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## The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam

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# The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam

Daniel T. Murphy\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	871
II.	CFSP UNDER THE TREATY OF EUROPEAN UNION .....	876
	A. <i>Structure and Procedures</i> .....	876
	B. <i>Roles of the Institutions</i> .....	883
	C. <i>Problems of Consistency</i> .....	888
	1. Consistency Among Actors .....	888
	2. Challenges Arising from the Authorized Spheres of CFSP Action.....	893
	3. Challenges Arising from the EC Treaty and Law.....	896
	4. Practice .....	898
III.	THE TREATY OF AMSTERDAM .....	899
	A. <i>Structure and Procedures</i> .....	899
	B. <i>Institutions</i> .....	905
	C. <i>Other Provisions</i> .....	910
IV.	CONCLUSION.....	913

## I. INTRODUCTION

The radical shift in and expansion of the concepts of European law wrought by the now more than five-year-old Treaty on European Union (TEU)<sup>1</sup> are not fully appreciated in the United States. Until the TEU of 1992, European law was bounded by the reasonably well-defined and understood contours of the Treaty of

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1. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, [hereinafter TEU].

Rome and its amendments.<sup>2</sup> The expressly political TEU added new dimensions to European law, the relationships among the Member States, and the scope of activities to be pursued by the European Union. This expansion was accomplished through, among other provisions, (1) the TEU's monetary union provisions; (2) its grant of citizenship in the European Union (EU) to all citizens of the Member States; (3) its social provisions; and (4) its different areas of emphasis within the relations among the Member States and between the Member States and the European Community (EC) treaty institutions. In reality, an understanding of the more tightly-focused EC now provides only an incomplete appreciation of post-TEU era law and affairs. Although the implications of the TEU are only becoming fully understood in the United States, another wave of modification and change is on the horizon.

In October 1997, the Member States of the EU signed another treaty, which will bring even more change for the EC. The Treaty of Amsterdam (AT)<sup>3</sup> was signed by the Member States at the conclusion of an Intergovernmental Conference held at the direction of the TEU.<sup>4</sup> This Conference was held over a sixteen month period, culminating in June 1997, with agreement on the text of a draft of the Treaty.<sup>5</sup> The TEU envisioned that the

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter E.E.C. TREATY] as amended by, among other agreements, the Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA].

3. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter AT]. See generally THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY (Andrew Duff ed., 1997) [hereinafter AT: TEXT AND COMMENTARY]; Sally Langrish, *The Treaty of Amsterdam: Selected Highlights*, 23 EUR. L. REV. 3 (1998); Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1 (1998); Michel Petite, *The Treaty of Amsterdam*, (last visited Aug. 31, 1998) <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-2>>.

The AT is currently in the process of ratification by the Member States. It is difficult to predict the Treaty's effective date. It can only become effective upon ratification by each Member State, and the ratification process varies from Member to Member. In some States referendums will be necessary; in others internal legislative or constitutional changes may be required to accommodate some of the AT's provisions. The process is expected to take at least a year from the signing in October, 1997. Manin, *supra*.

4. TEU, art. 2. See generally REVIEWING MAASTRICHT: ISSUES FOR THE 1996 IGC (Alan Dashwood ed., 1996).

5. The Intergovernmental Conference formally began in Turin, Italy in March, 1996 (see *Intergovernmental Conference*, 29 BULL. E.U. 3-1996, II.4) and concluded with agreement on the substance of the draft text of the treaty in Amsterdam in June, 1997; see *Conclusions of the Presidency, Amsterdam European Council*, 30 BULL. E.U. 6-1997, I.2. The draft was edited over the summer and the treaty was signed in Amsterdam on October 2, 1997. Langrish, *supra* note 3, at 3.

Conference would review and reassess the provisions of the TEU with the aim of improving their effectiveness.<sup>6</sup> In this respect, the AT does address the agenda set forth in the TEU because the AT amplifies and clarifies the provisions of the TEU.<sup>7</sup> However, the Treaty falls far short of the ambitious agenda some had hoped it would accomplish.<sup>8</sup>

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At the Corfu Summit in July 1994, the European Council requested the EU institutions to prepare separate reports on the workings of the TEU. Manin, *supra* note 3, at 2. Based on these reports, the European Council adopted a preliminary report on the functioning of the TEU. The European Council formed a Reflection Group chaired by Carlos Westendorp of Spain to prepare for the Conference. Manin, *id.* at n.8. By the end of 1995 that group submitted its own report which identified three principal areas of concern for consideration by the Intergovernmental Conference: 1) the EU's closeness and relevance to the citizens of the Member States; 2) increased efficacy of the institutions as the Union prepares for enlargement; and 3) strengthening of the European Union's powers and presence in the foreign policy area. *Reflection Group's Report* (Dec. 5, 1995), <<http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html>> [hereinafter *Reflection Group's Report*]. The Commission issued a press release in reaction to the Reflection Group Report, *Press Release: Intergovernmental Conference 1996: Commission Reacts to Westendorp Report* (Dec. 6, 1998), <<http://europa.eu.int/en/agenda/igc-home/eu-doc/commissn/press-r.html>> [hereinafter *Press Release*]. The Commission also issued an opinion with respect to the holding of the IGC, *Commission Opinion: "Reinforcing Political Union and Preparing for Enlargement"* (Feb. 28, 1996), <<http://europa.eu.int/en/agenda/igc-home/eu-doc/commissn/avis-en.html>> [hereinafter *Commission Opinion*]. At the opening session of the Intergovernmental Conference during the Turin European Council meeting, it was agreed that the agenda for the Conference should center around three topics: 1) bringing the Union closer to its citizens; 2) making the institutions more efficient and democratic; and 3) strengthening the Union's external relations capabilities. Manin, *supra* note 3, at 3. These are the topics emphasized in the *Reflection Group's Report: The 1996 Conference*, *supra*. For summaries of the history of the Intergovernmental Conference, see GEORGE A. BERMAN, ET AL., 1998 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 5 (1998); Langrish, *supra* note 3, at 3; Manin, *supra* note 3, at 3; Petite, *supra* note 3, at 1-4. See generally Lamberto Dini, *The European Union after Amsterdam*, in AT: TEXT AND COMMENTARY, *supra* note 3, at xxvii.

6. TEU, art. 2.

7. Andrew Duff, *Supranational Institution for Postnational Europe*, in AT: TEXT AND COMMENTARY, *supra* note 3, at xxx-xxvi.

8. Many had hoped that among other things, agreement would be reached at the Intergovernmental Conference on the issue of the size of the Commission and on a reform of the voting within the Council to eliminate unanimous voting, except on defense matters. Both of these issues are critical for the Union, all the more so in view of the prospect of further enlargement of the Union. See, e.g., *Reflection Group's Report*, *supra* note 5, at ¶¶ 80, 99-105, 113-18 (discussing enlargement and voting); *Press Release*, *supra* note 5, at pt.2 (discussing enlargement); *Commission Opinion*, *supra* note 5, at ¶¶ 40-42 (discussing voting and enlargement); *Presidency's Progress Report on the Intergovernmental Conference*, in Annexes to the Conclusions of the Presidency (Florence) 29 BULL. E.U. No. 6, 50, 55 [hereinafter *Presidency Progress Report*]; DINI, *supra* note 5, at xxvii; *Commentary: Disappointment on Enlargement—and Another IGC to Come*, AT: TEXT AND COMMENTARY, *supra* note 3, at 130; Langrish, *supra* note 3, at 4; Manin, *supra* note 3, at 8; Petite, *supra* note 3.

Briefly stated, the TEU established an architecture for the EU and created a set of working relationships between the treaty-established institutions and the Member States broader than that which was realized under the EC Treaty and its *aquis*. Through the TEU, the EU is said to rest on three pillars.<sup>9</sup> The EC Treaty and its *aquis* are the first pillar of this structure. The other two pillars are the Common Security and Foreign Policy (CFSP)<sup>10</sup> and Cooperation in the Fields of Justice and Home Affairs.<sup>11</sup> These latter two pillars are innovations of the TEU.

Among the characteristics of these latter two pillars is the intergovernmental nature of their objectives and of the procedures established to accomplish those objectives. In contrast, the first pillar, the EC, is institutional in character. The TEU's second and third pillars require the Member States, through the Council of

In a Protocol to the AT the signatory states agreed that at least a year before the membership in the Union exceeds twenty, another intergovernmental conference will be convened to carry out a comprehensive review of the Treaty provisions regarding the composition and functioning of the institutions. Protocol on the Institutions with the Prospect of Enlargement of the European Union, 1997 O.J. (C 340) 111 [hereinafter Protocol on the Institutions]. The Commission has recommended that negotiations be opened with six applicant states, Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia. *Agenda 2000—For a Stronger and Wider Union*, 30 BULL. E. U. (Supp. 5/97), 54, 57-59. Thus, the Union could consist of 21 Member States at its next enlargement. In this same Protocol the signatories agreed that at the date of the next enlargement the Commission should be composed of one national from each Member State, if the voting in the Council has been modified in a way acceptable to all the Member States. Such modification in the voting is to take into account all relevant factors, including the possible need to compensate with additional voting power those larger Member States which would lose a second member of the Commission. Protocol on the Institutions, *supra*, art. 1.

9. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 5 (6th ed. 1995) [hereinafter MATHIJSEN].

