutional courts have established precedents for reviewing not only whether decision-makers acted within the bounds of their authority, but also the very substance of the decision itself. This is true of preventive review of treaties' conformity with the constitution but also - and above all – of the concept whereby the executive is deprived of its traditional freedom of action whenever fundamental human rights are in issue. An example of this unobtrusive but important development is to be found in the constitutional case-law relating to transfers of sovereignty to the institutions of the European Union and in particular to ratification of the treaty of Maastricht by certain EU member States (such as Germany and France). The unprecedented boom which constitutional law is undergoing at the end of the 20th century can but strengthen this trend.

11. Secondly, as a corollary to the emergence of legal rules governing foreign policy and its supervision, there is a move towards a degree of democratisation and decentralisation of the conduct of foreign affairs. As globalisation progresses, the number of legal standards laid down within international organisations or as a result of multilateral negotiations is on the increase. Nowadays, conduct of foreign policy sometimes has direct, immediate repercussions on the lives of ordinary citizens and can hence no longer be left to the executive's sole discretion. This tendency is apparent from the arrival of new players on the foreign policy stage. The executive naturally continues to have chief responsibility in this sphere but it is being joined by other actors, such as parliament and sometimes the people themselves. Long excluded from the conduct of political affairs, in strict compliance with the principle of representative democracy, the grass roots have gradually succeeded in obtaining a direct say in such matters. Their arrival on the political scene is *inter alia* reflected in the forms of semi-direct democracy introduced by many States, including with regard to determination of foreign policy. Moreover, in response to demand that power be exercised at a level closer to the citizen, greater responsibilities have been assigned to decentralised authorities and, sometimes, to socio-professional groups or non-governmental organisations, including in the foreign policy sphere. The emergence of these new players on the international scene is a sign of the present tendency to overstep the traditional limits within which foreign policy was conducted.

12. On the strength of the information which it has gathered, the Venice Commission considers that it is in a position to draw a number of conclusions in the form of guidelines for member States of the Council of Europe and other States sharing the same values concerning the implementation of their foreign policy. These have their basis in both international law and the fundamental values of the

democratic societies making up the Council of Europe and also reflect the trends of national law in the field of foreign policy. Those conclusions are as follows:

I. International law

States are under an obligation to respect and to implement international law in good faith, including *jus cogens* rules, treaties binding them, customary law, general principles of law and binding decisions of international organisations. In particular:

- In the conduct of their foreign policy States shall respect the three fundamental principles of the international legal system, namely resolution of international disputes solely by peaceful means, refraining from the threat or use of force in international relations and compliance with resolutions passed by the United Nations Security Council in matters of collective security.

- In their mutual relations States shall act in accordance with the principles and rules of friendly, neighbourly relations, which must guide their action at the international level, particularly in the local and regional context.

II. Democracy, Human Rights, the Rule of Law

In determining their foreign policy member States of the Council of Europe and all States sharing the same ideals shall take due account of the essential values on which they are founded, namely democracy, the rule of law and protection of human rights.

III. Democratisation of foreign policy

In their activities relating to foreign policy States shall enforce compliance with the constitutional system and the law, and facilitate supervision of government action by the relevant constitutional institutions, namely the legislature and, if need be the judiciary.

Parliaments' interest in their countries' foreign policy is, at first glance, a positive phenomenon, which should be given approval and encouragement. In particular, parliaments shall be fully informed of such policy and examine it periodically in order to participate in setting its principal directions.

The judiciary, especially the higher courts, shall enforce compliance with the above-mentioned essential principles of foreign policy, in particular as regards the application of international law in the domestic legal system.

States shall inform individuals, as widely as possible, of the main lines of their foreign policy and shall not impede free circulation of information about foreign affairs and international relations. They shall inform them of any action they can take to defend their rights before the international courts.

It is desirable that States take steps to ensure that the people and the relevant decentralised authorities or non-governmental organisations are consulted about and, when necessary, even directly involved in the determination and implementation of foreign policy.

1. ALBANIA

1.1 Principles

- Identification

There are *no legal principles* specifically applicable to foreign policy.

- Control mechanisms

Pursuant to Article 24.4 of the Constitution, the *Constitutional Court* determines whether international treaties are compatible with the Constitution prior to their ratification.

1.2 Implementation

- The legislature

Under Article 16 of the Constitution, the People's Assembly has the following powers: to *ratify* or denounce political or military treaties, those relating to frontiers, those concerning the fundamental rights and duties of citizens, treaties imposing financial obligations on the State or amending existing legislation and those which make provision for ratification or denunciation by the People's Assembly. The People's Assembly controls the activities of the Council of Ministers and the State Attorney's Department.

The Government is controlled by the Assembly, according to the normal control methods employed by parliamentary assemblies (vote of confidence, interpellation etc.).

- The executive

The *President of the Republic* has the following powers (Article 28): he concludes treaties and ratifies or denounces those which are not examined by Parliament; he appoints and dismisses diplomatic representatives, on a proposal from the President of the Council of Ministers, and he accepts the credentials of foreign representatives.

The *Council of Ministers* has the following powers (Article 36): it directs and supervises the activities of Ministers and other administrative authorities, concludes treaties and adopts or denounces those, which do not need to be ratified.

- Decentralised authorities

District and regional authorities are not empowered to develop international relations. They may only co-operate with equivalent bodies in other States in the spheres of investment, the economy and culture (and possibly conclude agreements, which do not have the force of treaties).

2. ARMENIA

2.1 Principles

- Identification

Armenia's arrival on the international relations scene coincided with its acquisition of independence on 23 September 1991. Before this, as one of the republics of the Soviet Union, Armenia did not have the prerogative of conducting its own independent foreign policy. Consequently, Armenia has only a short tradition in foreign policy matters.

The central preoccupation of the Republic of Armenia is the conflict in Nagorno-Karabakh. Armenian foreign policy seeks a peaceful solution to this conflict. Hence its active participation in the work of international organisations such as the Minsk Group, within the framework of the OSCE, in order to resolve the Nagorno-Karabakh conflict.

This policy issues in fact from the principles expressed in Article 9 of the Constitution. This article states the commitment of the Armenian authorities to conforming with international norms in the conduct of their foreign policy: *The Republic of Armenia conducts its external relations according to the norms of international law, aiming to establish friendly relations in accordance with the mutual interests of all countries.*

More generally, other constitutional provisions concerning the conduct of Armenian foreign politics refer to international norms. For example, Article 11 of the Constitution addresses concerns of the Armenian diaspora: *The Republic of Armenia contributes to the preservation of Armenian historical and cultural values, supporting the development of Armenian educational and cultural life in other countries in accordance with the norms and principles of international law*.

Furthermore, the Preamble to the Constitution states the Armenian people's commitment to the "universal values" of mankind. Article 48 of the Constitution forbids the use of constitutional rights and freedoms to "stir up national, racial and religious hatred or to advocate violence and war". Finally, the Constitution prescribes the protection of human rights and freedoms in accordance with "the norms and principles of international law" (Article 4).

- Control mechanisms

The Armenian Constitution institutes two types of control: the first political and the second judicial.

First, the Government, which ensures the implementation of foreign policy, as well as of defence and national security (Article 89.6 of the Constitution) is subject to political review by the national Parliament of Armenia: vote of confidence requested by the Government when presenting its general policy statement, vote of no confidence passed by members of Parliament.

Second, the Constitutional Court of the Republic of Armenia must review the conformity of international treaties with constitutional norms before their ratification by Parliament (Article 100.2 of the Constitution). In adopting the Constitutional Court of the Republic of Armenia Act (20 November 1995), Armenian legislators wanted to make this review mandatory: the President of the Republic must in all cases submit international treaties signed by Armenia to the Constitutional Court to ascertain their conformity with the Constitution. Treaties found to be in conflict with the Constitution cannot be ratified, except where the Constitution is amended by referendum (Article 6 para. 6 of the Constitution). The Constitutional Court passes judgement not on the appropriateness but on the constitutionality of the international treaty.

2.2 Implementation

In Armenia, the classical royal prerogatives, notably in matters concerning international relations, are allocated to the President of the Republic. Given this extension of competence of the President, the Armenian Constitution grants the Parliament effective powers of review over the acts of the President of the Republic.

- The legislature

First of all, the Parliament conducts a review of the use of loans and credits awarded to Armenia by other countries or by international organisations (Article 77 para. 1 of the Constitution). The Armenian national Parliament may pass a vote of no confidence in the Government at the initiative of the Parliament (Article 84 of the Constitution) or when the Government presents its programme of action, within twenty days following the formation of the Government or of the Parliament (Article 74 of the Constitution). Finally, at the instigation of the President of the Republic, the Armenian national Parliament "ratifies or denounces international treaties" (Article 81.2 of the Constitution) and declares war (Article 81.3).

Should the President of the Republic decree martial law in the event of a declaration of war (Article 55.13), the Parliament may request the Constitutional Court to give its binding opinion on the use of armed forces in these circumstances. Following the conclusion reached by the Constitutional Court, Parliament may decide, on a simple majority of members, to bring to an end the application of Article 55.13 of the Constitution (Article 81.3). Article 63.2 states that "Parliament cannot be dissolved under a martial law regime..." so as to ensure the continuity of Parliamentary review of the actions of the President of the Republic.

- The executive

Although the implementation of foreign policy, defence and national security policies lies with the Government, Armenian foreign policy is in fact a domain reserved exclusively to the President. It is the President who represents Armenia in international relations; he determines the general directions to be taken in foreign policy matters (Article 55.7 of the Constitution); he signs international treaties and promulgates intergovernmental agreements; it is he who is the commander-in-chief of the armed forces (Article 55.12 of the Constitution). Furthermore, he grants accreditation to Armenian ambassadors and receives the credentials of foreign ambassadors (Article 55.8). Finally, the President of the Republic is the guarantor of the independence, national integrity and security of the Republic (Article 49 para. 2).

- The people

Popular initiatives in matters of referenda are not envisaged in the Armenian Constitution. Thus the people cannot intervene of their own accord in the country's foreign policy. On the other hand, any amendment to the Republic's Constitution can only be made by means of a referendum (Article 111 of the Constitution), meaning that the people intervene in international relations, notably in the case of modifications to the Constitution when an international treaty contains provisions which are incompatible with the Constitution. Furthermore, according to Article 114 of the Constitution, national sovereignty cannot be the subject of a referendum.

3. AUSTRIA

3.1 Principles

- Identification

The Constitutional Law of 1955 provides that Austria is to be *neutral*. Article 9 of the Constitution sets out the *principle of comprehensive defence* (*umfassende Landesverteidigung*). The *protection of human rights* must be observed in domestic law as a constitutional rule and by virtue

of the commitments undertaken pursuant to the ratification of various international instruments in this area.[1]

- Control mechanisms

The *Constitutional Court* has jurisdiction to review the constitutionality of international treaties (Article 140a of the Constitution, inserted in 1988) and also compliance with international law, customary law and convention law (Article 145). Apart from that it has no powers to give rulings in matters of foreign policy. There are no examples of appeals (based on Article 140a and Article 145) which have been declared admissible.

3.2 Implementation

- The legislature

The *establishment of principles of foreign policy* is the result of a procedure which first involves Parliament. Moreover, certain treaties *must be approved by Parliament* (for example where they entail the amendment of existing legislation, they have a political character or they entail financial commitments by the State (Article 50 of the Constitution)). In such cases, however, Parliament's intervention comes at a late stage when the treaty has already been drawn up and signed, and therefore has no real effect. It has never refused to approve a treaty submitted to it. There has been only one case where fresh negotiations took place after the treaty was ratified, but before the instruments of ratification were exchanged.

There are also special rules concerning the consent of the *Principal Commission* of Parliament for certain foreign policy measures in connection with the European Union (Article 23 e) and participation in the operations of the United Nations and other international organisations (Constitutional Law of 1965).

Parliament's *power of control* is exercised in the following ways: right to ask parliamentary questions, right of inquiry, motions and vote of no confidence. Parliament also exercises indirect control over foreign policy by means of the vote on the budget of the Ministry of Foreign Affairs.

Matters are discussed in the Foreign Affairs Committee, Parliament in plenary and the *Council for Foreign Policy* (*Rat für auswärtige Angelegenheiten*). This Council was established in 1976 in response to the need for Parliament to take part in the preparatory stage of negotiations. The Council consists of Members of Parliament, members of the Government and senior officials. However, there is some controversy over the way in which Austria's representatives' scope for action is thus restricted.

- The executive

Power to determine foreign policy belongs essentially *to the executive*. However, the principle of legality and the *increasing number of laws* in various spheres which determine the rules which must be observed (concerning, for example, the issuing of passports and visas, co-operation in judicial matters, etc.), which require the executive power to abide by the legislative provisions in force in this

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[1] *See also articles 9.2 (introduced in 1981) and 23f (introduced in 1994), as well as the constitutional law of 1965, all of which relate to co-operation with international organisations, in particular with the European Union, and require the Republic to follow the policies of the international organisations in question.*

area. Many other spheres, however, do not have a legislative basis (for example the establishment and breaking off of diplomatic relations, diplomatic protection, an invitation to an international organisation to establish its seat in Austria, the entire domain of economic and cultural policy).

There is a shift in the balance of powers towards the Government. Within the Government the role of the Minister for Foreign Affairs is becoming less important as *the Head of the Government (in general) as well as other Ministers have an increasing say* with respect to the areas for which they are responsible.

- The people

There is provision for the people to be consulted in the form of a *referendum* where a treaty entails the amendment of a constitutional principle (for example the treaty on accession to the European Union).

4. BELGIUM

4.1 Principles

- Identification

The Belgian Constitution of 1831 contains very few provisions concerning the legal principles applying to foreign policy. When the Constitution was drafted, international relations did not have the importance that they have since acquired. This explains why, although revised as far as international relations are concerned, particularly in 1970 and more especially in 1993, the Belgian Constitution remains very discrete as regards the principles, which should guide the international action of the country. However two principles of a constitutional nature should be mentioned in this regard:

a) The principle of independence and of territorial integrity of the country asserted in two constitutional decrees of the National Congress of 18 November 1830 and 24 February 1831. The solemn oath, which the King is called to take before acceding to the throne, recalls these principles. The King must vow to observe the Constitution and the Laws of the Belgian people, to maintain national independence and the integrity of the territory (article 91 of the Constitution). Moreover according to certain authors, this principle of national independence has a supraconstitutional value.

b) The constitutional provisions in force until 1993, stated that the King "declares war". During the constitutional revision of 1993, this text was modified in the sense that "the King announces the state of war". This change has been explained by the willingness of Belgium to conform to the UN Charter and condemn wars of aggression.

Values like democracy, rule of law, the protection of human rights and individual freedom are not guaranteed as such by constitutional provisions in the field of foreign policy. It should be noted furthermore, that, owing to the period in which it was written the text of the Belgian Constitution is extremely sober and not strongly ideological; it does not contain any reference to democracy or to the rule of law. These values are indirectly established through the arrangement of technical rules concerning the exercise of power. One can also consider these as guides, from a political point of view, concerning country's foreign policy.

4.2 Implementation

The actors of foreign policy in Belgium can be approached from "a vertical perspective" (given the high degree of federalisation of the country) and from "an horizontal perspective" (in order to show how the separation and the collaboration of powers function at each level as far as international relations are concerned).

4.2.1 Division of powers in the international sphere between the State, the Communities and the Regions ("vertical approach")

This matter is very complex and has caused problems since the beginning of the federalisation of the country in 1970. The constitutional revision of 1993 has opted for a symmetry between the internal and the international competence of the Communities and the Regions. This means that when the federate entities are competent for a matter in the internal sphere, they will also be competent in the international domain.

4.2.1.1 Participation in the creation of international and supranational law

- Conclusion of treaties

In Belgium one should distinguish between exclusive treaties, i.e. those where the State or one or more of the Regions or Communities have exclusive competence, and the mixed treaties, i.e. those where the Federal State and one or many federate entities are competent.

As far as the exclusive treaties are concerned, each entity disposes (following article 167 §3 of the Constitution) of treaty making power. However the governments concerned must first inform the federal authorities of their intention to enter into negotiations with a view to concluding a treaty, as well as any consecutive legal act that they wish to accomplish (article 167 §4 of the Constitution and article 81 §1 of the Law of 8. August 1980). If the federal government expresses any objections, a consultation takes place within an ad hoc body (the inter - ministerial Conference of foreign policy).

In case of disagreement, the King (i.e. the federal government) can block the negotiating procedure through a royal decree deliberated in the Council of Ministers[2] in four cases restrictively enumerated:

a) when the contracting party is not recognised by Belgium;
b) when Belgium does not have diplomatic relations with the contracting party;
c) when, as a result of a decision or an act of the State, relations between Belgium and the contracting party are broken off, suspended or seriously compromised;
d) when the envisaged treaty is contrary to the international or supranational obligations of Belgium.
An appeal against the royal decree suspending the negotiation procedure of an exclusive treaty can be made to the Council of State.

Mixed treaties are by far the most common. Neither the Constitution nor the law regulate the status of mixed treaties, but they foresee the obligation for all interested parties (the State, Regions, Communities) to conclude a co-operation agreement on the subject (article 167 §4 of the Constitution, article 92 (2) §4 of the Law of 8 August 1980). This agreement has been concluded on the 8 March 1994: it foresees extremely complicate procedural modalities concerning mixed treaties. In practice, the constituent parties of the Belgian State concerned and the federal authorities, negotiate on an equal footing. All interested parties must consent to the treaty, except in the eventual application of a federal reserve clause. Agreement has to be given by all interested

[2] *The reader is reminded that since 1970 the Council of Ministers has equal linguistic representation, with the possible exception of the Prime Minister.*

assemblies. As soon as all interested assemblies have given their agreement, the Minister of Foreign Affairs shall establish the instrument of ratification or adherence and shall submit it to the King for signature (article 12 of the Cooperation Agreement of 8 March 1994).

- Belgium's representation in international organisations

A large number of international organisations pose the same problem as the mixed treaties, in the sense that their activities overlap areas which in Belgium come under the responsibility of both the Federation and the federate States. This problematic is not evoked in the Constitution, but in a special law (article 92 (2) §4 (2) of the Law of 8 August 1980), which calls for a conclusion of one or several co-operation agreements. A framework agreement was concluded on the 30 June 1994 between the federal State, the Communities and the Regions concerning the representation of the Belgian Kingdom in international organisations pursuing activities which fall under the joint responsibility of different entities in Belgium.

The Communities and Regions can be represented in the permanent Representation of Belgium to the international organisation concerned, if they wish so (article 4 of the framework-Agreement). A general consultation is organised by the federal Ministry of Foreign Affairs in order to determine the Belgian position (article 5 of the framework Agreement). A complex procedure aiming to seek a consensus is set up. Where there is a lack of time or of an agreement, it is foreseen that the President of the Belgian delegation will adopt "ad referendum" the position, which best expresses the public interest. If this procedure is not possible because of the rules in force in the international organisation concerned, or if disagreement persists after consultation, the President of the Belgian delegation can exceptionally abstain (article 9 §2 and 3 of the framework Agreement).

- Belgium's participation to the Council of Ministers of the European Union

Article 146 of the treaty has been modified in order to allow the Council to be composed of a representative of each member State at ministerial level, empowered to commit the government of that member State.

A specific co-operation agreement of 8 March 1994 has been concluded in this field. It distinguishes between those matters, which are the exclusive responsibility of the federal State, those which are the exclusive responsibility of the Communities or Regions and those for which they have a joint responsibility. In the first case the Belgian State is represented by a Minister of the Federation. In the second case, it is represented by a Community or Regional Minister, with a system of rotation being set up. Finally there is joint responsibility, Belgium is represented by a Federal, Community or Regional Minister, depending on the case, assisted by an "assessor" Minister representing the other level of power. A rotation system is once again set up between the different Communities and Regions.

A permanent co-ordination is organised within the "Directorate of Administration of European Affairs" of the Ministry of Foreign Affairs. As soon as the Belgian position is defined, it is communicated to the Permanent Representation to the European Communities (article 5 of the Agreement). If there is no time or in case of persisting disagreement, the Head of the Belgian Permanent Representation can exceptionally adopt "ad referendum" the position which is most likely to express the general interest (article 6 §2 of the Agreement).

4.2.1.2 The implementation of international and supranational law

The rules of international and community law do not in general have an impact on the internal division of responsibility. When these norms, for instance a directive, demand that legislative measures be taken, these must be taken by the Federal state, the Communities and the Regions as appropriate according to the internal criteria for division of responsibility.

However, in case of breach of international or supranational obligations, only the Belgian State can be condemned. Up to 1993, in case of condemnation, the Belgian State did not dispose of any means in the internal legal order to enforce the international decision. Since 1993, article 169 of the Constitution allows to the Federation to temporarily substitute for the Communities or Regions at fault, in order to guarantee respect for the international or supranational obligations of the country. This right of temporary substitution is subject to very strict conditions. In particular it implies first condemnations of Belgium by an international or supranational jurisdiction. The Federal State can only substitute for Communities and Regions in order to implement the decision. The exercise of the right of substitution can cause problems of responsibility, which are subject, as the case may be, to the Control of the Court of arbitration (laws) or the Council of State (executive acts).

Furthermore, the Communities and Regions do not have as such access to international jurisdictions, including the Court of justice of the European Communities. However they can oblige the State to bring a case before an international jurisdiction concerning matters for which they are responsible. In case of joint responsibility, the problem has to be resolved through a co-operation Agreement (article 81 §7 of the special Law of 8 August 1980).

4.2.2 Division of powers in the international field between the executive, the legislative and the courts ("horizontal approach")

This matter will only be dealt as regards the Federal State. What is said on this subject goes concerning the Communities and Regions in the implementation of their international relations. Two important observations are to be made straightaway:

a) In the framework of Belgian Federalism, the organisation and attributions of the jurisdictions are exclusively matter of federal responsibility. Therefore, the following presentation concerning the responsibilities of the Courts in the field of international and community law applies equally to the exercise by the Communities and Regions of their responsibilities.
b) Belgian constitutional law has always been interpreted as establishing a system of purely representative democracy, thus excluding any recourse to referenda or even a consultation of the electorate's opinion (except, in this last case, at the local level). This prohibition also applies to treaties and more generally to the external relations of the State. This failure to consult the people is currently being criticised in certain milieus. This explains, for instance, the passivity and even indifference of Belgian population towards large-scale reforms, such as the Maastricht Treaty, despite the fact that the Belgian population is traditionally in favour of the European Union.
These general observations having been made, it is important to situate the role of the executive, the legislative and the Courts in the field of foreign policy.

4.2.2.1 The executive

According to article 167 §1 of the Constitution, "the King is in charge of international relations, without causing prejudice to the responsibility of the Communities and Regions to regulate international cooperation, including the conclusion of treaties in areas which come under their responsibility by virtue of the Constitution or in accordance with it". The implications of this text are twofold. On the one hand it confers upon the federal authorities responsibility, in principle, for the conduct of foreign policy, the responsibility of Communities and Regions in this regard appearing

clearly as an exception. On the other hand, it confers responsibility upon the King, within the framework of the federal State.

By King is meant the Federal Government and especially the Minister of Foreign Affairs, who assumes the direct conduct of the country's foreign policy. However certain important questions, and particularly those concerning European Union are directly decided by the Prime Minister. Any act of the King in this field as in any other, can only take effect if it is accompanied by the countersignature of a Minister.

The King, as a person, can therefore have only a moral influence, through his opinions and advice within the framework of the "singular colloquium" with his Ministers. Historically, the Belgian King have always had an intense interest in the country's foreign affairs, and have played an active role in this field. It has even been claimed that until the Second Word War the King could, as far as military operations are concerned, act without ministerial countersignature. These doctrines are out of date, as one can note a slow, but constant erosion of royal prerogatives in the field of foreign policy a s in other fields.

4.2.2.2 The legislature

The legislative power plays essentially a role of control. This control is expressed by all the classical mechanisms of parliamentary control and by agreement to the treaties. It has been reinforced in the field of community law.

- General mechanisms of parliamentary control

The Assemblies can use all classical instruments of parliamentary control in the field of Government foreign policy: questions, interpellation, resolutions, enquiry commissions. It has to be noted, however, that since the reform of 1993, the right to ask questions and to call into question the political responsibility of the Government and it's Ministers fall exclusively under the responsibility of the House of Representatives. However, the senate has retained it's right to enquire and can use it concerning the conduct of the country's international relations. For instance, a parliamentary commission is currently in progress in the Senate concerning certain aspects of the policy exercised by Belgium in Rwanda.

- The approval of treaties

Common law
Since the reform of 1993, all treaties, including in principle agreements in simplified form have to be submitted to the assemblies for approval.[3] Before this date, only certain treaties (in fact quite numerous) were submitted for approval. Although the Senate has lost a lot of its powers since 1993, it remains on an equal footing with the House of representatives as far as the approval of treaties is concerned. The Constitution even foresees that the bills of law approving treaties have first to be presented to the Senate, before being transmitted to the House of representatives (article 75 (3) of the Constitution). One can see here the start of a certain specialisation of the senate in international affairs.

In Belgian law, the approval has to be seen, in principle, as a simple formal law, which enables a treaty to take effect in domestic law. In theory this is not a condition for the ratification of a treaty

[3] *The same goes for the assemblies of the federate entities as far as mixed treaties or exclusive treaties concluded by the executives of these entities are concerned.*

and can take place after this. In practice however, the ratification takes place after the approval of a treaty, in order to avoid a treaty binding Belgium internationally, being refused application in domestic law. This solution is imposed by the cooperation Agreement of 8 March 1994 concerning mixed treaties: The King can only ratify a mixed treaty after all the required approvals have been given (c.f. supra). On the contrary the denouncement of a treaty does not require any legislative intervention. Although the problem is not directly evoked by the Constitution, it has always unanimously been admitted that the publication of treaties constitutes a necessary condition of their obligatory force.

Treaties and specific acts
Certain treaties or acts are submitted to specific rules:

a) Concerning treaties relative to the territorial limits of the State, the King has to receive the prior authorisation of the Houses of Parliament (article 167 §1 (3) of the Constitution).
b) Article 34 of the Constitution, introduced in 1970, foresees that "the exercise of determined powers can be attributed by a treaty or a law to institutions of public international law". This provision aims to respond to the criticisms previously expressed concerning the constitutionality of the transfers of responsibilities that took place within the framework of the European Union. Thus, the ratification of the Maastricht Treaty in Belgium made it necessary to revise the Constitution on only one point, that concerning the right of nationals of other EU member States residing in Belgium to vote in local elections. It should be noted that the Belgian Government ratified the Maastricht treaty without revising the Constitution, although it was necessary to do so in this regard.
c) A new provision was introduced in 1993 and aims to reinforce democratic control of the Community treaties. Article 168 of the Constitution provides that, from now on, "as soon as negotiations are instigated in order to revise the treaties creating the European Communities and the treaties and acts which have modified or completed them, the chambers will be informed. They will be aware of the treaty before it is signed". It is a question of anticipating the assemblies' control in this regard and giving them a certain right to examine the negotiations themselves. The Community treaties being, in Belgian law, a mixed treaty, parallel information is ensured at the level of the Council of the federate entities (article 16 §2 (2) of the special Law of 8 August 1980).
d) In order to offset the "democratic deficit" in the adoption of secondary community law, it is foreseen that the proposals of regulations and directives are transmitted to the Houses of parliament and to the different Councils, as soon as they have been transmitted to the Council of the European Communities. The Houses of Parliament and the Councils can give their opinion on these proposals to the King and to the Governments of the federate entities respectively (article 92 of the Law of 8 August 1980).

- The courts

The Courts can be brought to exercise their control over diverse acts belonging to the country's foreign policy. Therefore the Council of State could be asked to control whether the King has acted within the framework of the conditions prescribed by law in suspending the negotiations envisaged by the Government of a Community or Region, with a view to concluding a treaty concerning exclusively federate matters (c.f. supra). Here also, the Court of arbitration (Constitutional Court) or the Council of State could be asked to control if the action of substitution of the federal power in the form of a law or a royal order, corresponds to the conditions foreseen by the Constitution and the law.

Authors assert however, that certain acts of foreign policy fall within the category of Government acts and are thus not subject to any jurisdictional control. This view appears to be largely theoretical and does not seem to be the case in practice.

In Belgian law, directly applicable conventional law is superior to the (Belgian) laws even if they are posterior. Two criterions are used to qualify directly applicable conditions: an objective criterion (precise and complete nature of the provision) and a subjective criterion (the willingness of the parties). Case-law tends to favour the first criterion and has a large conception of the provisions called directly applicable.

The primacy of directly applicable conventional law over posterior laws (and a fortiori the primacy of community law, primary or secondary, directly applicable) does not result from the Constitution itself, but from a decision of the Court of Appeal of 27 May 1971 (S.A Fromagerie franco-suisse Le Ski). If this decision is unanimously accepted concerning the primacy of directly applicable international law over domestic law (and a fortiori over the sources of internal law inferior to the law), the same is not true concerning the relation between international law and the Constitution it self.

Two different theses are currently under discussion. Certain authors contend that directly applicable conventional international law has a primacy over the Constitution it self following to the Courts decision of 27 May 1971, which considers that the primacy of international law is founded upon it's very nature, and that this primacy concerns any internal rule, without distinction. The Court of Arbitration, within the limits of it's responsibilities (control of division of responsibilities between the State and it's entities, control of the principle of equality and of the constitutional principles concerning education), subjects to control the laws (or decrees) approving treaties and through these laws or decrees, the treaties them selves. The Court of Arbitration considers itself therefore competent to declare that a treaty in force in the domestic legal order should not be applied by the courts, because, for instance, it violates the principle of equality. This problematic is at the heart of internal doctrinal controversy, which is far from been resolved.

