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The Institutional Framework of the European Union for the Conduct of Foreign Affairs

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THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION FOR THE CONDUCT
OF FOREIGN AFFAIRS: A COMPARATIVE STUDY WITH THE UNITED STATES

by

FREDERIC EGGERMONT

(Under the Direction of Professor Gabriel M. Wilner)

ABSTRACT

This thesis will analyze the evolution in the institutional framework for the conduct of foreign policy in the European Union until the Draft Treaty establishing a Constitution for Europe. This evolution will be compared with the institutional development in the United States. The intention of this thesis is to focus on the European Union and to point to similar evolutions in the United States.

INDEX WORDS: Institutions, institutional framework, European Community, European Union, conduct of foreign policy, integration process, European Treaties, Draft Constitution, confederate model, United States, Constitution

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DEDICATION

This thesis is dedicated to my father who passed away during my stay in the United States after losing the battle against a long and painful sickness.

ACKNOWLEDGEMENTS

I would like to express all my gratitude to Professor Gabriel M. Wilner, Associate Dean and Director of the Dean Rusk Center for International, Comparative and Graduate Legal Studies, who has always guided and supported me in the achievement of my professional goals and whose friendship is of great value to me.

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CHAPTER 1

INTRODUCTION

*“Rien n’est possible sans les hommes,
rien n’est durable sans les institutions”*¹

Europa, a Phoenician princess kidnapped by the Greek god Zeus in the form of a bull,² gave her name to the European continent.³ This continent has been the battlefield of all European states in their conquest for power and territory, but it has also been the birthplace of the most unique political project ever, called the European Union.

The European project started as an economic project, but from the beginning the drafters of this project intended it to evolve into a political project, what it eventually did. Today, the European Union is much more than a customs union; the European Union has become an important actor on the international stage. Nevertheless, important differences remain between the external trade policy of the European Community and the Common Foreign and Security Policy of the European Union, the latter being the main topic of this thesis, although both will be examined. The power of the European Union – when it acts as a unity – became clear in the World Trade Organization. Although all of the Member States are members, the European Communities, represented by the European Commission, speaks for all the Member States at nearly every meeting.⁴ The same power cannot yet be seen in the Common Foreign and Security

¹ JEAN MONNET cited in Giovanni Grevi, *The Convention on the Future of Europe*, EPC WORKING PAPERS (2003), available at http://europa.eu.int/futurum/documents/other/oth140403_2_en.pdf (last visited Feb. 3, 2004).

² WWW.IN2GREECE.COM, EUROPA, available at <http://www.in2greece.com/english/historymyth/mythology/names/europa.htm> (last visited Apr. 6, 2004).

³ According to Herodotus, Europa was abducted by the Greek in order to revenge the abduction of the Greek princess Io by the Phoenicians, *see id.*

⁴ WORLD TRADE ORGANIZATION, THE EUROPEAN COMMUNITIES, available at http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Jan. 28, 2004).

Policy. The inability of the European Union to reach a single European position during the 2003 Iraq crisis clearly indicated the lack of a “common” foreign policy.⁵

At present, the European Union faces a crucial moment in its existence: the coming enlargement together with the necessary institutional reforms. The final European treaty, the Treaty of Nice, had not prepared the Union sufficiently on this event. It is the intention of the Draft Constitution to accomplish where the Treaty of Nice had failed, but also to rethink the whole institutional framework of the European Community⁶ and European Union. The evolution in the European integration process can be compared with the American process. Between 1776 and 1786 the United States were a confederation, a political organization that carries a lot of similarities with the current European political organization. These similarities will be examined, but also the evolution towards a stronger political unity that has taken place in the United States and that is taking place in the European Union, but focused on the institutional framework for the conduct of foreign policy.

The first part of the thesis (Chapter 2) will examine briefly the institutional framework for the conduct of foreign affairs in the United States. The second part (Chapter 3) will contain an analysis of the institutional framework of the European Union for the conduct of foreign policy. The third part of the thesis (Chapter 4) will be the conclusion based on a comparison between the United States and the European Union.

This thesis will use the Draft Constitution as proposed by the European Convention for its analysis of the last developments in the institutional framework of the European Union, but the reader has to be aware that the heads of state and government of the Member States are still

⁵ Yvonne Campbell, *The Presidency of the European Union – An Irish Perspective*, INSTITUTE OF EUROPEAN AFFAIRS 11 (2003), available at http://www.iiea.com/futeuro/wp_pres.pdf (last visited Feb. 14, 2004).

⁶ Only the European Community has institutions; the European Union uses the institutions of the Community. When the Draft Constitution will come in force, the European Union will have its own institutions.

able to change the proposals of the European Convention on the next Intergovernmental Conference, which will take place in June 2004.

CHAPTER 2

THE EXPERIENCE OF THE UNITED STATES IN THE CONDUCT OF FOREIGN AFFAIRS

The first part of this chapter will deal with the institutional framework for the conduct of foreign policy under the Articles of Confederation where the United States had a confederate institutional model. Then, the second part will examine the experience in foreign policy making under the current Constitution of the United States; this part will be subdivided in a part on the President, a part on the Congress and a final part on the Supreme Court.

A. Foreign Affairs during the Time of the Articles of Confederation

The thirteen colonies united against the British Government, which had imposed oppressive measurements on the colonies.⁷ The colonies also did not look to Parliament anymore as the defender of their rights⁸ and understood that only as a union could they oppose the Empire to secure their rights and liberties.⁹ Their allegiance to England ended with the adoption of the Declaration of Independence, where it was declared that:

[T]hese United Colonies are, and of Right ought to be, [free and independent States that] have full power to levy War, conclude Peace, contract Alliances [...] and to do all other Acts and Things which [independent States] may of right do.¹⁰

⁷ JOSEPH P. THOMPSON, *THE UNITED STATES AS A NATION – LECTURES ON THE CENTENNIAL OF AMERICAN INDEPENDENCE GIVEN AT BERLIN, DRESDEN, FLORENCE, PARIS AND LONDON* 3 (Boston, James R. Osgood and Company 1877).

⁸ Arthur R. Landever, *Those Indispensable Articles of Confederation – Stage in Constitutionalism, Passage for the Framers, and Clue to the Nature of the Constitution*, 31 ARIZ. L. REV. 79, 93 (1989).

⁹ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 145 (Boston, Little, Brown, and Company, 5th ed., vol. 1, 1891).

¹⁰ THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776).

That the former colonies were transformed into thirteen independent states was reaffirmed in the Articles of Confederation,¹¹ which were ratified by the state legislatures, not by the people of the states.¹²

The United States became a confederation,¹³ where the major power was situated with the states.¹⁴ Institutionally, there was a Congress, which was the legislative branch in the Confederation, consisting of one chamber and a committee made of a delegation of each state that would act when Congress was not assembled.¹⁵ The separate states retained their sovereignty, freedom and independence, which were not expressly delegated to the central government.¹⁶ Congress had only few enumerated powers¹⁷ and it depended on the states for the implementation of its decisions.¹⁸ Although the Confederation Congress perceived the enumerated powers broadly,¹⁹ there was no theory of implied powers under the Articles of Confederation.²⁰ After their experience under the British Crown, the states did not want to create strong central government.²¹ Nevertheless, the Articles of Confederation restricted the power of the states in the field of foreign affairs. Although during the Revolution some states proclaimed

¹¹ Story does not agree with the fact that the former colonies became thirteen independent Nations. According to his view the United States of America had an own territory, an own people, an own Government and an exclusive sovereignty. From the moment the colonies created a union the Nation existed; see THOMPSON, *supra* note 7, at 4-11.

¹² See THE FEDERALIST NO. 20, at 193 (Alexander Hamilton) (John C. Hamilton ed., 1875).

¹³ ARTICLES OF CONFEDERATION art. I; for a thorough comparative study of the Articles of Confederation and the U.S. Constitution, see Douglas G. Smith, *An analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249 (1997).

¹⁴ MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 109 (1940).

¹⁵ JACK W. PELTASON, UNDERSTANDING THE CONSTITUTION 10 (7th ed. 1976).

¹⁶ ARTICLES OF CONFEDERATION art. II, which stated: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

¹⁷ JAMES PARKER HALL, CONSTITUTIONAL LAW 11 (1910).

¹⁸ Landever, *supra* note 8, at 90.

¹⁹ Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 529 (1925).

²⁰ HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 58 (1915).

²¹ SAMUEL A. PLEASANTS III, THE ARTICLES OF CONFEDERATION 23-24 (1968).

in their constitutions the sovereign right to conduct foreign affairs and to use military action,²² the Articles of Confederation declared that:

No State [shall] without consent of the United States, in Congress assembled [...] send any embassy to, or receive, any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince, or state.²³

The Articles of Confederation also stated that:

No State shall engage in any war without the consent of the United States, in Congress assembled.²⁴

The United States was also given exclusive and sole power in matters concerning war and peace,²⁵ in sending and receiving ambassadors and in treaty and alliance making.²⁶ The states could not impose duties or imposts, which could interfere with, any stipulations in treaties entered into by the United States in Congress assembled;²⁷ however the Confederation Congress could never enter into a treaty unless nine states of the 13 assented.²⁸

²² CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN AFFAIRS – CASES AND MATERIALS* 161 (2003).

²³ ARTICLES OF CONFEDERATION art. VI, cl. 1.

²⁴ *Id.* art. VI, cl. 5.

²⁵ With exception of the issues mentioned in *id.* art. VI.

²⁶ *Id.* art. IX, cl. 1, which stated: “The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article -- of sending and receiving ambassadors -- entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever -- of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated -- of granting letters of marque and reprisal in times of peace -- appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.”

²⁷ *Id.* art. VI, cl. 3, which stated: “No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.”

²⁸ *Id.* art. IX, cl. 6, which stated: “The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.”

The Congress had the power to appoint one of its members to preside, but this President could not be allowed to serve in that office for more than one year in any term of three years.²⁹ The only task of this President was to preside and he did not have any powers in the conduct of foreign policy. The President of Congress did not have executive powers.³⁰

Despite the creation by Congress of a Department of Foreign Affairs and a War Department,³¹ the Confederation did not have a strong foreign policy.³² According to Louis Fischer, external sovereignty did not pass from the British Crown to the United States, but to the states.³³ That opinion has been rejected by the United States Supreme Court, which has stated that the international powers passed from Great Britain to the United States as an entity and not the individual states.³⁴

The Articles of Confederation explicitly forbade the states to make treaties without the consent of the Congress,³⁵ but the Articles of Confederation did not state that treaties entered into by the United States assembled in Congress would have binding force in the states³⁶ and there was surely no Supremacy Clause in the Articles of Confederation, thus making it very difficult for the Confederation to uphold a strong position in international negotiations.³⁷

The major political problem under the Articles of Confederation was that Congress depended on the states for the execution of its powers and despite the obligation for the states to

²⁹ *Id.* art. IX, cl. 5.

³⁰ See PLEASANTS, *supra* note 21, at 25; THE U.S. CONSTITUTION ONLINE, THE ARTICLES OF CONFEDERATION, available at <http://www.usconstitution.net/articles.html#Article2> (last visited Apr. 6, 2004).

³¹ PLEASANTS, *supra* note 21, at 24.

³² FORREST McDONALD & ELLEN SHAPIRO McDONALD, CONFEDERATION AND CONSTITUTION 1781-1789 61 (1968).

³³ LOUIS FISCHER, AMERICAN CONSTITUTIONAL LAW 320 (2nd ed. 1995).

³⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

³⁵ ARTICLES OF CONFEDERATION art. VI, cl. 1.

³⁶ Thomas Healy, *Is Missouri v. Holland still good law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1728 (1998).

³⁷ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643.

abide by the decisions of Congress,³⁸ there was no mechanism to force the states to honor and follow the decisions made by the Confederation. Although the Confederation had important powers, it had no mechanism to implement them by itself.³⁹ The Confederation was in a weak position in its dealing with other nations,⁴⁰ thus in its conducting of foreign policy. Even more, when the Confederation entered into a treaty with a foreign nation, the states of the Confederation could not be obliged to respect the treaty.⁴¹

In the absence of certain supreme powers invested in the Confederation to deal with issues of general concern, the country could never become a real political union.⁴² A confederation is always composed of sovereign and equal constitutive entities⁴³ and its power to govern does not derive from the people itself.⁴⁴ The composition of the legislative body of the confederation showed this very clearly: each state appointed annually delegates for Congress, in such a manner as the legislature of each state directed⁴⁵ and the delegates were remunerated by the states.⁴⁶ At any time, the state could recall its delegates and send others to fulfill their term.⁴⁷ No state was represented in Confederation Congress by less than two, nor more than seven members.⁴⁸ Not the people, but the states were parties in the compact under the Articles of

³⁸ ARTICLES OF CONFEDERATION art. XIII.

³⁹ STORY, *supra* note 9, at 175-176.

⁴⁰ THE FEDERALIST NO. 15, at 140 (Alexander Hamilton) (John C. Hamilton ed., 1875).

⁴¹ STORY, *supra* note 9, at 175.

⁴² *Id.* at 182.

⁴³ THE FEDERALIST NO. 20, at 172 (Alexander Hamilton & James Madison) (John C. Hamilton ed., 1875).

⁴⁴ *Id.* at 176-177.

⁴⁵ ARTICLES OF CONFEDERATION art. V, cl. 1, which stated: "For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."

⁴⁶ THE U.S. CONSTITUTION ONLINE, *supra* note 30, available at <http://www.usconstitution.net/articles.html#Article2> (last visited Apr. 6, 2004).

⁴⁷ *Id.*

⁴⁸ art. V, cl. 2, which stated: "No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind."