10. TEU, arts. J-J.11.

11. *Id.* arts. K-K.9. Important and ambitious as they are, the TEU's provisions establishing the monetary union, with its separate institutions, are not accorded a separate pillar. These provisions are contained within the EC title of the TEU and are thus part of the first pillar. In its current configuration, the EU might be analogized, although perhaps unfairly, to a three legged stool or tripod in which one leg is sturdy and well-developed and the other two are less secure and currently under construction. More often the Union is visually depicted as the facade of a Greek temple in which the three pillars support the overarching pediment which represents the Union. The AT blurs this representation somewhat as it would bring a significant portion of the matters which the TEU treated as part of the third pillar within the EC and its *acquis*. The TEU provisions amending the E.C. Treaty, including the monetary union provisions, were carefully drafted and negotiated. In contrast, the other portions of the TEU, especially many of the intergovernmental relations provisions of the CFSP and the Justice and Home Affairs portions were hastily prepared, and are neither as well drafted nor as well thought through as the EC provisions. See generally Petite, *supra* note 3 (evaluating and comparing Commission Opinion goals to AT accomplishments).

Ministers and the European Council, to work to secure their objectives. The EC institutions, however, are responsible for carrying out EC objectives. Also, these latter two pillars, unlike the first, are outside the jurisdiction of the European Court of Justice.<sup>12</sup>

One of the goals of the 1996 Intergovernmental Conference—as envisioned in the TEU—was the strengthening of the CFSP based on the approximately four years of experience that had accrued since TEU implementation in 1992. The purpose of this Article is to consider some issues presented with regard to the second pillar, the CFSP, and to assess the AT's provisions regarding the CFSP.<sup>13</sup>

The Treaty of Rome did not provide for consideration of foreign policy and security matters apart from treatment in those areas within the Community's exclusive competency, such as commercial policy. Indeed, the external aspects of even explicit Community competencies are not clearly delineated in the Treaty of Rome.<sup>14</sup> However, treating foreign and security policy matters as legitimate areas of Community concern and activity did not spring forth in the TEU from a void. For many years the Member States, with increasing coordination and support from the Commission, had dealt with these matters within the context of European Political Co-Operation (EPC).<sup>15</sup> The Single European Act of 1986 (SEA) institutionalized these cooperative and collaborative procedures. But in 1992 the TEU significantly elevated and regularized these areas of concerted effort. Accordingly, cooperation and coordination in matters of foreign policy evolved from an acknowledged and valued—although purely extra-Community—activity prior to the SEA to one of the three fundamental pillars upon which the entire structure of the European Union rests. This development occurred in less than a decade. This shift from a somewhat ancillary activity to a core endeavor evidences the ambition articulated in the TEU that the Union attain and exercise an international presence befitting a significant world power.<sup>16</sup>

12. Article L of the TEU provides that the jurisdiction of the Court of Justice is limited to the first pillar (the EC), one provision within the third pillar, and Articles L through S, the Final Articles of the TEU. The AT would expand the Court's jurisdiction to cover many provisions of the restated third pillar. AT, art. L.

13. The emphasis is on the structure of CFSP and its operation in foreign policy areas. Less attention is given to the security aspects. The structure and procedures, however, are the same for both aspects.

14. See *infra* notes 101, 147-52 and accompanying text.

15. See generally SIMON J. NUTTALL, *EUROPEAN POLITICAL CO-OPERATION* (1992).

16. One of the objectives of the Union is that it "assert its identity on the international scene . . . ." TEU, art. B. Also, in one of the recitals at the outset of

Part II of this Article delineates the structure and procedures of CFSP under the TEU, discusses the roles of the EC institutions that are involved in the CFSP, and addresses consistency between actions taken under the first and second pillars of the TEU, and consistency among actions within CFSP. Part III describes the portions of the AT that affect CFSP.

## II. CFSP UNDER THE TREATY OF EUROPEAN UNION

### A. Structure and Procedures

The TEU emphasized the significance of the sphere of foreign and security policy by elevating it to one of the three pillars of the European Union. Title V of the TEU contains essentially all of the TEU's provisions regarding the CFSP. In that Title the European Union as an entity and the Member States individually commit themselves to defining and implementing a common foreign and security policy.<sup>17</sup> The objectives of this common policy are: to safeguard the common values, fundamental interests, and independence of the Union; to strengthen the security of the Union and its members; to preserve the peace; to develop and consolidate democracy; to reinforce the rule of law; and to foster respect for human rights and fundamental freedoms.<sup>18</sup> More boldly, the Member States provide in the TEU that "[a] common foreign and security policy is hereby established . . . [and that it] shall be governed by the following provisions."<sup>19</sup>

The TEU provides several avenues by which the European Union may pursue the stated objectives of common foreign and security policies: (1) systematic cooperation among the member states in the conduct of foreign policy;<sup>20</sup> and (2) the gradual implementation of joint action.<sup>21</sup> The Member States commit themselves to support the Union's foreign and security policy

the TEU the signatories resolve to implement a common foreign and security policy "thereby reinforcing the European identity in order to promote peace, security and progress in Europe and in the world." TEU Recital Nine; see *Reflection Group's Report*, *supra* note 5, at ¶ 149; *Commission Opinion*, *supra* note 5, at ¶ 23.

17. TEU, art. J.1(1). The commitment is stated in obligatory language: "The Union and its Member States shall define and implement a common foreign and security policy covering all areas of foreign and security concern." *Id.* This commitment, obligatory though it may be, is not legally enforceable. See *infra* notes 85-86 and accompanying text.

18. TEU, art. J.1(2).

19. *Id.* art. J.

20. This cooperation entails systematic coordination of positions and the taking of common positions. See *infra* notes 32-37 and accompanying text.

21. TEU, art. J.1(3).

“actively and unreservedly in a spirit of loyalty and mutual solidarity,”<sup>22</sup> and they agree not to take “any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”<sup>23</sup>

The TEU adopts, practically unchanged, the obligations of the Member States and the treaty institutions agreed to six years earlier in the SEA. However, the emphasis of the SEA is on unilateral, though concerted and consistent, positions and actions among the Member States rather than on a common policy.<sup>24</sup> The SEA certainly acknowledged the incremental development of a common foreign policy as a goal.<sup>25</sup> By comparison, the TEU deems that a common foreign and security policy is established by Title V and governed by the provisions of Article J.

Just what a “common foreign and security policy” means remains unclear. The TEU contains no definitions or illustrations of these concepts. In the absence of any definition, the contours of the common policies must be developed from various other sources. Among the Union’s stated objectives are “efforts to assert . . . [its] identity on the international scene in particular through the implementation of a common foreign and security policy including the eventual framing of a common defense, which might in time lead to a common defense.”<sup>26</sup> Neither Article B nor Article J.1 defines what these terms mean. Obviously, these policies will cover issues in which the Member States have common rather than unique interests. Moreover, these common policies will evolve over time. Article J.1(3) expresses both of these concepts in providing that the objectives of the common foreign and security policy are to be pursued “by gradually implementing . . . joint action in the areas in which the Member States have important interests in common.”<sup>27</sup>

22. *Id.* art. J.1(4).

23. *Id.*

24. For example, under the SEA, consultations were to take place before the Members decided on their final positions. SEA, art. 30.2. In deciding on their own positions, the Member States agreed to take into account the positions of the other Members and to consider the desirability of a common position. SEA, art. 30.2(d). They also agreed to endeavor to avoid any action or position that would impair the Member States’ effectiveness as a cohesive force in international affairs. SEA, art. 30(2)(d).

25. The Member States agreed that, in order to increase their capacity for joint action in foreign policy matters, common principles and objectives would be developed over time. SEA, art. 30.2(c).

26. TEU, art. B.

27. *Id.* art. J.1(3).



The experience of the Member States in the EPC process will also help define the areas of common policy.<sup>28</sup> It is also the TEU's ambition that the common policy stated in the objectives for Union extend to defense.<sup>29</sup> In this respect, the notion of the common policy is broader than past practice under EPC. Although economic and political aspects of security issues were able to be considered within EPC, military aspects were not.<sup>30</sup>

The provisions of Title V set out the broad objectives of the common policies and establish a procedural framework by which certain specific common positions and joint actions can be agreed upon. However, the TEU neither facilitates nor provides for a common policy in the sense of a single document or single decision making body for the Union and the Member States.<sup>31</sup>

Articles J.2 and J.3 of Title V set forth the three means by which the objectives of the CFSP are to be implemented.<sup>32</sup> Article J.2 contains provisions regarding consultation and common position and Article J.3 deals with joint actions. In the consultation procedure, the Member States agree to inform and consult one another within the Council of Ministers on matters of foreign policy of general interest.<sup>33</sup> This is done so that the combined effort of the member states may be exercised as effectively as possible through concerted and convergent action. Thus, the aggregate effort of the Member States may be more effective than unilateral action of the members, even when the unilateral actions are consistent with each other. This procedure requires information and consultation, but not much else. It is in

28. 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 MAASTRICT TREATY (David O'Keeffe & Patrick M. Twomey eds., 1994) 227, 229-31 [hereinafter LEGAL ISSUES] and sources cited therein.

29. The objective is to implement a common foreign and security policy "including the eventual framing of a common defense policy which might in time lead to a common defense." TEU, art. B.

30. NUTTALL, *supra* note 15, at 175.

31. The Commission had proposed to the Intergovernmental Conference in 1992, which produced the TEU, that certain matters of security policy be declared as vital to the interests of the Union, and that the Council by majority vote be authorized to formulate common policy with respect to those areas. See 24 BULL. E. C. (Supp. 2), at 98; Neuwahl, *supra* note 28, at 229; see also DOMINIC MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 141 (1997) [hereinafter MCGOLDRICK] (discussing what is meant by a "common" foreign and security policy). See generally PHILIP ALLOTT, *European Foreign Policy: After-Life of an Illusion*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 215 (Martti Koskenniemi ed., 1998) [hereinafter INTERNATIONAL LAW ASPECTS]; TEIJA TILIKAINEN, *Does Europe Need a Common Identity? A Comment upon the Core Problems of the CFSP*, in INTERNATIONAL LAW ASPECTS, *id.* at 19.