5. BULGARIA

5.1 Principles

- Identification

According to Article 24.1 of the Constitution, "the foreign policy of the Republic of Bulgaria shall be established *in accordance with the principles and norms of international law*". Article 24.2 provides that "*the fundamental objectives of the foreign policy of the Republic of Bulgaria* shall be national sovereignty and the independence of the country, the welfare, rights and fundamental freedoms of Bulgarian citizens and assistance in the establishment of an equitable order". Values such as democracy and human rights are also referred to in the preamble to the Constitution as supreme principles, which bind the public powers in the determination of their conduct.

Bulgaria's intention to become part of the European Union means that it must endeavour to comply with its international undertakings. It is for this reason that mechanisms have been established to ensure compliance with the European Association Agreement.

- Control mechanisms

Observance of the legal principles which must be observed in the definition of foreign policy is considered to be guaranteed owing to the *political control of Parliament*. Furthermore, the *Constitutional Court* has power to review all acts of the Government and Ministers, including

those connected with foreign policy. There have been three cases where the Court has ruled on foreign policy matters but these decisions do not constitute a body of case-law.

5.2 Implementation

Decision-making power is divided between Parliament, which defines the general directives of foreign policy, the Government, which directs and implements foreign policy, and the President, who represents the country abroad.

- The legislature

The National Assembly discusses and *expresses its confidence in the Government's programme*. It continuously supervises the implementation of the Government's policy. Only the National Assembly discusses *questions of major importance*, such as war and peace. The same applies to State borrowing. The National Assembly *ratifies and denounces certain treaties*, namely those of a political or military nature, those entailing financial obligations for the State, etc.

The *Foreign Affairs Commission* plays an important part in determining the country's foreign policy. Members of the National Assembly may debate important questions of foreign policy and request reports from the Government, which will be discussed within the Foreign Affairs Commission.

- The executive

All fundamental *initiatives* in foreign policy are in practice a matter for the Government. The heads of diplomatic representations and the permanent representatives of the Republic of Bulgaria at international organisations are *accredited and recalled by the President* of the Republic on a proposal from the Council of Ministers.

- The people

There is provision for consultation of the people by *referendum*, but this does not actually happen in practice.

6. CANADA

6.1 Principles

- Identification

In the conduct of its foreign policy, Canada considers itself bound by the international treaties and agreements it has ratified. It also conducts its foreign policy in a manner consistent with general principles of international law, including customary principles. It respects the decisions of international courts and tribunals to whose jurisdiction Canada has subjected itself, and settles international disputes in accordance with the Charter of the United Nations and decisions and resolutions of the United Nations as well as the Security Council. The Government recalls its political loyalty to values such as democracy and human rights and acknowledges the influence which Canada's membership in such international organisations as the UN, NATO and the OSCE has in practice on the formulation of its foreign policy.

- Control mechanisms

Legislative measures adopted domestically in connection with foreign policy must comply with the Canadian Charter of Human Rights and Freedoms, and administrative measures adopted domestically in connection with foreign policy must comply with statutory, civil code or common law including the principles of the rule of law, as well as with the Charter.

6.2 Implementation

Treaties are negotiated and concluded by the federal government. If the subject matter of the treaty falls under provincial jurisdiction in Canadian constitutional law, then the provinces will be consulted during the process of negotiating and concluding the treaty. Representatives from the provinces may, in such a case, accompany the Canadian delegation to negotiating sessions. In addition, non-governmental organisations are often consulted on the treaty as it is being negotiated, and may also accompany the Canadian delegation to negotiating sessions. The acts of signature and ratification are authorised by the executive branch of the federal government. Treaties are implemented in a number of manners, and legislation will be enacted if Canada's obligations cannot otherwise be implemented. If provincial implementing legislation will be required to fulfil the obligations of the treaty, either the consent of the provinces to enact such legislation obtained prior to Canada's signature of the instrument, or Canada will seek the insertion of a federal state clause in the treaty. Often treaty obligations can be implemented by administrative actions or under the authority of previously existing legislation. In such cases, no new legislation is required.

7. CROATIA

7.1 Principles

- Identification

Foreign policy must comply with the Constitution and legislation: there is no further requirement. Treaties and decisions of the international organisations of which Croatia is a member are part of the domestic legal order and their force is higher than that of legislation (Article 134 of the Constitution). They must therefore be observed when the directions to be taken by foreign policy are determined. Accordingly, *values* such as democracy, the rule of law, human rights and fundamental freedoms, *in so far as they are guaranteed by treaties*, must be taken into account.

- Control mechanisms

The principles of foreign policy established by treaties are implemented by legislative provisions. Compliance with these principles is ensured by the normal controls employed to ensure compliance with laws and treaties. There is no relevant case-law. However the judicial control of foreign policy questions is excluded neither by the Constitution neither by the law. There are no precedents of such cases. Thus it is possible that individuals on national ethnic or religious minorities dispute certain acts of foreign policy which they believe jeopardise their interests. It appears even that a complaint to the Constitutional Court would be possible if an action of foreign policy was in contradiction with the Constitution. Given the absence of previous jurisprudence in this area, it is difficult to foresee the scope of judicial control in case of dispute.

On the other hand the political control exercised by the Parliament over the Government ensures the respect of principles defining the foreign policy of the country. The minister of foreign affairs regularly presents the policy implemented in different domains to the members of the Parliament. This presentation is followed by questions, comments or criticism by the deputies.

7.2 Implementation

- The legislature

According to Article 2 of the Law on Foreign Policy, Parliament may *adopt directives on foreign policy. Furthermore, Parliament is responsible for ratifying treaties* which require legislation (or the amendment of existing legislation), military or political international agreements and those entailing a financial commitment on the part of the Republic. The same applies in the case of agreements establishing international organisations or alliances. The same procedure must be observed where these treaties are denounced or the reservations expressed in regard thereto are withdrawn.

- The executive

The *President* represents the Republic in its external dealings. On a proposal from the Government, he decides to send diplomatic missions, he *appoints and recalls* the diplomatic representatives of the Republic, he takes part in the conclusion of the treaties which *he concludes* on behalf of the Republic. The Head of State has fundamental power of decision as regards the *recognition of States* and the *establishment of diplomatic relations*.

The *Government* may *conclude treaties relating to economic and social activities* and also those connected with the protection of the environment (Article 2.2 of the Law on the conclusion and application of international treaties). The Minister for Foreign Affairs implements foreign policy decisions which have already been taken.

- The people

Decisions concerning the participation of the Republic in an association must be adopted by referendum (Article 135.4 of the Constitution), as must those *concerning the withdrawal of Croatia from an international organisation* (Article 135.5). Furthermore, pursuant to Article 120 of the Rules of Procedure of the Assembly of Representatives of the People, *any citizen may take the initiative to begin a procedure which might lead to the adoption of a law*, including in matters of foreign policy (popular initiative).

8. CZECH REPUBLIC

8.1 Principles

- Identification

Depending on whether or not the person empowered to conclude treaties occupies a place at the summit of the hierarchy of powers, the legal principles applicable to that person are different. Thus a territorial authority, a member of the administration or a member of the diplomatic corps must, when concluding an agreement, observe both the statutory provisions and the regulations applicable. In the case of the Government and the President of the Republic, it is clear that they will not be subject to the constraints of any regulations or decrees applicable, but that they will be required to observe the

law and constitutional principles. Lastly, as regards the legislature, only the constitutional provisions and any possible general principles of law limit its power to determine the directions taken by foreign policy. It is also necessary to mention that the constituent power (the people itself, by means of a referendum or a strong majority in Parliament) may amend the Constitution. Consequently, *where one speaks of legal principles applicable to foreign policy, these clearly vary according to the position which the persons responsible for foreign policy occupy in the hierarchy of norms*.

- Control mechanisms

Pursuant to Article 4 of the Constitution, rights and fundamental freedoms are guaranteed by the judiciary. The *Constitutional Court* may be called upon to intervene where human rights are violated. This mechanism is also effective where this *violation has occurred in the context of foreign policy*. There is no relevant case-law, however.

8.2 Implementation

- The legislature

Determining the directions to be taken by foreign policy is a matter for Parliament (Article 39.3 of the Constitution). Furthermore, Parliament exercises political *control* over the Government, and this also applies to foreign policy (Article 68.1 of the Constitution). Members of Parliament have the right to question the Government or its members (Article 53.1 of the Constitution).

Parliamentary committees are established, including in the sphere of foreign policy. They make draft resolutions, which are generally taken up by Parliament. Budget debates may also influence the formation of foreign policy.

- The executive

The *President* represents the country abroad. He *signs and ratifies international conventions*. The President *appoints and recalls* the heads of diplomatic missions. He also appoints and dismisses the Minister of Foreign Affairs, on a proposal from of the Prime Minister.

The *Government* is at the head of the executive power. It may *represent the country abroad*. It may bind the country by *declarations* or measures adopted in the sphere of external relations, but there are no provisions which grant the Government actual powers in this area. More specifically, the Minister of Foreign Affairs is responsible for representing the Republic abroad. Other organs within the Administration may also be empowered to conclude treaties. The *members of the diplomatic corps* report to the Government.

- Decentralised authorities

Territorial authorities are empowered to cooperate with other authorities abroad and to participate in associations of local bodies (Act of Parliament no. 367/1990 and Territorial Authorities Code). *Agreements concluded in this way cannot exceed the territorial authorities' statutory powers*.

9. DENMARK

9.1 Principles

- Identification

The *Constitution* makes *no reference* to principles which must be observed in the definition of foreign policy and does not determine its aims. However, certain ordinary *laws* may define the *aims* of the conduct of foreign policy in their particular sphere.

Principles such as democracy, the rule of law and the protection of human rights and individual freedoms are extremely important in the conduct of Danish foreign policy, but there is no indication that they have any other than political or moral value. Danish diplomatic and consular missions report on compliance with these values in the various countries. Reports of the United Nations or NGOs are also taken into consideration.

9.2 Implementation

- The legislature

The *Foreign Policy Committee*, whose members are appointed from among Members of Parliament, must be consulted *before decisions of major importance are adopted* (Article 19.3 of the Constitution). Moreover, a *special parliamentary commission was set up following Denmark's accession to the EEC*.[4] The Government is required to *inform* this committee of decisions of the Council of Ministers which will be directly applicable in the Danish legal order or the application of which will require the agreement of Parliament. In accordance with a practice established since 1973, all major issues relating to Denmark's policy in European affairs are discussed within the Committee, which then provides the Minister for Foreign Affairs with a "negotiating mandate". In 1972 a *Foreign Affairs Committee specialising in development assistance* was set up. The increase in the number of parliamentary committees which must be consulted before foreign policy is determined and implemented has enabled the legislature to increase its influence in an area traditionally that of the executive.

Under Article 19 of the Constitution, *certain acts require Parliament's consent if they are to have legal value*. These include acts which increase or reduce the territory, those which require Parliament's consent before they can be implemented and other acts of major importance. Parliament's consent is also required for the termination of any treaty which came into force with its consent. Lastly, military force cannot be used against foreign States without the consent of Parliament, except for reasons of defence against armed attack (Article 19).

- The executive

The Constitution (Article 19) provides that "*the King shall act on behalf of the Realm* in international affairs". However, it is the *Ministers who are responsible for the conduct of Government* (Article 13 of the Constitution). It is thus the Government that acts on behalf of the Realm.

The Government draws up the essential principles of the conduct of foreign policy. The Minister for Foreign Affairs plays an important role in this process. In practice, Government decisions are often influenced by parliamentary resolutions adopted by majority not comprising the Government (since the country traditionally has minority Governments). These resolutions have political rather than legal value.

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[4] *European Economic Community.*

- The people

Article 20 of the Constitution provides for a *referendum* in certain circumstances where *sovereignty is to be delegated* to international authorities. Parliament may also submit *other questions* to a referendum, including in the sphere of foreign policy. Certain laws cannot be submitted to referendum, however. Danish law makes no provision for *popular initiative*.

10. ESTONIA

10.1 Principles

- Identification

The preamble to the Constitution contains requirements on State behaviour. In particular, *the following principles* are mentioned: *protection of internal and external peace*, security and social progress and the *preservation of the nation and its culture* throughout the ages.

Article 1 proclaims the *independence* of Estonia and the *inalienability of its sovereignty*. Other provisions of the Constitution refer to principles which much be observed in the determination of foreign policy. Thus Article 122 provides that Estonia's territorial frontiers are defined by the Tartu Peace Treaty of 2 February 1920 and other international treaties. The same applies to its sea and air borders. Article 123 prohibits the conclusion of treaties which are contrary to the Constitution.

The Law on Foreign Relations (1993) regulates foreign relations and the jurisdiction of the government institutions established for that purpose. The fact that, according to Article 1 of this law provides that the foreign relations of the Republic are to be regulated by law *is regarded as a guaranteed of democracy, the rule of law and the protection of human rights* in the conduct of foreign affairs. Furthermore, it is provided that foreign policy issues not addressed in the Constitution, the Law on Foreign Relations or international law are to be regulated according to the *usual international practices* (Article 1).

- Control mechanisms

Article 139 of the Constitution establishes a control mechanism in respect of these principles. A "*Legal Chancellor*" is responsible for monitoring whether the legislation adopted by Parliament and Government measures are compatible with the law and the Constitution.

The *Supreme Court* also ensures compliance with legal and constitutional rules. Article 152 provides that any law or other legal measure found to be contrary to the provisions or spirit of the Constitution is to be declared void. Article 15 of the Constitution provides that anyone whose case is heard by a court may require that the constitutionality of the relevant law or measure be examined. The courts declare unconstitutional any law or other procedural measure which violates the rights and freedoms established in the Constitution.

10.2 Implementation

- The legislature

Article 1 of the Law on Foreign Relations provides that the *foreign relations of the Republic are to be regulated by law*, as is the action of Parliament, in accordance with the Constitution.

Parliament may *adopt directives on foreign policy*, decided to *hold a referendum*, ratify and denounce treaties (Article 121 of the Constitution) and, on a proposal of the President, *declare war*, a state of *mobilisation* or demobilisation. According to Article 5 of the Law on Foreign Relations, Parliament is to adopt decisions on the maintenance of foreign relations with other countries. It deals with declarations and appeals within the sphere of foreign policy, it communicates with other Parliaments and other inter-parliamentary institutions, determines the role of the army in international affairs, establishes the hierarchy of diplomatic positions and the procedure for filling diplomatic posts and discusses foreign policy and its implementation at least twice a year.

Article 121 of the Constitution provides that *Parliament is to ratify and denounce treaties* which alter the State frontiers, those whose implementation requires the enactment or amendment of legislation, those whereby Estonia accedes to international organisations, those whereby Estonia undertakes military or financial obligations and those which require ratification.

A *special commission* on foreign affairs has been established pursuant to Article 71 of the Constitution.

- The executive

The *President* of the Republic represents Estonia abroad, *appoints and recalls* the diplomatic representatives of the Republic, *signs letters ratifying or denouncing treaties* and is head of the armed forces. He *accepts the credentials* of foreign diplomatic representatives (see Article 77 of the Constitution and Article 6 of the Law on International Relations).

The *Government* is responsible for co-ordinating foreign relations and for *implementing* foreign policy. It submits the various agreements to Parliament to secure their ratification or denunciation. It *recognises the legal existence of Governments* or nations. It *concludes treaties* on behalf of the Republic, *negotiates*, *establishes* and *decrees diplomatic relations* and regulates other foreign policy issues which are not within the competence of Parliament or the President.

- The people

Article 105 of the Constitution provides that Parliament may submit a draft law or other national issues to a *referendum*. The results of such a referendum are binding on all State organs. However, Article 106 of the Constitution provides that questions connected with the budget, taxation, the financial obligations of the State or the *ratification or denunciation of international treaties cannot be submitted to a referendum*.

11. FINLAND

11.1 Principles

- Identification

The Constitution[5] contains *no principles on foreign policy*. Section 1 of the Constitution Act provides that the Constitution is to protect the *freedoms and rights of individuals* and human

[5] *The Constitution consists of two fundamental laws, the Constitution Act (1919) and the Parliament Act (1928); there are also two other fundamental laws, the Ministerial Responsibility Act and the Act on the High Court of Impeachment.*

dignity. These principles seem to be generally applicable to all activities of the public powers, including those relating to foreign policy. The promotion of justice in society is also laid down as an aim of the country's policy.

Treaties do not directly form part of the domestic legal order, but require implementing measures in order to be applicable.

The Constitution contains no provisions requiring the approval of treaties which limit sovereignty. Section 1 of the Constitution expressly declares though, that Finland is a sovereign Republic. It is a clear and established interpretation of this constitutional rule, that treaties which limit national sovereignty in a more essential matter violate the Constitution. *Treaties limiting the sovereignty in this manner must therefore not only be submitted to the approval of the Parliament, but also be incorporated by the Parliament as exceptions to the Constitution, that is with a majority of two thirds of votes cast.*

- Control mechanisms

In principle, all administrative decisions with the exception of those of the President are subject to judicial review. This is only possible upon application. On the other hand, subordinate legislation and *decisions adopting principles of foreign policy are not as such susceptible of appeal.* However, section 92 of the Constitution provides that where a decree is contrary to the Constitution or another Act of Parliament the courts must not apply it. Where the principles of foreign policy are applied in an individual case their legality may be examined when the case is examined. *Where the Administration exercises its discretionary power in good faith its decisions cannot be called in question by the courts*.

However, *Parliament may declare that no appeal lies against certain administrative decisions*. This provision is not entirely compatible with the 1995 constitutional reform on fundamental rights, which recognises that everyone is entitled to have a decision relating to his rights and duties reviewed by a court. On the other hand, even where no ordinary appeal lies, *an extraordinary appeal against administrative decisions*, including those of the President of the Republic, may be presented to the Supreme Administrative Court on the basis of procedural errors, other grave errors of law or substantial new evidence.

There are also other indirect means of controlling the conduct of foreign policy. The Chancellor of Justice[6] may *object if a member of the Government acts unlawfully*. A report may be presented to the President. There is also an ombudsman responsible for ensuring that human rights are observed by the public powers in the conduct of their policies. Impeachment proceedings may also be commenced. The President of the Republic himself may be subject to such proceedings, in case of high treason.

The role played by the *Supreme Administrative Court* as *guardian of the Constitution* is relatively modest. There is primarily a preventive control of the legality of various measures before they are submitted to Parliament. The courts are not entitled to declare an Act of Parliament unconstitutional when it has been duly signed and promulgated. They are only able to apply a principle according to which laws are to be interpreted in the way which renders them most

[6] *The Chancellor of Justice is not a minister, but a permanent official appointed by the President of the Republic. The main function of the Chancellor of Justice is to secure legality in public administration. He shall be present at all sessions of the Council of Ministers.*

consistent with the Constitution. Only decrees or regulations are subject to control of their legality and constitutionality. There is no significant body of case-law on the matter.

11.2 Implementation

The President of the Republic, the Government and Parliament are responsible for drawing up the essential principles of the conduct of foreign policy.

- The legislature

The legislature must *approve treaties* after they have been concluded if they contain provisions which fall within the legislative domain or where the Constitution so requires. Parliament's approval is necessary where a reservation is to be withdrawn or where an Act of Parliament is necessary to ensure compliance with the commitments undertaken at international level. Decisions concerning war or peace are adopted by the President with the consent of Parliament. Similarly, peace treaties must be approved by Parliament.[7] Parliamentary approval is not required, however, for the implementation of unilateral action. Furthermore, *Parliament's approval has not always been deemed necessary if existing legislation corresponds to the treaty in question*. By legislative authorisation, Parliament may *delegate* certain of its legislative powers to the President or other State organs.

Following the adoption of the Act of Accession to the EEA,[8] a new section 33 (a) was inserted into the Constitution. *According to this provision, Parliament is to participate in the preparatory work related to matters which fall to be decided by international organisations*. Similarly, Finland's accession to the EU[9] required the amendment of the preparatory and decision-making procedures, in order to satisfy the need to protect democracy and effectiveness. Thus it was provided that the special Foreign Affairs Committee could require Government reports on specific issues of foreign policy. The Government shall inform the Foreign Affairs Committee of the Parliament on matters concerning the common foreign and security policy of the European Union, and especially upon decisions taken by the European Council.

The duty of the Government to inform parliamentary bodies extends however beyond matters handled by the European Council. The duty covers i.e. all proposals for measures to be decided by the Council of ministers of the European Union, or pursuant to powers delegated by the Council, by the Commission or any other organ, in so far as the decision would concern matters which would, save for the Union competence, fall within the competence of the Finnish Parliament. Any such proposal which has come to the Government's notice shall be communicated for consideration by the Grand committee of the Parliament or, in case of matters concerning the Union's common foreign and security policy, by the Foreign Affairs Committee. The committee concerned shall furthermore be informed about the stage of consideration of the matter in the Union and of the Government's own position in this matter. The committee may also deliver an opinion to the Government.

According to paragraph 2 of section 48 of the Parliament Act, reports must be given to the Foreign Affairs Committee of Parliament where this is requested. *Questions* may be put to the Ministers and there is also a *right of interpellation*.

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[7] *Paragraph 1 of section 33 of the Constitution has not been interpreted as always extending to the conclusion of an interim peace treaty or a treaty of alliance.*

[8] *European Economic Area.*

[9] *European Union.*

Once it has been informed, *Parliament may then express its views on foreign policy. These views are prepared by the Foreign Affairs Committee*. On the basis of the Government reports concerning the outcome of the resolutions adopted by Parliament in foreign policy matters, the Committee may propose that Parliament should withdraw its confidence from the Government.

Politically, the Government is responsible to Parliament. *Immediately after being appointed, the Government presents its programme to Parliament. Parliament discusses the programme and decides whether or not to give the Government a vote of confidence*. The possibility of *withdrawing its confidence from the Government* is therefore an indirect means whereby Parliament may control the Government's foreign policy.

Furthermore, on the basis of its *budgetary powers* Parliament may avoid foreign policy projects of the President which require new funding. Parliament may thus refuse to give its consent to expenditure which it has not approved. Moreover, where a foreign policy act of the President requires legislation the President must comply with what Parliament has decided or abandon the implementation of that act.

- The executive

Section 33 of the Constitution Act provides that "*Finland's relations with foreign powers shall be directed by the President*". Decisions concerning war or peace are adopted by the President with the consent of Parliament. The President is also commander of the armed forces.

The Government decides upon the preparation at national level of the decisions which have to be taken at European Union level. The Government also decides upon the other measures to be taken in Finland in relation to these European Union decisions insofar as these do not require parliamentary approval or a presidential decree. Lastly, the increase in the number of treaties has had the consequence that a significant number of decisions are henceforth within the competence of the Minister for Foreign Affairs.

- The people

The people may express its views by *referendum* (section 22 a of 1987). However, there is no provision for a *popular initiative*.

- Decentralised authorities

The province of Aland has a fairly large legislative autonomy.[10] In addition to the provincial legislature, the province of Aland has an executive organ of its own. If an international treaty includes provisions belonging to the legislative competence of the province of Aland, the entering into force of such provisions in the province presupposes that the provincial legislature adopts legislation enforcing the treaty in the province. This entails, in practice, that such a treaty can only be ratified after such enforcing provincial legislation has been adopted.

The national Government shall inform the Governing Board of the Province of Aland of any matters under preparation in the organs of the European Union in case such matters are within the competence of the province or are otherwise of special importance to the province. The Governing

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[10] *The legal foundation of this autonomy is the Constitution of Finland of 1919 and the "Self Government Act" of Aland.*

Board is entitled to participate in the preparation of such matters within the National Government. In regard to matters within the competence of the province, the Governing Board formulates the positions of Finland concerning the application of the common policy of the Union in the province. A person nominated by the Governing Board shall be proposed as one of the representatives of Finland in the Committee of Regions in the European Community.

12. FRANCE

12.1 Principles

- Identification

The French Constitution refers in its preamble to the attachment of the French people to human rights and the principles of national sovereignty as defined in the Declaration of 1789 and confirmed and supplemented in the preamble to the Constitution of 1946. According to the *preamble, the Republic, faithful to its traditions, observes international law and in particular the principle pact sunt servanda*. It therefore observes the principles of self-determination of the peoples and respect for established frontiers.

France's foreign policy must therefore be consistent with these broad principles. However, that applies only to its own activities. *France cannot require other States to obey the same values*, as otherwise it might be accused of interfering in their domestic affairs. The most it can do is to encourage them and to continue to set an example. France has let it be known on many occasions that it wished certain legal systems to be made more liberal or more democratic, but it cannot make its commercial relations with other countries conditional upon the extent to which its partners observe the principles from which France takes its inspiration.

The signature of the Maastricht Treaty required the amendment of the Constitution, which indicates the existence of certain constitutional provisions which should be respected even in connection with France's foreign policy. Article 88.2, which was inserted into the Constitution, provides that France consents to the transfers of powers necessary for the establishment of European Monetary Union, and also to the determination of the rules associated with the crossing of the external frontiers of the Member States of the Community. Similarly, Article 88.3 provides for the right to vote and eligibility to stand in French municipal elections for non-French nationals of the EU.

The new Article 53.1 of the Constitution provides that the Republic may conclude, with European States linked by the same undertakings as those of France on asylum and the protection of human rights and fundamental freedoms, agreements determining their respective powers to examine applications for asylum presented to them. This, too, is a *sovereign power of France*. *In order for this power to be relinquished in favour of an international organisation pursuant to a treaty it was necessary to revise the Constitution*.

On these points the Constitutional Council had held that the French Constitution was opposed to the conditions laid down by the Maastricht Treaty, since these two domains were within the national sovereignty of each State. *The inalienability of national sovereignty is therefore a legal rule which is binding on foreign policy*.

- Control mechanisms

All matters relating to the conduct of France's foreign relations engage the sovereignty of the State and legal acts associated with diplomatic negotiations are regarded as *acts of State which are not susceptible of appeal*. Only *a separable act* may be brought before the administrative courts by an application to set it aside on the ground that it is *ultra vires*.

As regards treaties themselves, the *Constitutional Council* may be required to determine whether they are compatible with the Constitution (Article 54 of the Constitution). Authorisation to ratify or approve the international undertaking can only be given after the Constitution has been amended. This applied in the case of the Maastricht Treaty, which was only ratified following a constitutional amendment.

12.2 Implementation

- The legislature

According to Article 53 of the Constitution, *Parliament* is responsible for *ratifying and approving peace treaties, treaties concerning trade,* those relating to an international organisation, those whereby the State undertakes a financial commitment, those which amend legislative provisions, those relating to individual status and those which entail the cession, exchange or acquisition of territory. Although France has accepted that part of its sovereign powers be transferred to the Community institutions it has done so only on condition that *Parliament*, representing national sovereignty, is *consulted* by the Government *in respect of every proposed Community measure which includes provisions of a legislative nature*.[11]

Furthermore, when the *budget is being debated* the vote on the appropriations to the Minister for Foreign Affairs almost always involves a debate on the directions which France's foreign policy should take.

Questions may be put to Ministers, but the ensuing debate is limited to the subject under discussion. Consequently, it is important for the Minister for Foreign Affairs to provide regular information to the relevant *special committee* concerning the main issues of foreign policy. Furthermore, it should be noted that when the Prime Minister presents his action programme and seeks confirmation by Parliament, a large part of this programme concerns foreign policy. Thus Parliament indirectly gives its consent to the broad axes of foreign policy *by its vote of confidence in the Government*.

- The executive

The *President of the Republic* is invested with the bulk of powers in respect of foreign policy. He is responsible for ensuring compliance with the Constitution and for ensuring the proper functioning of the public powers and the continuity of the State. *He is the guarantor of national independence, the integrity of the territory, observance of agreements* of Community and treaties Article 5 of the Constitution). The fact that he does all these things means that foreign policy is in his hands.

More specifically, the President is responsible for *accrediting ambassadors* and special envoys to foreign powers, while their counterparts from other countries are accredited to the President (Article 14). He is the head of the armed forces (Article 15). He *negotiates and ratifies treaties* and is

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[11] *Article 88.4 of the Constitution requires the Government to lay before the National Assembly and the Senate draft Community measures which include provisions of a legislative nature as soon as they are transmitted to the Council of the Communities.*

informed of any negotiation aimed at concluding an international agreement which does not require to be ratified (Article 52).

The ambiguity of the wording of the Constitution regarding the exact division of powers between the President on the one hand and the Government and the Prime Minister on the other hand means that the conduct of foreign policy is a delicate matter. It is the *Government which, according to Articles 20 and 21 of the Constitution, determines and conducts the policy of the nation* and which has the armed forces at its disposal (Article 20), while the Prime Minister is responsible for national defence.

- The people

The people may be consulted in the form of a *referendum* on a foreign policy issue. According to Article 11 of the Constitution, any *draft law designed to authorise the ratification of a treaty*, which, although not contrary to the Constitution, would have effects on the functioning of the institutions, may also be submitted to a referendum. This technique was employed in connection with the ratification of the Maastricht Treaty. Only where the referendum has been in favour of adopting the draft law does the President of the Republic promulgate it.