Confederation;⁴⁹ thus no sovereignty derived from the people. The fact that the powers of the confederation do not derive from the people could be seen as the principal weakness of the confederate model, which was not able to put forth its supremacy over the states.⁵⁰ The states would have remained more powerful than the national government, because their sovereignty and independence was explicitly stated⁵¹ and the Articles of Confederation could not be amended without unanimous approval of all the state legislatures.⁵²

B. Experience under the Constitution

1. The Presidential Powers in Conducting Foreign Policy

The Constitution of the United States of America gave the institutions of the federation much stronger foreign affairs power than under the Articles of Confederation. A strong executive branch embodied by the President was created together with a federal Supreme Court.⁵³ The political authority of the federal government was stated to be derived from the states *and* the people. The system of government could no longer be seen as a mere compact between the states; the federal government was responsible to the people directly.⁵⁴ This would transform the United States into a great republic,⁵⁵ the powers of which would derive from the people and the states.⁵⁶

⁴⁹ Smith, *supra* note 13, at 316.

⁵⁰ *Id.* at 254.

⁵¹ ARTICLES OF CONFEDERATION, art. II, which stated: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

⁵² *Id.* art. XIII, cl. 1, which stated: “Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”

⁵³ Goldsmith, *supra* note 37, at 1645.

⁵⁴ Smith, *supra* note 13, at 292-293.

⁵⁵ 3 THE COMPLETE ANTI-FEDERALIST 31-32 (Herbert J. Storing ed., 1981).

⁵⁶ See THE FEDERALIST NO. 39, at 301-308 (Alexander Hamilton) (John C. Hamilton ed., 1875).

The Constitution does not give Congress or the President primacy in foreign relations;⁵⁷ the Constitution just does not talk about general foreign affairs powers.⁵⁸ Numerous powers in the field of foreign affairs are conferred on Congress,⁵⁹ but it is the President who is in charge of the external relations of the United States.⁶⁰ The relation between these two institutions could be defined as a “magnificent ambiguity”⁶¹, “often cryptic [...] and incomplete”⁶² and “a struggle for the privilege of directing American foreign policy”.⁶³ Nevertheless, the Framers of the Constitution were convinced that concentration of power had to be avoided.⁶⁴

In international relations, the President of the United States has the primary authority,⁶⁵ a principle that is commonly accepted.⁶⁶ He is solely responsible for the diplomatic and foreign relations.⁶⁷ Even Members of Congress recognize that on certain occasions, it is necessary to talk with a single voice in the international community and the institution of the Presidency is more apt for this function; the President can act quickly and has wider access to intelligence than Congress.⁶⁸

⁵⁷ Robert J. Spitzner, *The President, Congress, and the Fulcrum of Foreign Policy*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 85, 107 (David Gray Adler and Larry N. George eds. 1996); also see GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787* 112 (1989).

⁵⁸ H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *GEO. WASH. L. REV.* 527, 545 (1999).

⁵⁹ BRADLEY & GOLDSMITH, *supra* note 22, at 108.

⁶⁰ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 37 (1972).

⁶¹ William D. Rogers, *The Constitution and Foreign Affairs: Two Hundred Years*, 83 *AM. J. INT'L L.* 894, 894 (1989).

⁶² ARTHUR MEIER SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 2 (1973).

⁶³ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 171 (4th ed. 1957).

⁶⁴ Elliot L. Richardson, *Checks and Balances in Foreign Relations*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 25, 25 (Louis Henkin, Michael J. Glennon and William D. Rogers eds. 1990).

⁶⁵ *Curtiss-Wright*, 299 U.S. at 319; also see *Gravel v. United States*, 408 U.S. 606, 643-644 (1972) (Douglas, J., dissenting); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *United States v. California*, 332 U.S. 19, 45 (1947) (Frankfurter, J., dissenting).

⁶⁶ *Haig v. Agee*, 453 U.S. 280, 293-294 (1981), where the Supreme Court ruled that the federal government has the right to protect foreign policy; *Saie v. Haitian Ctrs. Council Inc.*, 509 U.S. 155, 183 (1993); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972); also see LOUIS FISCHER, *THE CONSTITUTION BETWEEN FRIENDS* 192 (1978).

⁶⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

⁶⁸ Philip R. Trimble, *The President's Foreign Affairs Power*, 83 *AM. J. INT'L L.* 750, 752-753 (1989).

The powers of the President in foreign affairs can, amongst others, be found in the Constitution:

“He shall have the power, by and with the Advice and Consent of the Senate, to make Treaties.”⁶⁹

Note that it does not follow from the text of the Constitution that the President on the one hand negotiates the treaties and the Senate on the other hand approves.⁷⁰

The Supreme Court has decided that Congress cannot intrude in the power of the President to negotiate treaties.⁷¹ The power to make treaties is an essential part of sovereignty⁷² and the executive branch is more suitable than the legislative branch to negotiate and make treaties in the name of the United States.⁷³

The President cannot overrule a decision, such as a refusal to give advice and consent of the Senate.⁷⁴ Therefore the executive branch has taken the power to create agreements with foreign Nations, which do not need to be submitted to the Senate, based on “the independent constitutional authority”,⁷⁵ despite the constitutional involvement of the Senate in the treaty-making process.⁷⁶ In the case of the congressional-executive agreements, Congress has given permission to the President to negotiate and to make agreements in a specified field. “Sole” executive agreements are agreements negotiated and made by the President to implement a treaty or when he deems such agreements appropriate in light of international obligations.⁷⁷ Although

⁶⁹ U.S. CONST. art. II, §2, cl. 2.

⁷⁰ See FISCHER, *supra* note 66, at 194.

⁷¹ *Curtis-Wright*, 299 U.S. at 319.

⁷² JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 356 (vol. 3, 1970).

⁷³ *Id.* at 358.

⁷⁴ ANASTAPLO, *supra* note 57, at 112.

⁷⁵ Powell, *supra* note 58, at 560; Grover Joseph Rees, *The Treaty Power*, 43 U. MIAMI L. REV. 123, 130 (1988-89); according to the executive the power to make executive agreements flows from the authority of the President as Commander-in-Chief, his function as representative of the Nation, his duty to execute the laws and to receive ambassadors, see FISCHER, *supra* note 66, at 204.

⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *United States v. Pink*, 315 U.S. 203, 229 (1942); also see *Field v. Clarke*, 143 U.S. 649, 694 (1892).

⁷⁷ HENKIN, *supra* note 60, at 173-176.

these types of executive agreements cannot be an alternative to treaties, which need to be passed with advice and consent of the Senate,⁷⁸ sole executive agreements have contributed to the extension of the President's power in foreign relations.⁷⁹

The President has a veto power; before an act of Congress can become law it has to be approved by him,⁸⁰ but a two-thirds majority in each of the 2 Houses of Congress can override the veto of the President.⁸¹ Although Congress can override the presidential veto, this constitutional power of the executive branch is nevertheless a great weapon for defending the foreign policy as conducted by the executive.⁸²

In general, foreign affairs power of the President is derived from the executive power vested in him.⁸³ When the President acts in accord with the implicit or explicit will of the legislature, then the powers of the executive branch are at their zenith,⁸⁴ while the powers are at their lowest ebb when the President acts in violation of the implicit or explicit will of Congress.⁸⁵

The President has to respect the law like any other citizen and he is not the *sole* authority in conducting the foreign affairs policy,⁸⁶ but he is without question *the most important*

⁷⁸ *Id.* at 560-561.

⁷⁹ Ernest S. Griffith, *The Place of Congress in Foreign Relations*, in CONGRESS AND FOREIGN RELATIONS 11, 11 (Thorsten V. Kalijarvi and Chester E. Merrow eds. 1953).

⁸⁰ U.S. CONST. art. II, § 7, cl. 2, which states: "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

⁸¹ *Id.*

⁸² CORWIN, *supra* note 63, at 223.

⁸³ U.S. CONST. art. II, § 1, cl. 1; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-253 (2001).

⁸⁴ Prakash & Ramsey, *supra* note 83, at 635.

⁸⁵ *Id.* at 637.

⁸⁶ MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 228 (1977).

institution.⁸⁷ All foreign affairs powers that are not explicitly given to the Congress belong to the President; residual powers are thus invested in the executive branch.⁸⁸

2. The Powers of Congress in Foreign Affairs

Congress was actually intended to have primacy in foreign affairs, although this intention was never written down in the Constitution,⁸⁹ but the President took over Congress' primacy in the twentieth century.⁹⁰ Nonetheless, Congress remains having important powers in the conduct of foreign policy.

Congress has enumerated powers in the area of foreign affairs: it has the power “[t]o regulate Commerce with foreign Nations”⁹¹, “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”⁹² and “[t]o declare War, grant Letters of Marque and Reprisal,⁹³ and make Rules concerning Captures on Land and Water”.⁹⁴ Besides these enumerated powers, Congress has others, which are not specifically mentioned in the Constitution and are acknowledged by the United States Supreme Court.⁹⁵

The Necessary and Proper Clause entails a very important congressional power;⁹⁶ the clause states that Congress will have the power:

⁸⁷ See *Curtiss-Wright*, 299 U.S. at 319.

⁸⁸ Prakash & Ramsey, *supra* note 83, at 254.

⁸⁹ *Id.* at 241.

⁹⁰ Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, 67 IND. L.J. 879, 880-84 (1992). See for an opposite opinion H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1474-1475 (1999).

⁹¹ U.S. CONST. art. I, §8, cl. 3.

⁹² U.S. CONST. art. I, §8, cl. 10.

⁹³ A letter of marque and reprisal is a governmental authorization to a private party to engage in retaliatory action against citizens and vessels of another Nation, see BLACK'S LAW DICTIONARY 917 (Bryan A. Garner ed., 7th ed. 1999).

⁹⁴ U.S. CONST. art. I, §8, cl. 11.

⁹⁵ BRADLEY & GOLDSMITH, *supra* note 22, at 108.

⁹⁶ HENKIN, *supra* note 60, at 78.

“[t]o make all Laws which shall be necessary and proper for carrying into Execution the [...] Powers vested by the Constitution in the Government of the United States, or in any Department of Officer thereof”.⁹⁷

As long as the end is legitimate, Congress can act within the letter and spirit of the Constitution, even though it is not within the scope of the powers enumerated in the Constitution.⁹⁸ This principle is also valid for any legislation that is necessary and proper to implement treaties.⁹⁹

The Constitution gives the President the power to make treaties, but he needs the advice and consent of two-thirds of the Senators present at the session.¹⁰⁰ Congress and the President are very connected to each other in this area.¹⁰¹ Although the fact that Henkin puts the emphasis in the Senate’s participation on the authority of the Senate to consent, rather than in the advice-giving function,¹⁰² the practice of the executive agreements, where the consent of the Senate is not required, contradicts his opinion. The consent of the Senate, where all the states have an equal representation,¹⁰³ is a very important check over the exercise of the foreign affairs power by the President¹⁰⁴ and the two-third majority was established to ensure, that treaties would not be made too easily,¹⁰⁵ but the President can use executive agreements in order to bypass a possible rejection by the Senate. The role of the Senate also consists of more than just voting on a treaty; it can demand reservations and attach conditions.¹⁰⁶

⁹⁷ U.S. CONST. art. I, §8, cl. 18.

⁹⁸ *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819) (where the Supreme Court ruled that a state cannot enact a law to burden the constitutional power of Congress); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

⁹⁹ TUCKER, *supra* note 20, at 130.

¹⁰⁰ U.S. CONST. art. II, §2, cl. 2.

¹⁰¹ FISCHER, *supra* note 66, at 194.

¹⁰² HENKIN, *supra* note 60, at 131.

¹⁰³ U.S. CONST. art. I, §3, cl. 1.

¹⁰⁴ HENKIN, *supra* note 60, at 131.

¹⁰⁵ Spitzner, *supra* note 57, at 85.

¹⁰⁶ *Haver v. Yaker*, 76 U.S. 32, 35 (1869) (where the Supreme Court ruled that the Senate can modify a treaty negotiated by the President).

The power of the purse can be seen as an especially important weapon in the hands of Congress.¹⁰⁷ The Constitution stipulates that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”¹⁰⁸ but Congress cannot exercise this power without any limits;¹⁰⁹ Congress cannot use this power to forbid the President to make treaties,¹¹⁰ a power given to him by the Constitution.¹¹¹ The Congress has to give the President a certain amount of freedom and discretion when he is conducting his foreign policy.¹¹² For example, imagine the impact on the foreign policy of the United States if Congress decides not to give any more appropriations to the American Embassy in Tel Aviv with the underlying purpose to relocate the Embassy to Jerusalem to make clear that the future Palestinian State cannot claim Jerusalem as its capital.

The Framers of the Constitution feared a situation where there would be a “union of the purse and the sword,”¹¹³ which would lead to a foreign policy that is not based on approval by Congress.¹¹⁴ If Congress does not approve the expenditure necessary for the conduct of a certain foreign policy, then this policy cannot be implemented.¹¹⁵ This provision was specifically intended to limit the power of the executive branch,¹¹⁶ which cannot intrude on the exclusive powers of Congress.¹¹⁷

¹⁰⁷ E.g. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Payment of U.S. Arrears to the United Nations*, 94 AM. J. INT’L L. 348 (2000).

¹⁰⁸ U.S. CONST. art. I, §9, cl. 7.

¹⁰⁹ Louis Fischer, *How tightly can Congress draw the Purse Strings*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 47, 51 (Louis Henkin, Michael J. Glennon and William D. Rogers eds. 1990).

¹¹⁰ Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1351 (1988).

¹¹¹ U.S. CONST. art. II, §2, cl. 2.

¹¹² *Curtiss-Wright*, 299 U.S. at 319.

¹¹³ Fischer, *supra* note 109, at 47, 54.

¹¹⁴ *Id.* at 55.

¹¹⁵ H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS 110 (2002); *see* CORWIN, *supra* note 63, at 224.

¹¹⁶ *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) and *Knote v. United States*, 95 U.S. 149, 154 (1877).

3. The United States Supreme Court and Foreign Affairs

The highest federal judicial power is vested in the United States Supreme Court.¹¹⁸ The United States Constitution states the following:

“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”¹¹⁹

The Supreme Court has acknowledged that it cannot review all the acts of the executive branch.¹²⁰ Nevertheless, the President must obey the Constitution and the laws, which are the basis of his power.¹²¹

The Supreme Court is not excluded from the resolution of a case because it touches upon foreign affairs.¹²² When a judicial settlement can be reached the courts will adjudicate,¹²³ even if the decision may have significant political consequences.¹²⁴ The Supreme Court has always stated that it has the power to exercise judicial review on the implementation of the discretionary power of the President in foreign affairs.¹²⁵ Nonetheless, the courts have rarely tried to control exercises of foreign policy power. Usually they have declined to step in based on the political question doctrine, ripeness, etc.;¹²⁶ so, in fact, the judicial role with respect to foreign affairs has been quite limited.