32. TEU, art. J.2 & J.3.

33. See *id.* art. J.2(1).

language and substance very similar to the obligations imposed on the Member States under the SEA.<sup>34</sup>

The SEA's political cooperation system was, at base, a system of consultation and concerted unilateral action, with the aim of gradually attaining common action. By comparison, the TEU emphasizes common positions or joint actions. The common position is the second of the three means of effecting the CFSP. By virtue of Article J.2(2), the Council of Ministers is authorized, when it deems it necessary, to define a common position with respect to a particular foreign policy matter. As contemplated in Title V, a "common position" is a specific, single, and articulated position on a matter of international concern to the Union and the Member States. This common position is promulgated by the Council and is published in the Official Journal of the Union.<sup>35</sup> After the Council has decided on a common position, the Member States commit themselves to assuring that their national policies conform to it;<sup>36</sup> that is, they will take the actions necessary to implement the common position. They further agree to coordinate their actions in international organizations and to uphold the common position in such forums.<sup>37</sup>

Article J.2 thus sets forth two methods of implementing the CFSP. The first is a process for consultation similar to that of the SEA. Then, departing from the SEA, Title V provides for the determination by the Council of a common foreign policy position for the Union and the Member States, coupled with the obligation of the Member States to conform their actions to that position.

In reaching a decision about whether to take a common position, and what that position should be, the Council must act unanimously.<sup>38</sup> However, this requirement is not entirely what it seems to be. In a Declaration incorporated into the Final Act of the adoption of the TEU, the Member States agreed that, within CFSP, whenever the Council is to act by unanimity, they would "to the extent possible" avoid preventing a unanimous vote if a qualified majority favors the decision.<sup>39</sup> This Declaration is

34. SEA, art. 30.2(a).

35. Common positions are published in the L portion of the Official Journal, the portion containing legislation and other acts the publication of which is mandatory.

36. TEU, art. J.2(2).

37. *Id.* art. J.2(3). The Member States agree to support the Union's external and security policies unreservedly and to refrain from any actions which are contrary to the interests of the Union or are likely to impair the Union's effectiveness as a cohesive force in international relations. TEU, art. J.1(4). The Single European Act contained a provision similar in nature, but of a more general nature.

38. *Id.* art. J.8(2).

39. Declaration on Voting in the Field of the Common Foreign and Security Policy, 1992 O.J. (C 191) 104. The SEA contained a somewhat similar obligation.

clearly the compromise which might allow the CFSP to function. Qualified majority voting would obviously provide more flexibility. But qualified majority voting would have been unacceptable to many of the Member States; some no doubt would have preferred complete unanimity. The Declaration is a small acknowledgment by the Member States of their communitarian responsibilities.<sup>40</sup> Given this "quasi-unanimity" requirement,<sup>41</sup> the consultative procedure also set forth in Article J.2 remains a viable process in implementation of the CFSP. Presumably, it is a process to be used unless the Council determines it should take a common position or a joint action. As structured in the TEU the common position procedure lies exclusively within the Council of Ministers, guided by the principles and general guidelines developed by the European Council.<sup>42</sup> The impetus for the discussion and formulation of a common position is within the Council of Ministers. However, the Member States and the Commission can suggest to the Council of Ministers that certain matters be the subject of a common position.<sup>43</sup>

The third means of implementation of the CFSP is joint action by the Union. In this regard a "joint action" means a specific action or activity undertaken by the Union in response to a foreign policy concern. Article J.3 sets forth with some precision the procedure for determination and implementation of a joint action. The Council of Ministers is to decide, based on general guidelines from the European Council, whether a matter of

Under it, the Member States agreed to "in as far as possible refrain from impeding the formation of a consensus and the joint actions which this could produce." SEA, art. 30.3(c).

40. This unanimous or "quasi-unanimous" voting requirement is one of the issues bedeviling CFSP process and is one of the matters some had hoped the Intergovernmental Conference would reform. See *supra* notes 5, 8 and *infra* notes 177-92 and accompanying text for discussion of CFSP expectations.

41. Despite the requirement of unanimity, during the several years of the CFSP the Council has determined approximately 35 common positions regarding almost 20 different issues of a widely varying nature. Common positions have been taken on issues ranging from Bosnia/Herzegovina and Serbia/Montenegro, to arms embargoes on and visa restrictions applicable to officials of Myanmar and Nigeria because of concerns about the protection of democracy and human rights, to the EU's objectives in Angola, to efforts achieve an internationally acceptable solution in East Timor. The monthly Bulletin of the EU contains references to the common positions, whose text is set forth in the L portion of the Official Journal. There is criticism, however, of the effectiveness of the Union's record of action under Title V. See, e.g., *Reflection Group's Report*, *supra* note 5, at ¶¶ 146-62; *Commission Opinion*, *supra* note 5, at ¶¶ 23-24; Note, *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. 252 (1997). For a summary of recent CFSP practice, see Steve Peers, *Common Foreign and Security Policy 1995-6*, 1996 Y.B. EUR. L. 611.

42. TEU, arts. J.8(1) & (2).

43. *Id.* arts. J.8(3).

concern should be the subject of a joint action.<sup>44</sup> In the joint action procedure, the European Council's role is restated. This role is more specific than it is with respect to common positions.<sup>45</sup> The Council of Ministers is to decide whether a matter should be the subject of a joint action on the basis of guidelines furnished by the European Council.<sup>46</sup> In the text of a joint action decision, the Council of Ministers refers to the guidelines regarding the matter specifically provided by the European Council.<sup>47</sup> Thus, the initiative for joint actions rests more with the European Council. While the Council of Ministers is to decide whether a matter is to be the subject of a joint action, it does so only after guidelines have been provided by the European Council. Assuming a decision to take joint action, the Council of Ministers shall determine the terms of the action, its scope and objectives, the means of implementation and, if necessary, its duration.<sup>48</sup>

The process of voting on joint actions is confusing. When the Council of Ministers adopts a joint action, or at any stage thereafter, the Council may determine which matters should be voted upon by a qualified majority.<sup>49</sup> Thus, the initial decision as to whether a joint action should be undertaken requires the same "quasi-unanimity" as the common position.<sup>50</sup> However, the Council of Ministers may then decide that some of the more

44. *Id.* art. J.3(1). Matters with defense implications are not to be dealt with through joint action. TEU, art. J.4(3). Presumably the cooperation and common position procedures of Article J.2 are to be used for such matters.

45. The European Council is not specifically assigned a role in the common position procedure. Its role in that procedure is derivative from its general role as stated in Article J.8(1) to define the principles and guidelines for the common foreign and security policies.

46. TEU, art. J. 3(1).

47. *See, e.g.*, Council Decision 96/688/CFSP of 22 November 1996 Concerning Measures Protecting Against the Effect of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L309) 7; Council Decision 96/442/CFSP of 15 July 1996 On the Nomination of a Special Envoy of the European Union in the City of Mostar, 1996 O.J. (L185) 2. The texts of Council decisions adopting common positions do not generally contain any reference to European Council guidelines. *See, e.g.*, Council Decision 96/635/CFSP of 28 October 1996 On Burma/Myanmar, 1996 O.J. (L287) 1.

48. TEU, art. J.3(1).

49. *Id.* art. J.3(2).

50. During the several years of the CFSP the Council has undertaken over 35 joint actions regarding about 13 widely differing situations. These actions range from humanitarian aid to Bosnia/Herzegovina, to the administration of Mostar, to measures designed to counter the extraterritorial effect of third party legislation (specifically, the Cuban Liberty and Democracy Solidarity Act of 1996 and the Iran and Libya Sanctions Act of 1996 in the United States, see *infra* notes 59-60 and accompanying text). Many of the joint actions taken are simply extensions of previously agreed upon actions. The monthly Bulletin of the EU contains references to the joint actions, whose text is set forth in the L portion of the Official Journal.

specific decisions can be taken by a qualified majority. All decisions will require unanimity, except those more specific decisions which the Council of Ministers unanimously agrees shall be made by a qualified majority.<sup>51</sup> Once the Council decides upon a joint action, that action stands until modified or terminated by the Council.<sup>52</sup>

The specific obligations of the Member States regarding the joint action are twofold. First, the Member States are bound by the joint action in the positions they take and in the conduct of their own international relations.<sup>53</sup> This obligation means that the Member States must tailor their own foreign policy to the joint action. Generally, the joint action, in contrast to the common position, does not require implementing action by the Member States. In fact, the joint action is designed to take the place of unilateral Member State action. But if a Member State does act with respect to the matter, it would be obliged to act consistently with a joint action. Taking a unilateral position inconsistent with the joint action would seem to be a breach of a Member State's obligation.

The notion that the joint action is to stand in lieu of Member State action is reinforced by the second of the Member States' obligations. Whenever a Member State proposes to take a national position or action pursuant to the joint action, that state must provide timely information to the Council so that the Council may consider the proposal prior to action.<sup>54</sup> The foreign policy processes of the Member States are thus constrained by the joint action. However, the ability of the Member States to act individually in emergency situations when there has been a change in circumstances is preserved. In such a situation, a Member State can essentially act on behalf of the Union by taking measures consistent with the objective of the joint action.<sup>55</sup>

There is no prescribed form that joint actions must take; they are, of course, tailored to the situation. Most are taken solely by the EU and the Council and are funded on an ad hoc basis from the EU's general budget. Examples of this type include the

51. TEU, arts. J.3(2) & 8(2). The qualified majority necessary for adoption is the more strenuous one applicable when the vote is on a measure which is not brought forward by the Commission. After the enlargement to 15 countries, 62 out of the 87 votes in the Council are required for adoption of such matters and the affirmative votes must be from at least 10 of the 15 Member States. E. C. Treaty, as amended, Article 148. See *infra* notes 177-78.