13. GEORGIA

13.1 Principles

- Identification

According to the preamble to the Constitution, "the people of Georgia is firmly resolved to guarantee the universally recognised *human rights* and fundamental freedoms, to strengthen the independence of the State and *peaceful relations* with other peoples". Treaties which are compatible with the Constitution take priority over other domestic normative acts (Article 6 of the Constitution). They therefore also contain principles which must be observed in the determination of the country's foreign policy.

- Control mechanisms

The protection of human rights in foreign policy is ensured by the Committee for the Protection of Human Rights and International Relations. The Constitution also provides for this protection to be ensured by an ombudsman and the *Constitutional Court*.

13.2 Implementation

Parliament determines foreign policy (it gives its consent to diplomatic representatives proposed by the President, it has powers connected with the budget and the ratification and denunciation of treaties and it controls the foreign policy conducted by the executive). Parliament defines the principles of foreign policy.

The President implements foreign policy, he negotiates with other States, he concludes treaties, with the consent of Parliament, *he appoints and dismisses diplomatic representatives and he accepts the credentials* of foreign ambassadors (Article 73.1 a). According to the Constitution there is no Government: Ministers serve directly under the President.

The people express its views by referendum. Two hundred thousand voters may initiate such popular consultation in matters of foreign policy.

14. GERMANY

14.1 Principles

- Identification

The entire German constitutional structure is founded on the concept of the dignity of the human person which all public authority is required to respect and protect (Article 1.1 of the Basic Law). The German people therefore profess the existence of *inviolable and inalienable human rights* as the basis of every community, of peace and of justice in the world. Article 1.2 of the Basic Law may be regarded as the source of an obligation on decision-makers in foreign policy matters to promote the protection of human rights throughout the world. However, this obligation is *very general in nature* and implies a very wide discretion in regard to the various situations. Lastly, in the light of Germany's obligation to protect human rights, *the Federation is under a duty to Germans to exercise diplomatic protection* to their advantage as against any States which might ill-treat them. It is true, however, that the competent organs have a wide discretion in this sphere as to how and when they afford this protection. Article 16 of the Basic Law provides that anyone persecuted on political grounds has the *right of asylum*, which is subject to various conditions and limitations set out in paragraphs 2 and 5 of that article.

The German State aims to promote peace (preamble to, and Article 26 of, the Basic Law). Article 26.1 of the Basic Law declares *unconstitutional any activities apt or intended to disturb peaceful international relations, especially preparations for military aggression*. This rule appears to be capable of binding foreign policy.

Article 23.1 of the Basic Law authorises the legislature, subject to certain conditions relating to a qualified majority, to transfer sovereign rights to the EU. Article 24.1 provides that sovereign powers may be transferred to international organisations. Under this article even the *Länder* may transfer sovereign powers falling within their competence to international organisations. With a view to maintaining peace the Federation may *become a party to a system of collective security* (Article 24 of the Basic Law). For the purpose of settling international disputes the Federation may accede to *agreements providing for general, comprehensive and obligatory international arbitration* (Article 24.3 of the Basic Law).[12]

The principles set out in international *treaties* are capable of determining the formulation of foreign policy, since the executive is bound by treaties. International law is directly integrated into domestic law and *takes priority* over ordinary legislation. It also has direct effect. If, and insofar as, an international treaty reflects norms of *customary international law* already binding the Federal Republic of Germany, those norms will override even subsequent federal legislation.

In the context of European integration, Article 23.1 of the Basic Law expressly requires those responsible for taking political decisions to observe and promote a number of constitutional values.

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[12] *The reason for this provision is not clear. Perhaps the drafters meant to encourage participation in inter-State co-operation of this type, or perhaps they considered that express authorisation to conclude such agreements was necessary because these agreements imply a transfer of the sovereignty of the country.*

Thus *Germany's participation in the EU is subject to observance in the EU of a number of values*. The Union must be bound by the principles of *democracy, the rule of law, social and federal principles as well as the principle of subsidiarity, and ensure protection of basic rights* comparable in substance with the level of protection afforded by the Basic Law. Consequently, German foreign policy which led to European integration was dependent on these factors.

On the other hand, Article 79.3 of the Basic Law places certain *absolute limits on the power to be integrated within the EU*. This provision prohibits amendments of the Basic Law affecting the division of the Federation into *Länder* and the participation of the *Länder* in the legislative process. Similarly, amendments of the principles laid down in Article 1, namely the inviolability of human dignity and respect of fundamental human rights by all public authority, and Article 20, namely the principles of social democracy, popular sovereignty and the rule of law, are prohibited.

- Control mechanisms

The only control mechanism in place is judicial review of foreign policy decisions by the administrative courts and/or by the Federal Constitutional Court. *If a foreign policy decision violates an individual's rights* he or she can *bring an action in the competent administrative court* (provided that the alleged action has violated the fundamental rights guaranteed by the Basic Law (Article 93.1 of the Basic Law)). However, the courts will take into account the *wide margin of appreciation* and discretion enjoyed by the competent organs. Thus, for example, while it is accepted that the Federation owes it to German nationals to exercise *diplomatic protection* in their favour as against any States which might ill-treat them, the courts recognise that the competent organs have a *wide margin of appreciation* as to how and when they afford this protection.

The Federal Constitutional Court, which may be required to settle disputes over the constitutionality of a foreign policy act, law or decision to conclude an agreement (Article 59.2 of the Basic Law) *has been reluctant to review the constitutionality of international treaties* or other foreign policy measures. It has never issued an injunction to stop a foreign policy move by the executive. Even as regards control of compliance with the rules of international law, the Constitutional Court has proved reluctant to act. The Court is inspired by the idea that it is of crucial importance that the FRG should appear at the international level with a single voice, naturally that of the executive. In the absence in the international legal order of organs competent to reach binding decisions on the compatibility of the positions adopted by States with their international obligations, what matters most is the opinion advocated by the State. Thus the courts must exercise great restraint in disapproving as illegal an international position adopted by a State. *A judicial intervention of this kind should not be able to occur unless the international legal position adopted by the State is arbitrary or irrational.*

14.2 Implementation

The role played by the separation of powers is as important in foreign policy as it is in domestic policy. The major share of power is given to the executive. At the same time, however, important rights of participation are given to the legislature, in particular as regards the conclusion of treaties (Article 59.2 of the Basic Law), EU matters (Article 23.2 of the Basic Law) and the deployment of German troops abroad.

- The legislature

International treaties which regulate the political relations of the Federation or which are connected with issues falling within the federal legislative power require the *approval* or

participation of the Bundestag and the Bundesrat in the form of a federal law (Article 59.2 of the Basic Law). Despite the fact that the Bundestag is the only organ directly elected by the people, and that it therefore enjoys the highest level of democratic legitimacy, there is no general presumption that all important foreign policy decisions must be authorised by it. *Competence to take foreign policy decisions lies with the executive and the Bundestag plays a part only where the Basic Law expressly so provides*.

European integration has greatly influenced the division of powers, since the two legislative chambers, and especially the Bundesrat, are much more involved in determining the directions taken by European affairs than in other areas of foreign policy. According to Article 23.2 and .3 of the Basic Law, the Bundestag is to be constantly and closely integrated in the decision-making process. The Government is to give the Bundestag the opportunity to state its opinion before engaging in negotiations within the Council and must take account of the opinions of the Bundestag in the negotiations. A committee has been set up to enable Parliament to exercise its powers under Article 23 of the Basic Law.

In addition to these express or implied powers which the Bundestag has to participate directly in the decision-making process, it also has the powers of *control* which every Parliament has in a democratic system. These include the *vote of no-confidence* (Article 67 of the Basic Law) and its *budgetary powers*.

- The executive

According to Article 59 of the Basic Law, the *President represents the Federation in its international relations*. He concludes treaties. His role is largely *ceremonial*, since the countersignature of the Chancellor or the competent Minister is required (Article 58 of the Basic Law). All foreign policy decisions are taken by the Government. The Prime Minister is responsible and determines the general guidelines of foreign policy (§ 1 of the Rules of Procedure). Within the framework of the guidelines set by the Chancellor, the Cabinet adopts the important foreign policy decisions. The Minister for Foreign Affairs is only responsible for the day-to-day business of foreign policy. Setting the course of foreign policy is a matter for the Chancellor and does not require parliamentary authorisation.

- The people

There is no provision for the direct participation of the people in the determination of foreign policy, either in the form of a referendum or that of popular initiative.

- Decentralised authorities

Under Article 32 of the Basic Law, *foreign relations are the domain of the Federation*. Where exercising its power to conclude treaties, however, the Federation must consult any federated State (*Land*) affected by a treaty project. On the other hand, *in areas where the Länder have the power to legislate, Article 32.3 provides that they may conclude international treaties*. This gave rise to a problem, since it was not clear was this power belonged exclusively to the *Länder* or whether it was concurrent with that of the Federation and whether the Federation had the power to enact legislation to implement the treaty. This dispute was resolved by an arrangement between the

Federation and the *Länder*.[13] Consequently, constitutional customs creating a *modus vivendi* between institutions influenced the division of powers in foreign policy matters.

European integration has brought a more important role for the Länder and led to the amendment of the Basic Law and the insertion of a new Article 23. According to that provision (Article 23.4), in European Union matters the Bundesrat, which represents the *Länder*, *is to be involved in the decision-making process of the Federation* insofar as it would have to be involved in a corresponding internal measure or insofar as the *Länder* would be internally responsible.

According to Article 23.5 of the Basic Law, where in an area in which the Federation has exclusive legislative jurisdiction the interests of the *Länder* are affected, or where, in areas in which the Federation and the *Länder* have concurrent jurisdiction (Articles 72 and 74 of the Basic Law) or the Federation has sole jurisdiction (Articles 72 and 75 of the Basic Law), the Federation has the right to legislate, the *Federal Government is to take into account the opinion of the Bundesrat*. Where essentially the legislative powers of the *Länder*, the establishment of their authority or their administrative procedures are affected, the opinion of the Bundesrat is to *prevail* in the decision-making process of the Federation. Pursuant to Article 52.3 of the Basic Law, the Bundesrat has established a *Chamber for European Affairs* with decision-making powers in matters concerning the EU.

It is also provided in Article 23.6 of the Basic Law that *where essentially the exclusive legislative jurisdiction of the* Länder is affected *the exercise of the rights of the FRG as a member of the EU are to be transferred by the Federation to a representative of the Länder* designated by the Bundesrat. However, these rights are to be exercised with the participation of and in agreement with the Federal Government. In this respect, too, *the Federation retains full responsibility* for the conduct of foreign policy as a whole.

The German members of the *Committee of the Regions*, which was set up by the Maastricht Treaty on a German initiative, are appointed by a complex procedure which involves the participation of not only the Federal Government, which proposes the candidates, and the *Länder*, which appoint them, but also the municipalities and counties, which must be given a say in the process (they appoint three of the twenty-four members of the Committee), although the *Länder* had initially attempted to monopolise the nomination process.

15. GREECE

15.1 Principles

- Identification

There is no provision which directly, expressly and exhaustively lists the foundations, principles and objectives of foreign policy. In domestic law, however (Constitution, legislation, regulations, decrees), provisions are sometimes found which refer expressly or by implication to that issue.

This is so, in particular, of Article 2.2 of the Constitution of 1975, which provides that "*Greece, in accordance with the generally recognised rules of international law, pursues the strengthening of peace and justice and the development of friendly relations between peoples*

[13] *This agreement was set out in the Lindau Agreement, which has not been officially published.*

and States". Similarly, according to Article 108 of the Constitution, "the State safeguards the living conditions of the Greek Diaspora and the maintenance of its links with the Mother Country". "*It also safeguards the education and social and occupational promotion of Greeks working outside the national territory*." Furthermore, Organic Law no. 419 of 1976 of the Ministry of Foreign Affairs, which sets out the powers of that Ministry, also refers to the *protection of the rights and interests of the Greek State and Greek individuals abroad* (Article 1.1 and 2).

Customary international law and international *treaties* approved by law and decisions of international organisations which are binding on Greece and immediately enforceable in or introduced into its domestic legal order form an integral part of domestic law and therefore constitute a source of law. They may therefore institute or define the objectives of foreign policy (one example is the Charter of the United Nations).

As a democratic country, Greece takes inspiration from a number of *values* in the exercise of its foreign policy. Thus Article 2.1 of the Constitution provides that "respect for and observance of human value constitute the primordial obligation of the Republic". Article 25 provides that human rights are guaranteed by the State and that "the recognition and protection by the Republic of fundamental and inalienable human rights are designed to achieve social progress and justice".

- Control mechanisms

There are no specific mechanisms to control respect for democratic values and human rights. In Greece all acts relating to the negotiation and conclusion of treaties are regarded as acts of State and are not amenable to judicial review.

15.2 Implementation

Foreign policy is conducted by the executive under the more or less passive control of the legislature. The courts' role is essentially confined to applying international law in domestic law.

- The legislature

External affairs come within the exclusive powers of the executive. Parliament may provide advice and express *wishes* in connection with the country's foreign policy but cannot make foreign policy itself. It is still able to control the Government in its foreign policy (Article 70.6 of the Constitution) and even to overrule it by a *motion of censure* (Article 84), but is *not entitled to force it to conclude a particular treaty, for example*.

However, according to the Constitution Parliament *plays a mandatory role in the procedure leading to the conclusion of treaties, in the case of certain categories*, which cover a very large number of agreements. Article 36.2 provides that "treaties on trade, those on taxation, economic cooperation or participation in international organisations or unions and those which include concessions which, according to other provisions of the Convention, require legislation, or treaties which affect Greek citizens individually, shall take effect only after they have been approved by an express law". Parliament's participation in the treaty-concluding procedure does not mean participation in the act of ratification, accession, acceptance or approval of the treaty, but it constitutes an essential condition of the treaty's validity from the aspect of domestic law.

Parliament's approval, which must be given before the treaty is ratified by the Head of State or accepted by the Government, always takes the form of a law which has greater force than all other laws and has a three-fold function: (a) it authorises the executive to conclude the treaty; (b) it

incorporates the treaty in the Greek order; and (c) it represents the legislature's order to the authorities and citizens to ensure that the treaty is implemented within the State.

Even after a treaty has been approved by Parliament, however, the President of the Republic or the Minister for Foreign Affairs may decide *not to ratify it or accept it*, where the interest of the country so requires, or to delay it. They may still *express reservations* when ratifying or accepting it, provided that these reservations are lawful in the eyes of international law; *and they may also denounce a treaty*, without requiring Parliament's approval, even where it was required in order for the treaty to be concluded.

- The executive

The *President* exercises all the powers expressly conferred on him by the Constitution. None the less, he *requires the Government's consent* in the form of the countersignature of the competent Minister. He *represents the State* at international level; he declares war and *concludes treaties* on peace, alliance, economic cooperation and participation in international organisations or unions (Article 36.1 of the Constitution). He has exclusive power to *ratify* any other treaty which, pursuant to international law, must be ratified in order to be validly concluded. He *issues credentials* to diplomatic missions sent abroad and *accepts* the credentials of foreign ambassadors. He also convenes the Council of heads of political parties represented in Parliament in order to consider important foreign policy issues of concern to Greece.

According to Article 82 of the Constitution. "*the Government determines and directs the general policy of the country* in accordance with the provisions of the Constitution and the law". This also applies to foreign policy. Consequently, all external powers, whatever they may be, belong to the Government, apart from those, which the Constitution expressly confers on the President of the Republic.

As regards *treaties*, in particular, apart from those which are not referred to in Article 36.1 of the Constitution and those which, according to international law, do not require ratification or accession, the others are directly *concluded by the organs of the Government* by acceptance or approval, by exchange of letters or memoranda, or simply by signature.

The *Minister for Foreign Affairs* generally concludes all treaties, which fall within the competence of the Government, without needing to produce full powers. It goes without saying that in the case of important treaties he acts on the instructions of the Cabinet or the Prime Minister. *In order to sign international agreements, other Ministers must have full powers issued by the President* of the Republic and in most cases by the Minister for Foreign Affairs. *The Council of Ministers is responsible for according international recognition to a foreign State*.

- The people

It is quite exceptional for the people to be involved in resolving foreign policy issues. However, the possibility exists in law. According to Article 44.2 of the Constitution of 1975, as amended in 1986, "the President of the Republic shall declare by decree a *referendum on grave national issues*, following a decision adopted by an absolute majority of the total number of Members of Parliament, on a proposal by the Council of Ministers".

16. HUNGARY

16.1 Principles

- Identification

The legal foundations of foreign policy are determined in the Constitution. According to Article 5 of the Constitution, "The State of the Republic of Hungary safeguards the freedom and power of the people, the *sovereignty* and *territorial integrity* of the country, and the boundaries registered in international treaties". According to Article 6, "The Republic of Hungary *repudiates war* as a means of dealing with conflicts between nations and refrains from the use of force against the independence or territorial integrity of other States". The Republic of Hungary considers that it is *responsible for the fate of Hungarians* living outside its borders.

According to Article 7 of the Constitution, the legal system of Hungary *accepts the universally recognised rules of international law* and ensures that the internal laws of the country are harmonised with the obligations assumed under international law. Article 8 states that Hungary recognises *fundamental rights*. Ensuring respect and protection for these rights is a primary obligation of the State.

Reciprocity and non-intervention in the domestic affairs of other States are fundamental principles. However, Hungary confers primary importance on the *protection of minorities* living in neighbouring countries. The violation of human rights cannot therefore be regarded as a matter internal to a country.

- Control mechanisms

Acting in their administrative capacity, the courts may annul individual administrative acts, which infringe the rights of the person concerned. The *Constitutional Court* is responsible for overseeing the constitutionality of laws, regulations and other legal measures of the State services. In principle an international treaty, which had been ratified by Parliament, inserted in and published as a law could be annulled by the Constitutional Court on the ground that it was unconstitutional. *In practice*, however, the Constitutional Court has declared on a number of occasions that it *has no jurisdiction* to review the constitutionality of laws relating to international treaties. The Constitutional Court has not yet taken a decision in this area.

16.2 Implementation

- The legislature

In Hungary *Parliament determines the fundamental principles of foreign policy*. It enacts the Constitution and concludes the international treaties that are of outstanding significance for external relations (Article 19.3 of the Constitution).

A *Standing Committee on Foreign Affairs* examines draft treaties before they are concluded by Parliament. Foreign policy may be debated in Parliament. Questions may be put to the Government. The Committee also often asks for reports from the Government on specific subjects.

- The executive

The *President* of the Republic is Head of State. According to Article 30 A of the Constitution, he represents the Hungarian State and *concludes international treaties*, but if the subject of the treaty falls within the competence of the legislature, the prior agreement of Parliament is required. The

President *appoints and receives ambassadors* and plenipotentiary ministers. All measures adopted by the President require the *countersignature* of the Prime Minister or the competent Minister. The President's role is therefore largely symbolic.

The *Government* ensures the implementation of the laws and *concludes international treaties* (Article 35.1 of the Constitution). It therefore ensures the *implementation* of the principles determined by Parliament in the exercise of international relations, while on the other hand it has autonomous powers in the conclusion of international treaties. Ministers may therefore conclude international treaties in their own special fields.

- The people

According to Law no. XVII of 1989 on referenda, all matters coming within the powers of Parliament may by the subject of a *referendum*, except where the law provides otherwise. In principle, questions relating to the directions to be taken by foreign policy may form the subject of a referendum. However, the *implementation of obligations undertaken in commitments governed by international law* and laws promulgating these treaties are *excluded* subjects. In practice Parliament has always refused to hold a referendum on the question of Hungary's accession to NATO, although an initiative requesting such a referendum was signed by more than 100,000 persons.

17. ITALY

17.1 Principles

- Identification

The legal foundations of foreign policy, as regards both its principles and essential aims and the organisation and functioning of the bodies responsible for implementing it, are laid down in the Constitution. Article 10 governs the relations between the Italian legal order and the generally recognised rules of international law, the legal position of aliens in Italy, the right of asylum and the prohibition of extradition for political crimes. These rules must be co-ordinated with Article 26 on the extradition of Italian citizens. According to Article 11, Italy *repudiates the use of war* to resolve international conflicts; on the other hand, *limitations of sovereignty are allowed for the purpose of establishing an order of peace and justice between nations*.

Democracy, the rule of law and the protection of human rights are not expressly mentioned as foreign policy objectives. However, they may be given effect by means of Article 11, since the repudiation of war by Italy is justified by its desire to contribute to the protection of the freedom of peoples. This point of view finds support in the fact that limitations of State sovereignty are permitted provided that they are capable of furthering peace and justice between nations.

The *generally recognised rules of international law* have *direct effect* in domestic law, pursuant to Article 10 of the Constitution. However, it must be remembered that the Italian legal order is dualist in the sense that other international rules do not have direct effect.[14]

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[14] *There is an exception to this rule, however, since pursuant to a consistent line of decisions of the Court of Justice of the European Communities Community norms have direct effect in all Member States of the Union.*

Asylum must be granted to aliens who are not entitled to exercise in their own country the rights and freedoms protected in the Italian Constitution, while neither Italian citizens nor aliens can be extradited for political reasons.[15]

- Control mechanisms

Parliamentary control is considered to ensure respect for the principles which must be observed when foreign policy is defined. The *Constitutional Court also has a role in this area*. This is the case where Articles 10 and 11 are infringed or where a regional provision is not consistent with the obligation to comply with the international commitments of the State. Furthermore, according to the Constitutional Court, there is a violation of the Constitution where a normative act of the EU is not compatible with the basic principles of the constitutional order and with the provisions on fundamental rights and freedoms. But because the measures adopted by the EU cannot be reviewed by the Constitutional Court, this body will declare unconstitutional the laws on the basis of which the EU measures acquire direct legal effect in the Italian legal order.

17.2 Implementation

- The legislature

Parliament and the Government are responsible for elaborating the basic principles governing foreign policy. When the Government is invested *Parliament approves its general political programme*, which includes the chapters dedicated to foreign policy However, Parliament may intervene at any time in the making of foreign policy by *adopting ad hoc documents* or putting *questions* to the Cabinet. A debate may then take place and *directives may be given* to the Ministers.

Special regulations provide for draft EU legislation to be communicated to Parliament prior to being adopted, but actual co-operation between the Cabinet and Parliament depends on the political interests of the institutions concerned. *Parliament must authorise the ratification of the most important international treaties* (which are ratified by the Head of State) and is empowered to *decide on a state of war* (which must also be declared by the Head of State by a formal act). However, there are no rules, which specifically require that Parliament is to authorise unilateral acts: denunciation of treaties, withdrawal of reservations, recognition of foreign States, etc.

Similarly, *there is no constitutional provision obliging the Cabinet to inform Parliament of, and obtain its approval for, the steps which it proposes to take in the future.* Although it is possible to gain the impression that this was what the drafters of the Constitution intended, it does not happen in practice.

- The executive

The Head of State is not competent to adopt the foreign policy of the State. The *President* is prohibited from playing an active part in the Government's foreign policy. However, he may participate in the implementation of foreign policy in bilateral meetings. In this case *he must comply with the directives* of the Government and Parliament. Moreover, he is generally accompanied by the Minister for Foreign Affairs. He *accepts the credentials of foreign diplomats and accredits Italian diplomats* in other countries. Lastly, he *ratifies*, on the basis of Parliament's authorisation, the international treaties negotiated by the Government where they are of a political nature, where

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[15] *However, genocide is excluded from these provisions: see Articles 10 and 26 of the Constitution.*

they imply the establishment of international arbitration and jurisdictions or where they require territorial changes.

Within the Government there are *three Ministers* who are competent in treaty matters: the Minister for Foreign Affairs, the Minister for External Trade and the Minister for European Affairs. The Prime Minister may also intervene, especially where important issues need to be resolved. The *Prime Minister represents* Italy in international conferences. The Cabinet *approves the directives* to be followed in the sphere of international relations and that of the EU and also the *drafts of international treaties* which have military or political relevance. The Minister for Foreign Affairs has certain discretion in implementing the decisions of the Cabinet and is responsible for negotiating international treaties, even where they fall within the competence of other Ministers.

- The people

A *referendum* was held in 1989. It concerned the adoption of a directive on the establishment of a European Government and the entrusting of the European Parliament with the drafting of a European Constitution. The text was approved by a large majority and the result of the referendum was regarded as the basis for Italy's adhesion to the new steps in European integration. However, a popular referendum *abrogating decisions of Parliament authorising the ratification* of international treaties is *not permitted*. The Constitutional Court concluded that this meant that decisions of Parliament aimed at *implementing* international commitments in the domestic legal order could not be abrogated by referendum.

- Decentralised authorities

In Italy only the State has the power to conclude treaties. However, the regions are authorised to establish promotional *contacts* with the authorities of other States at the same territorial level and to exchange views on matters of common interest. They may also maintain direct relations with the authorities of the EU. The importance of transfrontier co-operation is thus increasing.

18. KYRGYZSTAN

18.1 Principles

- Identification

The essential principles of foreign policy are set out in the Constitution. The preamble thereto states that the Republic, as a free and democratic community, is attached to the general moral principles existing among the peoples of the world. Article 9.4 of the Constitution states that the Republic of Kyrgyzstan aspires to *a fair world, mutually advantageous co-operation among the peoples, the peaceful resolution of world or regional problems and observance of the conventional principles of international law*. Consequently, acts which affect the peaceful cohabitation of peoples, and the propagation and instigation of international conflicts are prohibited. Treaties, which have been ratified, form part of domestic law. Article 15 proclaims human dignity as an absolute right.

- Control mechanisms

The Constitutional Court declares unconstitutional legislative acts which infringe the Constitution.

18.2 Implementation

- The legislature

In accordance with the Constitution (Article 58), Parliament determines the major directions of the policy of the country. *It ratifies and denounces treaties*. It also decides on a state of war or peace and the use of the armed forces.

- The executive

The President is responsible for implementing foreign policy and assigns special tasks to the Prime Minister. According to Article 42 of the Constitution, *the President represents the State* in international relations. Pursuant to Article 46, he may *enter into negotiations, sign bilateral treaties* and submit them for consideration by Parliament. According to Article 20.1, Chapter II of the Law on *the Government*, the Government may elaborate and *submit for consideration by Parliament the principles applicable in foreign policy*. It is also responsible for adopting implementing measures, ensuring compliance with treaties ratified by Parliament, reaching decisions on the conclusion of bilateral treaties and renewing or denouncing them. According to Article 21 of that Law, the Prime Minister is entitled to submit proposals for the formulation of foreign policy to the President and the Government. He may also represent the country in international meetings and sign bilateral agreements.

19. LATVIA

19.1 Principles

The essential principles of the foreign policy of the Republic of Latvia are: (a) integration in the structures of Europe; (b) increased co-operation between the Baltic States; (c) bilateral relations within the framework of regional co-operation; and (d) a more active role in international economic and financial organisations.

19.2 Implementation

- The legislature

The essential principles of foreign policy are elaborated by Parliament, which ratifies multilateral treaties. All treaties affecting matters, which must be the subject of legislation, must be ratified by Parliament.

- The executive

The President represents the State in its international relations. *He accredits Latvia's representatives* abroad and *receives the credentials* of foreign representatives. *He implements the decisions* of Parliament concerning the ratification of treaties.

- The people

According to Article 73 of the Constitution, *treaties are not to be submitted to a referendum*.

20. LIECHTENSTEIN

20.1 Principles

- Identification

International law automatically forms part of domestic law. In its foreign policy the State is legally *bound by the Charter of the United Nations and other international instruments which have been ratified* (for example, the decisions of the International Court of Justice are recognised as binding). Furthermore, the State is required to comply with the binding decisions adopted by international organisations to which it belongs (for example, the binding decisions of the United Nations Security Council). Finally, it is under a political duty to comply with the principles of the Helsinki Final Act of the CSCE, which govern the mutual relations of the participating States.

- Control mechanisms

There is an *ex post facto* control of the compatibility of legal rules with treaties.

20.2 Implementation

- The legislature

Parliament's influence has grown during the last twenty years. There is a *Standing Parliamentary Committee* on foreign affairs. Article 8.2 of the Constitution provides that *treaties* ceding the territory or disposing of the property of the State, treaties concerning the rights of sovereignty or regal rights and those imposing a fresh burden on the Principality or its citizens may only be concluded *after the Diet has given its assent*. *Treaties may not be denounced* without at least the tacit consent of Parliament.

- The executive

In international relations *the Prince represents the State*, subject to the necessary assistance of the responsible Government. The Prince enjoys the right to *ratify* treaties, although the signature of the Government is required in each case.

- The people

Every international treaty which requires the approval of Parliament is submitted to a facultative *referendum*. Every treaty approved by Parliament is submitted to a referendum, either by a decision of Parliament on upon application by 1,500 electors.

21. LITHUANIA

21.1 Principles

The legal foundations of foreign policy are the Constitution, other laws enacted by Parliament, the Government's programme of activity, the Government's directives and the decisions and conclusions of the Constitutional Court.

Chapter 13 of the Constitution deals specifically with foreign policy. According to Article 135, *in conducting its foreign policy Lithuania* is to promote the universally recognised principles and norms of international law. It must strive to safeguard *national security and independence and the basic rights, freedoms and welfare* of its citizens; it must take part in the *creation of a sound international order based on law and justice*. War propaganda is thus prohibited. Article 137 provides those weapons of mass destruction and foreign military bases are not to be stationed on the territory of Lithuania.

Values such as democracy, human rights etc. have both a direct and an *indirect influence* on the country's foreign policy. The direct influence is the result of Article 135 of the Constitution, while the indirect influence is the result of the fact that these values are regarded as the highest goals of the State and society. The Constitution and laws have provided appropriate means and legal guarantees for the achievement of these goals.