The decisions of the Supreme Court are very important for the allocation of powers with respect to foreign affairs. For example, those who defend the President as the sole organ of

¹¹⁷ Trimble, *supra* note 68, at 756.

¹¹⁸ U.S. CONST. art. III, §1, cl. 1.

¹¹⁹ U.S. CONST. art. III, §2, cl. 2; the Supreme Court also has original jurisdiction in cases concerning ambassadors, other public ministers, consuls and in cases where a state is a party; U.S. CONST. art. III, §2, cl. 2; *see* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 248 (1997).

¹²⁰ *Marbury v. Madison*, 5 U.S. 137, 165-166 (1803).

¹²¹ *Youngstown*, 343 U.S. at 585.

¹²² *Baker v. Carr*, 369 U.S. 186, 211 (1962); for cases dealing with foreign policy, *see* *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Japan Whaling Asso. v. American Cetacean Soc.*, 478 U.S. 221 (1986).

¹²³ *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 128 (D.C. Cir. 1977).

¹²⁴ *Japan Whaling*, 478 U.S. at 230.

¹²⁵ THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 95 (1992).

foreign affairs will cite from *Curtiss-Wright*¹²⁷ to support their argument,¹²⁸ although different authors have criticized that decision as being interpreted too broadly.¹²⁹ The *Curtiss-Wright* decision does not provide a sufficient legal basis to support the federal common law on foreign policy.¹³⁰ The Supreme Court judgment also does not speak about a “self-executing realm of exclusive federal foreign affairs power.”¹³¹

The judicial branch has played a vital role in obtaining presidential domination in the field of foreign relations, despite the fear of the Framers for presidential usurpation of foreign affairs powers.¹³²

¹²⁶ *Marbury*, 5 U.S. (1 Cranch) at 164-165; also see *Goldwater v Carter*, 444 U.S. 996 (1979).

¹²⁷ *Curtiss-Wright*, 299 U.S. 304 (1936).

¹²⁸ David Gray Adler, *Court, Constitution and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 25 (David G. Adler & Larry N. George eds. 1996).

¹²⁹ See Goldsmith, *supra* note 37; Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

¹³⁰ Goldsmith, *supra* note 37, at 1660.

¹³¹ *Id.* at 1661.

¹³² Adler, *supra* note 128, at 46-47.

CHAPTER 3

EXPERIENCE OF THE EUROPEAN UNION IN THE CONDUCT OF FOREIGN AFFAIRS

The first part of this chapter will give a general historical evolution of the European integration process. Then, the second part will examine the evolution of the institutional framework for the conduct of foreign policy of the European Community and European Union. The third and last part of this chapter will deal with the institutional framework for the conduct of foreign policy as proposed under the Draft Constitution.

A. Historical Evolution of the European Integration

After the First World War, European leaders increasingly saw the necessity of European cooperation in order to prevent the outbreak of a next world war and to respond to competition from Argentina, Japan and the United States.¹³³ Count Coudenhove-Kalergi¹³⁴ was without doubt the most important personality to fight for unity on the European continent in the 1920s through his Pan-European movement.¹³⁵ In 1930, the French Minister for Foreign Affairs Aristide Briand submitted a Memorandum¹³⁶ to 26 European states in which he proposed the establishment of a European Federal Union.¹³⁷

Unfortunately, Europe needed another shock in the form of the Second World War before it started with integration. In 1946 Winston Churchill suggested in his famous speech at the

¹³³ DAMIEN CHALMERS, *EUROPEAN UNION LAW* 5 (vol. 1, 1998).

¹³⁴ For a bibliography, *see* INTERNATIONAL PAN-EUROPEAN UNION, RICHARD N. COUDENHOVE-KALERGI, *available at* http://www.paneuropa.org/ch/html/richard_n_coudenhove-kalergi.html (last visited Apr. 7, 2004).

¹³⁵ *See* RICHARD N. COUDENHOVE-KALERGI, *PAN-EUROPE* (1926).

¹³⁶ The Briand Memorandum, *see* UNIVERSITY OF LEIDEN, *THE BRIAND PLAN* (1930), *available at* <http://www.let.leidenuniv.nl/history/rtg/res1/briand.htm> (last visited Apr. 7, 2004).

University of Zurich to create “a kind of United States of Europe”.¹³⁸ The idea of Churchill led to the creation of the Council of Europe, which is intergovernmental in nature.¹³⁹ The strongest integration came with the creation of the Benelux customs union between Belgium, the Netherlands and Luxembourg in 1948.¹⁴⁰

But the real European integration began in 1951 with the creation of the European Coal and Steel Community,¹⁴¹ which was based on the plan created by the French Minister for Foreign Affairs Robert Schuman and the French civil servant Jean Monnet.¹⁴² The Schuman Declaration¹⁴³ was intended to bring an answer on the French fears for an expansion of the German steel industry after the creation of the Federal Republic of Germany in 1949, which could harm the French steel industry, because there was already an overproduction of steel in Europe.¹⁴⁴ The Schuman Declaration was unique because the High Authority, composed of independent persons appointed by the governments on the basis of equal representation and with a chairman appointed by common agreement between the governments,¹⁴⁵ could make decisions that were binding on the Member States.¹⁴⁶ Unlike the Council of Europe, which was intergovernmental, the European Community for Coal and Steel had a supranational character.

¹³⁷ CHALMERS, *supra* note 133, at 5.

¹³⁸ Winston Churchill, Speech at the University of Zurich (Sept. 19, 1946).

¹³⁹ CHALMERS, *supra* note 133, at 10.

¹⁴⁰ *Id.*

¹⁴¹ TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 216 U.N.T.S. 140 [hereinafter ECSC TREATY].

¹⁴² CHALMERS, *supra* note 133, at 10.

¹⁴³ The Shuman Plan, *see* GATEWAY TO THE EUROPEAN UNION, DECLARATION OF 9 MAY 1950, *available at* http://europa.eu.int/abc/symbols/9-may/decl_en.htm (last visited Apr. 8, 2004).

¹⁴⁴ CHALMERS, *supra* note 133, at 10.

¹⁴⁵ ECSC TREATY art. 10, cl. 1.

¹⁴⁶ GATEWAY TO THE EUROPEAN UNION, *supra* note 143, *available at* http://europa.eu.int/abc/symbols/9-may/decl_en.htm (last visited Apr. 8, 2004).

A further landmark in the European integration was the adoption of the Treaty establishing the European Economic Community¹⁴⁷ in 1957, on the basis of the Spaak¹⁴⁸ Report of 1956,¹⁴⁹ in which decisions concerning the establishment of the common market had a supranational character, while decisions on other matters, such as on social policy and fiscal issues, had to be made through an intergovernmental framework.¹⁵⁰ The Treaty establishing the European Economic Community came into force on January 1, 1958, together with the Treaty establishing the European Atomic Energy Community.¹⁵¹ The atomic cooperation was put into a separate treaty because of fears that the French would reject the Treaty establishing the European Economic Community;¹⁵² because France was the only country with a serious atomic energy plan there was almost absolute certainty that France would not reject the Treaty establishing the European Atomic Energy Community.

B. The Conduct of Foreign Policy in the European Community and European Union

1. The European Community

a. The Common Commercial Policy

The European Community has legal personality,¹⁵³ which gives the Community autonomous external powers.¹⁵⁴ That Treaty does not contain a lot of provisions concerning the foreign affairs powers of the European Community, but the decisions of the Court of Justice of

¹⁴⁷ TREATY ESTABLISHING A EUROPEAN ECONOMIC COMMUNITY, March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC TREATY].

¹⁴⁸ Paul-Henri Spaak was the Belgian Minister for Foreign Affairs at that time.

¹⁴⁹ The Spaak Report, *see* ARCHIVE OF EUROPEAN INTEGRATION, REPORT OF THE HEADS OF DELEGATION TO THE MINISTERS OF FOREIGN AFFAIRS (21 APRIL 1956), *available at* http://aei.pitt.edu/archive/00000995/01/Spaak_report.pdf (last visited Apr. 7, 2004).

¹⁵⁰ CHALMERS, *supra* note 133, at 15.

¹⁵¹ TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, March 25, 1957, 298 U.N.T.S. 259 [hereinafter EURATOM TREATY].

¹⁵² CHALMERS, *supra* note 133, at 15.

¹⁵³ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, 2002 O.J. (C 325) 35 (as in effect 2003) [hereinafter EC TREATY]; EC TREATY art. 281.

the European Communities have contributed in defining the scope of the Community's external relations powers.¹⁵⁵

In the field of the Common Commercial Policy the Treaty establishing the European Community states the following:

Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.

The relevant provisions of Article 300 will apply.¹⁵⁶

The Common Commercial Policy, which is a matter of exclusive competence of the Community,¹⁵⁷ can be seen as the external part of the single market.¹⁵⁸ This is also shown by the express application of article 300, which deals with the approval of international agreements.¹⁵⁹ Agreements in the field of the Common Commercial Policy in accordance with latter article will be binding on the institutions of the European Community and the Member States.¹⁶⁰ Note that the assent of the European Parliament is only necessary for agreements establishing an association involving reciprocal rights and obligations, common action and special procedure;¹⁶¹ for agreements establishing a specific institutional framework by organizing cooperation

¹⁵⁴ DAMIEN CHALMERS & ERIKA SZYSZCZAK, EUROPEAN UNION LAW 158 (vol. 2, 1998).

¹⁵⁵ GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 1023 (2nd ed. 2002); *see e.g.* Case 22/70, Commission v. Council, 1971 E.C.R. 263.

¹⁵⁶ EC TREATY art. 133, § 3.

¹⁵⁷ CHALMERS & SZYSZCZAK, *supra* note 154, 178-179.

¹⁵⁸ *Id.* at 168.

¹⁵⁹ EC TREATY art. 300.

¹⁶⁰ *Id.* art. 300, § 7.

¹⁶¹ *Id.* art. 310.

procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the co-decision procedure.¹⁶²

b. External Relations in Other Fields

The Commission maintains relations with the United Nations¹⁶³ and as appropriate with all other international organizations.¹⁶⁴ The European Community also cooperates with the Council of Europe¹⁶⁵ and the Organization for Economic Cooperation and Development.¹⁶⁶

The Commission also has 123 delegations around the world accredited to third countries and at five international organizations in order to represent the European Community abroad.¹⁶⁷

2. The European Union towards a Common Foreign and Security Policy

a. The First Steps

The aim of the Schuman Plan was to create a federation of Europe in the long run.¹⁶⁸ The cooperation in the coal and steel sector would eventually lead to a more general economic union; the apotheosis of the European cooperation would be the establishment of a political union.¹⁶⁹ With the exception of a common coal and steel export strategy to other countries, the Schuman Declaration did not provide for a common external policy.¹⁷⁰

¹⁶² *Id.* art. 300, § 3, cl. 1.

¹⁶³ *Id.* art. 302, cl. 1.

¹⁶⁴ *Id.* art. 302, cl. 2.

¹⁶⁵ *Id.* art. 303.

¹⁶⁶ *Id.* art. 304.

¹⁶⁷ EUROPEAN COMMISSION, THE ROLE OF THE DELEGATIONS, *available at* http://www.europa.eu.int/comm/external_relations/delegations/intro/role.htm (last visited Apr. 8, 2004).

¹⁶⁸ GATEWAY TO THE EUROPEAN UNION, *supra* note 143, *available at* http://europa.eu.int/abc/symbols/9-may/decl_en.htm (last visited Apr. 8, 2004).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

A real attempt to establish a common foreign and security policy in Western Europe began after October 1950,¹⁷¹ when the French Prime Minister René Pléven created a plan for a unified European military structure.¹⁷² It was intended that the European Political Community would incorporate the European Coal and Steel Community and the European Defense Community.¹⁷³ However, on August 30, 1954 the French House of Representatives adjourned the debate concerning the European Defense Community Treaty,¹⁷⁴ which entailed the idea of a supranational European defense structure.¹⁷⁵ In fact, the French House of Representatives rejected the European Defense Community because of reasons of sovereignty and the fear of a re-armament of the Federal Republic of Germany; thus, the political pendent of this Community was also rejected.¹⁷⁶ Other objections to the European Defense Community were that it indeed created a European Army, but without a common foreign and security policy and the lack of democratic control.¹⁷⁷

In August 1950, Winston Churchill also launched an idea of a European military cooperation, and he even supported the idea of a European Minister of Defense, although according to him Great Britain would not become a part of this structure.¹⁷⁸

In 1961 the French President Charles de Gaulle wanted to eliminate the supranational characteristics of the Treaty establishing the European Economic Community and transform it

¹⁷¹ See Reinhardt Rummel, *Western European Cooperation in Foreign and Security Policy*, 531 ANNALS AM. ACAD. POL. & SOC. SCI. 112, 114 (1994); P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 9 (3rd ed. 1998).

¹⁷² The Pléven Plan of which the announcement can be found on UNIVERSITY OF LEIDEN, THE PLEVEN PLAN, available at <http://www.let.leidenuniv.nl/history/rtg/res1/pleven.htm> (last visited Sept. 30, 2003).

¹⁷³ THE EUROPEAN UNION ONLINE, THE COMMON FOREIGN AND SECURITY POLICY: INTRODUCTION, available at <http://europa.eu.int/scadplus/leg/en/ivb/r00001.htm> (last visited Feb. 14, 2004).

¹⁷⁴ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 10.

¹⁷⁵ See John J. Kavanagh, *Attempting to Run before Learning to Walk: Problems of the EU's Common Foreign and Security Policy*, 20 B.C. INT'L & COMP. L. REV. 353, 355 (1997).

¹⁷⁶ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 12.

¹⁷⁷ The European Political Community was intended to give the European Defense Community a democratic character; *id.* at 10.