52. *Id.* art. J.3(3). Many of the actions contain a termination date; they expire by their terms unless extended by a subsequent unanimous agreement to joint action.

53. *Id.* art. J.3(4).

54. *Id.* art. J.3(5).

55. *Id.* art. J.3(6). However, the Member State concerned must immediately inform the Council of such measures.

dispatch of a team of election observers for the 1993 parliamentary elections in Russia<sup>56</sup> and the establishment and funding of an administrator of the city of Mostar.<sup>57</sup> In other, although less common, instances the joint action envisions action by the European Union institutions and the Member States. For example, in November 1996 the Council adopted a regulation<sup>58</sup> retaliating against the Cuban Liberty and Democratic Solidarity Act<sup>59</sup> and the Iran and Libya Sanctions Act,<sup>60</sup> both of which had recently been enacted in the United States. On the same day that the Council adopted the regulation, it also adopted a joint action supplementing the regulation.<sup>61</sup> This joint action requires the Member States to take such measures as they deem necessary to protect the interests of their citizens from the consequences of these U.S. statutes, to the extent that such interests are not protected by the regulation. These two measures were drafted and adopted in tandem as a coordinated and plenary response to the U.S. legislation. The regulation is part of EC law to be implemented by the Commission and is subject to review and application by the Court of Justice. By comparison, the joint action within CFSP is to be implemented by the Member States and is not subject to review by the Court.

### B. Roles of the Institutions

The various institutions of the EU are involved in the CFSP, except the Court of Justice. The Council of Ministers and its mirror, the European Council, have the dominant roles, but the Commission has a significant, though lesser role. The Parliament

56. Council Decision 93/604/CFSP of 8 November 1993 Concerning the Dispatch of a Team of Observers for the Parliamentary Elections in the Russian Federation, 1993 O.J. (L 286) 3.

57. Council Decision 95/517/CFSP of 4 December 1995 On Continued Support for European Union Administration of the Town of Mostar, 1995 O.J. (L 298) 4; Council Decision 95/552/CFSP of 19 December 1995 On Continued Support for European Union Administration of the Town of Mostar, 1995 O.J. (L 313) 1.

58. Commission Regulation 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1.

59. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified in various sections of 22 U.S.C. 6023, *et seq.*)

60. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified in 50 U.S.C. § 1701).

61. Joint Action 96/668/CFSP of 22 November 1996 Concerning Measures Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 7.

has a role, although a relatively modest one. Parliament is to be consulted on the main aspect of the foreign and security policy matters by the Presidency of the Council and it shall assure that Parliament's views are taken into account.<sup>62</sup> Parliament also has the right to ask questions and make recommendations. The Presidency and the Commission are to keep Parliament regularly informed of the development of foreign and security policies and Parliament is to hold an annual debate on the process made toward implementation of the CFSP.<sup>63</sup> Indeed, Parliament often expresses its opinion regarding foreign and security matters.<sup>64</sup> However, while Title V expressly gives the Member States and the Commission the right to refer questions and proposals regarding the common foreign and security policy to the Council,<sup>65</sup> no comparable right is accorded to the Parliament.<sup>66</sup>

In a sense, the role of the Commission in foreign policy matters is de-emphasized in the TEU. It is not so much that its involvement is diminished; rather, the TEU heightens the role of other institutions. This is an inevitable consequence of the intergovernmental character of Title V and the CFSP. Certainly, the Commission is to be intimately involved in the CSFP. Title V provides that it should be fully associated with the work carried out in the common foreign and security policy field.<sup>67</sup> However, there is no delineation as to what such full association entails. In the statement of a common position the Council sometimes notes that the Commission will direct its actions toward achieving the objectives of the common position through appropriate Community measures.<sup>68</sup> The Commission also has a separate role

62. TEU, art. J.7.

63. *Id.*

64. See, e.g., 1996 O.J.(C 78) 15 Parliament's recommendations regarding an early settlement of the dispute on the future of Kosovo and the financing of the reconstructions of Yugoslavia.

65. TEU, art. J.8(3).

66. The AT significantly strengthens the position of the Parliament in many respects. In particular, the co-decision lawmaking process, which gives the Parliament a role in the lawmaking process almost equal to that of the Council, see generally MATHIJSEN, *supra* note 9, at 33, is extended to many additional areas. See generally AT: TEXT AND COMMENTARY, *supra* note 3, at 179 (outlining new provisions related to the Parliament); Manin, *supra* note 3, at 11-15 (summarizing changes to Parliament). However, the Parliament's role in the CFSP as delineated in the TEU is virtually unchanged by the AT. It does have an indirect role through its participation in the budgeting for CFSP matters. See *infra* notes 244-46 and accompanying text.

67. TEU, art. J.9.

68. See, e.g., Common Position 94/779/CFSP of 28 November 1994 On the Objectives and Priorities of the European Union towards Ukraine, 1994 O.J. (L 313) 1 ("The Council Notes that the Commission will direct its action towards achieving the objectives and priorities of this common position by appropriate Community measures.").

in CFSP through its participation in the European Council.<sup>69</sup> More specifically, the Commission is to be fully associated with the Presidency of the Council in the representation of the Union in common foreign and security policy matters and in the implementation of these matters.<sup>70</sup> The diplomatic missions of the Member States, the Commission's delegations in third countries and to international conferences, and international conferences and agencies shall cooperate to ensure compliance with the common positions adopted by the Council.<sup>71</sup>

Article 30(5) of the SEA, each within its sphere of competence, charges both the Presidency of the Council and the Commission with ensuring the consistency of the external policies of the EC and those of the EPC. Also, the Commission is to be fully associated with the EPC process.<sup>72</sup> This latter provision was maintained in the TEU.<sup>73</sup> However, the former responsibility to assure competency is replaced in the TEU by the more specific provisions. But these specific responsibilities and prerogatives of the Commission are different from, and certainly not paramount to, those assigned to it which involve the European Community. In the first pillar of the TEU, the Commission is charged with enforcing Community law and ensuring that the provisions of the EC Treaty and measures taken by the institutions pursuant to the Treaty are applied.<sup>74</sup>

By the terms of Title V, the CFSP is under the overall control of the Council of Ministers and the European Council. Although the European Council is mentioned in the SEA,<sup>75</sup> its role has never been well-defined. As stated in the TEU, the European Council is comprised of the heads of the government of the Member States, and the President of the Commission, assisted by the foreign ministers of the Member States and a member of the Commission. The European Council is to meet at least twice a year under the chair of the Presidency of the Council of Ministers.<sup>76</sup> Within the CFSP, the European Council is to define general principles and guidelines for the common foreign and security policy<sup>77</sup> and to provide general guidelines for any matter subject to a joint action.<sup>78</sup> The Council of Ministers, however, is

69. See *infra* note 76 and accompanying text.

70. TEU, art. J.5(1), (2) & (3).

71. *Id.* art. J.6.

72. SEA, art. 30(3)(b).

73. TEU, art. J.9.

74. E.C. Treaty, as amended, art. 155.

75. SEA, art. 2.

76. TEU, art. D.2. See MATHIJSSEN, *supra* note 9, at 62. This is the same composition as was provided in the SEA. SEA, art. 2.

77. *Id.* art. J.8(1).

78. *Id.* art. J.3(1).



charged with making the decisions necessary for the definition and implementation of these common policies on the basis of the general guidelines adopted by the European Council.<sup>79</sup> As previously noted, the Council of Ministers specifically defines and implements the foreign and security policy through the adoption and implementation of common positions and joint actions.<sup>80</sup> It is also charged with ensuring the consistency and effectiveness of the Union's action.<sup>81</sup>

The Council of Ministers is also charged with assuring that Member States comply with the commitments they have undertaken to support Union policy and not to engage in action contrary to the Union's.<sup>82</sup> There is no express charge to the Council regarding enforcement of a Member State's specific obligations with respect to a common position or a joint action.<sup>83</sup> Presumably, however, a Member State's failure to conform its national policies to a common position, its failure to implement a joint action, or its taking a foreign policy position inconsistent with a joint action<sup>84</sup> all would constitute a breach of the more general obligation to support the Union's policies. The Council is expressly charged with enforcing this more general commitment. Because CFSP is outside the jurisdiction of the European Court of Justice,<sup>85</sup> a judicial action by the Council against a recalcitrant Member to enforce compliance is not possible. The enforcement tool available to the Council in this regard is political persuasion.<sup>86</sup>

Finally, the Council, through the Presidency, is charged with representation of the Union in CFSP matters and is responsible for expressing the Union's position.<sup>87</sup> The Presidency is assisted in these responsibilities by the immediate past and the next Member State to hold the rotating office, the so called "troika."<sup>88</sup>

79. *Id.* art. J.3(1) & J.8(2).

80. *Id.* art. J.2(2) & J.3(1).

81. *Id.* art. J.8(2).

82. *Id.* art. J.1(4).

83. *See supra* notes 22-23 and 54-55 and accompanying text.

84. TEU, art. J.2(2) & J.3(4).

85. *Id.* art. L. This is not a change from the past. As structured in the SEA, the Court had no jurisdiction over the EPC. SEA, art. 31.