According to Article 136, the Republic of Lithuania is to *participate in international organisations* provided that they do not contradict the interests and independence of the State. *Treaties* may be regarded as the legal foundation of the conduct of foreign policy and the establishment of its principles and aims, provided that they have been ratified by Parliament. Since the principal aim of Lithuania's foreign policy is the country's integration in the alliances of Western Europe, its foreign policy is largely influenced by these alliances.

Significant among the constitutional laws is the Constitutional Act of 8 June 1992 on the Non-alignment of the Republic of Lithuania with Post-Soviet Eastern Alliances. Ordinary legislation includes the Law on International Treaties of the Republic. Parliament has sometimes adopted resolutions on current issues of foreign policy: it has condemned acts of aggression or terrorism, recognised new States, approved or disapproved special political acts of the Government.

- Control mechanisms

Judicial review is available only in respect of international treaties. Upon a decision of the Constitutional Court to the effect that an international treaty is or is not compatible with the Constitution, *Parliament decides* whether or not to ratify it.

21.2 Implementation

- The legislature

According to Article 138, Parliament *ratifies or denounces treaties which concern*:
(a) realignment of the country's borders;
(b) political co-operation with foreign countries, mutual assistance or national defence;
(c) the renunciation of the use or threat of force, and peace treaties;
(d) the stationing and status of the armed forces of the Republic on the territory of a foreign State;
(e) the participation of the Republic in international organisations;
(f) multilateral agreements or long-term economic agreements;

Parliament has sometimes adopted *resolutions* concerning current issues of foreign policy, such as, for example, resolutions condemning acts of aggression or terrorism, recognising new States or approving or disapproving specific political acts of the Government. According to Article 67.17 of the Constitution, Parliament may consider other foreign policy issues.

The Government's programme plays an essential role in the conduct of foreign policy. The Government has the right to adopt directives and other regulations to implement laws. *Parliament examines the Government's general programme of activities in order to decide whether to approve it*.

- The executive

The *President* of the Republic probably has the greatest power in the sphere of foreign policy. According to Article 84 of the Constitution, the President:

(a) settles foreign policy issues and, together with the Government, implements foreign policy;
(b) *signs treaties* and submits them to Parliament for ratification;
(c) *appoints or recalls*, upon the recommendation of the Government, the country's representatives in foreign States and in international organisations;
(d) makes *annual reports* to Parliament on the situation in Lithuania and domestic and foreign policy.

The Government submits its programme to Parliament; this includes a chapter on foreign policy. The Government cannot act until its programme has been approved (Article 92 of the Constitution). The Government is responsible to Parliament for its actions.

- The people

According to Article 9.1 of the Constitution, "*the most significant issues concerning the life of the State and the People shall be decided by referendum*". This also applies to the most significant issues of foreign policy. Such referenda have actually been held. Moreover, Article 68.2 of the Constitution makes provision for popular initiative.

22. MALTA

22.1 Principles

- Identification

Articles 1 and 2 of the Constitution proclaim Malta's attachment to the principles of democracy and fundamental rights. Article 1.3 provides that Malta is a neutral State actively pursuing *peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance*. This means, in particular, that:

(a) no foreign military base is permitted to be stationed on Maltese territory;
(b) no military activity is authorised in Malta, except at the request of the Government, in the exercise of the inherent right of self-defence, in the event of any armed violation of the national territory, or in pursuance of measures or actions decided by the Security Council of the United Nations, or where there is a threat to the sovereignty, independence, neutrality or territorial integrity of the country;
(c) apart from in the above circumstances, no other military activity may take place in Malta where it will entail the presence of a concentration of foreign forces;
(d) apart from in the above circumstances, no foreign military personnel are allowed on Maltese territory, other than military personnel taking part in civil activities (an exception is also made for a reasonable number of military technical personnel assisting in the defence of the country);

(e) the shipyards of the country are to be used for civil and commercial purposes, but may also be used, within reasonable limits, for the repair and construction of military vessels. In accordance with the principle of non-alignment, Maltese shipyards are not made available to the military vessels of the two superpowers.

A treaty which imposes duties or confers rights on individuals is not a source of domestic law unless it is given legislative effect (section 11 of the Maltese Independence Order 1964). In order to form part of domestic law, therefore, every treaty must be incorporated. Once incorporated in domestic law, a treaty may contain principles which must be observed when foreign policy is defined.

- Control mechanisms

Judicial review of compliance with the principles laid down by law and the Constitution is possible (before the First Hall of the Civil Court and then before the *Constitutional Court*). Administrative actions are subject to judicial review. The administration must act on the basis of a pre-existing rule of law and must justify its action as authorised by law; otherwise its action will be *ultra vires*.

22.2 Implementation

- The legislature

Parliament's role is centred round the ratification and adoption of international treaties in domestic laws. The Ratification of Treaties Act (Act V of 1983) stipulates the treaties, which cannot enter into force without being ratified by Parliament. These are treaties which affect the status of Malta under international law, the security of Malta, its sovereignty, independence, unity or territorial integrity (section 3(1)(a) and (b) and (2)) and those concerning the relationship of Malta with any multinational organisation (section 3(1)(c) and (2)). A Resolution to the effect that such a treaty is to come into force must be passed by Parliament.

As regards the *denunciation of treaties*, moreover, Article 4 of the Ratification of Treaties Act provides that where the country ceases to be a party to a treaty (as provided for in Section 3(1)(a), (b) or (c)), *the Minister responsible for foreign affairs is to inform the House of the fact, giving the reasons therefor*.

There is also an *indirect control* of Parliament in relation to the conduct of foreign policy; this is effected by parliamentary debates, promoted by the parliamentary committee responsible for foreign affairs. Questions may also be put to Ministers and information on foreign policy may be obtained in this way.

- The executive

The *President* is not directly involved in the formulation of foreign policy, but the Prime Minister must keep him informed of the general conduct of the Government's policy. *The Government determines the principles of Malta's foreign policy*.

- The people

In determining the principles applicable in foreign polity, the executive has discretion as to whether to hold a *referendum*. Under the Referenda Act (Chapter 237 of the Laws of Malta) *the electorate may demand a referendum*.

23. MOLDOVA

23.1 Principles

- Identification

Principles and objectives of foreign policy can be found in divers sources of domestic law. First of all the Constitution foresees in it's preamble it's attachment to universal values, such as the rule of law, civil peace, democracy, human rights, justice and political pluralism. Article 4 (2) of the Constitution foresees that "in case of conflict between international rules binding the Republic in the field of human rights and domestic law, it is always the first ones who prime". Article 8 of the Constitution also foresees that "the Republic of Moldova has the obligation to respect the UN Charter and the treaties it has signed, and found its relations with other countries on general accepted principles of international law". Finally article 11 of the Constitution declares Moldova's permanent neutrality. The Republic of Moldova does not admit military troops of other countries in its territory.

Furthermore, the Parliament of the Republic of Moldova has approved on the 8 February 1995 the "Concept of foreign policy", which contains following principles: the principle of abstention from the use of force or threat of force, the exclusion of war except of cases foreseen by law, the principle of pacific settlement of international disputes, State's sovereignty, international co-operation, States equality and territorial integrity, and the principle of international protection of human rights. The county's priorities in the field of human rights are the following: the strengthening of the independence and sovereignty of the State, the guarantee of it's territorial integrity, the promotion of social and economic reforms necessary to people's well fare and the harmonisation of domestic law with international standards.

- Control mechanisms

The Constitutional Court controls the constitutionality of laws, regulations and decisions of the Parliament, of the presidential decrees, the decisions of the Government and the international treaties to which the Republic of Moldova is party, when they are submitted to it's control. There has not been any case-law in this matter by now.

23.2 Implementation

- The legislature

The Parliament ratifies the treaties and international agreements and approves the "Concept of foreign policy" of the country which contains the directive principles of foreign policy. It also exercises a control over the implementation of foreign policy. Debates are regularly held on this subject. Twice a year there is a report on the implementation of foreign policy presented to Parliament. If needed, the Parliament can ask the Minister of Foreign Affairs to present explanations concerning specific questions. Furthermore it is the Parliament who approves the budget of the Ministry of Foreign Affairs.

The foreign policy committee of the Parliament is responsible for the inter-parliamentary relations. It points out the representatives of the Parliament to the other international parliamentary organisms. It approves the candidatures of the Ambassadors on proposition of the President of the Republic. It follows through the implementation of the "Concept of foreign policy", and, if needed, it's

elaboration. It presents to the Parliament all projects of treaties of a political, legal, social or economic nature and joins to them a detailed report.

- The executive

According to article 77 of the Constitution, the President of the Republic represents the State abroad and is the guarantor of the national independence, unity and territorial integrity of the country. He enters into discussions, he participates into negotiations, he concludes international treaties in the name of the Republic of Moldova (article 2 of the Law concerning the conclusion, the implementation, the ratification and the denunciation of treaties, conventions and international agreements), and submits them to the Parliament for ratification, in a delay established by law. The President of the Republic accredits and recalls the country's diplomatic representatives on Government's proposition. He receives the credentials and the letters recalling the representatives of other States in the Republic of Moldova. The ratification of treaties and their denunciation require the signature of the President of the Republic and the countersignature of the Minister of Foreign Affairs.

The Government adopts a plan of action in the field of foreign policy according to the principles adopted by the Parliament in this field.

- The people

The possibility of consulting people by referendum is regulated by the Constitution and the Law on referendum n°1040 - XII of 26 May 1992. Therefore, according to article 66 (b), one of the fundamental attributions of the Parliament is the declaration of a referendum. According to article 75 the most important problems of the State and the society are submitted to a referendum. Finally article 88 foresees that the President of the Republic can ask people to express by referendum their will on matters of national interest. The provisions adopted by referendum have a supreme legal force and are necessarily applied on the territory of the Republic. The question of Moldova's accession to a political organisation of States or it's withdrawal from such an organisation are exclusively settled by referendum.

24. THE NETHERLANDS

24.1 Principles

- Identification

According to Article 90 of the Constitution, "the Government shall promote the development of the *international rule of law*". This provision shows the major importance which Parliament and the Government ascribe to an international order based on universally applicable legal rules.

Article 91 deals with the conclusion of treaties; Article 92 provides that *powers may be transferred to international organisations*; and Articles 96, 98 and 100 provide for the defence of the realm, *maintenance of peace* and declaration of war.

Both written and unwritten law form part of the domestic legal order. Treaties take precedence over ordinary legislation. The principles contained in treaties must therefore be observed when the foreign policy of the country is determined. *Values such as democracy and human rights are provided*

for in treaties to which the Netherlands is a party. Consequently, they are binding on the Government even in the context of foreign policy.

- Control mechanisms

With the exception of parliamentary control, there is no specific control of respect for values such as democracy and human rights in foreign policy. Article 120 of the Constitution provides that the constitutionality of treaties is not to be reviewed by the courts.

24.2 Implementation

- The legislature

Treaties must be approved by Parliament (Article 91). *The same applies to the denunciation of treaties and the withdrawal of reservations, but parliamentary approval is not required for unilateral acts such as the recognition of States or Governments*. However, Parliament's consent need not necessarily be given by a formal act; *a treaty may be given tacit approval*. There are parliamentary committees in this area, but their responsibilities do not exceed those of Parliament.

On the other hand, the Government is politically answerable to Parliament, which means that Parliament exercises a certain control over foreign policy. Frequently, therefore, there are exchanges of opinions which enable the Government to take account of Parliament's ideas, requests and objections. However, *the question of parliamentary authorisation of directives on issues of foreign policy does not arise*. Once a year, when the budget is debated, foreign policy comes up for discussion.

- The executive

According to Article 90, "the Government shall promote the development of the international rule of law". *The Government is therefore responsible for international relations*. A major exception is the requirement for parliamentary approval, which also applies to the denunciation of treaties and the withdrawal of reservations, but this intervention by Parliament does not apply in the case of unilateral actions such as recognition of States or Governments.

Traditionally, the Minister for Foreign Affairs was responsible for elaborating the foreign policy of the country. However, growing inter-State co-operation has tended to blur the distinction between domestic and external policy. Ministers responsible for particular branches of domestic affairs aspire to taking over the external aspect of their responsibilities. Furthermore, the Prime Minister's role in foreign policy has also increased in importance since he sits on the European Council, where the major decisions on foreign policy are taken.

- The people

There is no provision for referenda or popular initiatives on foreign policy issues.

25. NORWAY

25.1 Principles

- Identification

In Norway, which has the oldest valid Constitution in Europe, there are very few written norms, which guide foreign policy. This area is principally covered by *customary law at constitutional level* and also by norms of a quasi-legal or political nature. The Foreign Service Act sets out the rights and obligations of the various individuals and bodies concerned. The legal norms do not contain any definition of the principles and aims of foreign policy. There is no provision specifically requiring respect for values such as *democracy, the rule of law or individual rights and freedoms* in the conduct of foreign policy.

- Control mechanisms

Judicial review is available only where *there has been a violation of an individual's rights*.

25.2 Implementation

- The legislature

Although the conduct of foreign policy is traditionally a prerogative of the King, Parliament has powers to control the executive. Pursuant to Article 26 of the Constitution, *Parliament is to consent to the ratification of a treaty, in three circumstances*: where the treaty requires new domestic legislation, where it requires budgetary action or where it is of importance from a legal and political point of view. The same applies where the State is to enter into an international commitment. On the other hand, *Parliament's consent is not required where the Government wishes to withdraw from a treaty*. In practice, therefore, the Government should always consult Parliament before adopting important foreign policy decisions. Consultations of this type may take place within *committees*, in this case within the Foreign Relations Committee.

- The executive

The King is only the formal Head of State. The Government is actually responsible for the conduct of foreign policy.

- The people

Referenda and popular initiatives do not ordinarily form part of the system. *As an extraordinary measure*, however, Parliament has decided to hold a referendum. It has done twice so in respect of Norway's accession to the European Union.

26. POLAND

26.1 Principles

- Identification

The Constitution contains only very general provisions relating to the legal foundations of foreign policy. Treaties, which are regarded as a source of domestic law, establish the aims of foreign policy. Human rights and fundamental freedoms, democracy and the rule of law are regarded as principles which apply to both domestic and external law. In the light of Poland's desire to be

integrated in the structures of Western Europe, the principles of these organisations have great influence on the formulation of its foreign policy.

- Control mechanisms

Article 188 of the Constitution provides for the Constitutional Court, which is responsible, *inter alia*, for controlling the conformity of laws and treaties to the Constitution. Article 79 of the Constitution gives everyone whose constitutional rights or freedoms have been infringed the right to appeal to the Constitutional Court for its judgement on the constitutionality of a law or other normative act upon which a court or organ of public administration based its final decision with regard to the individual's rights, freedoms or obligations specified in the Constitution.

26.2 Implementation

- The legislature

Each year the Parliament discusses the essential principles of foreign policy. A report is presented by the Minister for Foreign Affairs for adoption by Parliament. Specific reports may also be requested. Article 89 of the Constitution sets out the categories of treaties, which require legislation before they can be ratified or denounced. These are treaties relating to State borders, defensive alliances and treaties which impose financial burdens on the State or matters regulated by statute or those which the Constitution requires to be in the form of statutory law. Article 87 of the Constitution defines sources of universally binding law in Poland, which are the Constitution, statutory law, ratified international agreements, and regulations. Article 90 introduces a new principle, allowing Poland, by virtue of international agreements, to delegate to an international organisation or institution the powers of organs of State authority in relation to certain matters.

- The executive

According to Article 146 of the Constitution, the Council of Ministers is responsible for the conduct of Poland's foreign policy. According to Article 133 of the Constitution, the President is the supreme representative of the country in its international relations. Under Article 133 the President also has a general supervisory power in the field of foreign policy. This power is inconsistent with the power conferred by Article 142 on the Minister for Foreign Affairs to administer relations with other States and with Polish representatives in other countries. The President ratifies and denounces international treaties and/or notifies Parliament and the Senate thereof, if prior legislation is not required.

- The people

In matters which are most important for the State, a referendum may be held. Such important matters may, of course, also relate to foreign policy.

27. PORTUGAL

27.1 Principles

- Identification

The Constitution lays down the legal principles of foreign policy. *Article 7.1 of the Constitution of 1976 sets out the general principles which govern foreign policy*. They are consistent with those

provided for in the first two articles of the Charter of the United Nations. Paragraphs 2 and 3 of Article 7 define the principal axes of the activity to be employed by the organs responsible for the *ius tractuum*. Paragraph 4 *accords a special place to relations with Portuguese-speaking countries*. Paragraphs 5 and 6 are the *result of European integration*. They were inserted in the Constitution to meet the problems of sovereignty raised by the Maastricht Treaty.

Other provisions concern the country's foreign policy. These include Article 15, which concerns the rights and duties of aliens, stateless persons, citizens of the European Union and citizens of Portuguese-speaking countries. Article 33.5 concerns extradition, *deportation and the right of asylum*. Article 78.2.d concerns cultural relations. Article 163 f deals with *Parliament's participation in the construction of Europe* and Article 197.1.i with the duty to notify Parliament in European matters. Lastly, Article 9 concerns the State's duty to ensure national independence and to promote the conditions necessary to that end.

The principles and rules of general or ordinary international law form an integral part of Portuguese law (Article 8.1). The rules of conventions which have been duly ratified or approved and published in the Official Journal are applicable in the Portuguese legal order insofar as they impose international obligations on the country (Article 8,2). All legal rules adopted by international organisations enter directly into force in the domestic legal order where the relevant treaties so provide (Article 8.3).

Treaties of major importance, such as the Maastricht Treaty, which led to a revision of the Constitution in 1992, influence the formation of foreign policy.

- Control mechanisms

All courts have jurisdiction to *appreciate constitutionality* (Article 204). The court of last instance is the Constitutional Court (Articles 210.1 and 212.1). There have been a number of cases where the courts have been required to examine the constitutionality of treaties, conventions and agreements, since according to the Constitution international conventions occupy a place below the Constitution but above legislation.

27.2 Implementation

- The legislature

Parliament approves conventions relating to matters which fall within its exclusive competence (Articles 164 and 165); treaties concerning Portugal's participation in international alliances, or treaties of friendship, peace or defence, treaties on the adjustment of Portugal's borders, those dealing with military affairs or matters and all those which the Government has submitted for approval by Parliament. A treaty, which has not been approved, cannot be ratified (Article 135 b). Prior approval is therefore required only for conventions and for certain treaties whose subject-matter is international (Article 1641 i), or to declare war or peace (Article 164.n) - except in the case of actual or imminent aggression (Article 135 c).

- The executive

The *President of the Republic*, as Head of State, *represents* the country abroad. He guarantees national independence and the unity of the State (Article 120 of the Constitution). On a proposal from the Government, he *appoints* ambassadors and special envoys; he *accepts the credentials* of foreign diplomatic representatives, he *ratifies international treaties* once they have been approved, he *declares war* in the case of actual or imminent aggression and *makes peace* (Article

135) and, lastly, he may use his *power of veto against an application for ratification* of a treaty (Article 278.1) and refer treaties and international agreements or conventions to the Constitutional Court for a review of their legitimacy.

The *Government approves treaties* which do not fall within the competence of Parliament (Article 197.1.c) and *proposes* that the President should declare war or peace (Article 200.1.g). Any act of the President must be *countersigned* by the Government, otherwise it does not exist in law (Article 140). The Minister for Foreign Affairs, in agreement with the Government, is responsible for formulating, co-ordinating and implementing foreign policy.

- The people

Issues of great national interest which are to be the subject of legislation or an international convention may be submitted to a *referendum* (Article 115.3).

- Decentralised authorities

Article 197 of the Constitution provides that the Government is to be responsible for the conduct of foreign policy. The *Autonomous Regions* (Madeira and the Azores) are required to *participate in the negotiation* of agreements (Article 227.1.t). They are also free to establish *relations of co-operation* with foreign regional entities, provided that they adhere to the directions laid down by the organs of sovereignty (Article 229.1.u).

28. ROMANIA

28.1 Principles

- Identification

The Constitution states in Title I, "General Principles", that the Romania is to enter into and develop *peaceful relations* with all States (Article 10). The Constitution reproduces the content of the Declaration of the General Assembly of the United Nations Organisation of 24 October 1970 on the principles of international law concerning friendly relations and co-operation between States, in which the States are requested to *abstain from the use of force* or the threat of force and to observe the right to sovereign equality.

The second principle relating to foreign policy to which Article 10 of the Constitution makes express reference is the development of *good neighbour* relations, which is tending to become a generally recognised principle in international affairs and which is often found in UN resolutions.

The third principle of foreign policy set out in Article 10 of the Constitution is the State's firm undertaking to observe the principles and other *generally accepted rules of international law*. By forming part of the *jus cogens* the fundamental principles of international law are mandatory and must be observed as such. This follows from Article 103 of the Charter of the United Nations. Although the majority of mandatory rules of international law form part of the content of its general principles, Article 10 of the Constitution makes separate reference to respect for the other generally accepted rules of international law.

Treaties ratified by Parliament form part of domestic law. According to Title I of the Constitution, the Romanian State undertakes to meet its international treaty obligations strictly and in good faith.

This gives expression to one of the oldest principles of international relations, "*pacta servanda sunt*". Treaties have the legal force of the law whereby they are ratified. Article 20 provides that in the event of conflict between treaties relating to fundamental human rights and domestic legislation the international provisions are to prevail.

In practice Romania's aim to be integrated in European and Euro-atlantic structures and alliances influences the formation of its foreign policy. A number of articles of the Constitution establish the values of *democracy, the rule of law and human rights*. Romania is also a party to a number of treaties and international conventions, which implement these principles.

- Control mechanisms

Compliance with the democratic values incorporated in the rules of domestic or international law is controlled by the domestic courts and by the *Constitutional Court*, and also by the protection mechanisms established by the conventions on the protection of human rights to which Romania is a party. *Treaties must be compatible with the Constitution*. Therefore they may either be ratified without reservation or lead to an amendment of the Constitution. The constitutionality of a treaty may be reviewed before the relevant law is promulgated. Even after promulgation of the law an objection of unconstitutionality may be raised before the courts (Article 144.a and c of the Constitution). A further, and this time *political, control* is exercised by *Parliament*.

28.2 Implementation

- The legislature

Parliament approves the Government's foreign policy when it accepts its general programme and also when it approves the reports or general declarations subsequently presented by the Prime Minister. It may *withdraw its confidence* in the Government at any time by adopting a motion of censure (Article 112 of the Constitution). It may put *questions* to Ministers and put questions to the Government or any member of the Government on important aspects of foreign policy. The Government is required to produce the documents and information requested by Members of Parliament. Parliament may influence the definition of foreign policy, especially during the debates and vote on the Government's programme when it is submitted to Parliament. Parliament *ratifies treaties and may also denounce them*. It adopts declarations, messages and appeals on issues of foreign policy.

- The executive

The central role in the definition of foreign policy is played by the *President*. He *represents* the Romanian State and guarantees the national independence, unity and territorial integrity of the country (Article 80.1 of the Constitution). He may consult the Government on important or urgent problems. He may participate in meetings of the Government when problems of national interest relating to foreign policy are discussed; he presides over these meetings (Articles 86 and 87 of the Constitution). However, *the Government's opinion is advisory*. The President sends Parliament messages concerning the principal political problems of the nation (Article 88 of the Constitution), which to a large extent concern foreign policy. The President *concludes* on behalf of the Republic of Romania the *treaties* previously negotiated by the Government and subsequently submitted to Parliament for ratification. He *accredits and recalls* Romania's diplomatic representatives on a proposal from the Government and approves the creation and abolition of diplomatic missions and changes within their ranks. *The representatives of foreign countries are accredited to* the President (Article 91 of the Constitution).

The *Government's* role is to *implement* the Romania's foreign policy in accordance with the Government programme accepted by Parliament. This role is carried out both by its concrete executive action and by its normative activity of proposing the laws which ratify treaties. *Once accepted by Parliament, the Government's programme becomes binding* on the Government. The same applies to the reports or declarations of general policy presented to Parliament by the Prime Minister, which supplement or amend the initial programme. The Government is answerable politically to Parliament. The Minister for Foreign Affairs is responsible for carrying out the country's foreign policy in accordance with the law and the Government's programme. He also represents the country in international relations, alongside the President and the Prime Minister.

- The people

The President, after consulting Parliament, may ask the people to express by *referendum* their views on problems of international interest (Article 90), including foreign policy matters. On the other hand, there is no provision for a right of popular legislative initiative.

29. RUSSIA

29.1 Principles

- Identification

In the preamble to the Constitution the people of Russia proclaims its attachment to human rights, the universally recognised principles of equality of law and the *self-determination of peoples*, the intangibility of democracy and the *sovereignty* of Russia. The Russian people recognise that it forms part of the international community.

While proclaiming the sovereignty of Russia, Article 79 provides that Russia may be a party to inter-State unions and *transfer part of its powers to them*, in accordance with the corresponding treaties, where this does not entail a limitation of human and civic rights and freedoms and where it is not contrary to the foundations of the constitutional order of the Federation.

Values such as democracy, human rights and fundamental freedoms are among the foundations of the constitutional system of the Federation of Russia, which no provision of the Constitution can infringe (Article 16), still less the other State powers, including in the sphere of foreign policy.

According to Article 15.4 of the Constitution, the universally recognised principles and rules of international law, and also treaties, form an integral part of domestic law. Moreover, international *treaties take precedence* over domestic law. There are no constitutional laws which determine the aims and principles of foreign policy: these are defined in ordinary laws. Consequently, the principles established by treaties must be observed when the foreign policy of the country is defined.

- Control mechanisms

As guarantor of the Constitution, the *President* may repeal acts of the Government, which, according to the Constitution, is to adopt measures to implement Russia's foreign policy (Articles 80, 114 and 115).

The *Constitutional Court* of the Federation rules on the conformity with the Constitution of the various domestic measures (federal laws, acts of the President, the Council of the Federation, the Duma and the Government of the Federation), including those concerned with foreign policy. It also

rules on the conformity with the Constitution of treaties which are not yet in force. A treaty, which is declared contrary to the Constitution, cannot enter into force (Article 91 of the Law on the Federal Constitutional Court).

29.2 Implementation[16]

- Vertical division of powers

According to the Constitution of the Federation (Article 71), *foreign policy and international relations, treaties, the problems of war and peace, external economic relations etc. come within the competence of the Federation of Russia*. The co-ordination of economic relations comes within the joint competence of the Federation and its subjects (Article 72 of the Constitution and Law of 18 March 1992). *The Republics are autonomous participants in international and external economic relations*, provided that this is not contrary to the Constitution, the laws of the Federation and the Federal Treaty. International relations within the Federation (and also within the territories and the regions) is co-ordinated by the federal organs of the State power of the Federation with the Republics.

One example which may be given is the Treaty between the Federation of Russia and the Republic of Tartarstan "on the delimitation of spheres of competence and the delegation of powers between the organs of the State power of the Federation of Russia and those of the Republic of Tartarstan" of 15 February 1994. The treaty provides that the *organs of the Republic are to exercise State powers, including participation in international relations*, that they are to establish relations with foreign States and *conclude with these States agreements* which are not contrary to the Constitution and the undertakings of the Federation or to those of the Republic, that they are to participate in the activity of the corresponding international organisations and pursue an autonomous external economic policy. Lastly, joint co-ordination is envisaged for international and external economic relations.

On the other hand, Article 4 of the law on international treaties of the Federation of Russia provides that the treaties of the Federation which concern questions which fall within the competence of its subjects are to be *concluded by agreement with the competent organs of the subjects concerned*.

The subjects of the Federation of Russia may submit for consideration by the President of the Federation or the Government *recommendations on the conclusion or denunciation and the cessation of international treaties* (Articles 8 and 35 of the Law on International Treaties of the Federation of Russia). Similarly, the legislature of a subject of the Federation of Russia may submit to the Duma a draft law on the ratification of an international treaty which is not yet in force as regards the Federation (Article 104 of the Constitution and Article 16 of the Law on International Treaties of the Federation of Russia). On the other hand, the subjects of the Federation are responsible, within the limits of their powers, for implementing treaties (Article 32 of the Law).

Following the winding-up of the USSR and the creation of the *CIS*,[17] it was agreed by the Agreement on the Creation of the CIS, and its statutes (Article 1), that the CIS has *no*

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[16] *In view of the federal nature of the Russian State and the particular problems associated therewith, it was decided to deal with the relative responsibilities of the various bodies with a foreign policy role by analysing, first, the place of the federated States in this sphere (vertical division of powers) and, secondly, the respective roles of the legislature, the executive and the people (horizontal division of powers).*

international powers and that its organs are only *co-ordinating organs*. The council of Heads of State and the Council of Heads of Government of the Member States of the CIS adopt, by common accord (by consensus), decisions on the co-ordination of the foreign policy activities of members of the CIS.

- Horizontal division of powers

The President of the Federation
Pursuant to Article 80 of the Constitution, the President is the Head of State and the guarantor of the Constitution and human rights and freedoms. He protects the sovereignty, independence and integrity of the State. *He determines the fundamental directions to be followed by foreign policy and represents the Federation in its international relations*. He directs foreign policy, *negotiates and signs treaties* and the instruments of ratification, he *accepts the credentials* and *resignations of foreign representatives*, he appoints and dismisses Federal Ministers, including the Minister for Foreign Affairs, on a proposal from the President of the Government, he approves the Federation's military doctrine and, after consulting the committees and commissions of the chambers of the Federal Assembly, he appoints and recalls the *diplomatic representatives of the country in other countries* (Articles 83 and 86 of the Constitution). Pursuant to the law on international treaties, the President takes decisions relating to the organisation of negotiations and the signature of treaties, grants the corresponding powers and submits the relevant treaties for ratification. In the event of aggression or an imminent threat of aggression the President declares a state of emergency and notifies the Council of the Federation and the Duma (Article 87).