¹⁷⁸ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 10.

into a framework for mere intergovernmental cooperation.¹⁷⁹ For this de Gaulle established the Fouchet Committee, named after the French diplomat Christian Fouchet, which made proposals to establish a common foreign and security policy. This Committee was established to discuss the proposal of the French President. The latter proposed the establishment of a Political Union in which the heads of state and government within the Council of the Union could decide on a common foreign and security policy by unanimity. Besides a Council of the Union, this Political Union would also have consisted of a Political Commission to prepare and implement the decisions of the Council, and a Parliamentary Assembly with advisory powers. The original plan on this Political Union was to establish it parallel with the European Communities, but later plans expanded the action radius of the Political Union to economic issues, and the institutions of the Communities would be bound by the decisions of the heads of state and government.¹⁸⁰ The negotiations on the Fouchet Plan between the Member States did not lead to any action,¹⁸¹ because the small Member States feared a deterioration of the supranational character of the European Communities, and because of the refusal by the French to let the British participate in the negotiations.¹⁸²

In 1969, the heads of state and government meeting at The Hague inaugurated the European Political Cooperation, which entailed a common foreign policy, in an intergovernmental manner.¹⁸³ With the Davignon¹⁸⁴ Report that was presented to the Luxembourg Summit in 1970, the European Political Cooperation was informally launched as

¹⁷⁹ CHALMERS, *supra* note 133, at 21.

¹⁸⁰ KOEN LENAERTS & PIET VAN NUFFEL, *EUROPEES RECHT IN HOOFDLIJNEN* [EUROPEAN LAW IN GENERAL] 69 (2de herwerkte uitgave 1999) [2nd ed. 1999].

¹⁸¹ THE EUROPEAN UNION ONLINE, *supra* note 173, available at <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004).

¹⁸² LENAERTS & VAN NUFFEL, *supra* note 180, at 69-70.

¹⁸³ Kavanagh, *supra* note 175, at 355.

the main consultation device of the European leaders in matters of foreign policy.¹⁸⁵ The reason why the Member States accepted the European Political Cooperation could be found in the fact that unlike in the European Political Community the political cooperation was intergovernmental¹⁸⁶ and decisions required unanimity.¹⁸⁷

In 1974, the European Council was created. In the European Council the heads of state and government of the Member States gave incentives for the development of Community law. In fact, the meeting between the European heads of state and government started in the 1960s to discuss Community issues.¹⁸⁸ The European Council also defined the general orientation of the common foreign and security policy.¹⁸⁹ This organ was the main actor in the European Political Cooperation.¹⁹⁰ The Ministers of Foreign Affairs of the Member States could also discuss issues concerning foreign policy¹⁹¹ and the President of the Council represented the European Council in the European Political Cooperation.¹⁹² The role of the Commission increased¹⁹³ because it was involved in the proceedings of the European Council from the beginning and the European Parliament had the right to be informed.¹⁹⁴

¹⁸⁴ Etienne Davignon was a member of the Ministry of Foreign Affairs of Belgium and he led the working group that created the Davignon Report, *see* KNOWEUROPE, INTRODUCTION TO THE EU, *available at* <http://www.knoweurope.net/html/begguide/chrono/1970.htm> (last visited March 7, 2004).

¹⁸⁵ THE EUROPEAN UNION ONLINE, *supra* note 173, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004).

¹⁸⁶ *Id.* *available at* <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004).

¹⁸⁷ Kavanagh, *supra* note 175, at 355.

¹⁸⁸ BERMANN ET AL., *supra* note 155, at 40.

¹⁸⁹ THE EUROPEAN UNION ONLINE, *supra* note 173, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004).

¹⁹⁰ Daniel T. Murphy, *European Political Cooperation After the Single European Act: The Future of Foreign Affairs in the European Communities*, 12 B.C. INT'L & COMP. L. REV. 335, 338 (1989).

¹⁹¹ *Id.* at 339.

¹⁹² THE EUROPEAN UNION ONLINE, *supra* note 173, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004); Kavanagh, *supra* note 175, at 355.

¹⁹³ *Id.* *available at* <http://europa.eu.int/scadplus/leg/en/lvb/r00001.htm> (last visited Feb. 14, 2004); Kavanagh, *supra* note 175, at 355; Murphy, *supra* note 190, at 339.

b. Title III of the Single European Act

The Single European Act¹⁹⁵ gave a treaty basis to the European Political Cooperation,¹⁹⁶ but there remained a legal distinction between the European Community and the European Political Cooperation.¹⁹⁷ Nevertheless, the system of cooperation was given a treaty status.¹⁹⁸

The Member States had to endeavor jointly to formulate and implement a European foreign policy;¹⁹⁹ there was no obligation to create a common foreign policy, although some obligations were imposed on the institutions and organs to establish such a policy.²⁰⁰ The Member States would refrain from impeding the formulation of a consensus as much as possible.²⁰¹ Four times a year the Ministers of Foreign Affairs, the protagonists in the European Political Cooperation,²⁰² and a member of the Commission met to discuss foreign policy matters. They could also discuss foreign policy matters at the meetings of the Council of the European Communities.²⁰³ The Political Committee prepared the meetings of the Ministers and had to maintain the continuity of the political cooperation.²⁰⁴

The Commission was fully associated with the proceedings of the European Political Cooperation²⁰⁵ and had the task of controlling the consistency of the policy within the European Political Cooperation with the foreign policy of the European Economic Community.²⁰⁶

¹⁹⁴ Kavanagh, *supra* note 175, at 356.

¹⁹⁵ SINGLE EUROPEAN ACT, Feb. 17, 1986, O.J. (L. 169) 1 (1987) [hereinafter SEA].

¹⁹⁶ SEA title III.

¹⁹⁷ Kavanagh, *supra* note 175, at 355.

¹⁹⁸ Murphy, *supra* note 190, at 343.

¹⁹⁹ SEA art. 30.1.

²⁰⁰ Murphy, *supra* note 190, at 347.

²⁰¹ SEA art. 30.3 (c).

²⁰² Eric Stein, *European Foreign Affairs System and the Single European Act of 1986*, 23 INT'L LAW. 977, 983 (1989).

²⁰³ SEA art. 30.3 (a).

²⁰⁴ *Id.* art. 30.10 (c).

²⁰⁵ *Id.* art. 30.3 (b).

²⁰⁶ *Id.* art. 30.5; for more information about the consistency between the distinct policies, see Stein, *supra* note 202, at 986-987.

The European Parliament had the right to be informed, and the Presidency had the duty to take the views of Parliament in consideration.²⁰⁷

Also the existence of the European Council, which brings together the heads of state and government of the Member States and the President of the Commission and would meet twice a year, was recognized in the Single European Act,²⁰⁸ but it was not conceived as a new institution of the European Communities.²⁰⁹

The task of the Presidency of the European Political Cooperation was to initiate action and coordinate and represent the Member States to other countries within the framework of the political cooperation.²¹⁰ The Member State that was President of the Council was President of the European Political Cooperation.²¹¹

The Single European Act excluded jurisdiction of the Court of Justice of the European Communities in the field of foreign policy.²¹²

The Member States agreed to reexamine the foreign policy provisions after a period of five years,²¹³ which led to the adoption of the Treaty on European.

c. The Treaty on European Union

Although the Single European Act only provided for a possible revision of the provisions concerning the European Political Cooperation, the Member States wanted to have a stronger global integration²¹⁴ in a post-Cold War era²¹⁵ with a historical German reunification²¹⁶ and

²⁰⁷ SEA art. 30.4.

²⁰⁸ *Id.* art. 2.

²⁰⁹ Murphy, *supra* note 190, at 345.

²¹⁰ SEA art. 30.10 (b).

²¹¹ *Id.* art. 30.10 (a).

²¹² *Id.* art. 31.

²¹³ *Id.* art. 30.12.

²¹⁴ RICHARD CORBETT, THE TREATY OF MAASTRICHT 1 (1993).

therefore revised the whole structure of the European political project. Under the Treaty on European Union²¹⁷ the European Union was given a pillar structure,²¹⁸ wherein the first pillar had a supranational, and the two other pillars an intergovernmental character.²¹⁹ The Common Foreign and Security Policy became one of the fundamental pillars of the European Union,²²⁰ but the provisions had an intergovernmental character,²²¹ whose most important feature is that the Commission does not have the exclusive right of initiative.²²² The United Kingdom was very opposed to a common foreign and security policy that would have been integrated in the supranational pillar²²³ but the British Prime Minister agreed with the fact that European cooperation in matters of foreign policy would be in the best of the country.²²⁴ However, the Treaty on European Union contained more ad hoc compulsory provisions than the Single European Act,²²⁵ because the Member States had to *ensure* that their national policies were in conformity with the common positions²²⁶ and they had to coordinate their actions and uphold common positions on the international fora.²²⁷ In particular, this means that the Council, acting unanimously²²⁸ or with “quasi-unanimity”^{229, 230} can define common positions.²³¹ For example,

²¹⁵ BELMONT EUROPEAN POLICY CENTRE, *THE NEW TREATY ON EUROPEAN UNION, LEGAL AND POLITICAL ANALYSIS* 10 (vol. 2, 1992).

²¹⁶ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 36.

²¹⁷ TREATY ON EUROPEAN UNION, Feb. 2, 1992, O.J. (C. 191) 1 (1992) [hereinafter TEU].

²¹⁸ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 38.

²¹⁹ The first pillar consisted of the European Communities (European Coal and Steel Community, the European Community and the European Atomic Energy Community), the second pillar consisted of the common foreign and security policy and the third pillar entailed the cooperation in the field of justice and home affairs.

²²⁰ See Daniel T. Murphy, *The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam*, 31 VAND. J. TRANSNAT'L L. 871, 875 (1998).

²²¹ TEU title V.

²²² KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 38.

²²³ CORBETT, *supra* note 214, at 45.

²²⁴ Edward Best, *The United Kingdom and the Ratification of the Maastricht Treaty*, in *THE RATIFICATION OF THE MAASTRICHT TREATY* 245, 255 (1994).

²²⁵ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 171, at 38.

²²⁶ TEU art. J.2 (2), cl. 2.

²²⁷ *Id.* art. J.2 (3).

²²⁸ *Id.* art. J.8 (2), cl.2.

²²⁹ Murphy, *supra* note 220, at 880.

the Council Common Position on combating the illicit traffic in conflict diamonds, as a contribution to prevention and settlement of conflicts.²³² The Council can also decide that a matter should be the subject of a joint action.²³³ For example, the Council Joint Action on a European Union assistance programme to support the Palestinian Authority in its efforts to counter terrorist activities emanating from the territories under its control.²³⁴ These common positions and joint actions could entail every aspect of the foreign and security policy because the Treaty on European Union did not pose any limit on the extent of the Common Foreign and Security Policy.²³⁵ Also military aspects could be subject to a common position or joint actions, which was not the case within the former European Political Cooperation.²³⁶ Under the Single European Act the emphasis remained on unilateral actions by the Member States,²³⁷ whilst under the Treaty on European Union a true *common* policy was established.²³⁸

Because of the intergovernmental character of the Common Foreign and Security Policy, the Commission did not have a very important role in that policy,²³⁹ although it was totally associated with the work that was done under the second pillar.²⁴⁰ According to the Council this meant that the Commission had to use Community measures in order to achieve the objectives

²³⁰ DECLARATION ON VOTING IN THE FIELD OF THE COMMON FOREIGN AND SECURITY POLICY, 1992 O.J. (C 191) 104 (which states that “with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of that decision.”); compare with SEA art. 30.3 (c).

²³¹ TEU art. J.2 (2), cl. 1.

²³² Council Common Position 2001/758/CFSP, 2001 O.J. (L 286) 2.

²³³ TEU art. J.3 (1), cl. 1.

²³⁴ Council Joint Action 2000/298/CFSP, 2000 O.J. (L 97) 4; for another example, see Council Joint Action 96/668/CFSP, 1996 O.J. (L 309) 7.

²³⁵ Florika Fink-Hooijer, *The Common Foreign and Security Policy of the European Union*, 5 EUR. J. INT’L L. 173, 176 (1994).

²³⁶ TEU art. J.4 (1); Murphy, *supra* note 220, at 878.

²³⁷ See SEA art. 30.2 (c).

²³⁸ Murphy, *supra* note 220, at 876.

²³⁹ *Id.* at 884; for the opinion that the Commission has a strong role see Elizabeth Shaver Duquette, *The European Union’s Common Foreign and Security Policy: Emerging from the U.S. Shadow?*, 7 U.C. DAVIS J. INT’L L. & POL’Y 169, 174-175 (2001).

²⁴⁰ TEU art. J.9.

under the Common Foreign and Security Policy,²⁴¹ but the Commission could also effect the direction of this policy, because the President of the Commission, assisted by another Commissioner, was part of the European Council.²⁴² Nonetheless, the Commission was not the pair of the Member States and was not the one and only executive.²⁴³ It was the duty of the Commission to ensure the consistency and unity between the three pillars in foreign affairs,²⁴⁴ which means that the actions under the second pillar had to be consistent with the actions under the first pillar, where the Commission is the sole executive.²⁴⁵ The Commission also received a right of initiative equal to that of the Member States,²⁴⁶ but no “watchdog role”²⁴⁷ was imposed upon the Commission.

The Presidency became the representative of the European Union in matters relating to the Common Foreign and Security Policy, and would be responsible for the implementation of the common measures.²⁴⁸ The Presidency would also represent the Union in international organizations and conferences.²⁴⁹ Although the Commission would be totally associated with the work of the Presidency,²⁵⁰ the former did not have the same executive power as under the Treaty establishing the European Community,²⁵¹ where it enforced and applied Community law.²⁵² The Presidency will be assisted in its task by the previous Member State that held the Presidency and the next Member State that will hold the Presidency.²⁵³ This troika-structure,

²⁴¹ Council Common Position 94/779/CFSP, 1994 O.J. (L 313) 1.

²⁴² TEU art. D (2).

²⁴³ M.R. Eaton, *Common Foreign and Security Policy*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 215, 220-221 (David O’Keeffe & Patrick M. Twomey eds., 1994).