86. The possibility has been raised that inasmuch as the TEU is a treaty, it is governed by principles of international law, and an action to enforce CFSP obligations might therefore be brought before the International Court of Justice. *See M. R. Eaton, Common Foreign and Security Policy, in LEGAL ISSUES, supra* note 28 at 215, 222. Since the signatories to the TEU specifically provided in that international agreement that the CFSP obligations and procedures not be reviewable by the Court of Justice, it is reasonable to assume that they did not intend the obligations and procedures to be legally enforceable, as opposed to being politically binding.

87. TEU, art. J.5(1), (2).

88. *Id.* art. J.5(3).

The Commission is to be fully associated with the Presidency in this representation.<sup>89</sup> A Political Committee comprised of the "Political Directors," or senior foreign ministry officials, of the Member States is also established.<sup>90</sup> This Committee is charged with monitoring the situation in areas covered by common foreign or security policies. It contributes to the formulation of these policies by stating its opinion, either at the request of the Council or on its own initiative. Working groups of representatives of Member States reporting to the Political Committee are responsible for the detailed work of the CFSP.<sup>91</sup> The former EPC Secretariat, which assisted the Presidency under the SEA, was subsumed into the general secretariat of the Council.<sup>92</sup> The Political Committee as created by Title V is said to be "without prejudice to article 151 [of the EC Treaty]."<sup>93</sup> Thus, the COREPER created by Article 151 of the EC Treaty continues its work of preparing the agendas for the Council and facilitating its work.<sup>94</sup>

The financing of the CFSP effort comes from two possible sources: the Community's budget or contributions from the Member States.<sup>95</sup> Administrative expenses are to be charged to the Community's budget.<sup>96</sup> The Council can determine by the "quasi-unanimity" rule that operational expenses, usually those usually arising from a joint action (i.e., the expenses of the

89. *Id.* Thus, the representation is by a "troika" of four. Within the Commission, several directorates are concerned with external relations. These directorates are responsible for carrying out the Commission's and the EC's external affairs responsibilities. An additional directorate, DG1A, was established in 1993 to manage external affairs. This directorate, among other tasks, is responsible for carrying out the Commission's role in CFSP. Also, because of his role as a member of the European Council and a participant in the Council of Ministers deliberations, the President of the Commission is deeply involved in foreign affairs matters, in addition to his other responsibilities. See MCGOLDRICK, *supra* note 31, at 146.

90. TEU, art. J.8(5). A similar body with roughly the same charge existed within the SEA's EPC system. SEA, art. 30.

91. IAN MACLEOD ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES (1996) 422 [hereinafter MACLEOD].

92. Declaration on Practical Arrangements in the Field of the Common Foreign and Security Policy, 1992 O.J. (C 191) 104; MCGOLDRICK, *supra* note 31, at 146.

93. TEU, art. J.8(5).

94. MACLEOD, *supra* note 91, at 421; MCGOLDRICK, *supra* note 31, at 146. COREPER is the acronym for the Committee for Permanent Representatives (Comite des REpresentants PERmants). Since the Council of Ministers meets only a few days a month, a more permanent body is necessary to prepare for the meetings of the Council to follow up on actions taken. COREPER is that body. It is composed of high level civil servants from each of the Member States. See MATHIJSEN, *supra* note 9, at 55-56.

95. TEU, art. J.11(2).

96. *Id.*

administration of the city of Mostar<sup>97</sup> or contributions to the establishment of the Palestinian police force),<sup>98</sup> be funded from the Community's budget or from Member State contributions.<sup>99</sup> If the former source is selected, the normal Community budgetary process is applicable.<sup>100</sup>

### C. Problems of Consistency

#### 1. Consistency Among Actors

The three pillars of the Union, or more to the point of this discussion, the first and the second—the EC and the CFSP—are maintained and implemented by a single institutional structure, mainly the Council, Commission, and Parliament of the EC. The roles of the institutions and the relationship between the institutions and the Member States vary from pillar to pillar. Activities taken under the first pillar are subject to different procedures and have different legal consequences than activities taken under the second or third pillar. Moreover, it is inevitable that the same institution may be working on the same general matter within the context of two or even all three of the pillars, and conversely that the same matter will be considered in more than one pillar. International affairs is an area that has this character.

The Council and the Commission maintain the ongoing task of carrying out the Union's external relations within the EC and separately within the CFSP. These institutions may be working on the same foreign policy matter within both the first and second pillars. The allocation of external affairs responsibilities or competencies between the institutions and the Member States is an area of European Union law and practice still fraught with ambiguity and tension.<sup>101</sup> CFSP presents an opportunity for

97. Council Agreement in Principle, 27 BULL. E.U. (10-1994) 47.

98. Council Decision 94/276/CFSP of 19 April 1994 In Support of the Middle East Peace Process, art. 3, 1994 O.J. (L119) 1.

99. TEU, art. J.11(2).

100. *Id.*

101. See generally Opinion 1/94, Opinion Pursuant to Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267 (discussing the competence of the Community to conclude international agreements dealing with services and protection of intellectual property on behalf of Member States); Case 22/70, *Commission v. Council* 1971 E.C.R. 263 (determining that the Commission's objection to the Member States' negotiation of the AETR treaty dealing with international road transport be dismissed); MACLEOD, *supra* note 91; MCGOLDRICK *supra* note 31; Marise Cremona, *The Common Foreign and Security Policy of the European Union and the External Relations Powers of the European Community*, in LEGAL ISSUES, *supra* note 28, at 247 [hereinafter Cremona]; ALAN DASHWOOD, *Implied External Competence of the EC*, in INTERNATIONAL LAW ASPECTS, *supra* note 31, at 113;

compounding these ambiguities and tensions. The Union's external affairs are conducted within the first and second pillar, often within the third pillar as well. The need for consistency of action is obvious. But achieving consistency presents serious challenges. The intergovernmental nature of the second pillar versus the institutional nature of the first pillar could present the occasion for inconsistent practice, as could the vagueness and evolving nature of the external affairs aspects of Union law and practice. The notion of consistency is that measures taken should not conflict with or undercut one another, but should be compatible and mutually reinforcing.<sup>102</sup> Some facets of the challenge of consistency will be treated here.

For a variety of reasons, consistent practice among the Member States should not be difficult to sustain. This aspect of consistency is governed by the most extensive set of rules and processes. The Member States, together with the President of the Commission, comprise the European Council.<sup>103</sup> To the extent that a particular foreign policy matter is considered within the European Council, unanimous support for the position would be required.<sup>104</sup> Because Member States are members of the Council of Ministers, any specific action will be adopted only after obtaining unanimity or at least "quasi-unanimity" among the Member States.<sup>105</sup> If a Member State opposed a particular action, it could prevent the requisite unanimity.<sup>106</sup>

After a position is adopted, the Member States obligate themselves to support the policies and positions agreed upon, and there are specific provisions in Title V which minimize the Member States' ability or need to act inconsistently with these positions.<sup>107</sup> Lastly, the Council is granted the authority to enforce, at least politically, the common positions and joint actions vis-à-vis the Member States.

Nicholas Emiliou, *The Allocation of Competence Between the EC and Member States in the Sphere of External Relations*, in *THE EUROPEAN UNION AND WORLD TRADE LAW* 31 (Nicholas Emiliou & David O'Keefe eds., 1996); Koen Lenaerts and Eddy De Smijter, *The European Community's Treaty-Making Competence*, 1996 Y.B. EUR. L. 1; Takis Tridimas & Piet Eeckhout, *The External Competence of the Community and the Case Law of the Court of Justice: Principle versus Pragmatism*, 1994 Y.B. EUR. L. 143.

102. Neuwahl, *supra* note 28, at 235.

103. TEU, art. D.

104. *Id.* art. J.3(1) & J.8(2). See *infra* note 179 for a discussion of voting within the European Council.

105. See *supra* note 38-41 and accompanying text.

106. *Id.*

107. See *supra* notes 22-23, 36, 38-40, 54-56 and accompanying text. In addition, Article J.3(7) provides that a Member State having difficulty in implementing a joint action should refer this difficulty to the Council which will discuss the matter and seek appropriate solutions. The solution might entail modification of the terms of the joint action to accommodate the point of difficulty.

On another level there is a basis for real concern regarding consistency of action among the Member States. Joint actions within CFSP generally are single actions undertaken by and on the behalf of the Union, such as the European Union's administration of the city of Mostar.<sup>108</sup> In contrast, the common position is, in a sense, like a directive in the EC legislative scheme. A common position calls upon the Member States to do tasks, but it leaves the specific mechanisms for accomplishing those tasks to national authorities and processes.<sup>109</sup> Hence, there is not one operational order, but fifteen, all presumably working toward the common objective.

For example, numerous common positions impose embargoes on the sale of arms and military equipment; some go further by imposing entry visa restrictions. Such a common position was adopted in October 1996 with respect to Burma/Myanmar.<sup>110</sup> Among other measures, an embargo on sales of arms and military equipment and on all non-humanitarian aid and development programs was imposed.<sup>111</sup> In addition, entry visas for certain government and military officials and their families were prohibited and visits by high-ranking officials of the Member States were suspended.<sup>112</sup>

Implementation of the measures set forth in this common position requires fifteen separate national actions. As with directives, the precise form and timetable for implementation of these national actions may vary. Because this common position is taken within CFSP, it is not justiciable.<sup>113</sup> The Council or other Member States could not bring an action against a recalcitrant Member to force compliance. Compliance is left to the persuasion of the Council.<sup>114</sup>

The Council is charged with ensuring consistency in defining and implementing the common policies.<sup>115</sup> It must assure that the CFSP positions and actions are consistent with one another.<sup>116</sup> Because of the intergovernmental nature of the second pillar, the Commission is given no charge in this respect

108. See *supra* note 97.

109. TEU, art. J.2(2).

110. Common Position 96/635/CFSP of 28 October 1996 On Burma/Myanmar, 1996 O.J. (L 287) 1.

111. *Id.*

112. *Id.*

113. TEU, art. L.

114. Since the common position required unanimity there should be less of an issue of non-compliance. But in view of the "quasi-unanimity" rule, one or more Members may be less committed to the common position and might be slow to comply, or comply ineffectually. See *supra* notes 38-41 and accompanying text.