Pursuant to Articles 5 and 20 of the Law on defence the President declares a state of war in the event of armed aggression. Decisions to send armed forces outside the Federation to take part in peacekeeping activities are also taken by the President on the basis of a decree of the Council of the Federation (Article 7 of the Law). Where it is proposed to take part in international coercive actions the President's decision must be taken in accordance with a ratified treaty in accordance with the federal law (Article 10 of the Law). The President forms and presides over the Security Council of the Federation. The Security Council examines issues of foreign policy, in particular those concerned with the maintenance of security, and prepares the decisions of the President.

The Government
Pursuant to Article 110 of the Constitution, the Government exercises the executive power. It takes the measures necessary to carry out the policy of the country (Article 114 of the Constitution). However, its acts may be repealed by the President where they are contrary to the Constitution or to federal laws (Article 115). Pursuant to the Law on International Treaties, within the spheres of its competence, the *Government decides to negotiate and sign treaties and presents them for ratification*.

According to Article 6 of the Law on Defence, the Government, within the limit of its powers, organises the implementation of the commitments provided for in defence treaties. It organises the control of the export of arms and weaponry, conducts international negotiations on military issues and determines the measures to strengthen confidence between States and to reduce the military threat and to create collective security. Part of the armed forces may be under joint command, in accordance with the treaties. Pursuant to the Law on the procedure for sending military and civil personnel to take part in peacekeeping and security activities, the Government takes the decision to

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[17] *Community of Independent States.*

send civilian personal to the frontiers to take part in a peacekeeping and humanitarian aid activities (Article 9).

The legislature: Council of the Federation and Duma
According to Article 104 of the Constitution and Article 14 of the Law on Treaties, treaties are ratified or denounced by a federal law adopted by the Duma. The law must be examined in the Council of the Federation. Article 15 of the Law on Treaties determines the treaties which must be submitted for ratification. These are:

(a) treaties whose implementation entails the amendment of federal laws in force or the enactment of new laws and those which establish rules other than those provided for by law;
(b) treaties having as their subject-matter the fundamental rights and freedoms of citizens;
(c) treaties concerning the territorial delimitation of the Federation with other States, including those relating to frontier crossings;
(d) treaties concerning the establishment of inter-State relations, the capacity of Russia's defence, questions of disarmament, the international control of disarmament and the guarantee of peace in international security;
(e) treaties relating to the Federation's participation in inter-State unions and international organisations, where these treaties envisage the transfer of some of the powers of the Federation or where they establish the adoption of legal decision which will be binding on the Federation; and
(f) treaties which the parties have agreed are to be ratified.

The two chambers also exercise indirect control over the conduct of foreign policy:
- they hear the President's message on the principal directions to be taken by foreign policy (Articles 84 and 100 of the Constitution) and the speeches of the directors of the foreign States;
- they *advise the President* on the appointment and recall of diplomatic representatives;
- they *receive information* from the Minister for Foreign Affairs where treaties have been concluded or have ceased to be effective;
- they may also give recommendations on the conclusion, cessation or suspension of treaties (Articles 8 and 35 of the Law on International Treaties); and
- they may use the legislative initiative on the same subjects (Article 104 of the Constitution, Articles 16 and 37 of the Law on Treaties).

- The people

According to Article 32 of the Constitution, citizens are entitled to participate in *referenda*. The Law on Referenda of 1995 does not include foreign policy issues among those which are not to be submitted to a referendum. Consequently, the people may play a part in defining foreign policy by means of a referendum. The people may also take the initiative for a referendum. Where the Constitutional Court recognises that the statutory conditions are met, the President is required to hold a referendum (Articles 8 and 12 of the Law on Referenda).

Given such a complex division of powers, it was necessary to provide mechanisms to control compliance with the attribution of these powers. Article 125 of the Constitution, Chapter IX of the Federal Constitutional Law on the Constitutional Court and Article 34 of the Law on International Treaties provide that *the Constitutional Court is to resolve disputes as to* competence between the federal organs of the central power and also between the organs of State power of the Federation and those of its subjects in connection with the conclusion of treaties of the Federation where the disputed competence is defined in the Constitution of the Federation. Where the Court recognises that the act does not fall within the competence of the organ of the State power which promulgated it the act ceases to be effective as from the date indicated in the decision.

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The following contribution by Mr Alexey KOSTYAGIN, Consultant in the Legal Department of the Council of Federation Staff in Moscow, will help us understand the practical combination of this basic principles in the process of foreign policy making in Russia.

The Legal Foundation for Foreign Policy - Report by Mr Alexey KOSTYAGIN
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As an introductory remark, I would like to thank co-organisers - the European commission for Democracy through Law (the Venice Commission) and the Ministry for Foreign Affairs of Greece, for their kind invitation of the representative of the Council of Federation Staff to take part in this discussion, and to express hope that it will be highly productive and completely successful.

Obviously, the topics dealt with in this publication are of great theoretical interest and practical value. In this context I should like to thank Mr Nick for his contribution to the research done by the Working Group of the Commission, and for his deep thorough exploration of the subject which is under our discussion.

If we consider the problem of legal regulation of foreign policy in the Russian Federation, generally speaking, the situation in this regard confirms quite adequately two major conclusions taken up by the report analysing the evolution that takes place in the determination of the foreign political orientation of European countries: firstly, the foreign policy is really getting more established on pretty standard legal foundations and principles; secondly, it is being gradually subjected to processes of democratisation.

The specific character of our situation springs from the fact that Russia is going through transition, with all its ups and downs, achievements and setbacks, which produce an effect upon all spheres of the national life. Actually, it is engaged in building a new statehood and establishing a new system of external relations corresponding to modern trends in international affairs. The above-said fully refers to the field of law in general, and to the legal regulation of foreign policy in particular.

Happily, and we consider it as a great achievement, that due to the positive political developments in the country and adoption of the 1993 Constitution of the Russian Federation, these processes have acquired, from their very beginning, a right democratic orientation and solid legal basis. In this connection, I would like to remark that we highly appreciate participation and contribution of the Venice Commission in a preparatory work for the adoption of the Constitution.
It is worthy to note that the Constitution deals with the international position of the country. These are briefly, as following:

1. Recognition of the belonging of the Russian people to the international community. It should be borne in mind that the Soviet constitution recognised the soviet people as part of he block community.

2. Adherence to the rule of law. According to the Constitution, the universally recognised principles and rules of international law, and also treaties, form an integral part of domestic law. Moreover, international treaties take precedence over domestic law.

3. Attachment to such values as democracy, human rights and fundamental; freedoms, which no state power can infringe.

4. The principle of division of powers and responsibilities between the legislative, executive and judicial authorities.

5. The principle of federalism.

6. Parliamentary control over activities of the executive power, including its foreign policy.

All this constitute basic elements or components of the foreign policy's doctrine and legislation which determine its nature and implementation. But the Constitution stays at the level of regulating the matter in principle, giving some kind of framework, establishing the lines of competence and responsibilities of various state offices connected with international affairs. It defines mechanisms of forming and conducting foreign policy in rather general terms.

Let us note that there are no constitutional laws which would specify the above-mentioned aims and principles. Thus the care of regulating external activities and above all modalities of its implementation is left to other subconstitutional, legal norms. It is usually done through various laws, by-laws, presidential decrees, etc. For instance, the Ministry for Foreign Affairs of the Russian Federation is working in accordance with the Rules approved by the President's decree.

I shall briefly deal with the division of powers and distribution of formal decision-making authorities of the Federation. According to the Constitution (Article 17), foreign policy and international relations, international treaties, the problems of war and peace, external economic relations are in the competence of the Russian Federation.

As to the powers of subjects of the Federation in this sphere, Article 72 of the Constitution states that co-ordination of international and external economic links of the subjects of the Russian Federation and fulfilment of international treaties of the Russian Federation come within the joint competence of the Federation and its subjects. It means that the subjects of the Federation have access to activities in the international and external economic affairs, provided that it is not contrary to the Constitution and federal laws, but their powers are limited to establishing with their foreign partners ties, connections or links, in whatever better way one would translate the Russian word "svyazi", while relations (Russian word “ostnosheniya”) belong to the exclusive competence of the federal authorities. This is not a question of linguistics or terminology. In the absence of legal acts specifying these constitutional terms, it becomes a matter of political importance causing serious disputes among the subjects of the Federation and demanding some kind of accuracy when we try to handle with these things. One should bear this in mind in order to understand the passages of the report dealing with the responsibilities of the subjects of the Federation presented in the report on the legal foundation for foreign policy in its part devoted to Russia. For instance, page 92, para. 1, it is written that "the co-ordination of economic relations comes to the joint competence of the Federation and its subjects". And further; "The Republics are autonomous participants in

international and external economic relations". In the light of the above-said, these expressions must be handled with extreme care. It is also worthy to mention that according to the Federal Law on the State's regulation of external trade of 1995 (Article 8) the subjects of the Russian Federation are empowered to conclude agreements with subjects of foreign federal States and administrative and territorial forming and foreign States. It is also of interest to add that a draft law on the co-ordination of the international and external economic links of the subjects of the Federation is under debate in the State Duma. Meanwhile, treaties have been concluded between the Federation and its subjects to settle the question of the delimitation of their respective powers in this sphere.

If we examine the responsibilities of federal authorities in defining and implementing foreign policy, no one would have any doubts about the executive's predominance.

The powers of the President in the field of foreign relations are defined in the Constitution in accordance with standards existing in presidential republics.

The role of the Government, traditionally minimal, is limited to providing the conditions for implementation of the foreign policy.

The Ministry for Foreign Affairs acts as a subordinate organ under the President to implement his policy on issues of his competence.

The President of the Federation is the Head of State and the guarantor of the Constitution. He represents the Federation in its international relations and determines the fundamental directions to be followed by foreign policy. He directs foreign policy, negotiates and signs treaties and the instruments of ratification. He accepts the credentials and resignations of foreign representatives, he appoints and dismisses Federal Ministers, he appoints and recalls diplomatic representatives of the country in other countries. The President can abrogate laws passed by the Parliament. He approves the Federation's military doctrine and in the event of armed aggression or imminent threat of war he declares a state of war or emergency.

All this gives some ideas about the constitutional powers of the without mentioning the possibilities provided by international law.

Recent years have indicated a tendency towards an increasing involvement of our Parliament in the sphere of foreign policy. The Federal Assembly participates directly in determining foreign policy when it exercises its power to ratify international treaties.

According to the Constitution, international treaties are ratified or denounced by a federal law adopted by the State Duma. The law must be examined in the Council Federation. A list of treaties which, owing to their importance, must be submitted for ratification is set out in the Federal law on the international treaties of the Russian Federation of 1995 (Article 15). This applies in particular to treaties of war and peace, treaties dealing with frontiers and those concerned with fundamental rights and personal status, membership of international organisations, entailing financial commitments and amending existing legislation.

The two chambers also exercise indirect control over the conduct of foreign policy by various constitutional instruments. For instance, in certain cases, the Federal Assembly may pass a vote of confidence in favour of the Government. It can also exercise control over the definition of foreign policy as a consequence of its budgetary power.

Lastly, the Federal Assembly has at its disposal the ordinary means of controlling Government policy, namely the possibility of questioning Ministers, requesting information, reports, etc.

Among the new phenomenons which correspond to the Parliament's desire to follow more closely the questions concerning foreign policy, there is the increase in the number of parliamentary committees connected with international affairs and the conduct of foreign policy. The power of these committees and commissions goes beyond the mere ability to obtain information and propose solutions to the Federal Assembly.

One more channel of influencing foreign policy is interparliamentary exchange and co-operation.

A process of democratisation of the implementation of foreign policy led to the emergence of new institutions, such as the Constitutional Court which is empowered to review the conformity with the Constitution of international treaties and other foreign policy measures, and to a broader people's involvement in it manifested by referendums, growth of non-governmental organisations, activities of various pressure groups, etc.

The transition, which we go through, not only opens new prospects, but carries along serious problems. Despite the constitutional regulation of foreign policy, its legal basis is still rather weak and it lacks many supporting laws, which would make up for existing deficiency, such as legal acts on the division (vertical and horizontal) of powers, the co-ordination of activities in foreign affairs between the Federation and its subjects, diplomatic service, etc. A process of searching foreign policy's new priorities and of elaborating its doctrine is the focus of attention as well as the struggle of political parties, pressure groups and mass media. It is subjected to influence of many domestic as well as external factors, including those of personal character. In these circumstances, close collaboration with international organisations of democratic orientation, especially with the Council of Europe and its affiliates, such as the Venice Commission, becomes for us a matter of great importance and is highly appreciable.

30. SLOVAKIA

30.1 Principles

- Identification

There are no specific provisions on the legal foundations and objectives of foreign policy. In the light of the general provisions of the Constitution, however, it is possible to conclude that a number of principles exist. Thus the preamble to the Constitution refers to the *inherent right of nations to self-determination* and to *the importance of continuous peaceful co-operation* with other democratic States. Article 1 provides that "the Republic of Slovakia is a sovereign and democratic State subject to the rule of law. It is not bound by any ideology or religion".

The essential document, in which the objectives of foreign policy are set out, as required by the Constitution, is the programme of the Government (Article 113 of the Constitution).

Article 11 of the Constitution establishes the conditional superiority of treaties and other international agreements on human rights and fundamental freedoms over domestic law, provided that the international treaties and agreements guarantee greater rights and freedoms. Other treaties have priority over domestic laws provided that they contain a superiority clause to ensure preferential application. Where the provisions of a treaty are different from those of domestic laws they are

applied directly. In certain cases, therefore, the principles established by international conventions must be observed when foreign policy is determined.

The values of democracy and respect for human rights have indirect influence of the country's foreign policy, since their observance is a condition of the country's admission to international organisations.

- Control mechanisms

First of all, a control is effected by international organisations. Thus, for example, pursuant to Article 8 of the Statute of the Council of Europe and Article 6 of the Charter of the United Nations, a country which fails to respect certain values may be excluded.

According to Article 86.g of the Constitution, Parliament may pass a *motion of censure* against the Government, including where it fails to carry out its foreign policy programme. A specific vote of no confidence in the Minister for Foreign Affairs, or any other member of the Government, may be passed in respect of his activities in connection with foreign policy.

30.2 Implementation

- The legislature

The National Council of the Republic of Slovakia is responsible for debating the Government's programme, for controlling its activities and for "negotiating" the *vote of confidence* to be adopted *vis-à-vis* the Government as a whole and its individual members (Article 86.g).

According to Article 86.e of the Constitution, Parliament is to *approve certain categories of treaties*: "international political treaties, general economic treaties and other international treaties which must be implemented by a law". Similarly, Parliament must consent to withdrawal from these treaties or to the withdrawal of reservations etc.

Furthermore, certain matters fall within the exclusive competence of Parliament. Article 86.c of the Constitution provides that Parliament is to give its consent, in the form of a Constitutional Law, to treaties of union between Slovakia and other States and to the termination of such treaties. According to Article 86.k, *Parliament is to declare war* in the event of an armed attack against Slovakia or where its international obligations under common defence treaties so require. Lastly, Article 86.l provides that Parliament must consent to *troops being sent abroad*.

- The executive

The organ essentially empowered to elaborate the basic principles of foreign policy is the Government. These principles are incorporated in the Government's programme, which is approved by Parliament in a vote of confidence. According to Article 11.g of the Constitution, "*the Government shall decide collectively on basic questions of domestic and foreign policy*". Since 1993 *the Government has been authorised to conclude international treaties which do not require the approval of Parliament*. With the Government's consent, its members are authorised to conclude other treaties.

The *President* is not empowered to elaborate the basic principles of foreign policy. Within the framework of his constitutional powers (Article 102.a to r of the Constitution), the President conducts foreign policy as provided for in the Constitution. According to Article 102.a of the Constitution, he *represents* the Republic in international relations, he *negotiates and ratifies* the

most important *international treaties*, he *receives and accredits* ambassadors (Article 102.b), and declares a state of war and war (Article 102.k).

- The people

Articles 93 to 100 of Chapter 5, Part 2 of the Constitution cover the circumstances in which a referendum may be held. Article 93.1 of the Constitution provides that *a constitutional statute on the formation of a union of the Slovak Republic with other States or its secession from such a union is to be confirmed by an obligatory referendum*.

A facultative referendum may be held either upon a resolution of Parliament or upon a petition submitted by 350,000 citizens. According to Article 95 the Constitution, the referendum is to be declared by the President. Article 93.3 provides that "no issue of fundamental rights, freedoms, taxes, duties or national budgetary matters may be decided by a referendum". Article 93.2 provides that "a referendum may also be held to determine crucial questions of public interest". The President does not declare a referendum until he has examined whether the constitutional conditions for a referendum are met. Furthermore, Article 27.1 of the Constitution establishes a *right of petition*.

As a general rule there is no control of the conduct of foreign policy. In the event of a *conflict as to competence*, however, *the problem will be resolved by the Constitutional Court* (Article 126 of the Constitution). Similarly, where a problem arises as to the interpretation of the constitutional provisions on competence in the sphere of foreign policy, the Constitutional Court may give a generally binding interpretation (Article 128.1 of the Constitution).

31. SLOVENIA

31.1 Principles

- Identification

According to the Constitution, laws and regulations must conform with treaties and *the generally accepted principles of international law*. The Law on Foreign Affairs regulates the conduct of foreign affairs. Values such as *democracy, the rule of law and the protection of human rights and fundamental freedoms* are among the principles forming the basis of the State, according to Constitution, which, as the supreme legal act, is binding on all authorities.

Slovenia's intention to take part in the process of European integration and to become an associate member of the European Union influence its legislation, in the sense of seeking to achieve harmonisation with European standards.

- Control mechanisms

The Constitutional Court decides upon the conformity of laws and regulations with ratified treaties and the general principles of international law. It also has jurisdiction to decide any individual complaint alleging a violation of human rights and fundamental freedoms by personal acts. Finally, it may also be requested to rule on the *conformity with the Constitution of a treaty which is in the process of being adopted.* Its opinion is binding on Parliament. The Constitutional Court has not yet ruled on whether it has jurisdiction to evaluate the conformity with the Constitution of a treaty which has already been ratified by statute. However, it has already declared that it has jurisdiction to evaluate the conformity with the Constitution of treaties ratified by regulation.

Judicial review of actions taken within the framework of foreign policy is possible only in the event of error, crime or tort. Complaints may also be lodged against the Prime Minister or any other Minister and against the President of the Republic.

31.2 Implementation

- The legislature

Parliament defines the basic principles of foreign policy. It ratifies treaties. It adopts resolutions, recommendations, opinions and decisions and it *appoints and dismisses* members of Slovenia's permanent delegations to international organisations. The Foreign Affairs Committee of Parliament confirms the initiative for concluding a treaty and gives its suggestions. In the *negotiating stage the delegation reports to the Committee*. Following the signature of the treaty the Committee decides whether or not to propose that Parliament should ratify it. Parliament may also initiate the procedure for the amendment or *denunciation* of an international treaty.

- The executive

The *President* has a *representative* function. He *accredits and revokes the accreditation of* Slovenia's ambassadors to foreign countries and *accepts the credentials* of foreign represents. He issues instruments of ratification.

The *Government* and the Minister for Foreign Affairs ensure that foreign policy is formulated and implemented in conformity with the principles defined by Parliament. The Government takes the initiative for the signature of international agreements and *assumes responsibility for the negotiations*. It ratifies protocols, programmes and other similar instruments which do not contain additional obligations and which are concluded for the purpose of implementing treaties which have already been concluded. The Government is accountable to Parliament.

- The people

Citizens may initiate a procedure for amending the Constitution and *propose laws*. In certain cases (where a large number of citizens have signed a petition to that effect) Parliament must declare a *referendum*. There are very few issues which *cannot be submitted to a referendum*. One such issue is the *implementation of a treaty*. Parliament may also hold a consultative referendum on an issue of major importance. The results of such a referendum are binding.

32. SOUTH AFRICA

32.1 Principles

- Identification

The constitutional and institutional changes that took place in South Africa since 1994 provides for important changes in the foreign policy formulation and implementation processes.[18] The Constitution

[18] *The constitutional changes that took place in South Africa include the replacement of the Constitution of the Republic of South Africa (Act 110 of 1983, with the transitional Constitution (Constitution of the Republic of South Africa of 1993, Act 200 of 1993). This*

does *not include any specific foreign policy guidelines*. However it provides a *framework for procedural matters and policy decisions.*

Relevant constitutional provisions that have a bearing on foreign policy matters include the following:

a) The founding provisions in Section 1 (Act 108 of 1996): The Republic of South Africa is one, sovereign, democratic State founded on the following values: human dignity, the achievement of equality, and the advancement of human rights and freedoms; non racialism and non sexism; supremacy of the Constitution and the rule of law; universal suffrage, regular elections and a multi-party system.
b) The supremacy of the Constitution (Section 2).
c) The Bill of rights (Section 7-39).
d) International agreements (Section 231): The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.
e) Customary international law (Section 232): Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
f) Application of international law (Section 233): When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

- Control mechanisms

The position of the judiciary in South Africa has also changed considerably since 1994. This is the result of important changes to the constitutional framework that strengthens the role of the judiciary. First of all, as provided for in the Constitution (Act 108 of 1996, Section 2), the Constitution is the supreme law of the Republic, and any conduct or law inconsistent with the Constitution is invalid. The second change involves the inclusion of the rule of law principle as a provision in the Constitution (Section 1 c). The third change brought about in the Constitution is the creation of a Constitutional Court. The Constitutional Court is the highest court in constitutional matters (Section 167 3 a). The fourth important change is the limitation of the sovereignty of the Parliament. The Constitution provides for the rejection of any law of Parliament by the Constitutional Court which is inconsistent with the Constitution. Such a decision or any other decision by the judiciary is binding on all persons or organs of State to which it applies (Section 165).

32.2 Implementation

According to Section 231 (1) of the Constitution, the negotiating and signing of international agreements is the responsibility of the national executive.

An international agreement binds the Republic only after it has been approved by both the National Assembly and the National Council of Provinces, unless it is one of the following agreements: international agreements of technical, administrative or executive nature and agreements which do not require either ratification or accession, entered into by the national executive, bind the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

When the African National Congress (ANC) took power in 1994 it envisaged a more active role for Parliament in the foreign policy sphere. The rules of Parliament were changed to give parliamentary

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was followed by the acceptance of a final Constitution of the Republic of South Africa 1996 (Act 108 of 1996).

portfolio committees a more direct and active role in the process of foreign policy formulation. However, the role of the Parliament remains still very limited in this field.

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The following contribution by Mr HENWOOD, Lecturer, University of Pretoria, will help us understand the practical combination of this basic principles in the process of foreign policy making in Russia.

The constitutional foundations of South-Africa's foreign policy - Report by Mr HENWOOD
Lecturer, University of Pretoria, South Africa

Introduction

The constitutional and institutional changes that took place in South Africa since 1994 provides for important changes in the foreign policy formulation and implementation processes. These aspects need to be explained to determine the effect of both on the foreign policy process in South Africa.

The constitutional changes that took place in South Africa since 1994 include the replacement of the Constitution of the Republic of South Africa, Act 110 of 1983, with the transitional constitution (Constitution of the Republic of South Africa, Act 200 of 1993). This was followed by the acceptance of a "final" constitution, the Constitution of the Republic of South Africa 1996 (Act 108 of 1996). These constitutional changes form part of the process to democratise South Africa in all respects, also in terms of the foreign policy South Africa follows or would like to implement. The constitution of South Africa does not include any specific foreign policy guidelines but provides a framework for procedural matters and policy decisions. The constitution also provides a framework of values that ought to be present in the declared and implemented foreign policy of South Africa. In order to evaluate the influence of constitutional changes on the foreign policy of South Africa the sections in the constitution that have a bearing on the foreign policy process need to be briefly explained and linked to the institutional changes that resulted from the constitutional changes.

I. Constitutional provisions that influence foreign policy

The transitional constitution (Act 200 of 1993) provided for the President (in consultation with the Executive Deputy-Presidents) to exercise important powers relating to the foreign policy of South Africa. These included:[19]

- the appointment, accreditation and reception of ambassadors and other foreign representatives;

- the negotiation and signing of international agreements (parliamentary ratification is required before these agreements can be implemented); and

[19] *Constitution of the Republic of South Africa (Act 200 of 1993), section 81(1)(f), (l); 82(a-e) and 231(2).*

- the development and implementation of the policies of the national government.

The Constitution of the Republic of South Africa 1996 does not include the specific provisions that were contained in the transitional constitution (as described above) but also provides for matters related to foreign policy. Other relevant constitutional provisions that have a bearing on foreign policy matters include the following:

- the founding provisions in section 1 (Act 108 of 1996),

(a) "The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(*d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."*

(Section 74(1) provides a special amendment procedure for this section. An amendment to section 1 requires a Bill passed by the National Assembly with a supporting vote of at least 75 per cent of its members and the National Council of Provinces with a supporting vote of at least six provinces.)

- The supremacy of the constitution (section 2):

*"*This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*."*

- The Bill of Rights (section 7–39):

Section 39(1)(a-c) is specifically important in this regard as it provides for the interpretation of the Bill of Rights.

"When interpreting the Bill of Rights, a court, tribunal or forum:

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law and

(c) *may consider foreign law.*"

(South Africa is bound by various international agreements concerning human rights, including the African Charter on Human and Peoples' Rights).

- International agreements (section 231 (1-5):

(1) "the negotiating and signing of all international agreements is the responsibility of the national executive.

(2) an international agreement binds the Republic only after it has been approved by both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) the Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

- Customary international law (section 232):

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

- Application of international law (section 233):

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

II. The institutional dimension of foreign policy formulation in South Africa

The Constitution of the Republic of South Africa 1996 provides for the national executive to negotiate and sign international agreements, but does not require parliamentary ratification in the case of agreements of a technical, administrative or executive nature. It is however a requirement that all international agreements be tabled in both houses of parliament even if ratification of a specific agreement is not a required by the constitution.[20] This change from the more specific provisions introduced in the transitional constitution of 1993 establishes a more independent position for the executive in the foreign policy process of South Africa. This may in the end limit the role of parliament in the foreign policy process, though it may streamline the decision-making process.

The role of parliament in the foreign policy process of South Africa has changed from that of the pre-1994 parliaments. Previously parliament served mainly as a rubber stamp of government foreign policy with very little input or influence on policy decisions. When the African National Congress (ANC) took power in 1994 it envisaged a more active role for parliament in the foreign policy sphere. The rules of parliament were changed to give parliamentary portfolio committees a more

[20] *Constitution of the Republic of South Africa 1996 (Act 108 of 1996) section 231(1,2,3).*

direct and active role in the process of policy formulation.[21] Although parliament has undergone important and wide-ranging changes, the role of the legislature in the policy formulation process seems to be very limited. The problem will be exacerbated by the fact that the constitution seemingly strengthens the role of the executive at the cost of the legislature. This will make it very difficult or even impossible for parliament to be more than an *ex-post facto* role-player in matters of foreign affairs.[22] This may result in limited participation and inputs in the process of foreign policy formulation as it institutionalises and entrenches the independent role of the President, Minister of Foreign Affairs and Department of Foreign Affairs. This will undoubtedly influence the nature of the foreign policy to be followed by South Africa.

The position of the judiciary in South Africa has also changed considerably since 1994. This is the result of important changes to the constitutional framework that strengthens the role of the judiciary. The first of these changes centres on the status of the constitution. As provided for in the Constitution of South Africa (Act 108 of 1996, section 2) the constitution is *the supreme law of the Republic*, and any conduct or law inconsistent with the constitution is invalid. The second change involves the inclusion of the *rule of law* principle as a provision in the constitution (section 1(c). The third change brought about in the Constitution is the creation of a Constitutional Court in South Africa. The Constitutional Court is the highest court in all constitutional matters (section 167(3)(a). The fourth important change from previous constitutions in South Africa is the limitation of the sovereignty of Parliament. The Constitution provides for the interpretation and rejection of any law of Parliament by the Constitutional Court it is inconsistent with the Constitution. Such a decision or any other decision by the judiciary is binding on all persons or organs of state to which it applies (section 165). The last aspect to the role of the judiciary centres on the provision in the Constitution that all the organs of state must assist and ensure that the courts function in an effective, independent and impartial manner (section 165(4)).

Conclusion

The conclusion that one can draw from this is that in spite of important constitutional and institutional changes the process of foreign policy formulation in South Africa has not changed that much. It is however still early days and the fact that the Constitution prescribes different roles for the organs of state, especially the judiciary, may have important consequences in the long run. The effect of this will most probably become stronger as the process of regional integration in southern Africa gathers momentum.