²⁴⁴ Fink-Hooijer, *supra* note 235, at 190.

²⁴⁵ Eaton, *supra* note 243, at 221.

²⁴⁶ TEU art. J.8 (3).

²⁴⁷ Eaton, *supra* note 243, at 221.

²⁴⁸ TEU art. J.5 (1)-(2).

²⁴⁹ *Id.* art. J.5 (2).

²⁵⁰ *Id.* art. J.5 (3).

²⁵¹ EC TREATY (as in effect 1993) (amended by art. G.1 TEU); *see* Murphy, *supra* note 190, at 885.

²⁵² EC TREATY art. 155.

²⁵³ TEU art. J.5 (3).

which includes always 4 members, i.e. the previous Presidency, the current Presidency, the next Presidency and the Commission, was intended to establish certain continuity in the actions of the European Union.²⁵⁴ This construction – representation of the Union under the second and third pillar by the Presidency and by the Commission under the first pillar – did not give the Union a clear single voice on the international scene, especially concerning mixed-pillar matters.²⁵⁵

The European Parliament continued playing a limited role,²⁵⁶ because it only had the right to be consulted and to be kept informed,²⁵⁷ and to ask questions and make recommendations.²⁵⁸ These provisions, however, only meant that the views of the European Parliament had to be duly taken into consideration²⁵⁹ and not that the consultation of Parliament became a formal legal procedure before taking a decision under the second pillar.²⁶⁰ In common foreign and security issues, the European Parliament did not have direct democratic control.²⁶¹

The Council was responsible for the daily conduct of the common foreign policy under the guidelines of the European Council and according to the principles defined by the European Council.²⁶²

The Court of Justice of the European Communities had no jurisdiction within the Common Foreign and Security Policy. The Court could neither control the implementation of the decisions by the Member States nor could it rule on the validity of an action of the European Union taken in the field of that policy, and no prejudicial questions concerning the common

²⁵⁴ See Fink-Hooijer, *supra* note 235, at 190.

²⁵⁵ See *id.* at 188.

²⁵⁶ Duquette, *supra* note 239, at 715.

²⁵⁷ TEU art. J.7 (1).

²⁵⁸ *Id.* art. J.7 (2).

²⁵⁹ *Id.* art. J.7 (1).

²⁶⁰ Nanette Neuwahl, *Foreign and Security Policy and the Implementation of the Requirement of “Consistency” under the Treaty on European Union*, in LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 243, at 227, 243.

²⁶¹ See Fink-Hooijer, *supra* note 235, at 192.

²⁶² TEU art. J.8 (1)-(2).

foreign policy could be posed to the European Court.²⁶³ This meant that a Member State could not be sued when it failed to abide by a common position; political pressure was the only enforcement method under the common foreign policy provisions.²⁶⁴ The Confederation under the Articles of Confederation also depended on the states for the implementation of its decisions and there was no Supreme Court in which the states could be sued. Questions concerning the line between the common foreign policy and the Treaties establishing the European Communities were well within the jurisdiction of the Court²⁶⁵ because the Treaty on European Union did not affect the Treaties establishing the European Communities.²⁶⁶ The Community Treaties were thus dominant over the Treaty on European Union,²⁶⁷ which entailed the Common Foreign and Security Policy. The European Union had to respect the *acquis communautaire*²⁶⁸ and the Court of Justice had the power to impose this duty and sanction any violation of it.²⁶⁹

The European Council, which is not an institution of the European Community,²⁷⁰ defined the principles of and the general guidelines for the common foreign policy²⁷¹ and provided guidelines for matters that are subject to joint action.²⁷²

Under the Treaty on European Union, the Union had equipped itself with the necessary structure to create and implement a common foreign policy, but the European Political Cooperation had already shown that instruments alone were not sufficient if there was no political will to create a real common policy.²⁷³

²⁶³ LENAERTS & VAN NUFFEL, *supra* note 180, at 102-103.

²⁶⁴ Eaton, *supra* note 243, at 221.

²⁶⁵ TEU art. L (c) *juncto* art. M.

²⁶⁶ *Id.* art. M.

²⁶⁷ Murphy, *supra* note 220, at 894.

²⁶⁸ This term cannot be translated and means the existing Community law as interpreted and used by the Court of Justice, *see* LENAERTS & VAN NUFFEL, *supra* note 192, at 91.

²⁶⁹ LENAERTS & VAN NUFFEL, *supra* note 180, at 103.

²⁷⁰ *See* EC TREATY art. 4 (1) (as in effect 1993).

²⁷¹ TEU art. J.8 (1).

²⁷² *Id.* art. J.3 (1).

²⁷³ Fink-Hooijer, *supra* note 235, at 197-198.

d. The Treaty of Amsterdam

The Treaty of Amsterdam²⁷⁴ completely rewrote the provisions on the Common Foreign and Security Policy²⁷⁵ and created a new title for it.²⁷⁶ The Treaty improved the mechanisms – i.e. the structures and the decision-making process –²⁷⁷ of the Union to act more effectively in external relations matters,²⁷⁸ without altering the substance and definition of the common foreign policy,²⁷⁹ although the objective of safeguarding the territorial integrity of the European Union in conformity with the principles of the Charter of the United Nations was added.²⁸⁰

Under the Treaty of Amsterdam, the European Council was given a more important role in the common foreign policy.²⁸¹ As under the Treaty on European Union, the European Council defined – by consensus under the heads of state and government –²⁸² the principles of and the general guidelines for the Common Foreign and Security Policy.²⁸³ The European Council was also assigned the task of deciding on common strategies to be implemented by the Union in areas where the Member States have important interests in common.²⁸⁴ These common strategies were a new foreign policy device created by the Treaty of Amsterdam²⁸⁵ in order to provide for a more appropriate framework for the decisions on joint actions and common positions made by the Council than the general guidelines might offer and to introduce an additional veto to safeguard

²⁷⁴ TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].

²⁷⁵ TREATY OF AMSTERDAM art. 10; LENAERTS & VAN NUFFEL, *supra* note 180, at 109.

²⁷⁶ Murphy, *supra* note 220, at 899.

²⁷⁷ THE EUROPEAN UNION ONLINE, THE AMSTERDAM TREATY: A COMPREHENSIVE GUIDE, available at <http://www.europa.eu.int/scadplus/leg/en/lvb/a19000.htm> (last visited Jan. 8, 2004).

²⁷⁸ Giorgio Maganza, *The Treaty of Amsterdam's Changes to the Common Foreign and Security Policy Chapter and An Overview of the Opening Enlargement Process*, 22 FORDHAM INT'L L.J. S174, S175-S176 (1999).

²⁷⁹ Murphy, *supra* note 220, at 899.

²⁸⁰ TEU art. J.1 (renumerated TEU art. 11).

²⁸¹ Murphy, *supra* note 220, at 905.

²⁸² LENAERTS & VAN NUFFEL, *supra* note 180, at 580.

²⁸³ TEU art. J.3 (1) (renumerated TEU art. 13 (1)).

²⁸⁴ *Id.* art. J.3 (2) (renumerated TEU art. 13 (2)).

²⁸⁵ THE EUROPEAN UNION ONLINE, *supra* note 277, available at <http://www.europa.eu.int/scadplus/leg/en/lvb/a19000.htm> (last visited Jan. 8, 2004).

the national control of foreign policy, because decisions on general guidelines *and* common strategies have to be made by consensus.²⁸⁶ This additional safeguard was invented by Germany to overcome the resistance of France towards the creation of majority voting in the Common Foreign and Security Policy.²⁸⁷

While the European Council was given the role to define the principles of and guidelines for the common foreign policy as well as to decide on common strategies, the Council was given the role to implement these decisions through joint actions and common positions.²⁸⁸ With respect to joint actions the Treaty of Amsterdam seemed to place the initiative with the Council, according to Murphy, because in the ad hoc provisions there was no reference to the European Council.²⁸⁹ Unlike with common strategies,²⁹⁰ the scope, duration, means, objectives and conditions for the implementation of joint actions were laid down by the Council and not by the European Council.²⁹¹ This would mean a shift from the Treaty on European Union where the European Council provided guidelines for matters that are subject to joint action.²⁹² The special position of joint actions could be explained by the fact that it is a single institutional act of the European Union, while common positions required implementation by every Member State; guidance and coordination by the European Council was thus more required for common positions.²⁹³ But the distinction made by Murphy between joint actions and common positions is not so convincing, because the Treaty of Amsterdam only referred to the European Council with

²⁸⁶ Dieter Mahncke, *Reform of the CFSP: From Maastricht to Amsterdam*, in THE EUROPEAN UNION AFTER THE TREATY OF AMSTERDAM 227, 237-238 (Jörg Monar & Wolfgang Wessels eds., 2001).

²⁸⁷ Elfriede Regelsberger & Uwe Schmalz, *The Common Foreign and Security Policy of the Amsterdam Treaty: Towards an Improved EU Identity on the International Scene?*, in *id.* at 249, 254; but note that Franklin Dehousse is of the opinion that also Germany did not agree to take decision by qualified majority, see FRANKLIN DEHOUSSE, AMSTERDAM: THE MAKING OF A TREATY 57 (1999).

²⁸⁸ TEU art. J.3 (1)-(3) (renumerated art. 13 (1)-(3)).

²⁸⁹ *Id.* art. J.4 (renumerated TEU art. 14).

²⁹⁰ *Id.* art. J.3 (2) (renumerated TEU art. 13 (2)).

²⁹¹ *Id.* art J.4 (1) (renumerated TEU art. 14).

²⁹² See *id.* art. J.3 (1) (as in effect in 1993 before the adoption of the Treaty of Amsterdam).

²⁹³ Murphy, *supra* note 220, at 906.

regards to common strategies. The Council's position was thus allegedly reinforced with respect to joint actions, but in the Treaty on European Union there was never any reference to the European Council in the provisions concerning common positions.²⁹⁴ Since the Treaty of Amsterdam a general provision in the Treaty on European Union stated that the Council would make the necessary decisions to define and implement the Common Foreign and Security Policy *on the basis of the general guidelines defined by the European Council*.²⁹⁵

The Treaty of Amsterdam took into account the criticism on the Treaty on European Union and provided more effective procedures in the common foreign policy,²⁹⁶ although the governments in the European Council continued to decide by unanimity²⁹⁷ or consensus.

Joint actions, common positions, other decisions on the basis of a common strategy and decisions implementing a joint action or common position were taken by the Council, which would act by qualified majority.²⁹⁸ Nonetheless, there was a so-called “emergency brake”,²⁹⁹ because if a Member State declared that, for important and stated reasons of national policy, it intended to oppose the adoption of a decision to be taken by qualified majority, a vote would not be taken. The Council could, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.³⁰⁰ Decisions were thus again taken by “quasi-unanimity”,³⁰¹ as it was under the Single European Act. In matters other than adopting joint actions, common positions, decisions implementing a joint action or a common position or taking any other decisions on the basis of a common strategy, the Council would act

²⁹⁴ See TEU art. J.2 (2) (as in effect in 1993 before the adoption of the Treaty of Amsterdam) & TEU art. 15 (as in effect 1999).

²⁹⁵ *Id.* art. J.3 (3) (renumerated TEU art. 13 (3)).

²⁹⁶ EUROPEAN COMMISSION, TREATY OF AMSTERDAM: WHAT HAS CHANGED IN EUROPE 18 (1999).

²⁹⁷ Mahncke, *supra* note 286, at 24.

²⁹⁸ TEU art. J.13 (1) (renumerated TEU art. 23 (1)).

²⁹⁹ COUNCIL OF THE EUROPEAN UNION, THE TREATY OF AMSTERDAM, CHALLENGES AND SOLUTIONS 12 (1998).

³⁰⁰ *Id.*

³⁰¹ Murphy, *supra* note 220, at 880.

unanimously.³⁰² In order to preserve the balance between unanimity and important national interest, the procedure of constructive abstention had been introduced.³⁰³ Although abstention by a Member State did not prevent the adoption of a decision in the matters mentioned previously, every member of the Council could qualify its abstention by making a formal declaration. This Member State was not obliged to apply the decision, but it had to accept that the decision committed the European Union. In a spirit of mutual solidarity, the Member State had to refrain from any action likely to conflict with or impede action of the European Union based on that decision and the other Member States had to respect the position of the abstaining member of the Council. But if the members of the Council qualifying their abstention in this way represented more than one third of the weighted votes, the decision was not adopted.³⁰⁴ Although the mechanism of abstention opened the possibility of an à la carte common foreign policy, a less restrictive decision-making procedure was established with the Treaty of Amsterdam,³⁰⁵ but the efficacy of a decision to which some Member States are not bound could be questioned.³⁰⁶

Under the Treaty of Amsterdam, the Secretary-General of the Council, who was appointed by the Council,³⁰⁷ became the High Representative for the Common Foreign and Security Policy,³⁰⁸ responsible to assist the Council in matters coming within the scope of the Common Foreign and Security Policy, especially through contributing to the formulation, preparation, and implementation of policy decisions.³⁰⁹ The function of the High Representative was strongly favored by France, although most other Member States did not favor a new organ

³⁰² TEU art. J.13 (1) (renumerated TEU art. 23 (1)).

³⁰³ Simon Duke, *The Common Foreign and Security Policy: Significant but Modest Changes*, in THE AMSTERDAM TREATY 473, 496 (2002).

³⁰⁴ TEU art. J.13 (1) (renumerated TEU art. 23 (1)).

³⁰⁵ Duke, *supra* note 303, at 498.

³⁰⁶ Murphy, *supra* note 220, at 904.

³⁰⁷ EC TREATY art. 151 (as in effect 1999).

³⁰⁸ TEU art. J.8 (3) (renumerated TEU art. 18 (3)).