115. TEU, art. J.8(2).

116. *Id.*

within Title V. However, Article C of the TEU charges both the Council and the Commission with assuring consistency of external activities within their respective spheres.<sup>117</sup> Since the Commission has no responsibility or power to assure consistency under the second pillar, its responsibility as stated in Article C must be to assure that all of the operations and activities for which it does have responsibility under the treaties are carried out consistently, both with one another and with the objectives of CFSP. This raises the troublesome question of which part of the Union's overall activity is paramount: the EC and its *acquis* or the CFSP.<sup>118</sup> Article C's charge imposes a significant burden on the Commission. It is charged with assuring consistency of activity within the first and second pillars. Yet it has no direct role in determining the activities in the second pillar, other than the President of the Commission's participation in the European Council. In a sense, the Commission is placed in a reactive rather than a proactive role. It is charged with assuring consistency, but it does not have the power to initiate action within the second pillar to help achieve this goal.

Foreign policy matters are dealt with in both the first and second pillars, although the actions taken with respect to them under the first pillar are subject to quite different rules and review processes than those which might apply within the second pillar. Actions taken within the EC system must be grounded in a proper treaty provision, be adopted and implemented under the proper procedures, and meet the test of subsidiarity.<sup>119</sup> These actions are judicially reviewable.<sup>120</sup> None of these requirements, except the proper voting majority, apply in the second pillar.<sup>121</sup> Consistency of action between the two pillars logically means that activities undertaken in the second pillar are in part constrained by the first pillar. Particularly, if Article C dictates that there be consistency between the pillars, the activity in the second is constrained by the bounds of lawful action under the first pillar. This in turn might dilute the efficacy of the Union's overall approach to a particular issue.

Two recent foreign policy matters illustrate these points. United States legislation enacted in 1996 imposes economic sanctions on any person, within or without the United States, engaged in certain economic activities in Cuba, Iran, and

117. *Id.* art. C.

118. See *infra* note 140 and accompanying text.

119. See generally MATHIJSEN, *supra* note 9, at Part One, Chapter Three; T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (3rd ed. 1994), Parts I and II.

120. TEU, art. L.

121. See *supra* note 38-41 and accompanying text.

Libya.<sup>122</sup> These statutes were of grave concern within the Union<sup>123</sup> and the Union reacted, proceeding down parallel tracks. The Commission drafted and the Council adopted a strong retaliatory regulation through the usual lawmaking procedures.<sup>124</sup> Within CFSP, a joint action was agreed upon the day the regulation was adopted.<sup>125</sup> The regulation is subject to the normal EC rules, including a proper grounding in a treaty provision and subsidiarity justification.<sup>126</sup> Consistency between the pillars was neatly achieved in this situation. The Commission's responsibilities extended no further than is usual in EC matters. The joint action supplemented the regulation by directing the Member States to take such measures as they deemed necessary to protect persons within their territories from the consequences of the statutes to the extent that these interests were not protected by the regulation.<sup>127</sup>

122. Among other provisions, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the Helms-Burton Act), *supra* note 59: strengthens the economic and financial embargo against Cuba by applying its provisions to foreign firms owned or controlled by "US persons" (Title I); makes any person, US citizen or not, "trafficking" in property confiscated by the Cuban government liable to any US national owing the claim to such property; and excludes from the United States officers and controlling shareholders of companies "trafficking" in such property and their families (Title II). The Iran and Libya Sanctions Act of 1996, *supra* note 60, authorizes the President to impose a range of sanctions on any person, US or foreign citizen, who has invested more than a specified sum in Iran or Libya.

123. See, e.g., Ian Black, *Sanctions Bill Likely to Infuriate EU Row: Looms Over New US Move to Target "Pariah" Regimes*, GUARDIAN, July 18, 1996, at 13 (outlining European, especially British, concerns with the bills); Tom Rhodes, *Clinton Bows to Protest on Cuba Trading*, TIMES of 'London,' July 17, 1996, at 1 (describing President Clinton's compromise to avoid a trade war with Europe); John Palmer & Jonathan Freedland, *Europe Poised for Trade Clash with US over Cuba*, GUARDIAN, July 16, 1996, at 3 (discussing possible EU retaliatory legislation that meets the threat of U.S. sanctions regarding trade with Cuba).

124. Council Regulation (EC) 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1. Among other provisions, the regulation prohibits persons from complying directly or through a subsidiary with any requirement or prohibition of the "laws specified in the Annex," *id.* art. 5, and creates a cause of action in favor of any person damaged by application of the laws specified in the Annex. *Id.* art. 6.

125. Joint Action 96/668/CFSP of 22 November 1996 Protecting Against the Effects of Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 7. This joint action calls upon the Member States to take such measures as they deem necessary to protect the interests of persons in their territories from the effects of the U.S. legislation, to the extent such interests are not protected by the Regulation. See also Peers, *supra* note 41, at 641 (discussing union efforts to deter the United States from applying the Cuban Liberty and Democratic Solidarity Act of 1996 and the Iran and Libya Sanctions Act of 1996).

126. See *supra* note 118.

127. See *supra* note 125.

Another example occurred in 1994, when a common position was adopted defining the Union's objectives and priorities regarding the Ukraine.<sup>128</sup> In this common position the Member States undertook to conform their policies to further the stated objectives and the Council noted that the Commission would direct its action toward achieving the States' objectives and priorities.<sup>129</sup> In this situation, the achievement of the overall CFSP objective is partly constrained by the bounds of lawful action under the first pillar because of the Commission's involvement.

## 2. Challenges Arising from the Authorized Spheres of CFSP Action

As stated in Article J.1, the Union and the Member States agreed to implement a common foreign and security policy covering "all areas of foreign and security policy"<sup>130</sup> and such policy is governed by the provisions of Title V.<sup>131</sup> Given the non-justifiability of the CFSP, both as to substance and process,<sup>132</sup> this sweeping language of Article J.1 is doubly significant. Read literally, it appears to cover all matters of a foreign or security policy nature. The only constraints in Article J.1 are the fact that the matters must be of common concern to several Member States, and that there be at least "quasi-unanimous" support for action with respect to them.<sup>133</sup> Given the uncertainties surrounding external affairs within the EC Treaty and *acquis*—including the issues of allocation of competencies between the Member States and institutions,<sup>134</sup> as well as the questions of proper treaty basis authorizing a particular action and subsidiarity—Article J.1 might be viewed as an extraordinary grant. All of the procedural niceties, along with possibility of judicial review, could be avoided by taking action to deal with any foreign policy or security policy situation under the second pillar rather than under the first.

However, Title V and Article J.1 are not "writ so large." Article M of the TEU provides that the EC Treaty as amended shall not be affected by certain portions of the TEU, including

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128. Common Position 94/779/CFSP of 28 November 1994 On the Objectives and Priorities of the European Union Towards Ukraine, 1994 O.J. (L 313)1.

129. *Id.*

130. TEU, art. J.1(1).

131. *Id.* art. J.

132. *Id.* art. L.

133. *Id.* arts. J.1(3), J.8(2).

134. *See supra* note 101.



Title V.<sup>135</sup> Article M is within the competence of the Court of Justice.<sup>136</sup> Thus, questions with respect to the line between the EC Treaty and CFSP are justiciable.<sup>137</sup> Because both the EC system and the CFSP are dynamic and evolving, the vague line drawn by Article M between the EC system and CFSP will be a source of continuing uncertainty. Member States or the Commission could institute an action before the Court of Justice pursuant to Article 173 of the EC Treaty,<sup>138</sup> seeking to annul a Council CFSP decision, on the grounds that the decision is inconsistent with or undermines the EC Treaty.

The broad language of Article J.1, providing that all foreign and security matters are subject to definition and implementation within CFSP notwithstanding, the EC Treaty has allocated certain activities and responsibilities with external affairs aspects to the Community institutions. This apparent inconsistency raises the question of whether the EC Treaty circumscribes legitimate CFSP action or whether the EC Treaty and *acquis* are modified by CFSP decisions. The language of Article M appears to place the EC Treaty in the dominant position.

If, as Article M provides, Title V is not to affect the EC Treaty, and by extension all of the *acquis*, then Title V should not impinge on or subsume the external affairs undertaken within the EC Treaty and *acquis*. The logic of this notion certainly extends to the past. Activities or agreements in place under the EC system should not be subject to an action under the CFSP.<sup>139</sup> In the *WTO* case,<sup>140</sup> the Court of Justice determined that by virtue of Article 113 of the EC Treaty the Community had exclusive competence as against the Member States to negotiate and represent the Community and the Member States in the negotiation of the Multilateral Agreements Covering the Trade in Goods as part of the Uruguay Round of the GATT. It would seem inappropriate for the Member States through CFSP to adopt a common position or joint action regarding issues involving the Multilateral Agreements. Moreover, there seems to be little

135. TEU, art. M provides:

Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Economic Community . . . and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.