33. SPAIN

33.1 Principles

- Identification

There are very few principles which guide the foreign policy of the State. The Constitution mentions only the principle of the *peaceful resolution of disputes* and the principle of *co-operation between*

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[21] *For a more detailed discussion of this see R Henwood South Africa's foreign policy and international practice - 1994/95- an analysis in South African Yearbook of International Law, 20, 1995, Verloren van Themaat Centre for Public Law Studies, University of South Africa, pp. 271-274.*

[22] *R Henwood, South African foreign policy and international practice - 1995/96 - an analysis in South African Yearbook of International Law, 21, 1996, Verloren van Themaat Centre for Public Law Studies, University of South Africa, pp. 247 - 249.*

countries (Articles 1 and 2 of the Charter of the United Nations). Moreover, it only does so in the preamble, which undermines their legal force. In addition, the terms employed are very general.

However, it is possible to find other articles which may be regarded as indirect guidelines for foreign policy:

(a) Article 11.1 of the Constitution authorises the State to *conclude treaties on dual nationality with Iberian-American countries* or countries which have or had special links with Spain. This authorisation was not constitutionally necessary and must therefore be regarded as designed to promote political action in that direction.
(b) Article 13.2 refers to the treaties whereby the nationals of the signatory countries may be granted the *right to vote in municipal elections*. The concession must be granted on a reciprocal basis.
(c) Article 42 requires the public powers to ensure the *protection of the economic and social rights of Spanish workers abroad*.
(d) Lastly, Article 56, which provides that the King is the supreme representative of the State in international relations, ascribes particular importance to relations with "the nations of its historical community". This article has been interpreted as constituting encouragement on the part of the drafters to develop relations with Latin America. It is important to note that the role of the King is purely symbolic.

The Constitution makes no reference to values such as *democracy, human rights or the rule of law* as a basis for foreign policy, but Article 95.1 of the Constitution, which expressly prohibits the signature of treaties containing provisions contrary to the Constitution, and the importance of these values in domestic law, argue *in favour of a foreign policy which seeks to satisfy the principles and values established in the Constitution*. Legal rules having less than constitutional force also play a part in defining the legal foundations of foreign policy, particularly as regards the organisation of the State's international activities.

According to Article 96.1 of the Constitution, properly concluded international treaties form part of the domestic legal programme once they have been officially published in Spain. According to Article 96.1 treaties cannot be amended except by the mechanisms provided for therein.

- Control mechanisms

The *Constitutional Court* may intervene in the final stage of the approval procedure to evaluate a treaty's conformity with the Constitution (Article 92).

33.2 Implementation

- The legislature

The two chambers intervene in different ways, and different conditions apply as to the majority required, depending on the treaty in question. According to Articles 93 and 94 of the Constitution, *treaties must be accepted by both chambers* where:

(a) they authorise international institutions or organisations to exercise powers deriving from the Constitution;
(b) they are of a political or military nature, they concern the integrity of the national territory or rights and fundamental freedoms, they entail financial obligations or require an amendment of or derogation from the law or require special measures in order to be implemented. The chambers must be *notified immediately of all other treaties or agreements* (Article 94.2).

Foreign policy lies within the realm of Government powers. Another specificity of the Spanish system is that Parliament, by its authorisation to conclude treaties as well as by its supervision of their implementation, plays an active role in this domain, and may even act as a driving force in such matters.

- The executive

The Constitution of 1978 democratised the implementation of foreign policy. Although the King is the supreme representative of the State in international relations (Article 56.1 of the Constitution), the Government is given the role of principle administrator of foreign policy. Moreover, a range of controls has been established: these may be political, and exercised in Parliament, or legal, and exercised in the Constitutional Court.

Article 63 of the Constitution provides that *the King* is to *express the State's agreement to be bound by international treaties*. The majority opinion among legal writers holds that this reference is only to agreements which have been approved by Parliament. The King *accredits ambassadors* and other diplomatic representatives and *declares war and peace* with the *prior authorisation of Parliament*.

The initiative for concluding treaties is exclusively within the competence of the *Government*, which, according to Article 97, "*directs domestic and foreign policy*". The Minister of Foreign Affairs is responsible for negotiating treaties.

- The people

Article 87 *prohibits direct legislative initiatives* by citizens in international matters. However, there is nothing to prevent a *referendum* being held in such circumstances. Thus a referendum was held in 1982 in which citizens were asked whether Spain should remain a member of NATO.

- Decentralised authorities

Article 149.1.3 provides that international relations are among the matters for which the State has exclusive competence. Following an initial literal interpretation of this article, which was severely criticised by legal writers, the Constitutional Court reduced the scope of the exclusive powers of the State. The reasoning is that Spain's integration in the world, and in the European Union in particular, has the effect that international relations may affect any matter, which might in practice deprive the powers granted by the Constitution to the *Autonomous Communities* of their importance.

The Autonomous Communities may in certain circumstances, without weakening the Government's prerogatives, *request the Government to negotiate treaties*. However, they cannot attempt to obtain international status *or to conclude treaties which are legally binding on the State*. On the other hand, the Government is *required to notify the Communities of the negotiation and signature of a treaty which might have repercussions* in areas which are of particular concern to the Communities.

34. SWITZERLAND

34.1 Principles

- Identification

The *traditional axioms of foreign policy* are:

(a) *neutrality*. This is the only one mentioned in the Constitution (in the provisions on the respective tasks of the legislature and the executive, not in those on foreign policy).[23] The reference is to the principle of non-interference in war between two States, which has been amended (Switzerland may participate in multilateral sanctions or in actions against threats which cannot be removed by co-operation).
(b) *solidarity*. This is humanitarian solidarity and solidarity by economic and social co-operation.
(c) *universality*. This relates to the maintenance of diplomatic relations with all States, of contacts in matters of co-operation and adherence to international organisations of a universal nature.
(d) *availability*. This refers to Switzerland's good services being offered to States or international organisations which request them,

Article 2 of the Constitutions sets out *four aims* of the Constitution, which must be the aims of both domestic and foreign policy:

(a) to ensure the *independence* of the country;
(b) to maintain *peace and order* within the country;
(c) to protect the *freedom and rights* of confederates; and
(d) to increase the *common prosperity* of confederates.

In its Report on foreign policy in the 1990s the Federal Council endeavoured to define the aims of its foreign policy action with express reference to Article 2 of the Constitution, with the intention of giving a new lease of life to the above principles. Five axes were set out:

(a) the maintenance and promotion of security and peace,
(b) commitment in favour of human rights, democracy and the principles of the rule of law,
(c) growth in common prosperity,
(d) the promotion of social cohesion, and
(e) the preservation of the natural environment.
Here it is a matter of measures concerned with the implementation of foreign policy rather principles which are binding on those responsible for defining it.

Treaties form an integral part of domestic law. Insofar as they establish principles or objectives of foreign policy, they are therefore *binding*. However, Switzerland is not a party to international organisations of integration. However, from the political point of view Switzerland follows the directions laid down by the UN, although it is not a member; "Eurocompatibility" is also one of the principles which in practice influence the determination of Swiss foreign policy; values such as democracy, human rights and the rule of law are binding on the organs of the State, including where they deal with international matters.

- Control mechanisms

Mechanisms to ensure the control and protection of human rights are provided for in domestic law or in treaties. The violation of a treaty may be relied on before any court, provided that the provision is self-executing, which does not apply, for example, in the case of economic and social rights.

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[23] *Article 8 Chapter 6 and Article 102 Chapter 9.*

An act which falls within the sphere of foreign policy may be challenged before the Federal Tribunal on the ground that it violates a political or constitutional right. However, whether or not such a control is available depends on the nature of the contested act. Article 113.3 *prohibits the Federal Tribunal from reviewing the constitutionality of federal laws* and there is no autonomous limit to the revision of the Constitution. Authorisation to ratify a treaty decided following popular consultation cannot be reviewed by the Federal Tribunal.

34.2 Implementation

- The legislature

The conclusion of treaties.
The Federal Assembly is competent to *conclude treaties* and alliances Article 85.6 and Article 102.8). In principle, the executive negotiates and signs treaties, *although the legislature authorises their ratification*.

Foreign policy directives.
The fundamental principles of foreign policy are formulated by the Federal Council. Admittedly, its messages are presented to Parliament, but they do not require *formal approval*.

- The executive

The Federal Assembly is empowered to conclude treaties and alliances and the *Federal Council is responsible for conducting foreign relations* (Article 85 Chapter 6 and Article 102 Chapter 8). In principle *the executive negotiates and signs treaties*, although the legislature authorises their ratification. However, *the Federal Council may only ratify* agreements in simplified form (treaties of minor importance, provisional treaties, treaties which do not create new obligations). The Federal Council may only *denounce treaties*, including those ratified by the Federal Assembly.

The *fundamental principles of foreign policy are formulated by the Federal Council*. Admittedly, its messages are presented to Parliament, but they do not require formal approval. The Government defines and implements foreign policy It conducts Switzerland's external relations.

The regime is collegiate in the sense that the Head of State is *primus inter partes* and plays no particular role in formulating foreign policy.

- The people

The ratification of certain international instruments, depending on the nature of the treaty, is sometimes submitted to a *referendum*. Switzerland has a *popular initiative* in the sense that a sufficient number of citizens may propose a constitutional amendment. Thus there have recently been a number of popular initiatives designed to secure a stricter immigration policy.

There are two kinds of referendum: an obligatory referendum, which is addressed to the people and the cantons, and a facultative referendum, which is addressed only to the people and which is held only where requested by a sufficient number of citizens. *The issue of accession to collective security organisations or to supranational communities* is determined by the people and the cantons, that is to say, it is submitted to an obligatory referendum. *The ratification of treaties of unlimited duration, accession to an international organisation or the ratification of treaties entailing a multilateral unification of the law* are submitted to a facultative referendum.

- Decentralised authorities

Pursuant to Article 8 of the Constitution, the Confederation alone is competent to conclude treaties and alliances with foreign States. However, Article 9 provides for an exception in favour of the cantons, but one which is relatively unimportant. The cantons may *conclude treaties of local importance or of lesser importance and they must be approved by the Federal Council*, which may oppose their ratification or conclude them on its own behalf where they are of national importance. Pursuant to the draft Constitutional reform currently in progress, the cantons will be empowered to conclude treaties within the spheres of their competence. This provision therefore appears less restrictive than the present Article 10.

35. SWEDEN

35.1 Principles

- Identification

The conduct of foreign policy and the definition of its governing principles are not the subject of legal provisions. Even Sweden's traditional policy of *neutrality*, which may be summarised as "non-participation in alliances in peacetime with a view to remaining neutral in the event of war", has no legal basis in either domestic law or international law. Furthermore, international law does not form part of domestic law unless it has been received in the internal legal order.

35.2 Implementation

- The legislature

According to Article 6 of the Instrument of Government, the Government, *before adopting a decision, must confer with the Foreign Affairs Advisory Council on all foreign policy matters of major importance*.

According to Article 1 Chapter 10 of the Instrument of Government, the Government may not conclude any *treaty* without the *consent of Parliament* if the agreement presupposes the amendment or abrogation of a law or the enactment of a new law, or if it otherwise concerns a matter which is for Parliament to decide. Similarly, without Parliament's approval the Government may not conclude any other treaty giving rise to international obligations for Sweden if the agreement is of major importance. The same rules apply to the commitment of the Realm to any other international obligation and to the denunciation of an agreement or international commitment.

- The executive

The King represents Sweden. He has *symbolic and ceremonial duties*. As Head of State he is kept informed by the Government concerning the affairs of the Realm

The Government is responsible for determining foreign policy under the political, legislative and financial control of Parliament. Pursuant to Article 1 Chapter 10 of the Instrument of Government, the Government *concludes treaties* with other States and with international organisations. According to Article 9, it may *commit the armed forces* in order to repel an attack on the Realm. Otherwise the armed forces can be committed only with the agreement of Parliament, unless a law so provides or an obligation to that effect is envisaged in a treaty approved by Parliament. No declaration of war may be made without the consent of Parliament except in the event of an armed

attack. However, the Government may authorise the use of force in accordance with international law to prevent a violation of Swedish soil.

- The people

The people may be consulted by referendum on foreign policy matters, as in the case of the *referendum* on Sweden's accession to the EU.

36. TURKEY

36.1 Principles

- Identification

In the preamble to the Constitution, which has the same legal force as the Constitution itself, the expression of the founder of modern Turkey, Kemal Atatürk, "peace at home, peace in the world" is repeated. According to Article 16, the fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law. *Article 92 limits Parliament's power to declare war or to send armed forces abroad to situations deemed legitimate under international law*. According to Article 90, international agreements which have entered into force have the same force as law. To this extent they may also influence the determination of the principles or aims of foreign policy.

Democracy, the rule of law and respect for human rights are among the essential principles of the Turkish Republic set out in Article 2 of the Constitution and the conduct of foreign policy must therefore also respect these principles.

- Control mechanisms

There is no specific control mechanism to ensure respect for the above-mentioned principles in foreign policy. There is no provision for instituting proceedings before the *Constitutional Court* for a review of the constitutionality of treaties which have already been ratified.

36.2 Implementation

- The legislature

Parliament contributes to the determination of foreign policy by its power to *ratify treaties*. However, *certain treaties take effect without Parliament's approval*. This applies to agreements regulating economic, commercial and technical relations and covering a period of no more than one year, provided that they do not entail any financial commitment by the State and do not adversely affect the status of individuals or the property rights of Turkish citizens abroad. *Parliament must be notified of such agreements* within two months of their promulgation. Similarly, agreements concerning the implementation of a treaty which has already been ratified and economic, commercial, technical or administrative agreements concluded on the basis of an authorisation by law do not require parliamentary approval.

Parliament may not *adopt legally binding foreign policy directives*. However, it may pass a resolution expressing its views, but without legal force. Furthermore, Parliament cannot take unilateral action in the field of foreign policy. Parliamentary *control* takes the form of questions, general debates, interpellation and parliamentary inquiries.

- The executive

The conduct of foreign policy is the responsibility of the *Council of Ministers*. The Minister for Foreign Affairs plays a particularly important role in determining the principles of foreign policy.

The *President* (Article 104) *ratifies and promulgates* treaties and *accredits* Turkey's representatives in other countries; however, these are formal powers exercised jointly with the Council of Ministers.

37. UKRAINE

37.1 Principles

- Identification

Article 8 of the Constitution of Ukraine[24] provides that the principle of the rule of law is recognised and effective in Ukraine.

According to Article 18 of the Constitution, the foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.

In accordance with Article 9 of the Constitution, international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine,[25] are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.

According to Article 26 of the constitution, foreigners who are in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine, subject to the exceptions established by the Constitution, laws or international treaties of Ukraine.

The use of existing military bases on the territory of Ukraine for the temporary stationing of foreign military formations is possible on the terms of lease, by the procedure determined by the International treaties of Ukraine ratified by the Verkhovna Rada of Ukraine (Provision 14 of Chapter XV "Transitional Provisions" of the Constitution of Ukraine).

- Control mechanisms

The Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (the Parliamentary Ombudsman) exercises parliamentary control over the observance of constitutional human and citizens' rights and freedoms (Article 101 of the Constitution, Article 1 of the *Authorised Human Rights Representative of the Verkhovna Rada of Ukraine Act*).[26]

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[24] *The Constitution of Ukraine was adopted by the Verkhovna Rada of Ukraine on 28 July 1996.*

[25] *Parliament of Ukraine.*

[26] *The Authorised Human Rights Representative of the Verkhovna Rada of Ukraine Act was adopted by Verkhovna Rada of Ukraine 23 December 1997.*

The Constitutional Court of Ukraine provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or international treaties submitted to the Verkhovna Rada for granting agreement on their binding nature (Article 151 of the Constitution of Ukraine and Article 13 of the *Constitutional Court of Ukraine Act*).[27]

37.2 Implementation

- The legislature

According to Article 85 of the Constitution, the authority of the Verkhovna Rada of Ukraine comprises:

- determining the principles of domestic and foreign policy;
- hearing annual and special messages of the President of Ukraine on the domestic and foreign situation of Ukraine;
- declaring war upon the submission of the President of Ukraine and concluding peace, approving the decision of the President of Ukraine on the use of the Armed Forces of Ukraine and other military formations in the event of armed aggression against Ukraine;
- confirming decisions on granting loans and economic aid by Ukraine to foreign states and international organisations and also decisions on Ukraine receiving loans not envisaged by the State Budget of Ukraine from foreign states, banks and international organisations, and exercising control over their use;
- approving decisions on providing military assistance to other states, on sending units of the Armed Forces of Ukraine to another state, or on admitting units of armed forces of other states on to the territory of Ukraine;
- granting consent to the binding character of international treaties of Ukraine within the term established by Law and denouncing international treaties of Ukraine;
- hearing annual reports of the Authorised Human Rights Representative on the situation of the observance and protection of human rights and freedoms in Ukraine.

In accordance with Article 92 of the Constitution, the following are determined exclusively by the laws of Ukraine:

- human and citizens' rights and freedoms, the guarantees of these rights and freedoms; the main duties of the citizen;
- citizenship, the legal personality of citizens, the status of foreigners and stateless persons;
- the principles of foreign relations, foreign economic activity and customs;
- the legal regime governing the state border.

The procedure for deploying units of the Armed Forces of Ukraine to other states as well as the procedure for admitting and the terms for stationing units of armed forces on the territory of Ukraine are established exclusively by the laws of Ukraine (Provision 2 part 2 Article 92 of the Constitution of Ukraine).

- The President

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[27] *The Constitutional Court of Ukraine Act was adopted by Verkhovna Rada 16 October 1996.*

The president of Ukraine is the Head of State and acts in its name. The President of Ukraine is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human and citizens' rights and freedoms (Article 102 of the Constitution of Ukraine).

In accordance with Article 106 of the Constitution of Ukraine, the President of Ukraine:

- ensures state independence, national security and the legal succession of the state;
- represents the state in international relations, administers the foreign political activity of the State, conducts negotiations and concludes international treaties of Ukraine;
- adopts decisions on the recognition of foreign states;
- appoints and dismisses heads of diplomatic missions of Ukraine to other states and to international organisations; accepts credentials and letters of recall of diplomatic representatives of foreign states.

- The executive

According to article 116 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine:

- ensures the state sovereignty and economic independence of Ukraine, the implementation of domestic and foreign policy of the State, the execution of the constitution and the laws of Ukraine, and the acts of the President of Ukraine;
- takes measures to ensure human and citizens' rights and freedoms;
- organises and ensures the implementation of the foreign economic activity of Ukraine.

In accordance with Article 15 of the *International Treaties of Ukraine Act*, the Ministry of Foreign Affairs of Ukraine is responsible for general supervision over execution of international treaties of Ukraine.

- The people

According to Article 5 of the Constitution of Ukraine, the people are the bearers of sovereignty and the only source of power in Ukraine. The people exercise power directly and through bodies of state power and bodies of local self-government.

In accordance with Article 69 of the Constitution, the expression of the will of the people is exercised through elections, referenda and other forms of direct democracy.

In accordance with Article 73 of the Constitution, issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum.

38. UNITED STATES OF AMERICA

The Judiciary and Foreign Affairs in the United States

This is a vast subject in the United States, and there have been numerous cases testing whether one branch of government or another has exceeded its constitutional powers in the area of foreign affairs. The opinion of the United States Supreme Court in *Baker v. Carr* 369 U.S. 186 (1962) summarises the extent to which the field of foreign relations is thought to raise "political questions" unsuitable for judicial resolution in the United States:

> "Foreign relations: There are sweeping statements [in previous cases] to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognisance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action [must] be regarded as of controlling importance", if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.
>
> "While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing", and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. [Still] again, though it is the executive that determines a person's status as representative of a foreign government, the executive's statements will be construed where necessary to determine the court's jurisdiction. [Similar] judicial action in the absence of a clearly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments."

Many of the most interesting court cases in the United States involve a claim that either the President or congress has exceeded the appropriate foreign affairs powers of its branch of government, and that action by the other branch is needed. In short, these are "separation of powers" or "checks and balances" cases. Some cases worth special mention are the following:

Youngstown Sheet and Tube Co. v. Sawyer [The Steel Seizure Case] 343 U.S. 579 (1952): the Supreme Court struck down as a violation of separation of powers principles President Harry Truman's seizure and operation of most of the countries' steel mills during the Korean War. President Truman argued that an impending steelworkers' strike threatened the war effort and that a variety of his powers allowed him to seize the steel mills in these circumstances. The Supreme Court ruled that the President could not act here without congress authorisation. And although the majority disagreed among themselves about the precise rationale, the case stands for the proposition that the U.S. Constitution puts significant and enforceable limits on presidential powers even in time of war.

In *Dames & Moore v. Regan* 453 U.S. 654 (1981), the Supreme Court upheld the President's suspension of claims against Iran as part of the resolution of a hostage crisis, rejecting a claim that the President had exceeded his constitutional powers.

A number of interesting cases have been brought challenging the President's use of armed forces abroad. The proper roles of Congress and President in committing such forces are deeply controversial in the United States, and particular decisions to do so are similarly controversial. During the Vietnam War, a number of cases were brought challenging the constitutionality of the President's commitment of forces there. Some lower courts held that the question was a non-justiciable political question; others held that Congress had done enough to authorise the commitment of forces. The Supreme Court never decided the questions, but some Justices dissented. Perhaps the most important point to note is that the cases were brought and were seriously considered by the courts. See, for example, *Mora v. McNamara* 389 U.S. 934 (1967).

An interesting more recent case was brought in late 1990, following Iraq's invasion of Kuwait, seeking to prevent President Bush from launching an offensive strike against Iraq without explicit congressional authorisation. In their book *Constitutional Law* (13th edition 1997), Professors Gerald Gunther and Kathleen Sullivan summarise what happened:

> "The trial court dismissed the suit for lack of "ripeness", but agreed with the major contentions in a memorandum submitted by a group of law professors: the Court stated that it had "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen could be described as a "war" within the meaning of the [Constitution]. To put it another way: the Court is not prepared to read out of the constitution the clause granting to the Congress, and to it alone, the authority 'to declare War'". *Dellums v. Bush* 752 F. Supp. 1141 (D.D.C. 1990). In the ensuing weeks, the constitutional debates intensified and, when the issue reached the floor of Congress, there was widespread agreement that congressional authorisation was necessary if the nation was to embark on offensive warfare. On January 12, 1991, Congress, by a relatively narrow margin, adopted a Joint Resolution authorising the President "to use United States Armed Forces" pursuant to the U.N. Resolution. American aerial warfare against Iraq commenced soon after; the ground war against Iraq began on Feb. 24, 1991, and ended 100 hours later."

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The following contributions by MM. Perrakis (Professor, Secretary General for European Affairs, Ministry of Foreign Affairs, Greece) and Demaret (Professor, University of Liege, Belgium) allow us to complement this study of the legal foundations of foreign policy at the national level, with an overview of the way the European Union has adopted and adapted those principles in order to respond to its own needs in the field of external policy.

The European Union's Common Foreign and Security Policy from Maastricht to Amsterdam: the slow march towards a common position for the European Union Partners - Report by Mr Stelios PERRAKIS
Professor, Secretary General for European Affairs, Ministry of Foreign Affairs, Greece

I. Introductory remarks

The sweeping changes which took place in Europe in the late 1980s and early 1990s, namely the collapse of the communist regimes, the disintegration of the USSR, German reunification, the break-up of Yugoslavia and civil war, particularly in Bosnia, the Gulf War, etc mark the advent of a new era in contemporary international relations and, in Europe especially, the emergence of a new political landscape.

What these events served to reveal was not just the European Community's/European Union's absence from the field of international initiative when it comes to managing such crises, but also its own institutional failings and the EU's functional shortcomings, not to mention the lack of a necessary, indeed indispensable element: political will to act among EU member states. There was thus an obvious and urgent need to improve the system of European Political Co-operation (EPC), which at the time operated outside the framework of the EC, at intergovernmental level, in order that the Community should be capable of forging and implementing a common foreign policy that would give it an international presence at least commensurate with its economic potential and the wishes and aspirations of its peoples.

II. The CFSP as provided for in the Treaty of Maastricht, institutional framework and results

It was quite obvious, then, that Europe needed to acquire a proper identity and a political profile, coupled with effective means of action, if it wanted to play a significant role on the international stage, based on its own choices.

In order to remedy this situation, the 1991 Treaty of Maastricht created a separate "pillar" (Title V), of an intergovernmental nature, entitled "The Common Foreign and Security Policy" (CFSP).[28] Unlike the former European co-operation between member states, as instituted by the Single European Act (Art. 30), the Treaty of Maastricht thus introduced the idea of a Common Foreign Policy for the EU partners. The Treaty aimed to transcend the weaknesses of the previous system, by endeavouring to progress from "unity of views" to "unity of action", thus providing Europe with a fully-fledged "common foreign and security policy".

Under Title V of the Treaty of Maastricht, the member states now have an obligation to seek to jointly define and implement a common foreign and security policy. In so doing, they are bound to observe certain principles and values in their international relations
(Art. J.1).

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[28] *For the CFSP see, inter alia, S. Bertelsmann, "CFSP and the Future of the European Union", Gutersloh, 1995, J. Cloos, G. Reinesch, D. Vignes and J. Weyland, "Le traité de Maastricht, Genèse, Analyse, Commentaires", second edition, 1994, Bruylant, Brussels;*

G. Edwards, "Common Foreign and Security Policy", in A. Barav, D.A. Wyatt (eds), Yearbook of European Law, Vol. 13, 1993, pp. 499-509; G. Edwards and S. Nuttall, "Common Foreign and Security Policy", in A. Duff, J. Pinder and R. Pryce (eds), "Maastricht and Beyond – Building the European Union", pp. 84-103, Routledge, London, 1994; B.C. Ryba, "La Politique Etrangère et de Sécurité Commune (PESC)", operating procedures and first-year assessment at the end of 1993/1994, Revue du Marché Commun et de l'Union Européenne, No. 384, 1–1995, pp. 14-35. For a comprehensive approach, see

M. Holland (ed), Common Foreign and Security Policy, Pinter, London, 1997.

The instruments available under the Treaty of Maastricht for implementing the CFSP are:

(a) common positions (Art. J.2) which are designed to make co-operation more systematic and better co-ordinated. The member states are expected to conform to and uphold these positions;

(b) joint actions (Art. J.3) whereby all kinds of resources (human resources, know-how, finance, hardware, etc) are to be deployed in order to achieve the objectives set by the member states.

Even though the adoption of these actions requires the unanimous approval of the Council, their precise method of implementation may be decided by a qualified majority (Art. J.3, para. 2). As for the operational expenditure arising from the CFSP, this can be charged to the budget of the European Communities and the national budgets (Art. J.11).

Title V of the EU Treaty further provides for the incorporation of matters relating to EU security in this common policy (Art. J.4 and Declaration No 30 annexed to the Treaty), including the eventual definition of a common defence policy. That means bringing in the Western European Union, as an integral part of the European Union's development in the defence sphere (Art. J.4, para. 2).

Lastly, Title V of the Treaty of Maastricht contains provisions on the institutional workings of the CFSP and provides for co-operation with the Commission, as well as consultation with and notification of the European Parliament (Arts. J.3, J.5, J.7, J.8, J.9).

Although the Treaty of Maastricht laid the initial foundations for the implementation and development of a truly common foreign policy for EU member states, thus marking an important stage in the political construction of Europe, in its first few years of operation, the CFSP failed to live up to Europeans' high expectations.[29] The structural deficiencies, namely the unanimity requirement, which sometimes makes action impossible, the lack of a proper policy-making "engine", the intergovernmental nature of the second pillar and the fear of excessive supranationalism (including the involvement of the Community institutions: the Commission and the European Parliament), have prevented the EU from making the anticipated qualitative leap, from protecting its legitimate interests to any significant extent and from embarking on any ambitious yet unifying initiatives, in order to meet the challenges of our era. In this respect, the criticisms expressed by the European Parliament, for example, are amply justified.[30]

The shortcomings of the CFSP, the EU's lack of diplomatic muscle and the inability to create within the European area a credible, specifically European system of security and defence, beyond the minimal framework afforded by the European Security and Defence Identity (ESDI) as part of Nato's Euro-Atlantic strategy, recently highlighted the EU partners' need for genuine political will and a more cohesive, and hence more effective, approach to external relations.[31]

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[29] For an overview of the implementation of the CFSP, see Ph. Willaert – C. Marqués-Ruiz, "Vers une politique étrangère et de sécurité commune: état des lieux", Revue du Marché Unique Européen, 3-1995, pp. 35-95.

[30] See the T. Spencer report of 14.4.1997 on the implementation of the CFSP in 1996 and the relevant resolution (doc. PE 220.788/A).

[31] J. Howorth-A. Menon (eds). The European Union and National Defence Policy, Routledge, London 1997.

It is interesting to note that this shift in the CFSP coincides with a significant expansion in that other area of the EU partners' external activities, namely foreign economic relations within the framework of the EC.[32]

The Treaty of Maastricht, which itself provides for the possibility of reviewing certain provisions concerning the CFSP (Art. J.10), through an intergovernmental conference which would deal, among other things, with the second pillar, raised the prospect of a solution to this unsatisfactory state of affairs.

III. The CFSP in flux - The 1996/97 intergovernmental conference and its outcome: the Treaty of Amsterdam

In the light of the above, it comes as no surprise to find among the three main topics for discussion at the IGC initiated by the Turin European Council in March 1996, the definition of a new, more cohesive and effective CFSP, with the necessary institutions and means to give the EU a different kind of international presence.[33]

It is worth noting that in its report to the Madrid European Council (December 1995), the Reflection Group made a number of proposals concerning the CFSP. They included: setting up a common foreign policy analysis and planning unit, reviewing the CFSP decision-making and financing procedures and appointing a High Representative for the CFSP. The Reflection Group further noted that the Intergovernmental Conference should look at how the European identity might be developed further, and emphasised the need to forge still closer links between the European Union and the Western European Union.