³⁰⁹ *Id.* art. J.16 (renumerated TEU art. 26).

that would be on the same level as the Ministers of Foreign Affairs.³¹⁰ The function was created in order to strengthen the administration of the Common Foreign and Security Policy and to let it work more effectively³¹¹ and to bring continuity in the foreign relations of the Union.³¹² At the request of the Presidency and on behalf of the Council, the High Representative for the Common Foreign and Security Policy conducted the political dialogue with third parties.³¹³ In the Declaration on the Establishment of a Policy Planning and Early Warning Unit,³¹⁴ attached to the Treaty of Amsterdam, it was mentioned that the High Representative would also lead a new Policy Planning and Early Warning Unit established in the General Secretariat of the Council,³¹⁵ which would monitor and analyze the development of the Common Foreign and Security Policy, assess and warn about situations which may affect significantly the latter policy, and publish policy option papers with recommendations and strategies in this field.³¹⁶ Although the High Representative would be the single face and voice of the European Union on the international forum,³¹⁷ the Council could still appoint separate special representatives to deal with specific geopolitical circumstances.³¹⁸ It was not the intention to transform the High Representative into a “czar”³¹⁹ who would conduct the common foreign policy of the European Union,³²⁰ especially because there remained an overlapping with the responsibilities of the Commissioner in charge

³¹⁰ Michel Petite, *The Treaty of Amsterdam*, 2 THE JEAN MONNET WORKING PAPERS, available at <http://www.jeanmonnetprogram.org/papers/98/98-2--III.AN.html#Heading21> (last visited Jan. 18, 2004).

³¹¹ REFLECTION GROUP REPORT, available at <http://www.europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html#s13> (last visited Jan. 8, 2004); also see Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 16 (1998).

³¹² Sally Langrish, *The Treaty of Amsterdam*, 23 EUR. L. REV. 3, 13 (1998).

³¹³ TEU art. J.16. (renumerated TEU art. 26).

³¹⁴ DECLARATION ON THE ESTABLISHMENT OF A POLICY PLANNING AND EARLY WARNING UNIT 1997 O.J. (C 340) 132.

³¹⁵ *Id.* § 1.

³¹⁶ *Id.* § 2.

³¹⁷ THE EUROPEAN UNION ONLINE, GLOSSARY, available at <http://www.europa.eu.int/scadplus/leg/en/cig/g4000h.htm#h3> (last visited Jan. 8, 2004).

³¹⁸ THE EUROPEAN UNION ONLINE, *supra* note 277, available at <http://www.europa.eu.int/scadplus/leg/en/lvb/a19000.htm> (last visited Jan. 8, 2004).

³¹⁹ Murphy, *supra* note 220, at 909.

³²⁰ *Id.*

of External Relations.³²¹ This also made clear why the existing figure of the Secretary-General of the Council became High Representative, in order to prevent the creation of a strong political personage.³²²

The Commission remained fully associated with the work carried out in the field of the common foreign policy.³²³ As under the Treaty on European Union,³²⁴ it was fully associated with the tasks of the Presidency.³²⁵ The Commission could ask questions and submit proposals to the Council³²⁶ and request the Presidency to convene an extraordinary Council meeting in a case of emergency.³²⁷ The Council could also request the Commission to submit to it any appropriate proposals relating to the Common Foreign and Security Policy to ensure the implementation of a joint action.³²⁸ Only the latter was an extension of the power of the Commission,³²⁹ so the Commission did not acquire a stronger position in the conduct of the foreign policy of the European Union.³³⁰ The creation of the Policy Planning and Early Warning Unit in the General Secretariat of the Council also diminished some of the responsibilities of the Commission.³³¹

The Presidency represented the European Union in matters coming within the Common Foreign and Security Policy,³³² and was responsible for the implementation of the decisions in

³²¹ Manin, *supra* note 311, at 17.

³²² Petite, *supra* note 310, available at <http://www.jeanmonnetprogram.org/papers/98/98-2--III.AN.html#Heading21> (last visited Jan. 18, 2004).

³²³ TEU art. J.17 (renumerated TEU art. 27).

³²⁴ *Id.* art. J.5 (3) (as in effect 1993).

³²⁵ *Id.* art. J.8 (4) (as in effect 1999; renumerated TEU art. 18 (4)).

³²⁶ *Id.* art. J.12 (1) (renumerated TEU art. 22 (1)).

³²⁷ *Id.* art. J.12 (2) (renumerated TEU art. 22 (2)).

³²⁸ *Id.* art. J.4 (4) (renumerated TEU art. 14 (4)).

³²⁹ Murphy, *supra* note 220, at 908.

³³⁰ *See id.*; see also a *contrario* Petite, *supra* note 310, available at <http://www.jeanmonnetprogram.org/papers/98/98-2--III.AN.html#Heading21> (last visited Jan. 9, 2004) (where Petite mentioned the fact that the Commission was explicitly included in the troika-structure, which should strengthen the position of the Commission); *de facto* the Commission was already involved in the troika-structure.

³³¹ Murphy, *supra* note 220, at 908-910.

³³² TEU art. J.8 (1) (renumerated TEU art. 18 (1)).

the field of the latter policy. In principle the Presidency expressed the position taken by the European Union in international organizations and conferences.³³³ Everything remained as it was under the Treaty on European Union.³³⁴ When the current Presidency saw it fit, it was assisted by the next Member State to hold the Presidency.³³⁵ The troika-structure had been changed³³⁶ and consisted of the current Presidency, the next Member State to hold the Presidency,³³⁷ and the Commission, the latter being a permanent member of the troika.³³⁸ Thus, since the Treaty of Amsterdam, the troika consisted of three members instead of four, as it was established under the Treaty on European Union.

As before, the European Parliament continued playing a very limited role. The Parliament had the right to be consulted by the Presidency on the main aspects and basic choices of the Common Foreign and Security Policy and to be kept regularly informed by the Presidency and the Commission of the development of this policy.³³⁹ The Presidency had to ensure that the views of the European Parliament were duly taken in consideration.³⁴⁰ The Parliament also had the right to ask questions of the Council or to make recommendations to it and to hold an annual debate on the progress in the implementation of the Common Foreign and Security Policy.³⁴¹ Although the European Parliament did not have the power to sanction the Council for the conduct of the Union's foreign policy,³⁴² the Interinstitutional Agreement on the Financing of the Common Foreign and Security Policy³⁴³ provided that the Presidency needed to consult the

³³³ *Id.* art. J.8 (2) (renumerated TEU art. 18 (2)).

³³⁴ *Id.* art. J.5 (1)-(2) (as in effect 1993); *see also* Maganza, *supra* note 278, at S178 (1999).

³³⁵ TEU art. J.8 (4) (renumerated TEU art. 18 (4)).

³³⁶ Murphy, *supra* note 220, at 909.

³³⁷ TEU art. J.8 (4) (renumerated TEU art. 18 (4)).

³³⁸ Fink-Hooijer, *supra* note 235, at 190.

³³⁹ TEU art. J.11, cl. 1 (renumerated TEU art. 21, cl. 1).

³⁴⁰ *Id.*

³⁴¹ *Id.* art. J.11 (2) (renumerated TEU art. 21, cl. 2).

³⁴² LENAERTS & VAN NUFFEL, *supra* note 180, at 584.

³⁴³ INTERINSTITUTIONAL AGREEMENT ON THE FINANCING OF THE COMMON FOREIGN AND SECURITY POLICY (July 16, 1997), 1997 *Bull. EU* 7-8-1997.

European Parliament on a document established by the Council on the main aspects and basis choices of the Common Foreign and Security Policy, including the financial implications on the budget of the European Communities.³⁴⁴ Each time, when the Council adopted a decision in the field of the latter policy, the Council had to communicate to the European Parliament an estimate of the costs envisaged, i.e. a “fiche financière.”³⁴⁵ Also the Commission had to inform the Parliament on the financial forecasts of the common foreign policy.³⁴⁶

The Treaty of Amsterdam did not change the provisions concerning the competence of the Court of Justice of the European Communities, which means that the Court has no competence in the field of common foreign policy.³⁴⁷

Although the Treaty of Amsterdam did not alter the institutional framework of the common foreign policy in a significant way,³⁴⁸ the creation of the position of the High Representative for the Common Foreign and Security Policy had an important impact on the conduct of the Union’s external relations.³⁴⁹ The Treaty of Amsterdam also did not settle the conflicting relationship between the High Representative and the Commissioner in charge of External Relations,³⁵⁰ which would remain a substantial problem for several years.

e. The Treaty of Nice

The treaty in force today is the Treaty of Nice,³⁵¹ which was intended to prepare the institutions of the European Union on the coming enlargement with twelve more Member

³⁴⁴ *Id.* under 2.3.1. (L).

³⁴⁵ *Id.* under 2.3.1. (M).

³⁴⁶ *Id.* under 2.3.1. (N).

³⁴⁷ TEU art. L (renumerated TEU art. 46).

³⁴⁸ Murphy, *supra* note 220, at 913; Manin, *supra* note 311, at 17.

³⁴⁹ Manin, *supra* note 311, at 17.

³⁵⁰ *See id.*

³⁵¹ TREATY OF NICE, AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, O.J. (C 80) 1 (2001) [hereinafter TREATY OF NICE].

States.³⁵² The institutions of the European Community had never been reformed since the creation of this Community and it was clear that a Union with 27 Member States could not work with an institutional framework created by and for the six Founding Members.³⁵³ The Treaty of Amsterdam had not given sufficient solutions on the problems that would arise due to the enlargement process.³⁵⁴

The Treaty of Nice did not bring many changes in the field of the Common Foreign and Security Policy. One important factor was the establishment of enhanced cooperation under the second pillar³⁵⁵ – which had not been introduced in the Treaty of Amsterdam –³⁵⁶ in addition to the existing constructive abstention.³⁵⁷ Enhanced cooperation can only be undertaken as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable time schedule by applying the relevant provisions of the Treaties.³⁵⁸ Enhanced cooperation is possible for the implementation of a joint action or a common position.³⁵⁹ Member States that want to establish enhanced cooperation between them have to address a request to the Council.³⁶⁰ The request is then forwarded to the Commission and the European Parliament for information. The Commission has to give its opinion on whether the proposed enhanced cooperation is consistent with the policies of the European Union.³⁶¹ A negative opinion by the Commission will not prevent the enhanced cooperation, although there were suggestions that the Council should decide on the enhanced cooperation

³⁵² DAVID GALLOWAY, *THE TREATY OF NICE AND BEYOND* 13 (2001).

³⁵³ EUROPEAN COMMISSION, *THE INSTITUTIONS AND BODIES OF THE EUROPEAN UNION: WHO'S WHO IN THE EUROPEAN UNION? WHAT DIFFERENCE WILL THE TREATY OF NICE MAKE?* 3 (2001).

³⁵⁴ Xenophon A. Yataganas, *The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective*, 7 EUR. L. J. 242, 243 (2001).

³⁵⁵ TREATY OF NICE art. 6 (current TEU art. 27a-e).

³⁵⁶ GALLOWAY, *supra* note 352, at 134.

³⁵⁷ TEU art. 23.

³⁵⁸ TREATY OF NICE art. 12 (current TEU art. 43a).

³⁵⁹ *Id.* art. 6 (current TEU art. 27b).

³⁶⁰ *Id.* art. 6 (current TEU art. 27c).

³⁶¹ *Id.*

with unanimity if the Commission had given a negative advice.³⁶² The Council will act by qualified majority, but if a Member State declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision by qualified majority, a vote will not be taken. Then, the Council can, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.³⁶³ The same “emergency brake”³⁶⁴ as created under the Treaty of Amsterdam is thus applicable on the enhanced cooperation.³⁶⁵

If a Member State wants to participate in enhanced cooperation it has to notify its intention to the Council and to notify the Commission. Within three months of the date of receipt of that notification the Commission has to give an opinion to the Council. The Council will then make a decision within four months of the date of receipt of that notification. The decision will be deemed to be taken unless the Council, acting by a qualified majority within the specified periods, decides to hold it in abeyance. If so, the Council can set a deadline for re-examining the request.³⁶⁶ Decisions by the Council are taken by qualified majority.³⁶⁷

The European Parliament plays an insignificant role in the common foreign policy of the Union.³⁶⁸ It has the right to be informed of the implementation of enhanced cooperation.³⁶⁹ In the evolution of the institutional framework of the common foreign policy, the European Parliament never succeeded in taking more power.

Without prejudice to the powers of the Presidency or of the Commission, the High Representative for the Common Foreign and Security Policy has to ensure that the European

³⁶² GALLOWAY, *supra* note 352, at 137.

³⁶³ TREATY OF NICE art. 6 (current TEU art. 27c) *juncto* TEU art. 23 (2).

³⁶⁴ COUNCIL OF THE EUROPEAN UNION, *supra* note 299, at 12.

³⁶⁵ GALLOWAY, *supra* note 352, at 137.

³⁶⁶ TREATY OF NICE art. 6 (current TEU art. 27e).

³⁶⁷ *Id.*

³⁶⁸ Jan Wouters, *Institutional and constitutional challenges for the European Union – some reflections in the light of the Treaty of Nice*, 26 EUR. L. REV. 342, 352 (2001).

³⁶⁹ TREATY OF NICE art. 6 (current TEU art. 27d).

Parliament and all members of the Council are kept fully informed of the implementation of enhanced cooperation.³⁷⁰

The Political and Security Committee will monitor the international situation in the areas covered by the Common Foreign and Security Policy and has to deliver opinions to the Council at the request of the latter, or on its own initiative.³⁷¹ Without prejudice to the responsibility of the Presidency and the Commission, it must monitor the implementation of agreed policies.³⁷² Under the responsibility of the Council, the Political and Security Committee will exercise political control and strategic direction of crisis management operations and, when authorized by the Council, the Committee will be able to make ad hoc decisions.³⁷³

Thus, the Treaty of Nice brought only minor changes in the institutional framework and the conduct of the common foreign policy.

C. The Draft Constitution

1. The European Convention

Pursuant to the Declaration on the Future of the European Union³⁷⁴ adopted at the European Council in Laeken held on December 14-15, 2001, the Convention was established to pave the path towards the Union's future development³⁷⁵ and to reform the complex treaty structure into a less complex one.³⁷⁶ The former French President Valéry Giscard d'Estaing presided over the Convention, assisted by the former Belgian Prime Minister Jean-Luc Dehaene

³⁷⁰ *Id.*

³⁷¹ *Id.* art 5 (current TEU art. 25).