136. As stated in Article L of the TEU, the Court of Justice's jurisdiction includes Articles L through S of the TEU. TEU, art. L(c).

137. *Id.*

138. E.C. Treaty, as amended, art. 173.

139. See Cremona, *supra* note 101, at 254.

140. Opinion 1/94, Opinion Pursuant to Article 228(6) of the E.C. Treaty, 1994 E.C.R. I-5267, 5286-87.

reason to distinguish areas in which the Community has acted in the past from areas in which future action is possible. The principle of Article M should mean that the CFSP ought not intrude into areas of exclusive Community competence, regardless of whether the Community had previously acted with respect to a particular issue.

In areas of shared competence the resolution is less clear. It would seem that even in shared areas CFSP should not be used to detract from agreements previously negotiated by the Community. But as to future activities this determination is less certain. In the *WTO* case, the Commission argued that the exclusive competence of the Community should extend to the two other major sets of agreements covered by the Uruguay Round—the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>141</sup> The Court held that these latter two sets of agreements did not fall entirely within Article 113 of the EC Treaty, but were instead part of the shared competency between the Community and the Member States.<sup>142</sup>

Article M presumably would allow a common position or a joint action under CFSP in these two areas. Curiously, the AT would add a new Article 113(5) to the EC Treaty which would allow the Commission to negotiate agreements relating to services and intellectual property, but only if the Council unanimously acts on the proposal from the Commission requesting such an extension of authority.<sup>143</sup> Obviously, if such unanimous approval were granted, the common position or joint action with respect to such types of agreements should not be taken within CFSP. If such a grant of authority is not given, presumably activity by “quasi-unanimity” within CFSP would be possible.

Also, under the AT, large areas of the European Union’s asylum and immigration policies would be brought within the EC sphere.<sup>144</sup> Clearly, upon ratification, the CFSP should not be permitted to prevent common positions or joint actions in areas covered by those new provisions of the EC Treaty.

141. *Id.* at 5303-05, 5313-15.

142. *Id.* at 5417, 5419.

143. AT, art. 2(20), amending Article 113 by adding new paragraph (5). Normally, under Article 113, the Commission’s authority to negotiate is granted on the basis of a qualified majority approval from the Council. E.C. Treaty, Article 113(4).

144. *Id.* art. 2(15) (adding a new Title IIIa to the E.C. Treaty dealing with visas, asylum, immigration and other policies related to free movement of persons).

### 3. Challenges Arising from the EC Treaty and Law

Two other, and related, doctrines allow for the evolution of Community competence. The first is the doctrine of implied powers. Article 235 of the EC Treaty gives the Community the implied power, upon the unanimous approval of the Council, to take measures necessary for the attainment of the objectives of the EC Treaty when the Treaty has not provided for the necessary power.<sup>145</sup> Separately, the Court of Justice held more than twenty-five years ago in the *E.R.T.A.* case<sup>146</sup> that the Community's treaty or agreement-making powers extended to all areas of activities listed in Article 3 of the Treaty of Rome.<sup>147</sup> Moreover, the Court stated that the Community's authority to enter into international agreements can be implied from the whole scheme of the EC Treaty, not just from its substantive provisions.<sup>148</sup>

The doctrine of "parallelism" in EC law states that as the Community's internal competence grows or changes—either through additions to areas of expressly exclusive competence, use of the implied power under Article 235 of the EC Treaty, or by activity in areas of shared competence—its external competence changes correspondingly.<sup>149</sup> In *E.R.T.A.*, the Court noted that "the system of internal Community measures may not be separated from that of external relations."<sup>150</sup>

These are settled doctrines of EC law. Article M's injunction that the second pillar not affect the EC Treaty logically extends to these settled doctrines. Article M ought not be interpreted to detract from the accretion in Community competence through the doctrines of implied powers or "parallelism." Such accretion, however, will be at the expense of the CFSP. Once the EC has acted on a matter pursuant to these doctrines, a subsequent CFSP action with respect to that matter would seem inappropriate. On the other hand, little would be gained if

145. MATHIJSEN, *supra* note 9, at 57.

146. Case 22/70, *Commission v. Council* 1971 E.C.R. 263.

147. *Id.* at 274. The list of activities in Article 3 of the E.C. Treaty which are to be pursued by the Community or the Union has been expanded by the SEA, the TEU, and the AT.

148. *Id.* at 274; *see also* Cases 3,4,6/76 *Kramer* [1976] E.C.R. I-1279. *See generally* Dashwood, *supra* note 101 (discussing the EC's ability to enter into international commitments and to function as a subject of international law, even in instances not expressly authorized by the Treaty).

149. *See* MACLEOD, *supra* note 91, at 47-48 (describing the doctrine of parallelism).

150. *Id.* at 49 (citing Case 22/70, *supra* note 146); *see also* Opinion 2/91 (Re. ILO Convention 170) 1993 E.C.R. I-1061 (describing the implied competence of the Community as flowing from the Treaty's provision); MACLEOD, *supra* note 91, at 47-8 (discussing the parallelism between the Community's internal and external powers).

actions in CFSP were forestalled because the area might in the future be deemed by the Court of Justice of be part of the EC's competence. If such a decision were made, Article M would simply dictate that the common position or joint action be terminated in favor of EC action under the first pillar. Or, as was neatly done in the 1996 economic sanctions setting,<sup>151</sup> the CFSP action could be tailored to supplement the EC action.

There is another area of confusing overlap between the first and the second pillars, one by which the CFSP may broaden the scope of legitimate EC activity. Prior to the adoption of the TEU there had been concern over the legitimacy of Community-based economic sanctions. It was unclear whether Article 113 of the EC Treaty (the article stating the Community's competence with respect to the commercial policy) provided a sufficient basis for economic sanctions.<sup>152</sup> The TEU, in part, responded to this uncertainty by adding Article 228(a) to the EC Treaty.<sup>153</sup> This Article provides that when a common position or a joint action adopted in the second pillar calls upon the Community to impose economic sanctions, the "Council shall take the necessary urgent action."<sup>154</sup> This provision is a separate treaty basis of authority for the imposition of economic sanctions. When it is used, the sanctions do not need to be grounded in Article 113 of the EC Treaty or other authorizing law.<sup>155</sup> This provision folds the sanctions requested in a CFSP decision into the EC order to be implemented by a regulation or a directive.<sup>156</sup> However, because

151. See *supra* notes 122-25 and accompanying text (discussing the US sanctions for dealing with "pariah" nations and the corresponding European retaliatory measures).

152. See MACLEOD, *supra* note 91, at 352-53 (describing the status of Article 113 before the TEU); Pieter Jan Kuyper, *Community Sanctions against Argentina: Lawfulness under Community and International Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 141 (David O'Keeffe & Henery G. Schermers eds., 1982).

153. See MACLEOD, *supra* note 91, at 354-57.

154. E. C. Treaty, Article 228(a) provides:

Where it is provided, in a common position or in a joint action adopted according to the provision of the Treaty of European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

See generally MACLEOD, *supra* note 91, at 352-66 (discussing Community sanctions).

155. MACLEOD, *supra* note 91, at 356.

156. These measures would most likely be regulations because of the direct applicability doctrine. Article 228(a) provides that the "Council shall take the necessary urgent measures." They are adopted by a qualified majority acting on a recommendation from the Commission. But the Parliament apparently has no

Article 228(a) is a separate, explicit authorization, the Community order may be expanded through its use. The subsidiary justification for them ought to apply, as it does to other EC legislation or action. But such justification can likely be easily met, as it was in the case of the 1996 sanctions.

#### 4. Practice

The practice to date shows little intrusion by CFSP into Community activity, in either substantive matters or specific implementing measures. The matters dealt with to date are generally of the type that would have been considered within the EPC system and are therefore outside the normal Community competence. The actions taken regarding the former Yugoslavia, election monitoring in Russia, support for the Middle East peace process, concerns for stability, democratic values and human rights in Nigeria, Afghanistan and Myanmar, are not matters relating to commercial policy, fishing, agriculture or the environment—those areas of Community concern.<sup>157</sup>

The previously discussed European Union reaction to the U.S. sanction legislation is the foreign policy issue which could have directly raised the conflict between the EC system and CFSP. This foreign policy issue, the extra-territorial imposition of economic sanctions by the United States, is commercial in character. And the European Union's response was to enact both Community legislation (regulation) under the first pillar and a joint action under the second pillar.<sup>158</sup> The foreign policy matter certainly comes within the Community's competence, as witnessed by the regulation. The regulation does not literally impose economic sanctions against the United States or its citizens, and consequently it was adopted under the normal law-making process rather than under Article 228(a) of the EC Treaty. The response within CFSP was by a joint action, which by its terms was deferential to the Community action. It was supplemental in nature, calling for protective measures to be applied to the extent protection was not afforded by the regulation.<sup>159</sup> Both the Community and the CFSP were acting within their respective spheres. Article M was not breached, and the Union effected a plenary response to the legislation.

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involvement. MACLEOD, *supra* note 91, at 357. Article 228(a) is limited by its terms. It only authorizes economic sanctions imposed by the EC pursuant to a joint action or common position. It does not clarify the legal uncertainty surrounding any other economic sanction action taken by the EC.

157. See *supra* notes 97, 98, 110.

158. See *supra* notes 122-25 and accompanying text.

159. See *infra* notes 125-27 and accompanying text.

## III. THE TREATY OF AMSTERDAM

A. *Structure and Procedures*

The conclusions of the Intergovernmental Conference with respect to the CFSP, and as expressed in the AT, are procedural and to some extent structural. The AT starts fresh in this respect. It replaces all of the former Title V with a new Title V.<sup>160</sup> Thus, anything not restated in the new Title V is eliminated. But the new Title V restates almost all of the old and adds very little.<sup>161</sup> CFSP remains the procedural framework it was under the TEU. No progress was made on the definition of a common foreign or security policy.