The aim from the outset of the negotiations, therefore, was, *inter alia*, to better enable the European Union to cope with the new external challenges, by providing it with a range of measures designed to improve the functioning and efficiency of the CFSP.

Accordingly, the fifteen EU member states turned their attention to the CFSP mainly during the final phase of the IGC, under the Dutch presidency (first half of 1997). From all of these difficult negotiations, and from the various texts and memoranda submitted, by certain member states (France, Germany, Greece, etc),[34] it emerges that the talks focused mainly on the institutional apparatus of the CFSP, the decision-making system, future relations between the EU and the WEU from the point of view of a European defence policy, the incorporation of new ideas in the CFSP objectives and flexibility within the CFSP.

Through the new provisions which were finally incorporated in the Treaty of Amsterdam to reflect the compromises reached, the CFSP does indeed seem to have been bolstered while the EU,

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[32] On this aspect of EC/EU activities, see B. Hocking – M. Smith, Beyond Foreign Economic Policy, Pinter, London, 1997 as well as the full analysis provided by P. Demaret in this same volume.

[33] See, for example, E. Bonnino, "La réforme de la politique étrangère et de sécurité commune: aspects institutionnels", Revue du Marché Unique Européen 3/1995, pp. 261-265; G. Burghardt, "Politique étrangère et de sécurité commune : garantir la stabilité à long terme de l'Europe", Revue du Marché Unique Européen 3/1995, pp. 267-277.

[34] See the Greek memorandum on "the development of the CFSP" including proposals on the aims, institutional means and implementation of the CFSP (CIJ doc. CONF/3861/96).

although it still does not have the necessary democratic legitimacy, has acquired better mechanisms and institutional resources with which to pursue a foreign policy.

More specifically, the new provisions of the treaty, which deal with the institutional foundations and the machinery for implementing the CFSP, are as follows:

a. Principles – objectives

Firstly, it is recognised that the Union is responsible for ensuring the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies (Art. C, para. b). The Council and the Commission are responsible for ensuring such consistency, each in accordance with its respective powers.

Secondly, the Treaty of Amsterdam provides for a significant widening of the CFSP objectives (Art. J.1), by including, for example, such principles as: the safeguarding of the independence and integrity of the Union in conformity with the principles of the United Nations Charter, the preservation of peace and the strengthening of international security, in accordance with the principles of the United Nations Charter, the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders.

The incorporation of these provisions in the new treaty – under Hellenic proposals – will enable the Union to develop policies and actions which will help to preserve the security and integrity of the Union and its member states in a more effective manner.

It is further planned to incorporate an enhanced political solidarity clause in the CFSP (Art. J.1, para. 2), to the effect that: "The member states shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".

b. Institutional apparatus and means of action

In order to pursue the objectives set out in Article J.1, the Union shall decide on common strategies and adopt joint actions and joint positions (Art. J.2). In addition, the member states shall pursue systematic co-operation in the conduct of policy while informing and consulting one another on any matter of foreign and security policy which is of general interest (Art. J.6).

As regards institutions, the European Council is formally recognised as the supreme body responsible for defining the principles of and general guidelines for the CFSP (Art. J.3, para. 1). The same body shall decide on common strategies which are recommended and implemented by the Council (of Ministers) of the EU (Art. J.3, para. 2,3).

As for the decision-making process, which used to require unanimity, it becomes a little less restrictive. The right of veto, for the adoption of fundamental decisions relating to the CFSP by the European Council and the Council of Ministers, will continue to apply. In future, however, any abstentions by members present in person or represented shall not prevent the adoption of such decisions, providing enough votes are cast in favour (Art. J.13, para. 1). In addition, by derogation from this provision, the Council shall act by qualified majority: (i) when adopting joint actions, common positions or taking any other decision on the basis of a common strategy, (ii) when adopting any decision implementing a joint action or a common position (Art. J.13, para. 2). This rule does not apply in cases where a member state cites reasons of national policy.

At an institutional level, the Secretary-General of the Council shall in future exercise the function of High Representative for the CFSP (J.8). The UE will thus be more closely identified with the outside world and there will be continuity of representation from one presidency to the next. His or her presence alongside the President-in-Office will also help to simplify the latter's task. Undoubtedly the personality of the High Representative for the CFSP will be an important factor in the success of his or her mission.

An "analysis and planning unit" is also to be set up, under the supervision of the Secretary General of the Council. The staff for this "unit" will come from the Council, the member states, the Commission and the WEU. Its job will be to examine any matter relating to the CFSP and to outline the options as regards decision-making. The creation of such a "unit" is essential for the introduction of any foreign policy worthy of the name and it is felt that it will enable the CFSP to spot problems and crises swiftly and to anticipate them.

Finally, it is planned to strengthen the role of the European Parliament in the formulation and implementation of the CFSP (consultation and information procedures, Art. J.11).

c. Defence

Even though differences of opinion about the future direction of relations between the EU and the WEU and the formulation of a defence policy have prevented the fifteen member states from making decisive moves in this area, certain provisions of the Treaty of Amsterdam indicate the beginnings of a European defence policy. Accordingly:

- The European Council has the power to define the "principles" and "general guidelines" not only for the political aspects of the CFSP (as provided for in the Treaty of Maastricht), but also for matters with defence implications (Art. J.3, para. 1).

- The objective of progressively framing a common defence policy "which might lead to a common defence, should the European Council so decide" is expressly acknowledged. It has also been decided to foster closer institutional relations between the EU and the WEU and explicit provision is made for the possibility of integrating the WEU into the Union, should the European Council so decide. That means that there will be no need to carry out a review of the treaty in order to establish a common defence (by integrating the WEU into the EU, for example) and that a simple decision by the European Council will suffice (J.7, para. 1).

- A Protocol on Art. J.7 annexed to the Treaty further provides that the EU shall draw up, together with the WEU, arrangements for enhanced co-operation between the two institutions, within a fixed time limit.

- "The Petersberg tasks" are incorporated in the treaty (Art. J.7, para. 2) as a first decisive stage on the road to a common EU defence. They comprise humanitarian and rescue tasks, peace-keeping and crisis management tasks, including peace-making.[35]

- The Union will avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications (Art. J.7 para. 3).

d. Other provisions

[35] *M. Eyskens, D. Owen and others, How can Europe Prevent Conflicts? PMI Brussels, 1997.*

Art. J.9 codifies existing provisions on the co-ordination between member states with regard to international bodies (organisations, conferences, etc). Similarly, Art. J.10 incorporates the clause on co-operation between the diplomatic and consular authorities of the fifteen member states and Community delegations in third countries.

IV. The CFSP and the international rules governing the legal foundations of States' foreign policy

In the light of the above considerations, and allowing for the special nature of the activities of the CFSP, derived as it now is from an intergovernmental body which is in a state of flux and hence different in character from a State in the international order, it is important to evaluate the legal foundations of EU member states' foreign policy.

It thus seems, particularly through the objectives set out in Art. J.1 and other provisions, that when it comes to determining its broad lines, at least in terms of stated intentions, the EU's CFSP is influenced by the existence of rules of international law. The implementation of this policy must therefore be aligned with the rules and principles of the United Nations Charter, for example, or the 1990 Paris Charter of the OSCE. The values of democracy, the rule of law and respect for human rights must also be central to the EU's activities.

The lack of democracy in the formulation and conduct of the CFSP, as provided for in the Treaty of Amsterdam, remains considerable, moreover, as the various levels of European Parliament intervention (Art. J.11) hardly amount to a proper legislative presence or effective political control of the EU executive.

V. Conclusions

The risk of crisis in neighbouring regions of the European Union has perceptibly increased in recent years and that Europe is facing an extremely volatile environment.[36] It is thus essential that the EU should present a united front in every area, that it should move beyond the stage of verbal diplomacy and react swiftly and effectively whenever a crisis occurs. With the reforms set out in the Treaty of Amsterdam, the CFSP system has been significantly strengthened and improved. The CFSP has been endowed with proper resources and capabilities that will enable it to respond to the challenges and problems facing Europe today. As a result, the EU would appear to be better equipped to act on the international front. The amendments/improvements provided for in the Treaty of Amsterdam, moreover, do not take the CFSP into the realms of supranational co-operation of the sort favoured by the first pillar, but rather retain the principle of intergovernmental co-operation.

Clearly the most important thing for the success of the CFSP today, however, is that the member states should have the political will to sketch out and implement a common foreign policy with some degree of continuity and consistency.

In addition, the development and implementation of the CFSP require the active support of European public opinion. The citizens of the European Union must therefore be informed about the objectives, functioning and outcomes of the CFSP, as well as the problems, challenges and dangers which the EU is facing and which it must learn to manage through the CFSP. The intervention of both national parliaments and the European Parliament would seem to be crucial in this respect.

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[36] *O. Tunander, P. Baev, V. Einagel (eds), Geopolitics in post-wall Europe, Sage, London, 1997.*

External Policy of the European Community - Report by Paul DEMARET
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he following paper consists of five parts. In the first part, we consider what is meant by the terms "European Community" and "European Union". In the second part, we make the point that there is not so much an EC external policy as a Community aspect to the external policy pursued by the TEuropean Union. In the third and largest part, we catalogue the various means on which the European Union can draw, under the EC treaty, to make its views known to third countries. The emphasis here is on institutions. In the fourth part, we observe that the member states rarely allow the European Community to speak with one voice on the international stage. In the fifth part, we identify some of the key features of the external policy, which the European Union pursues through the European Community on the basis of the EC treaty.

I. European Community and European Union

The concept of a European Union was created by the Treaty of Maastricht. It is additional to, but does not supplant, the concept of the European Community (previously known as the European Economic Community). Since Maastricht, there has been frequent uncertainty over which term to use, European Community or European Union. Nowadays – particularly outside Europe – the "European Union" is often used as though it was more or less synonymous with "European Community".

Strictly speaking, the "European Union" is both broader and less precise than "European Community". The European Union comprises three pillars. The first pillar consists of the treaty establishing the European Community (EC), the ECSC treaty and the Euratom treaty. From the point of view of their implementation, these treaties are characterised by the role played by supranational institutions and mechanisms. European economic integration, including monetary union, is developing on the basis of the EC treaty. The second and third pillars are concerned with external policy and common security policy and legal and internal affairs respectively. Up until now, their implementation has depended mainly on intergovernmental co-operation. Under the draft revision of the treaty on European Union negotiated in Amsterdam, however, it is planned to introduce an element of "Community method" (on a flexible, variable-geometry basis) into the third pillar.

Depending on the context in which it appears, the term "European Union" can mean either the European Community (which is merely one element of it, however), or the member states acting on the basis of the second or third pillar, or the Community and its member states whenever they act in unison, the first on the basis of the EC treaty, the second on an intergovernmental basis. This latter situation frequently arises in the field of foreign relations (cf. point IV below).

The European Community has legal personality (see Article 210 of the EC treaty) and capacity to take on international obligations. That is not the case with the European Union. Under the draft revision of the treaty on European Union negotiated in Amsterdam, however, the Council, in sectors covered by the second and third pillars, could conclude international agreements on behalf of the European Union.

II. External policy of the Community or the Community aspect of the external policy pursued by the European Union?

If by external policy we mean foreign policy, covering in particular security and defence matters, the European Community as such does not have an external policy. Only the European Union, i.e. the member states acting in areas covered by the second pillar, pursues or rather – one might be tempted to say – attempts to pursue a foreign policy.

The notion of external policy, however, can also be understood more broadly to encompass, in addition to foreign policy in the traditional sense of the term, the policy pursued vis-à-vis third countries in the commercial, economic, monetary or environmental sphere. From this point of view, the European Community can be said to have an external policy. Within the field of competence assigned to it, it endeavours to promote or to protect the interests of its member states and their populations, and the political values, which they share.

Rather than to external policy of the European Community, however, it is more appropriate to refer to the Community aspect of European Union external policy. The fact is that it is difficult, even artificial, to separate European Union external policy, seen in intergovernmental terms, from external policy of the European Community per se, for a number of reasons.

The first is institutional. The decision-making body for the second pillar and intergovernmental co-operation, as under the terms of the EC treaty, is the Council, made up of representatives of the member states.

The second reason has to do with the fact that at its present stage of political integration, the European Union is not equipped to pursue a foreign policy in the normal sense of the term. It is patently obvious that in times of international crisis, the European Union, acting within an intergovernmental framework, finds it difficult to react swiftly and consistently. There is no single authority, such as the President of the United States, who is empowered to or could legitimately today take decisions on its behalf. Nor does the European Union have the capacity – yet at any rate – to single-handedly deploy a full-scale external task force. The Gulf War and the Yugoslav crisis proved this. In the commercial and economic sphere, however, the European Union, acting through the European Community, is more capable of pursuing an external policy. The completion of monetary union should lead to greater consistency on the external economic front and augment the role played by the European Union in international relations.

Since the end of the Cold War, furthermore, defence and security matters (as seen from the military point of view) have featured less prominently in international relations, whereas commercial and economic matters have become more important. And, moreover, are often dealt with in such a way as to accommodate political considerations: ensuring the stability of neighbouring states, minimising the risk of migration flows, or even promoting democracy and respect for fundamental rights. The external policy of the United States is a case in point. Here, the liberalisation of trade (in the wide sense of the term) and harmonisation of competition conditions at multilateral level (WTO, OECD) and regional level (NAFTA, APEC) have assumed major importance since the late 1980s. The same can be said, *mutatis mutandis*, for the European Union.

Nowadays, therefore, external policy of the European Union largely finds expression within the institutional framework of the EC treaty, which ensures a measure of consistency and effectiveness. The EU's external policy, at least in its most visible manifestations at international level, is seldom deployed within a purely Community framework, however. When it comes to conducting the European Union's external relations, the Community method and the intergovernmental method are often combined. Apart from the advantages this affords in terms of legal technique, there is a political explanation for this. The member states, or most of them at any rate, no doubt recognise the benefit of using the Community instrument to inject some consistency and effectiveness into the European

Union's external activities. That is not to say, however, that they are prepared to be eclipsed by the Community or to take a backseat in international affairs. Added to this is the fact that, in the intergovernmental sphere, normally each state must give its approval whereas in the Community context the qualified-majority rule often applies.

The draft treaty negotiated in Amsterdam, while it allows the Council to give the Community greater powers in the commercial sphere, should not make any basic difference to the hybrid system which currently governs the European Union's external relations.

III. The EC treaty and external relations

We will begin by looking, in some detail, at the institutional framework before moving on, very briefly, to the actual instruments provided by the EC treaty for conducting the EU's external relations.

A. The institutional framework

We will deal in turn with the external responsibilities currently vested in the European Community, the various bodies and procedures involved in conducting the Community's external relations and the relationship between the Community legal system and international law.

1. The external competences of the European Community

1.1. Gradual development of the Community's external competences

In its original version, the EEC treaty did not go into much detail about the external dimension of the common market. It mainly provided for the introduction of a commercial policy for goods (Article 113) and allowed the Community to conclude association agreements with third states (Article 238). The case-law of the Court of Justice has offset this, however, by establishing the doctrine of implicit competence (see in particular the AETR judgement given in 1971 and opinion 1/76.)

The Single European Act explicitly conferred on the Community the capacity to conclude agreements with third countries in respect of the environment (Article 130r § 4) and research (Article 130m).

Since the Maastricht treaty, the Community has had express competence to impose economic sanctions on third countries (Articles 228A and 73F), to decide which third countries' nationals require a visa and to conclude agreements on development co-operation (Article 130YC. The Community was also granted power to take measures affecting external movement of capital (see Articles 73C and 73fFand compare with Article 73B § 2), as well as power to co-operate with third states in various areas in which the Community has a degree of internal competence (see Articles 126 § 3, 127 § 3, 128 § 3, 129 § 3 and 129c § 3 concerning education, vocational training, culture, health and trans-European networks respectively).

The most significant provision introduced into the EC treaty by the Maastricht treaty concerning external relations is not yet in force. It is Article 109, which specifies the competences of the Community and of its different organs with regard to international monetary relations once the Euro has been introduced.

Although in some sectors the Maastricht Treaty supplemented the external machinery of the EC treaty, it also trimmed the former EEC treaty: Article 116 of the EEC treaty, concerning international

organisations of an economic character and common positions to be adopted by the member states within them, was repealed.

The draft revised treaty on European Union negotiated in Amsterdam in June 1997 allows for the possibility of extending the scope of Article 113 on commercial policy. It also transfers certain matters relating to movement of individuals from the third pillar to the EC treaty, which will include a new title, "Visas, asylum, immigration and other policies related to movement of persons". This transfer should extend the Community's external competences: the new title will require the Council to adopt measures concerning the crossing of external borders, movement within the Community by nationals of third states and the right to asylum and immigration. Articles 100C and 100D of the present EC treaty will be repealed insofar as their content is taken over by the new title.

We shall now consider the Community's capacity to conclude international agreements, making a distinction between explicit and implicit competence.

1.2. Explicit external competence

1.2.1. Conclusion of trade agreements: the case of the Uruguay Round agreements

Under Article 113, the Community has competence to conclude trade agreements. The Court of Justice has ruled that, within the scope of Article 113, the Community has exclusive competence to act, *ab initio* (see opinions 1/75, 1/78 and 1/94). In principle, the member states as such, can therefore no longer take action, either individually or collectively, in the area of commercial policy.[37] Recognition of the Community's exclusive external competence in this connection explains the debate surrounding the scope of the concept of commercial policy, especially during conclusion of the Uruguay Round and the setting up of the World Trade Organisation (WTO).

Until 1994, Article 113 was used mainly for the adoption of measures directly affecting trade in goods. However, it had been suggested that the concept of commercial policy within the meaning of Article 113 could and should be extended to include trade in services, investment and even intellectual property. Insofar as the Community had exclusive competence to act on the basis of Article 113, such an interpretation of the concept of commercial policy would have helped to ensure external Community consistency and coherence of the internal market. This was basically the position adopted by the Commission in the debate leading up to conclusion of the Uruguay Round agreements. These were concerned not only with goods, but also with trade in services (and, indirectly, investment) and protection of intellectual property. In the Commission's view, all the agreements came within the exclusive purview of the Community and therefore it alone was empowered to conclude them and deal with third states. For their part, the Council and most of the member states took the view that only the agreements on trade in goods could be concluded on the basis of Article 113 and thus by the Community alone. The conclusion of other agreements was not a matter for the Community alone and, in the opinion of the Council and most of the member states, necessitated the member states' participation.

When called upon to settle the matter, the Court of Justice, in opinion 1/94, opted for a middle course, but one whose outcome was closer to the Council's argument than to that of the Commission. It ruled that, as well as trade in goods, Article 113 covered trade in services insofar as they did not require movement of individuals or the establishment of a commercial presence in the territory of the state in which the service was provided. Conversely, however, it held that neither

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[37] *Subject to the doctrine of delegation or specific authorisation within the meaning of the Donckerwolcke judgement of 1976 and the Bulk Oil judgement of 1986.*

trade in services requiring such movement or establishment of a commercial presence nor protection of intellectual property (other than action to combat trade in counterfeit products) came within the scope of Article 113 and of commercial policy. These matters might nonetheless have come within the Community's purview in that it could have claimed implicit competence based on the concept of "pre-emption".[38] It would have had to prove, however, that its internal legislative activity in the sectors in question had been sufficient to preclude any external action by the member states thereafter. The view taken by the Court of Justice was that the Community had as yet only partially "occupied" or "regulated" the sectors in question. The Uruguay Round agreements concerning services and intellectual property consequently had to be concluded by the Community and the member states, the former having jurisdiction over one part and the latter over the rest. As a result of opinion 1/94, the member states acted as such at the conclusion of the Uruguay Round agreements and joined the WTO alongside the Community.

The Court of Justice subsequently confirmed this fairly narrow interpretation of the concept of commercial policy in opinion 2/92. That opinion concerned the respective competence of the Community and its member states to participate in the OECD decision on direct foreign investment and national treatment. Once again, the Court of Justice ruled that the Community had only partial competence to conclude the agreement and that the member states' participation was therefore essential.

The draft revised treaty on European Union negotiated in Amsterdam in June 1997 allows extension of the scope of Article 113 to include agreements on services (such as the GATS) or intellectual property (such as the TRIPs agreement). However, such extensions would be decided on case by case, depending each time on a unanimous decision by the Council. This would give Article 113 variable scope supervised by the member states with regard to everything other than goods, and than services not entailing movement of persons.

1.2.2. Conclusion of association agreements

The Community has competence to conclude association agreements within the meaning of Article 238. The Lomé agreements, the agreement with Turkey, the agreements with central and eastern European countries and the agreement setting up a European Economic Area (EEA) are all based on Article 238.

In its Demirel judgement of 1987, the Court of Justice stated that Article 238 gave the Community jurisdiction to deal with third countries in all matters covered by the EC treaty, including movement of workers. However, association agreements have generally been concluded on a joint basis, that is, by the Community and its member states.

1.2.3. Conclusion of agreements on environment, research and development co-operation

In these areas, the Community has express competence to conclude agreements with third countries (subject to compliance with the principle of subsidiarity). However, the EC treaty clearly states that it does not have exclusive competence here: in principle, the member states remain competent to

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[38] *In the event of Community "pre-emption", the Community acquires sole competence ipso facto. However, this type of sole competence is different to that which the Community is accepted as having in commercial policy. The latter competence exists ab initio, is not subject to prior legislative activity by the Community, and is therefore even less dependent on the degree of such activity.*

conclude agreements with third states in these areas. They only lose this concurrent power insofar as there is an effect of Community "pre-emption". A member state cannot conclude an agreement whose subject matter would interfere with the content of a measure already adopted by the Community (that is, a regulation or directive or an agreement already concluded by the Community).

Where there has not been any Community "pre-emption", there are three possibilities:

- the Community concludes the agreement on its own (see CJ judgement, Portugal v. Council of 3 December 1996, concerning the agreement with India based on Article 130y);[39]

- all the member states, or some of the member states, or one member state conclude(s) the agreement;

- the Community and the member states conclude the agreement on a joint basis.

The approach taken in a given case will depend primarily on the majority system operating within the Council. If it is possible for a minority of member states to block a measure, they can, if they wish, either prevent the conclusion of an agreement by the Community or demand that the member states participate alongside the Community.

International agreements on environmental protection such as the Vienna Convention on the Protection of the Ozone Layer, the Montreal Protocol and the Basle Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal have thus been concluded by the Community and its member states.

1.3 Implicit external competences

In those areas where the EC treaty does not expressly grant it the authority to conclude agreements with third countries, the Community may nevertheless invoke the doctrine of implicit external competence. This doctrine, instituted by the AETR judgement, 1971, is based on the idea that there should be a parallelism between internal and external competence. When the Community has an explicit internal competence[40] (such as the power to legislate regarding the internal market, under Articles 100 and 100a) and has exercised this competence, it thereby becomes competent to conclude an agreement with third countries on the matter dealt with by Community legislation. The external competences of the Community may therefore increase in parallel to acquisition of internal competences. The Community may even become exclusively competent on an external matter if the content of previously adopted Community measures is such that any external intervention by member

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[39] *Requiring internal legislative activity on the part of the Community as a basis for its competence to conclude an external agreement, as has sometimes been the case, does not seem justified where the Community has express external competence. The exercise of internal competence is usually necessary, however, as the basis for an implicit external competence (see below).*

[40] *The concept of internal competence is somewhat ambiguous here: the "internal competence" invoked as a basis for Community authority to conclude an external agreement is sometimes a competence enabling the Community to take autonomous measures affecting external relations. This situation arose in the AETR case (see Article 75 (1)a of the EC treaty). Strictly speaking, it would be more correct to refer to a Community competence to act autonomously than an internal competence. However, we have followed the established practice.*

states is ruled out. This is an application of the concept of Community "pre-emption". It follows that the demarcation of the respective competences of the Community and the member states with regard to external issues may change over time.

Logically, the doctrine of implicit competence should extend to the situation where Community rules with external implications have been established by the EC treaty itself rather than by derived law (a regulation or directive).

The various situations which may arise from this doctrine, together with the main cases to which it applies, are grouped below:

1) Implicit external competence, resulting from the EC treaty or an act of accession. In the Kramer (1976) and Commission v. United Kingdom (5 May 1981) judgements, the Court of Justice held that Article 102 of the Act of Accession of Denmark, Ireland and the United Kingdom conferred exclusive competence on the Community as of 1 January 1979 in the fisheries and conservation of marine resources sector. In my opinion the same conclusion should be drawn from Articles 73b onwards in the EC treaty. Since these articles establish uniform rules on movement of capital, including relations with third countries, only the Community should be competent to conclude agreements on the subject with third countries. Judging by its recent practice, however, it would appear that the Council does not share this view.

2) Implicit external competence resulting from an internal competence conferred by the treaty and exercised by the Community by adoption of derived legal measures. This eventuality, which was present in the AETR case, at least three variants:

- The existence of Community legislation which is exhaustive and therefore excludes the possibility of any further external action by member states in the sector covered. As a result of "pre-emption", the member states are no longer "competent" (although they were before) and the Community now has exclusive competence. Examples might include certain areas covered by ILO Convention 170 (see opinion 2/91), GATS and the Trip's agreement (see opinion 1/94) and the OECD Third Decision on national treatment of foreign investment (see opinion 2/92).

- The existence of Community legislation whose subject matter coincides with that of an external agreement, but which consists only of a set of minimum standards, or which leaves room for action by member states. In this case, the Community has become competent to participate in concluding the agreement, but not exclusively: the states are still competent to take part in its conclusion. Two of the areas covered by ILO Convention 170 (see opinion 1/91) are an example. See also the Kramer judgement (1976), where the Court of Justice made it clear that during the transition period provided for in the Act of Accession, due to end in 1979, the Community already had authority to enter into international commitments relating to fisheries and conservation of marine resources, but was not yet able to exclude the member states.

- The existence of basically internal Community legislation that includes accessory "external clauses", which either refer to treatment of nationals of third countries or explicitly delegate power to the Community to negotiate on certain matters[41] with third states. As a result of such clauses, the Community acquires sole competence to conclude agreements with third states on the matters with which the clauses are concerned. The external clauses in the Second Banking Directive on mutual recognition of bank subsidiaries (see opinion 1/94) are an example of this.

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[41] *In such cases, the Community's external competence is "implicit" in terms of the EC treaty but "explicit" with regard to the secondary legislation.*

3) Implicit external competence resulting from an internal competence that has not yet been exercised, in cases where an external agreement is essential to decide an internal question. This was the situation contemplated by the Court of Justice in opinion 1/76. The problem of overcapacity of the Rhine transport fleet required the conclusion of an agreement with Switzerland, since an autonomous Community measure would not have sufficed. It should be noted that while the AETR case-law has been frequently applied, opinion 1/76, extending the doctrine of implicit external competence to encompass cases other than prior exercise of an internal competence, has not been followed in practice. It was restrictively interpreted by the Court of Justice in its opinion 1/94 on the conclusion of the Uruguay Round.

1.4 Exclusive external competences

The above description of the Community's external competences shows them to be fragmentary, even incomplete, but also to be evolving. To conclude this description, it might be useful to group together the instances where the Community has exclusive competence in external affairs. Essentially, there are three of them:

- The subject matter comes within the field of commercial policy as defined in Article 113 (trade in goods and services not involving the movement of persons);

- The subject matter is covered by another provision, explicitly conferring external competence on the Community, and the Community has adopted measures which have had a pre-emption effect;

- The subject matter is covered by a provision explicitly conferring internal competence on the Community, and this competence has been exercised sufficiently to create an effect of pre-emption.

1.5 External competences retained by the member states

An overall picture of the competences retained by member states emerges from the above description of the Community's external competences. There are four variants.

Firstly, the member states alone have authority to conclude agreements on subjects that are outside the scope of the EC treaty (e.g. criminal or military affairs).

Secondly, the member states provisionally retain sole competence if an agreement deals with matters covered only by internal competences of the Community, and if in fact these competences have not actually been exercised by it: in opinions 1/94 and 2/92, this was held to apply to certain areas covered by GATS, the Trip's agreement and the OECD Third Decision (see paras. 106-109 of opinion 1/94 and paras. 34 and 35 of the OECD opinion).

Thirdly, the member states retain the right to conclude agreements, jointly, individually or alongside the Community, in those areas where the Community has non-exclusive explicit competence, as long as internally or externally originating "pre-emption" has not occurred. This is also true when the Community has implicit external competence based on an internal competence that has been exercised but which does not exclude action by member states. The Court of Justice held that this applied to two parts of ILO Convention 170 (opinion 2/91).

Fourthly, member states have in principle lost all authority to conclude agreements with third states in areas covered by the EC treaty, for which the Community enjoys exclusive competence, either *ab initio* or through the developing "acquis communitaire".

2. The competent bodies and the applicable procedures when an international agreement is concluded by the Community

Under Article 113, negotiation of trade agreements with third countries is carried out by the Commission, and the decision to sign is taken by the Council, by qualified majority. When the Commission decides that it would be appropriate to negotiate a trade agreement, it submits recommendations to the Council, which then authorises it to open negotiations. These are conducted by the Commission on the basis of Council directives in consultation with a special committee (known as Committee 113) which is appointed by the Council and is made up of representatives of the member states. This procedure was followed for the Uruguay Round, the Council having stated at the outset that bringing in Committee 113 did not prejudge the legal basis for concluding the agreements.