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ EUROPEAN COUNCIL, LAEKEN DECLARATION ON THE FUTURE OF THE EUROPEAN UNION, 2001 PRESIDENCY CONCLUSIONS (Annex I) 19 (Dec. 14-15, 2001).

³⁷⁵ *Id.* at 24.

³⁷⁶ Yves Mény & Claus-Dieter Ehlermann, *A Basic Treaty for the European Union: The EUI's Draft*, in *A SIMPLIFIED TREATY FOR THE EUROPEAN UNION?* 29, 32 (Kim Feus ed. 2001).

and the former Italian Prime Minister Giuliano Amato. The Convention consisted of representatives of the heads of state and government of the current and future Member States, members of the Commission and national and European parliamentarians; in total 105 members were represented.³⁷⁷ This Convention, constructed to the model of the American Convention in 1786-1787, completed its work on July 10, 2003,³⁷⁸ and submitted the final text of the Draft Treaty establishing a Constitution for Europe³⁷⁹ to the Italian Presidency of the European Council in Rome on July 18, 2003.³⁸⁰

The relevant provisions on the Common Foreign and Security policy are now reorganized in one single constitutional document, which should make this policy area more transparent to the public and to the international community.³⁸¹

2. The Draft European Union Constitution

a. The Content of the Draft Constitution in the Areas of Common Foreign and Security Policy³⁸²

The European Union³⁸³ will conduct a Common Foreign and Security Policy in which the European Council – which has been given the status of institution of the European Union –³⁸⁴

³⁷⁷ *Id.*

³⁷⁸ EUROPEAN CONVENTION, DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, *available at* <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content> (last visited Feb. 14, 2004).

³⁷⁹ DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE DRAFT, July 18, 2003, O.J. (C 169) 1 (2003) [hereinafter DRAFT CONST.].

³⁸⁰ EUROPEAN CONVENTION, ROME DECLARATION 2 (July 18, 2003), *available at* http://european-convention.eu.int/docs/Treaty/Rome_EN.pdf (last visited Jan. 19, 2004).

³⁸¹ EUROPEAN CONVENTION, FINAL REPORT OF WORKING GROUP VII ON EXTERNAL ACTION 2 (Dec. 16, 2002), *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

³⁸² The reader has to be aware that everything in the Draft Constitution is still negotiable. This thesis will examine the Draft Constitution as it was proposed by the European Convention.

³⁸³ The distinction between European Community, European Communities and European Union will no longer exist; *see* DRAFT CONST. art. I-1.

³⁸⁴ *Id.* art. I-18.

will identify the strategic interests and the objectives³⁸⁵ and define the general guidelines.³⁸⁶ The composition of the European Council has not changed, except for the fact that the Union Minister for Foreign Affairs will take part in its work.³⁸⁷ The President of the European Council will be able to convene an extraordinary meeting of the European Council, if international developments so require, in order to define the strategic lines of the Union's policy in the face of such international developments.³⁸⁸ The role of the European Council was thus reinforced as the essential institution in the common foreign policy.³⁸⁹

The President of the European Council – elected by the European Council by qualified majority for a term of two and a half years –³⁹⁰ will, at his level and within that capacity, ensure the external representation of the Union on issues concerning common foreign policy, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.³⁹¹ The President of the European Council may not hold a national mandate.³⁹² In the Working Group on External Action it became clear that some Member States opposed the creation of a permanent – and stronger – President of the European Council.³⁹³ The smaller Member States especially feared that a strong President of the European Council would reduce the protection they received from a stronger Commission; one of the main tasks of the Commission is to protect the interests of the smaller Member States.

³⁸⁵ *Id.* art. I-39, cl. 2.

³⁸⁶ *Id.* art. III-196 (1).

³⁸⁷ *Id.* art. I-20, cl. 2; the High Representative for the Common Foreign and Security Policy did not take part in the work of the European Council.

³⁸⁸ *Id.* art. III-196 (1).

³⁸⁹ EUROPEAN CONVENTION, *supra* note 381, at 17, *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

³⁹⁰ DRAFT CONST. art. 21 (1).

³⁹¹ *Id.* art 21 (2).

³⁹² *Id.* art 21 (3).

³⁹³ EUROPEAN CONVENTION, *supra* note 381, at 32, *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

The Council of Ministers³⁹⁴ – or better the Foreign Affairs Council –³⁹⁵ must adopt, together with the European Council, the necessary ad hoc decisions,³⁹⁶ but the implementation of the decisions in the field of common foreign policy will be reserved to the Council of Ministers, which will decide on the basis of the general guidelines and strategic lines defined by the European Council.³⁹⁷ The European Council and the Council of Ministers take decisions in the field of the common foreign policy on proposal of the Union Minister for Foreign Affairs or of a Member State,³⁹⁸ which may refer all questions concerning this area to the Council of Ministers.³⁹⁹ The Council of Ministers will, on the one hand, take decisions by unanimity,⁴⁰⁰ but abstentions will not prevent the adoption of a decision.⁴⁰¹ A Member State may qualify its abstention by making a formal declaration. In that case, the Member State is not obliged to follow the decision, but it has to accept that the decision will commit the Union and it has to refrain from any action likely to conflict with or impede Union action based on that decision. When the members of the Council of Ministers qualifying their abstention in the above mentioned way represent at least one third of the Member States representing at least one third of the population of the European Union, the decision will not be adopted.⁴⁰²

Instead of requiring one third of the weighted votes,⁴⁰³ the Draft Constitution requires one third of the Member States representing at least one third of the population of the Union. On the

³⁹⁴ The Draft Constitution speaks about the ‘Council of Ministers’ instead of the ‘Council’; surely this will help to end the current confusion that is often made between the European Council and the Council.

³⁹⁵ The Council of Ministers will be divided in two formations depending of the issues concerned: the Legislative and General Affairs Council and the Foreign Affairs Council. The latter will be presided by the Union Minister for Foreign Affairs; *see* DRAFT CONST. art. I-23 (1)-(2); *see also* EUROPEAN CONVENTION, *supra* note 381, at 6, *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

³⁹⁶ DRAFT CONST. art. I-39, cl. 3.

³⁹⁷ *Id.* art. III-196 (2).

³⁹⁸ *Id.* art. I-39, cl. 7.

³⁹⁹ *Id.* art. III-200, cl. 1.

⁴⁰⁰ *Id.* art. I-39, cl. 7.

⁴⁰¹ *Id.* art. III-201 (1).

⁴⁰² *Id.*

⁴⁰³ TREATY OF AMSTERDAM art. J.13 (1).

other hand, the Council of Ministers will act by qualified majority, when adopting decisions on Union actions and positions on the basis of a European decision of the European Council, relating to the Union's strategic interests and objectives.⁴⁰⁴ Also when adopting a decision on a Union action or position, on a proposal that the Union Minister for Foreign Affairs has put to it following a specific request to him from the European Council made on its own initiative or that of the Minister the Council of Ministers will act by qualified majority,⁴⁰⁵ when adopting any European decision implementing a Union action or position,⁴⁰⁶ when adopting a decision concerning the appointment of a special representative,⁴⁰⁷ or when the European Council decides unanimously that the Council of Ministers will act by qualified majority for matters other than the previously mentioned ones.⁴⁰⁸ But if a Member State declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be adopted by qualified majority, a vote will not be taken. The Union Minister for Foreign Affairs will, in close consultation with the opposing Member State, search for an acceptable solution. If he does not succeed, the Council of Ministers may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity,⁴⁰⁹ which means that a filtered emergency brake has been introduced by the Draft Constitution. Decisions are still taken by "quasi-unanimity",⁴¹⁰ as it was under the Single European Act, which was regretted by a number of the members of the Convention.⁴¹¹ The only difference with the Treaty of Amsterdam is the extra institutional filter: before bringing the matter before the European Council for decision by

⁴⁰⁴ DRAFT CONST. art. III-201 (2)(a).

⁴⁰⁵ *Id.* art. III-201 (2)(b).

⁴⁰⁶ *Id.* art. III-201 (2)(c).

⁴⁰⁷ *Id.* art. III-201 (2)(d).

⁴⁰⁸ *Id.* art. III-201 (3).

⁴⁰⁹ *Id.* art. III-201 (2).

⁴¹⁰ Murphy, *supra* note 220, at 880.

⁴¹¹ EUROPEAN CONVENTION, SUMMARY REPORT ON THE PLENARY SESSION – BRUSSELS, 30 AND 31 MAY 2003, at 10, available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00783en03.pdf> (last visited Jan. 23, 2004).

unanimity, the Union Minister may try to find a solution, which actually means that the Union Minister has to reach unanimity on the issue presented to the Council of Ministers. The Council in its new formation will remain responsible for the implementation of the common foreign policy of the European Union set by the European Council.

The Union Minister for Foreign Affairs – a new position created by the Draft Constitution intended to combine the positions of the current High Representative for the Common Foreign and Security Policy and the Commissioner in charge of External Relations⁴¹² – will put into effect and conduct the Common Foreign and Security Policy, using national and Union resources.⁴¹³ The Minister will be appointed by the European Council, acting by qualified majority, with the agreement of the President of the Commission. His tenure will be ended by the same procedure.⁴¹⁴ He will be one of the Vice-Presidents of the Commission, responsible for handling external relations and for coordinating other aspects of the Union's external action, for which he will be bound by Commission procedures, but only when he exercises his responsibilities within the European Commission.⁴¹⁵ The Union Minister will not become a separate institution because the Member States thought of a new institution as complicating the general framework of the European Union.⁴¹⁶

The Union Minister for Foreign Affairs will chair the Council of Ministers of Foreign Affairs, as proposed by the current High Representative for the Common Foreign and Security

⁴¹² Antonio Missiroli, *ESDP – Post-Iraq: Building a European Security and Defense Policy: What are the priorities?*, 2003 THE CICERO FOUNDATION, available at http://www.cicerofoundation.org/lectures/format_print.htm?article=missiroli_jun03&title=Lecture%20by%20Missiroli (last visited Jan. 18, 2004).

⁴¹³ DRAFT CONST. art. I-39, cl. 4 *juncto* art. I-27, cl. 1.

⁴¹⁴ *Id.* art. I-27, cl. 1.

⁴¹⁵ *Id.* art. I-27, cl. 3.

⁴¹⁶ Petite, *supra* note 310, available at <http://www.jeanmonnetprogram.org/papers/98/98-2--III.AN.html#Heading21> (last visited Jan. 18, 2004).

Policy Javier Solana,⁴¹⁷ and through his proposals he will contribute towards the preparation of a Common Foreign and Security Policy. He will ensure implementation of decisions adopted by the European Council and the Council of Ministers.⁴¹⁸ For matters relating to the common foreign policy, the Union Minister will represent the European Union. He will conduct political dialogue on behalf of the Union and will express the Union's position in international conferences and organizations,⁴¹⁹ so that the Union will have a speaker in international fora.⁴²⁰ The Minister will be assisted by a European External Action Service, which will work in cooperation with the diplomatic services of the Member States.⁴²¹ In cases requiring rapid decision, the Union Minister, on his own motion or at the request of a Member State, will convene an extraordinary meeting of the Council of Ministers within 48 hours, or in an emergency, within a shorter time period.⁴²²

In international organizations and conferences Member States have to coordinate their action, under the organization of the Union Minister, in order to uphold the Union's position.⁴²³ Member States that are member of the United Nations Security Council have to keep the Union Minister fully informed and when the European Union has defined a position which is on the agenda of the Security Council, the Member States that sit on the Security Council will request that the Union Minister for Foreign Affairs be asked to present the Union's position.⁴²⁴ Although the Union Minister for Foreign Affairs has to be the European face to the world, the Council of Ministers can still appoint, on the initiative of the Minister, a special representative

⁴¹⁷ EUROPEAN CONVENTION, ADDRESS OF THE SECRETARY-GENERAL/HIGH REPRESENTATIVE MR. JAVIER SOLANA AT THE MEETING OF WG VII ON 15 OCTOBER 2002 9, *available at* <http://european-convention.eu.int/docs/wd7/4506.pdf> (last visited Jan. 19, 2004).

⁴¹⁸ DRAFT CONST. art. III-197, cl. 1.

⁴¹⁹ *Id.* art. III-197, cl. 2.

⁴²⁰ EUROPEAN CONVENTION, *supra* note 381, at 10, *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

⁴²¹ DRAFT CONST. art. III-197, cl. 3.

⁴²² *Id.* art. III-200, cl. 2.

with a mandate in relation to particular policy issues. Nonetheless, the special representative will carry out his mandate under the authority of the Union Minister.⁴²⁵

Finally, the Union Minister for Foreign Affairs – unlike the High Representative for the Common Foreign and Security Policy –⁴²⁶ will have ministerial status, because once the European Union has defined a common approach, the Union Minister and the Ministers for Foreign Affairs of the Member States will coordinate their activities within the Council of Ministers.⁴²⁷ Thus, in the European sphere, the Union Minister will be on the same level as the Ministers for Foreign Affairs of the individual Member States. The Draft Constitution has also given the Union Minister a strong mandate as the representative of the Union in the world. Although there were ideas to make the Union Minister for Foreign Affairs subordinate to the President of the European Council,⁴²⁸ there is no express mentioning of this in the Draft Constitution. It is important that the President of the European Council cannot interfere with the responsibilities of the Union Minister.⁴²⁹

Although there would still be a Presidency of the Council of Ministers, this will no longer have any powers in the field of the common foreign policy because the Foreign Affairs Council is presided by the Union Minister for Foreign Affairs.⁴³⁰ With the creation of the function of the Union Minister for Foreign Affairs, the so-called troika no longer has a place in the external representation of the Union.⁴³¹

⁴²³ *Id.* art. III-206 (1).

⁴²⁴ *Id.* art. III-206 (2).

⁴²⁵ *Id.* art. III-203.

⁴²⁶ Petite, *supra* note 310, available at <http://www.jeanmonnetprogram.org/papers/98/98-2--III.AN.html#Heading21> (last visited Jan. 18, 2004).

⁴²⁷ DRAFT CONST. art. III-202, cl. 1.

⁴²⁸ See EUROPEAN CONVENTION, SUMMARY REPORT ON THE PLENARY SESSION – BRUSSELS, 20 DECEMBER 2002 8, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00473en2.pdf> (last visited Jan. 19, 2004).

⁴²⁹ DRAFT CONST. art. I-21 (2).

⁴³⁰ *Id.* art. I-23 (2) & art. I-23 (4).

⁴³¹ EUROPEAN CONVENTION, *supra* note 381, at 5, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

Under the Draft Constitution, the composition of the European Commission has changed drastically and the Union Minister for Foreign Affairs will be the Vice-President of the European Commission.⁴³² The European Commission will ensure the external representation of the European Union, with the exception of the Common Foreign and Security Policy and other cases provided for in the Constitution.⁴³³ The new arrangements concerning the composition of the European Commission will only take effect on November 1, 2009,⁴³⁴ which means that the Union Minister will not become Vice-President of the European Commission before that date.⁴³⁵ The President of the Commission will have no powers in the field of foreign policy.⁴³⁶

The European Parliament has the right to be consulted on the main aspects and basic choices of the Common Foreign and Security Policy by the Union Minister for Foreign Affairs, who will ensure that the views of the European Parliament are duly taken into consideration. The Union Minister will also keep the Parliament regularly informed of the development of the common foreign policy.⁴³⁷ The Working Group on External Action proposed this involvement of the Union Minister in the consultation of the Parliament.⁴³⁸ Special representatives can be involved in briefing the European Parliament.⁴³⁹ It may ask questions of the Council of Ministers and of the Union Minister for Foreign Affairs or make recommendations to them. Twice a year the Parliament will hold a debate on the progress in implementing the common foreign policy.⁴⁴⁰ Basically, the European Council and the Council of Ministers will adopt

⁴³² DRAFT CONST. art. I-25 (3).

⁴³³ *Id.* art. I-25 (1).

⁴³⁴ *Id.* art. I-25 (3).

⁴³⁵ EUROPEAN COMMISSION, DRAFT CONSTITUTION: CITIZENS' GUIDE 16, *available at* http://www.europa.eu.int/futurum/comm/documents/guidecitoyen_en.pdf (last visited Jan. 20, 2004).

⁴³⁶ *See* DRAFT CONST. art. I-26 (3).

⁴³⁷ *Id.* art. III-205, cl. 1

⁴³⁸ EUROPEAN CONVENTION, *supra* note 381, at 8, *available at* <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> (last visited Jan. 23, 2004).

⁴³⁹ DRAFT CONST. art. III-205, cl. 1.

⁴⁴⁰ *Id.* art. III-205, cl. 2.

decisions relating to the Union's common foreign policy and the European Parliament will have no other right than to be consulted and kept informed.⁴⁴¹

The Court of Justice will have no jurisdiction with respect to the Common Foreign and Security Policy.⁴⁴² Nonetheless, the Court will have jurisdiction to monitor the compliance of the implementation of the Common Foreign and Security Policy with the areas of exclusive competence,⁴⁴³ the areas of shared competence,⁴⁴⁴ the coordination of economic and employment policies,⁴⁴⁵ and areas of supporting, coordinating or complementary action.⁴⁴⁶ But the implementation of the policies mentioned in the previous areas may not affect the Union's competence in matters of Common Foreign and Security Policy;⁴⁴⁷ the Court of Justice will also have jurisdiction to monitor this aspect.⁴⁴⁸ One group inside the Discussion Circle on the Court of Justice favored judicial review on decisions in the field of foreign policy based on the rule of law, while another group thought of this as weakening the Union's effectiveness in its conduct of foreign relations.⁴⁴⁹ Thus, no substantial changes in the jurisdiction of the Court will occur under the Draft Constitution.

The Political and Security Committee will monitor the situation in the areas covered by the common foreign policy and deliver opinions to the Council of Ministers at the request of the latter, or of the Union Minister for Foreign Affairs, or on its own initiative. The Committee will also monitor the implementation of agreed policies, without prejudice to the responsibility of the

⁴⁴¹ *See id.* art. I-39, cl. 6-7.

⁴⁴² *Id.* art. III-282, cl. 1.

⁴⁴³ *Id.* art. I-12.

⁴⁴⁴ *Id.* art. I-13.

⁴⁴⁵ *Id.* art. I-14.

⁴⁴⁶ *Id.* art. I-16.

⁴⁴⁷ *Id.* art. III-209, cl. 1 *in fine*.

⁴⁴⁸ *Id.* art. III-209, cl. 2.

⁴⁴⁹ EUROPEAN CONVENTION, SUPPLEMENTARY REPORT ON THE QUESTION OF JUDICIAL CONTROL RELATING TO THE COMMON FOREIGN AND SECURITY POLICY 2, available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00689-re01en03.pdf> (last visited Jan. 23, 2004).

Union Minister.⁴⁵⁰ The Political and Security Committee will exercise, under the responsibility of the Council of Ministers and of the Union Minister, political control and strategic direction of crisis management operations.⁴⁵¹ The Council of Ministers may authorize the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council of Ministers, to take the relevant measures concerning the political control and strategic direction of the operation.⁴⁵²

b. Comparison of the Proposed System and Institutions of
the European Union for the Conduct of Foreign Affairs

The most important contribution of the Draft Constitution to the further development of a common foreign policy is the creation of the function of Union Minister for Foreign Affairs who will put the common foreign policy into effect. Unlike the High Representative, he will have ministerial status. In his function as Vice-President of the Commission he will be responsible to the Commission of which the Union Minister will be a part. The Union Minister can only be dismissed by the European Council with the agreement of the President of the Commission.

Neither the Commission nor the European Council alone can end the tenure of the Union Minister, in contrast with the President of the United States, who can dismiss the Secretary of State – who has ministerial status – on his own authority. The Secretary of State is above all responsible to the President and not to Congress, although the President must get approval from the Senate for his appointment, the Secretary can be impeached, and he must testify before Congress. The Union Minister will also not be responsible to the Council or the Parliament, but only to the European Council, except in the case where he will act in his capacity as Vice-

⁴⁵⁰ DRAFT CONST. art. III-208, cl. 1.

⁴⁵¹ *Id.* art. III-208, cl. 2.

President of the Commission. The Commission, as a college, will be responsible to the European Parliament,⁴⁵³ which means that the Union Minister will also have to resign when the European Parliament has adopted a motion of censure. Thus the Union Minister will, as Vice-President of the Commission, be responsible to the European Parliament, just as the Commissioner in charge of External Relations is today.

The Draft Constitution also provides the creation of the function of President of the European Council who will ensure, at his level and within his capacity, the external representation of the Union, without prejudice to the responsibilities of the Union Minister. Although the President of the European Council cannot be compared with the heads of state and government of the Member States or the President of the United States, his power will largely depend of his personality. Especially in the field of foreign affairs, it is likely that the new President of the European Council will want to position himself as the representative of the European Union on the international forum.

Nonetheless, the current European confederation will have a President who will represent the European Union; that representational function was missing in the United States under the Articles of Confederation. The President of Congress did not act as the representative of the American Confederation towards other countries and did not have any executive powers; he had no other function than to preside the Congress of the Confederation.

⁴⁵² *Id.* art. III-208, cl. 3.

⁴⁵³ *Id.* art. I-25 (5).

CHAPTER 4

CONCLUSION

The same weaknesses that undermined the efficiency of the United States under the Articles of Confederation appear today in the European Union. The authority of the Confederation to govern derived from the sovereignty of the states and not from the people, as was apparent from the composition of Confederation Congress. This made the Confederation a very feeble entity. In the field of foreign policy, the states retained their sovereignty, while the Confederation had only very limited powers. Foreign policy was made by the states and in a lesser degree by the Confederation.

In the European Union the Member States remain being the most important actors in the foreign policy-making of Europe, although the instruments are available to establish a genuine common foreign policy of the European Union. The sovereignty of the European Union in the field of foreign policy also derives from constitutive entities, i.e. the Member States, and not from the peoples comprising the Union. This is shown by the fact that the European Council, the exponent of the intergovernmental cooperation, and the Council, which represents the Member States, are the important institutions in the field of external relations. As long as the sovereignty of the European Union in this area does not derive from the Member States *and* the European people, the European Union will never be able to have a strong voice in its dealing with other Nations and entities. In other words, to establish a real common foreign policy, more power for the European Parliament is an absolute necessity. This has been accepted in Community matters and should now be accepted in the Union's common foreign policy.

During the Convention on the future of the European Union the flaws in the current institutional framework and the different options for change were not really discussed,⁴⁵⁴ what raises questions about why so little time was allowed to discuss these important issues.⁴⁵⁵ Most likely, the President of the European Convention, Valéry Giscard D'Estaing, wanted to control the institutional debate and to lobby for a strong President of the European Council.⁴⁵⁶ This President of the European Council should be the answer on the "Kissinger Question"⁴⁵⁷, but instead the Draft Constitution does not give a clear answer to this question, just as under the present treaties. The external representation of the European Union remains divided between the President of the European Council, the Union Minister for Foreign Affairs and the European Commission.

Although the Union Minister, who will get ministerial status, would be the primary voice and face of the Common Foreign and Security Policy, a strong President of the European Council is able to place the Union Minister in a rather marginal role. The President of the European Commission, Romano Prodi, has already expressed his concern about the lack of democratic accountability with regards to the President of the European Council,⁴⁵⁸ who would only be accountable to the European Council, while the President of the European Commission

⁴⁵⁴ Giovanni Grevi, *What Prospects for Compromise on Institutional Question in the Convention Endgame?*, EUROPEAN POLICY INSTITUTE NETWORKS (2003), available at http://www.epin.org/pdf/comment_GreviHughes_may03.pdf (last visited Feb. 5, 2004).

⁴⁵⁵ Kirsty Hughes, *The Institutional Debate: Who is Pre-empting the Convention?*, EUROPEAN POLICY INSTITUTE NETWORKS (2003), available at http://www.epin.org/pdf/comment_hughes_pre-empting.pdf (last visited Feb. 7, 2004).

⁴⁵⁶ *See id.*; see also Campbell, *supra* note 5, at 37, available at http://www.iiea.com/futeuro/wp_pres.pdf (last visited Feb. 14, 2004).

⁴⁵⁷ Whom does the President of the United States or his Secretary of State need to call when there is an international crisis?

⁴⁵⁸ President of the European Commission Romano Prodi, Speech at the Bundestag (Berlin, June 5, 2003), available at http://europa.eu.int/futurum/documents/speech/sp050603_3_en.pdf (last visited Feb. 29, 2004).

is politically accountable to the European Parliament.⁴⁵⁹ The European Parliament has announced its skepticism towards a strong President of the European Council and warned that he cannot encroach upon the external competences of the Commission and the Union Minister, who will also be Vice-President of the Commission and qualitate qua accountable before the European Parliament.⁴⁶⁰ Unlike in the United States, where the President represents the whole Nation abroad, there will be no monolithic external representation of the European Union in the world, although a lot will depend on the personal authority of this President of the European Council.

Under the Draft Constitution the European Council, which cannot be compared to any American institution, will remain the most important actor in the Union's common foreign policy, although the Council of Ministers will be responsible for the implementation of this policy together with the Union Minister. The Commission, which has lost a lot of its prestige and power since the end of the period of Jacques Delors,⁴⁶¹ and a fortiori the European Parliament play almost no role in the Common Foreign and Security Policy, while the Council of Ministers will have substantial powers. Unlike Congress, the European Parliament will have no considerable powers in the Common Foreign and Security Policy. The President of the European Council will probably become the face and voice of the European Union, just as the President of the United States, but the people elect the latter, while the heads of state and government will appoint the former. The President of the European Council will not have the same powers of the President of the United States, which is rather an understatement. The relationship with the President of the European Commission and the Union Minister, which,

⁴⁵⁹ See Federal Union, *The European Council cannot lead Europe: The European Commission can*, FEDERALIST LETTER TO THE EUROPEAN CONSTITUTIONAL CONVENTION (2003), available at http://www.federalunion.org.uk/europe/fedletter/fl_7.shtml (last visited Feb. 8, 2004).

⁴⁶⁰ EUR. PARL. RESOL. (A5-0299/2003) 10 (Sept. 24, 2003).

mutatis mutandis, will be comparable to the Secretary of State although the powers of the Union Minister will be much more elaborate, is also not very clear. Because of the weakness of the European Commission its President lost the fight for leadership in Europe and depending of the personality of both the President of the European Council and the Union Minister for Foreign Affairs, the former and latter can compete with the each other for primacy in the external representation of the Union.

Under the Draft Constitution the power to decide on the conduct of foreign policy will remain in the European Council, of which the position in the Union will be reinforced because of the transformation from organ to institution of the European Union. The power to implement the decisions on the conduct of foreign policy will be situated in the Council of Ministers and in the new established function of Union Minister for Foreign Affairs. If the Union Minister will have a stronger role in the common foreign policy than the current High Representative for the Common Foreign and Security Policy still needs to be seen in practice, but a lot will depend of this personality and the relationship with the other actors in the Union's external relations. The European Parliament will not have the political power to control the conduct of foreign policy, whilst the Court of Justice will have no judicial power to control the conduct of foreign policy, although it will be able to monitor that the areas of exclusive competence, the areas of shared competence, the coordination of economic and employment policies and areas of supporting, coordinating or complementary action do not affect the Union's competence in matters of Common Foreign and Security Policy. The scope of this provision is currently not clear yet, but it will be unlikely that the Court of Justice will take jurisdiction on issues that remain for the most case intergovernmental.

⁴⁶¹ Ulrike Guerot, *Political Leadership for the European Union*, EUROPEUM 2 (2002), available at http://www.europeum.org/epin/06_Guerot_leadership.pdf (last visited Feb. 8, 2004).

A European federation to the example of the United States of America with a real common foreign policy is still far from possible, and according to Jacques Delors, a living European legend, such a federation will not be established before the year...2100.⁴⁶²

⁴⁶² Bernard Bulcke, *De schizofrenie van een Europese Fransman* [*The schizophrenia of a European Frenchman*] , DE STANDAARD, Jan. 30, 2004, at 7.

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