Article 228 provides for using a procedure similar to the Article 113 one for conclusion by the Community of other international agreements. Here too, the Council, in principle, decides by qualified majority. However, Council unanimity is sometimes required for agreements on matters such as taxation that require unanimity when being dealt with internally. Agreements on development co-operation may be concluded by a qualified majority under Article 130y as long as they establish only a general framework for co-operation. When special measures are taken within that framework on matters such as culture or the movement of goods, the provisions and procedures specific to these matters are applicable (see the Court of Justice judgement in Portugal v. Council, 3 December 1996, with regard to the EC-India agreement).

The EC treaty gives no explicit role to the European Parliament in concluding trade agreements that are based on Article 113. On the other hand, association agreements based on Article 238 can be concluded only with the assent of Parliament. In addition, Article 228 (3), section 2E, states that Parliamentary approval is required for international agreements that establish a special institutional framework by laying down co-operation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of a Community act under the co-decision procedure (that is, that required the assent of Parliament). It is self-evident that Parliament now supports a narrow interpretation of Article 113 and a wide interpretation of Article 228 (3), section 2E.

Since Parliament is not involved in the negotiation of international agreements, its influence on their content remains limited. Nevertheless, it has threatened to use its right of veto, and has in some instances done so, to block the conclusion of agreements with third states which it considered did not protect human rights sufficiently. It has also used its powers to put pressure on Israel with regard to the rules governing export of Palestinian agricultural products.

The role of the Court of Justice is described below.

3. The Community's legal system and international law

International agreements signed by the Community have a dual nature: they form part of international law but, from a Community point of view, they are also acts of the Community institutions. As such, they can be interpreted by the Court of Justice (Article 177), which also has jurisdiction to review their legality (Article 173). Finally, the Commission can ensure that the member states comply with such agreements by bringing alleged infringements before the Court of Justice (Article 169).

3.1. Interpretation of international agreements

The Court of Justice's interpretation of international agreements signed by the Community helps to ensure consistency of external Community action and coherence of the internal market. The 1947 GATT was signed by the member states rather than by the Community, which did not exist at the time. However, the Court of Justice decided that, under the terms of Article 177, it was competent to interpret the 1947 GATT insofar as the agreement could affect the Community's legal system (see SPI-Michelin judgement, 1983).

With regard to the way in which the Court of Justice interprets the provisions of international agreements, see section 3.4 below.

3.2 Compatibility of international agreements with the EC treaty

International agreements negotiated by the Community and the way they are concluded must conform to the EC treaty and what might be described as the Community's constitutional order (see Article 228 (6)). For this reason, the Court of Justice declared void the Commission decision "concluding" an agreement with the United States on competition rules since the Council was the only institution with the power to enter into such an agreement (see France v. Commission judgement, 9 August 1994).[42] Similarly, at the European Parliament's request, the Court annulled the Council's decision to conclude on the sole basis of Article 113 an agreement with the United States on government procurement (see Parliament v. Council, 7 March 1996). However, the EC treaty makes provision for a preventive procedure designed to avert such outcomes, which are an embarrassment to the Community in its international relations. Article 228 (6) provides that the Council, the Commission or a member state[43] may obtain the opinion of the Court of Justice as to whether an agreement which the Community intends to sign is compatible with the provisions of the EC treaty. Where the opinion of the Court of Justice is adverse, the agreement, unless it is amended, may enter into force only if the EC treaty itself is modified.

This preventive procedure has been used several times and has given rise to a series of Court of Justice opinions, some of which have already been mentioned. Many requests have concerned the Community's competence to sign an agreement, either independently or jointly with the member states, and identification of the appropriate legal basis: see opinions 1/75, 1/78, 2/91, 1/94, 2/92 and 2/94, the last of which deals with accession to the European Convention on Human Rights. However, some requests have challenged the actual compatibility of the content of a proposed international agreement with the "Community constitution": see opinions 1/76, 1/91 and 1/92, the last two of which relate to compatibility with the EC treaty of the institutional structure laid down in the draft agreement to set up the EEA. In opinions 1/76 and 1/91, the Court of Justice held that the planned agreements would infringe the Community "constitution", in particular its legal system.

Clearly, the preventive procedure provided for in Article 228 (6) can only do its job if the Court of Justice delivers its opinion in good time, before the agreement is signed by the Community. When asked to rule on the respective powers of the Community and of the member states to sign the Uruguay Round Agreements, the Court of Justice acted quickly. Having received the Commission's request for an opinion at the beginning of April 1994, it delivered a very detailed opinion in mid-

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[42] *Interestingly, the agreement to limit import of Japanese cars into Europe was signed with Japan not by the Council, but by the Commission. No member states protested about this.*

[43] *It is slightly surprising that Article 228 (6) does not mention the Parliament when the Parliament can request that a decision be set aside if it concerns a decision to conclude an international agreement which infringes its prerogatives.*

November 1994. Although the case was relatively complex and the case files voluminous, the court had clearly organised its work so that the Community would be able to sign the Uruguay Round Agreements before 1 January 1995 and thus avoid losing face on the international stage.

However, the Court of Justice acted quite differently in the case concerning compatibility of the framework agreement on bananas which the Community negotiated with Colombia, Costa Rica, Nicaragua and Venezuela at the end of the Uruguay Round. Despite reservations expressed by Germany and other member states, the agreement was included in the list of obligations entered into by the Community at the conclusion of the Uruguay Round. In July 1994, Germany asked the Court of Justice for an opinion on the agreement's compatibility with the EC treaty. On 22 December 1994, the Council decided to sign the Uruguay Round Agreements on the Community's behalf (and subject to the Community's competences). The appendices included the banana agreement. On 13 December 1995, the Court of Justice delivered opinion 3/94, in which it ruled that Germany's request for an opinion was inadmissible because it had no subject-matter, the Community having since signed the agreement. This is not the place to discuss in detail the relevance of the arguments put forward by the Court of Justice to justify its ruling of inadmissibility. However, it may be wondered whether the Court of Justice did not deliberately wait until it was no longer necessary to take a stand on an issue - the banana import rules - which was causing the Community problems. The difficulties were not just internal, with major differences of opinion between Germany on one side and France, Spain, Italy and the United Kingdom on the other; they were also external, resulting from the Community's desire to protect producers from the ACP countries and due to complaints filed with the GATT authorities by various South American banana-producing countries. Unless of course, having previously rejected Germany's challenge to the 1993 Community Regulation establishing the banana import rules, the Court of Justice considered that it had already made its position sufficiently clear…?

However, the court told Germany that it could have challenged the Council's decision of 22 December 1994 to sign the Uruguay Round Agreements by submitting a request for urgent interim measures. In other words, the court was advocating a procedure which, in the case of the Uruguay Round Agreements, would probably have given rise to the same international difficulties that the procedure set out in Article 228 (6) was designed to prevent. Maybe it ought to be possible to request interim measures as part of the preventive procedure itself.

Nevertheless, opinions 1/94 and 3/94 have something in common. The Court of Justice, through its quick action in the first case and its slow response in the second, eased the Community's international relations.

3.3. Supervision of member states' compliance with agreements signed by the Community

Insofar as an agreement signed by the Community is considered to be an act of a Community institution, member states' compliance with such agreements can be secured through Article 169 and the procedure for bringing actions for alleged infringements. This is basically just a counterpart of the Community's international liability. However, in bringing an action against a member state before the Court of Justice for breach of an agreement that the Community has signed, it can be argued that the Community recognises its own non-compliance with that agreement. A Court of Justice finding of infringement may in practice have the disadvantage of weakening the Community's position internationally, especially if a dispute-settling procedure is under way. Maybe this explains why the Commission has only very rarely taken proceedings over a member state's failure to comply with an international agreement signed by the Community (however, see the Commission v. Germany case

concerning the International Dairy Agreement, which gave rise to the Court of Justice's judgement of 10 September 1996).

3.4. Primacy of international law

The Court of Justice has always recognised the primacy of international law over Community law. However, this general rule has to be qualified in two respects.

Firstly, as mentioned above, international agreements negotiated or signed by the Community must be compatible with the Community's legal system.

Secondly, the Court of Justice does not necessarily accord the same force to provisions of the EC treaty as to identical or similar provisions contained in international agreements by which the Community is bound, such as association agreements, free trade agreements or the GATT. There are major differences both with regard to whether such provisions can be relied on under Community law and in terms of their substantive content. As far as external agreements are concerned, the Court of Justice does not necessarily follow its "internal" case-law, which seeks wherever possible to promote free trade and free movement of persons. To put it simply, it could be said that the closer the political and institutional ties between the Community and non-member states, the more likely it is that the provisions of an external agreement will be interpreted in the same way as the EC treaty. There are underlying considerations of reciprocity here. A number of examples are given below.

With regard to the GATT, see in particular the International Fruit (1971) and Germany v. Council (Bananas) (1994) judgements, which should be compared with Fediol III (1989), Nakajima (1991) and N.M.B.(1992).

With regard to association agreements with ACP countries and trade in goods, see the Bresciani (1976) and Chiquita (1995) judgements; for a case involving the association agreement with Greece and trade in goods, see Pabst & Richarz (1982).

With regard to the association agreement with Turkey and free movement of employed workers, see the Demirel (1987) judgement and compare it with the Bahia Kziber (1991) judgement concerning equal treatment of North African workers and their families in accordance with co-operation agreements with the Maghreb countries.

With regard to the 1973 free trade agreements with the EFTA countries and trade in goods, see the Polydor (1982), Kupferberg (1982) and Metalsa (1993) judgements, which should be compared with the Legros (1992), Commission v. Italy (nematode larval(1993) and Eurim-Pharm (1993) judgements.

With regard to the interpretation of the agreement to set up the EEA, see the Opel Austria judgement of the EC's Court of First Instance (22 January 1997).

B. Material resources

The European Community provides not only an institutional framework, but also material resources for the European Union's external policy: its market and its budget.

The principal means by which the European Union exerts influence over non-member countries is undoubtedly through the Common Market (or internal market) established under the EC treaty. Owing to its size, this market gives the European Union considerable leverage over third countries,

leverage which is one of the basic forces for European integration. An examination of Community instruments in the foreign policy sphere and the agreements it has entered into with third countries reveals that a large number of them are concerned, "actually or potentially, directly or indirectly" (the formula used in the Dassonville judgement), with access to the Community's market. This is true for goods, services, investment, capital and even people.

The European Union opens up, or offers to open up, the Community's market in a flexible manner so that, separately or simultaneously, European economic interests are protected or promoted, the development of non-member states is encouraged and European values and political ideas are spread. Illustrations of this can be found in the multilateral negotiations of the Uruguay Round and the setting up of the WTO, the numerous preferential agreements that have been entered into, the system of generalised preferences, measures concerning trade expenditure, measures to open up external markets, the imposition of economic sanctions, and measures to protect human rights, the environment or those working outside the European Union. In each case, the European Union's influence is linked to its market and the possibility of access to it for third countries and their firms. The Boeing-McDonnell Douglas merger is a case in point; the Commission was in a position to influence the merger basically because it was able to take measures calculated to restrict Boeing's sales in Europe.

In addition to its market, the Community has a budget through which it can either provide direct financial aid to third countries or guarantee investment financed wholly or in part by the European Investment Bank. Compared with the budgets of large states, the Community's budget may not appear very large. Nevertheless, it allows the Community and the European Union to carry out important initiatives in a number of developing countries, particularly when financial aid provided by the Community is supplemented by financial aid from the member states.

IV. The mixture of "Community" and "intergovernmental" influence in the European Union's external policy

As we noted earlier (see section III.1), the European Community has a range of powers enabling it to take action externally. It has used these powers to adopt measures on an autonomous basis and enter into international agreements. However, it is interesting to note that the European Community seldom has dealings with non-member states on its own. In fact, the Union's external policy is typically a mixture in which the Community ingredient no doubt predominates but an intergovernmental component is frequently present.

I shall now outline, without claiming to be exhaustive, some of the cases where Community action is subordinate to a decision taken at intergovernmental level. I shall then discuss the practice of "mixed measures" (autonomous measures or agreements), in which member states are involved individually alongside the Community in dealings with third countries.

A Subordination of Community action to a decision taken at intergovernmental level

There are at least two cases where Community external action must be subordinated to a political agreement between member states in a matter covered by the second pillar. These are the imposition of economic sanctions and the monitoring of exports of dual-use (civilian and military) goods. In these cases, foreign policy, for purposes of the second pillar, and trade are inextricably linked, since the purpose of the measures is political and they are concerned, in practice, with trade. However, in other cases, action initiated by the Community or its organs may be influenced or even dictated by member states acting at intergovernmental level.

1. Economic sanctions

Economic sanctions were first imposed by the Community in the early 1980s against the USSR, following the coup d'état in Poland, and against Argentina during the Falklands war. Later, economic sanctions were imposed against South Africa, Iraq, Libya, Serbia and Montenegro. Until the Maastricht Treaty, decisions to impose sanctions were taken under the heading of "political co-operation" and implemented on the basis of the EC treaty, usually by means of a Council regulation under Article 113. This provision ensured that sanctions were uniform and effective. The Maastricht Treaty codified previous practice and widened the possible scope of sanctions. They may now apply to all "economic relations" (Article 228A), including financial relations (Article 73 G). Under the EC treaty, a qualified majority is required for sanctions to be imposed. However, the initial political decision under the second pillar requires a unanimous vote from member states. Hence intergovernmental influence predominates in this instance. For example, the Commission has revealed that one state only gave its political assent to imposing sanctions against Haiti on condition that the measures to be taken under the EC treaty were not of a financial nature.

2. Monitoring exports of dual-use goods

Completion of the internal market brought about the abolition of goods controls at internal Community borders. This made it essential to establish Community rules governing the export of goods intended for civilian and military use. Unlike goods for military use alone, which are not governed by the EC treaty (see Article 223), dual-use goods are subject to the treaty, but their circulation may be restricted by member states for reasons of public security (see Article 36).

Community rules on the matter were established under Article 113 and came into force in 1995. Nevertheless, in this instance too, Community regulations are purely instrumental and decisions are primarily intergovernmental: both the list of third countries concerned and the list of goods subject to monitoring of exports are drawn up on the basis of Article J.3 of the European Union treaty (the "second pillar").

3. Policy on visas

Under Article 100 C, it is the responsibility of the Council to determine, on behalf of the Community, the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. Nevertheless, a co-ordination committee set up under the third pillar of the treaty (co-operation in legal and internal affairs) helps the Council with preparation of its work. In addition, the Commission, which, under the EC treaty, has, in principle, sole power of proposal, is in this instance required to "examine any request made by a Member State that it submit a proposal to the Council". A declaration appended to the draft revised treaty on European Union negotiated in Amsterdam stated that considerations of foreign policy should be taken into account in any Community policy on visas.

It has proved difficult to establish a Community policy on visas. In 1995, the Council drew up a joint list, but with national lists appended to it. The European Parliament, which had not had an opportunity to express an opinion on the matter, managed to have the Council regulation declared void.

4. The case of humanitarian aid to Bangladesh: use by member states of an organ of the Community

As was illustrated in the case involving humanitarian aid to Bangladesh (see Parliament v. Council and Commission judgement of 30 June 1993), member states acting outside the Community framework may entrust a task to the Commission, an organ of the Community.

In the present case, the member states, in a meeting of the Council, i.e. outside the Community framework, decided to grant emergency aid to Bangladesh, which they were to finance but which was to be co-ordinated by the Commission. The Parliament applied for judicial review of the measure, which it argued was in fact a decision of the Council infringing the Parliament's budget powers under Article 203 of the treaty. The Court of Justice held the appeal to be inadmissible, ruling that humanitarian aid did not fall exclusively within the competence of the Community and that, as a result, there was nothing to stop member states from collectively exercising their own powers in this respect, either within or outside the Council. The Court also found that Article 155, 4th sub-section, under which the Council may confer implementation powers on the Commission, did not prevent member states from entrusting the Commission with the task of co-ordinating joint action undertaken by them on the basis of a decision taken by their representatives meeting at Council level.

Besides Community law in the strict sense of the term, the Court of Justice thus accepts that a grey area has developed, which could be referred to as "para-Community law". Member states meeting at Council level may entrust a Community institution, the Commission (provided it agrees), with tasks which are not subject to supervision by the court. This is an example of what might be termed "realist" case-law. Rather than drawing a hard and fast distinction between intergovernmental and Community systems, it acknowledges the existence of bridges between the two. This particular judgement accepts that the two systems may combine to a certain degree. In practice, this has the potential advantage of encouraging member states to speak with one voice in matters involving third countries, through recourse to a Community institution in areas where the Community has only marginal jurisdiction. In some respects, the court's judgement in the case concerning humanitarian aid to Bangladesh was given in the spirit of the provisions comprising the second and third pillars of the Maastricht Treaty (see also Parliament v. Council of 2 March 1994 concerning the European Development Fund, which the member states set up under the Lomé Convention which they finance, but which they and the Community institutions jointly administer).

B. Mixed agreements

Examples of joint external action by the Community and its member states are to be found both in the adoption of autonomous measures[44] and in the conclusion of international agreements. I shall now turn my attention to the case of mixed agreements, an area which has provoked considerable debate.

1. Practice

The vast majority of external agreements of any importance and not confined to trade in goods have been concluded by the Community and the member states. Association agreements, such as the agreement with Turkey, the various Lomé conventions, the agreement creating a European Economic Area and the European agreements with the countries of central and eastern Europe, as well as the Uruguay Round agreements and the co-operation agreements with Mercosur and Chile, have all been concluded on the basis of this mixed procedure.

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[44] *For an example of autonomous measures involving both Community and member states, see Council regulation of 22 November 1996 (O.J. 1996, L 309/1) and the joint action of 22 November 1996 adopted by the Council under the second pillar of the Maastricht Treaty (O.J. 1996, L 309/7). These measures were adopted in reaction to the American Helms-Burton law.*

The major conventions concerning the environment are also mixed agreements, for example the Vienna Convention and the Montreal Protocol for the Protection of the Ozone Layer or the Basle Convention on Transboundary Movements of Hazardous Wastes.

The mixed procedure has even been used to conclude agreements in which the Community participated pursuant to Article 113. Following the Court of Justice's Opinion 1/78 (natural rubber), the member states may appear at the conclusion of an agreement based on Article 113 when they provide the finance for it.

The result of the mixed procedure is that the agreement cannot enter into force as long as the 15 member states have not all ratified it in accordance with their respective constitutional procedures; that can take time and place the European Union in a difficult position vis-à-vis other states. To help overcome this drawback, the Community provisionally puts into force the part of the agreement which definitely falls within its exclusive jurisdiction, namely the commercial part within the meaning of Article 113. This is how it proceeded in the case of the European agreements and the agreements with Mercosur and Chile. But this is only a stopgap, as can be seen in the case of the Mercosur agreement, one of whose bodies, the Co-operation Council, cannot meet yet.

2. The justification for mixed agreements

Quite apart from legal technicalities, the underlying reason for using the mixed procedure to conclude international agreements is political and has already been referred to earlier: most member states do not want to have their international legal personality gradually merge with that of the Community. The conclusion of the Uruguay Round agreements was revealing in this respect: virtually all the member states wanted to be members as such of the World Trade Organisation.

But in addition to this political explanation, there are legal considerations. The conclusion of an international agreement under the mixed procedure may be essential if the Community cannot, owing to external factors (which often combine with internal ones), participate alone in an international agreement in an area falling within its jurisdiction. The ILO conventions illustrate this point (see opinion 2/91).

As the Community's external powers under the EC treaty stand at present (see infra under III 1), the member states will often find arguments to support their participation in the conclusion of an international agreement if the agreement is not concerned with trade alone within the meaning of Article 113.

3. Mixed agreements and the Community legal system

There may be reason to use the mixed procedure whenever the Community does not have exclusive jurisdiction in respect of all areas covered by a planned agreement. If they see fit, the member states may take part in concluding the agreement in the areas in which Community jurisdiction is not exclusive, because they could act alone if they so desired.

From a legal point of view, however, the mixed procedure is only essential where the member states have sole jurisdiction - and thus the Community has none - with regard to at least part of the agreement.

In actual fact, knowing whether use of the mixed procedure is excluded, optional or compulsory may be no easy matter. The dividing lines between areas of sole Community jurisdiction, those in which

jurisdiction is shared (Community/member states) and those in which member states alone have jurisdiction are in certain respects blurred and also shift over time. Locating them often depends on how broadly or narrowly the idea of "pre-emption" is interpreted or on what, in the subject matter of an agreement, is considered of main importance and what is viewed as ancillary.

At the level of principles at any rate, the fact remains that the distinction between mixed agreements depending on whether they are optional or compulsory from the point of view Community law is not without its implications.

In the first case, the agreement may be regarded as an entirely Community one. The member states have had the political satisfaction of appearing in the conclusion of the agreement, but they are required to speak in unison with the Community in matters covered by the agreement. Further, and above all, the entire agreement is open to interpretation by the Court of Justice under Article 177 or, where appropriate, Article 169.

In the second case, as part of the agreement falls (perhaps temporarily) quite outside Community jurisdiction, the member states retain the possibility of taking a position individually. In addition, the Court of Justice does not have jurisdiction to enforce or interpret part of the agreement. When it delivered opinion 1/94 (Uruguay Round) and opinion 2/92 (OECD), it may have overlooked that. In both opinions, it made it clear that the member states should participate in concluding the agreements in question because the Community did not yet have jurisdiction for all the matters covered by them. It logically follows that parts of the agreements are non-Community, with the aforementioned consequences. The day that the Court of Justice must deal directly with these consequences - such as its own lack of jurisdiction for interpreting part of the GATS or the TRIPS or OECD agreements - it will probably find a way to correct the manner in which it formulated opinion 1/94 and opinion 2/92.

In the past, Germany and the United Kingdom have contested Court of Justice jurisdiction to interpret part of the association agreement with Turkey. At issue was the part relating to movement of Turkish workers. Germany and the United Kingdom argued that this part of the mixed agreement fell solely within the jurisdiction of the member states. But in its Demirel judgement of 1987, the Court of Justice dismissed this objection on the basis of a broad interpretation of Community jurisdiction flowing from Article 238 of the EC treaty. Subsequently, in its Sevince judgement of 1990, the Court reaffirmed that it had jurisdiction to interpret decisions taken by bodies created by association agreements and in charge of implementing agreements even if the member states were represented therein alongside the Community. Logically, this implies that the Community had jurisdiction, if only of a non-exclusive nature, to conclude the agreement as a whole. But perhaps it should simply be recognised that in certain respects, the relationship of mixed agreements to the Community legal system defies formal logic.

In any case, the Demirel and Sevince judgements resulted from a concern to ensure a uniform interpretation of mixed agreements, at any rate when they are based on Article 238.

4. Mixed agreements and external consistency of the European Union

At the stage of negotiations, consistency of the European Union stance is ensured if the Community and the member states agree to speak with one voice. This is the case if the conduct of negotiations is left to the Commission, and the member states do not appear until the conclusion of the agreement, such as during the Uruguay Round. The same is true if the Community and the member states agree to appoint a joint delegation, as during the negotiation of agreements on basic products in accordance with the Proba 20 arrangement. On the other hand, the European Union consistency is

less easy to maintain if the negotiations are conducted by the Commission and the 15 member states feature individually. Apparently, this is how the European Union is currently holding negotiations with the United States on the subject of the Helms-Burton law, the member states not having delegated authority to the Council to speak on their behalf.

When a mixed agreement enters into force, the question arises of European Union representation in any bodies which may be created by the agreement[45] and more particularly in such international organisations as the WTO, the OECD or the FAO. To take the WTO, the member states are present alongside the Community. They may in principle act independently to the extent that they alone have jurisdiction for certain areas covered by the GATS and the TRIPS agreement. That would create serious difficulties for the European Union, given that the dispute settlement mechanism allows for cross-retaliatory measures, ie in the various areas which currently fall within WTO's province.

Once again, the sole solution is for the Community and the member states to agree to speak with one voice and to establish an appropriate procedure to that end. This is what they have done in the case of the FAO, where either the Commission or the presidency of the Council intervenes depending on whether the particular question falls primarily within the jurisdiction of the Community or that of the member states (see the facts of the Commission v. Council case, which led to the Court of Justice judgement of 19 March 1996). In a number of instances, the Court of Justice has pointed out the obligation on the Community and the member states to co-operate and demonstrate cohesion in international organisations and in dealings with third states (see the ruling adopted under Article 103, 3rd paragraph, of the Euratom treaty, CJEC, 14 November 1978; opinion 2/91; opinion 1/94.

5. The amendment to Article 113 negotiated in Amsterdam

This amendment, to which reference has already been made, would enable the Council, acting by unanimous decision and on a case-by-case basis, to extend the scope of Article 113 and commercial policy so as to include agreements covering services and intellectual property to the extent that they did not already come under this provision. Briefly, this would involve granting the Community powers to conclude agreements alone, such as the GATS or the TRIPS agreement. That would make it possible to settle the difficulties stemming from opinion 1/94 and the conclusion of the Uruguay Round agreements in accordance with the mixed procedure.

But it should be pointed out that while decisions on "classical" commercial matters (goods and services without movement of persons) are taken by qualified majority, a prior unanimous decision by the member states will be needed in the case of new matters. It should also be noted that the member states have not yet shown a readiness to accept an extension, even on a case-by-case basis, of Article 113 to include investment.

V. Some of the outstanding features of the external policy conducted by the European Union on the basis of the EC treaty

The most distinctive aspects of the external policy conducted by the European Union on the basis of the EC treaty are obviously to be seen in the field of trade (in the broad sense of the term).

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[45] *In the Co-operation Council provided for by the agreement with Mercosur, the European party will be represented by the Council of the European Union and members of the Commission.*

Nowadays the Community plays a role in the multilateral trading system that is almost equal to that of the United States, vis-à-vis which the Community is sometimes an objective ally, sometimes a counterweight and sometimes a rival. Like the United States, but in a more moderate and less unilateral manner, the Community is currently pursuing a policy which aims to open up the markets of third countries to European exporters and to strengthen the protection of intellectual property throughout the world. The Community's protectionist agricultural policy is sometimes a handicap in the conduct of its external policy.

The Community has established and continues to establish a vast network of preferential trade agreements. It is bound to its neighbours in the north, east and south by agreements of this type. The agreements binding it to its European neighbours are designed to prepare for their admission to the Community, with certain exceptions (Switzerland, Norway, Iceland and Malta). In simple terms, it is possible to say that most European countries which are not members of the Community are influenced by the Community model and Community legislation.

One preferential agreement, the Lomé Convention, binds the Community to the ACP countries and continues the relations which existed between certain European countries and many of the ACP countries in colonial times. The importance which a majority of member states attach to maintaining relations with these countries partly explains the dispute which broke out over bananas both within the Community and the WTO.

The European Union has recently also entered co-operation agreements outside the circle of its neighbours and the ACP countries, i.e. with Mercosur and Chile, and has forged closer links with the Asian countries (ASEM). Both of these initiatives aim to safeguard markets for European exporters but are also of strategic importance; they are intended to ensure European presence and influence vis-à-vis the United States. The agreements with Mercosur and Chile are to be seen in the context of NAFTA and the American project to set up a free-trade area covering the whole of the Americas. The closer links with the Asian countries are a response to the APEC project launched by the United States.

Although the main instruments of the Union's external policy are commercial and financial, the aims pursued are, as has been noted, often partly political. The planned network of free trade agreements between the European Union and the countries of the southern Mediterranean illustrates this. One of the main objectives of this project is to ensure political stability in these countries in the coming years. In this connection, a remarkable illustration of the policy – and here the term foreign policy is doubtless the most appropriate – pursued by the European Union on the basis of the EC treaty is the interim association agreement concluded in February 1997 by the European Community (acting alone) and the PLO, acting on behalf of the Palestinian Authorities.

Human rights protection has played an important role in the Community's external relations for some years now. A clause is, in principle, inserted into all co-operation and association agreements that makes respect for human rights an essential aspect of such agreements. However, the coherence of this policy may not be maintainable. This year Australia, with which the Community was negotiating a co-operation agreement, steadfastly refused the inclusion of the "human rights" clause proposed by the Community. Australia does not consider itself the type of state on which it is appropriate to impose such a provision. The co-operation agreement has not been signed but has been replaced by a joint declaration. More recently the Commission, which had been negotiating draft agreements with Mexico, agreed, at the latter's request, to replace the standard clause by a clause more limited in scope. Several member states and the European Parliament, which was concerned at the emergent inconsistency of the policy on protection of human rights in third countries, took exception. Member states have differed in their attitudes, within the United Nations, to human rights protection in China,

which is a very important trading partner. It would therefore appear that, in the coming years, the Community and the European Union will have to choose between systematic protection of human rights and pursuit of economic interests.

The European Union's external policy is demonstrated, to a large extent, through the European Community and the action it takes at international level by the institutional and financial means provided by the EC treaty. The main lever of EU external policy is the common market.

The Community's external policy powers are fragmentary, if not deficient. The European Community still does not have explicit powers to take action externally in any of the matters which, from the internal point of view, come under the internal market. However, the Community's external powers may well change and increase as the external acquis communautaire grows.

The present state of Community jurisdiction explains, to a certain extent, the mixture of "intergovernmental" and "Community" ingredients, which characterises the European Union's external action. However, the main explanation for this mixture is political. Member states on the whole are not prepared to withdraw from the international stage and are therefore unwilling to agree to the transfer of general and permanent powers to the Community.

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