If anything, the AT takes a step backwards in stating the overall aim of the CFSP. The TEU boldly asserted that a common foreign and security policy was established by its terms, although there was in fact no statement of any policy. The AT more modestly—and more realistically—states that “the Union shall define and establish a common foreign and security policy.”<sup>162</sup> This rephrasing is an acknowledgment of the organic nature of the CFSP, and it is a concession to the reality that policies will have to develop over time.

Article J.1 of the TEU states that “[t]he Union and the Member States shall define and implement . . .” the common policies. As restated in the AT, the reference to the Member States is dropped and the sentence reads “the Union shall define and implement. . .” In one sense this is not a change because the Union, though not a legal personality, is thought to include the Community institutions, the Member States, and the citizenry. Elimination of the reference does not diminish the role of the Members. In fact, the Member States individually are in a stronger position under the AT than they were under the TEU.<sup>163</sup> But inclusion of the reference to the Member States in the TEU emphasized the intergovernmental nature of the CFSP. Deletion of the reference in the AT emphasizes the integration of the Member States into the Union. They are separate states, yet part of the Union.

160. AT, art. 1(10), replacing Title V.

161. Title V in the AT consists of eighteen subsections. Most of the changes are organizational, not substantive, in nature. *Id.*

162. *Id.* art. J.1(1). The bold introductory sentence to Title V of the TEU stating that the “common foreign and security policy is hereby established which shall be governed by the following provisions” of Article J of the TEU is simply deleted. In the AT version of Title V there is no introductory statement. Title V, Article J simply begins with Article J.1 “[t]he Union shall define and implement . . .”

163. *See infra* notes 177-80 and accompanying text.

The AT also adds an additional objective to the CFSP: the safeguarding of the territorial integrity of the Union in conformity with the principles of the Charter of the United Nations.<sup>164</sup> Again, the reference is only to the Union. In context, this reference to territory of the Union, rather than to that of the Member States, seems to be a rather presumptuous assertion.

The means by which the CFSP is to be pursued is also modified in the AT. Understandably, given the evolution of the processes, the consultation and coordination provisions which were carried over into the TEU from the EPC have been de-emphasized. As recast, Article J.2 provides that the objectives of the CFSP shall be pursued by five means: (1) defining the principles and general guidelines for the common foreign and security policy; (2) deciding on common strategies; (3) adopting common positions; (4) adopting joint actions;<sup>165</sup> and (5) strengthening systematic cooperation among the Member States in the conduct of policy.<sup>166</sup>

Articulation of the principles and guidelines for the common policies has thus become one of the means by which the CFSP pursues its objectives. This certainly makes sense and fills a gap that existed in the TEU.<sup>167</sup> But it falls far short of the aim that the Intergovernmental Conference should provide some content to the policy, rather than simply provide the procedural framework.<sup>168</sup> In fact, the effort at definition has been removed from the pressure and crucible of the Intergovernmental Conference and set as an ongoing project. However, this project is without specific impetus or timetable.<sup>169</sup>

164. AT, art. J.1.

165. The terms "common position" and "joint action" have been defined. Under the AT, a "joint action" addresses "specific situations where operational action by the Union is deemed required," AT, art. J.4(1), and a "common position" "define[s] [t]he approach of the Union to a particular matter of a geographic or thematic nature." *Id.* art. J.5.

166. *Id.* art. J.2.

167. Effectively the role assigned to the European Council in the TEU to provide general guidelines and more specific guidelines for joint actions TEU arts. J.8(1), J.3(1) was a means by which the CFSP was articulated and implemented. But this role was not stated among the TEU's means of effecting the CFSP. TEU arts. J.2, J.3.

168. See *supra* notes 26-31 and accompanying text; *Commentary: Foreign Policy or Troupe L'Oeil?*, in AT: TEXT AND COMMENTARY, *supra* note 3, at 124 (supporting a stronger CFSP).

169. It has been noted that the TEU was negotiated against the backdrop of the Gulf War whereas the AT was negotiated in an era in which domestic pressures were paramount. *Id.* The effort at definition of common policy might have been easier in 1992 at the time the TEU was negotiated than during the 1996 IGC, or than it will be in the future. In 1995 three "neutral" states joined the Union, Austria, Finland and Sweden, adding three new voices to the previous twelve. Future enlargements will add more disparate views.

Under the AT, the CFSP is also to be pursued using the "common strategy."<sup>170</sup> The common strategy is a decision or position more specific than the general guidelines, but not as tactical as the common position or joint action. This device did not exist as such under the TEU. The provisions regarding common positions and joint actions—including the Member States' obligations with respect to them—are not substantially changed.<sup>171</sup> The voting on these matters, however, has become even more cumbersome than it was under the TEU's "quasi-unanimity" procedure. At first glance, one might conclude that the CFSP process will be greatly facilitated because qualified majority voting has been introduced. However, what the AT has given with one hand it has taken back with the other. In the final analysis unanimity will still be required.

Article J.13 sets out two separate procedures for voting within CFSP and it indicates the matters to be voted on under each procedure. Article J.13(2) contains the procedure for voting on joint actions, common positions, decisions concerning implementation, and decisions based on a common strategy. For these matters, voting is by a qualified majority.<sup>172</sup> While this may appear to be a tremendous step forward, it is not. After Article J.13(2) provides for qualified voting, the very next sentence states that if a Member State declares that for important and stated reasons of national policy it intends to oppose the measure, a vote will not be taken. Thus, unanimity is effectively required for adoption of these measures, as one Member State can block the taking of a vote. If a vote is not taken, the Council can request, by a qualified majority vote, that the matter be referred to the European Council.<sup>173</sup> The only qualification on the objecting

170. See *infra* notes 194-95 and accompanying text.

171. The Member States are to assure that their policies conform to the common positions. AT, art. J.5. This obligation on the Member States is not only to assure that their positions not be inconsistent with the common position, but that they affirmatively implement the common position.

172. Again it would be the more stringent qualified majority rule from Article 148(2) of the E.C. Treaty, as these votes are not on proposals from the Commission. See *supra* note 51. The Commission, consistent with the intergovernmental character of the CFSP, does not have the right to initiate proposals. But see *infra* note 216 and accompanying text. As provided in Article 148(2) of the E.C. Treaty as amended, passage of a measure by qualified majority voting requires the affirmative vote of 62 of the 87 votes in the Council. The votes are weighted as follows: Germany, France, Italy, and the UK—10 votes each; Spain—8 votes; Belgium, Greece, the Netherlands and Portugal—5 votes each; Austria and Sweden—4 votes each; Denmark, Finland, and Ireland—3 votes each; and Luxembourg—2 votes.

173. AT, art. J.13(2). This explicit qualified majority with the right to block procedure means that the Ioannina Agreement is not applicable to voting within CFSP. Council Decision of 29 March 1994, on the Taking of Decisions by Qualified Majority by the Council, 1994 O.J. (C 105) 1, as amended by Council



Member's unfettered right to block an action covered by this section is that it may have to sustain its opposition within the European Council and withstand persuasive pressure brought by the other Members. The European Council has the power to decide that a matter should be pursued nonetheless, but only if it votes to do so unanimously.<sup>174</sup>

As structured in Article J.13(2), the position of the Member States with regard to the voting procedures has been strengthened from that which they enjoyed under the TEU. Under the Declaration of Voting within CFSP, which was also part of the TEU, the Member States were obligated to make an effort to defer to the group.<sup>175</sup> Each Member obligated itself to avoid, to the extent possible, preventing a unanimous vote if a qualified majority existed in favor of adoption.<sup>176</sup> Article J.13(2) requires

Decision of 1 January 1995, 1995 O. J. (C1) 1. The Ioannina Agreement is an attempt to minimize the number of Member States voting against a measure when voting is by qualified majority, thereby assuring a broader basis for support for the measure among the Member States. As provided in Article 148 of the E.C. Treaty, as amended, adoption of a measure by qualified majority requires 62 affirmative votes out of the total of 87 votes. Thus, a measure could be adopted even though as many as 25 negative votes were cast. The Ioannina Agreement provides that if Member States holding between 23 and 25 votes in the Council indicate their intention to oppose adoption of a measure, the Council will do all in its power to reach a satisfactory solution whereby the measure could be adopted by at least 65 votes. This solution might entail modification of the proposal in order to garner the necessary votes. The Agreement also means that in very close cases, even though there are sufficient votes for adoption, opposing Members can force further discussion, and perhaps modification, of the proposal.

174. AT, art. J.13(2). The AT requires absolute unanimity for such a vote within the European Council. Throughout the AT the distinction between the Council of Ministers and the European Council is maintained. The term "European Council" is used when the reference is to that body, and the term "Council" is used when reference is to the Council of Ministers of the Union. Article J.13(1) provides that "[d]ecisions under this Title shall be taken by the Council acting unanimously." The reference there is to decisions of the "Council," thus it is a reference to actions of the Council of Ministers. Article J.13(1) goes on to provide for the constructive abstention from "Council" decisions. See *infra* note 182 and accompanying text. Separately, Article J.13(2) provides that if the "Council" refers a matter on which a vote is blocked to the European Council by a qualified majority vote, the matter is "referred to the European Council for decision by unanimity." Article J.13(1)'s constructive abstention rule applies to decisions of the "Council," that is to decisions of the Council of Ministers. By its terms Article J.13(1)'s constructive abstention rule is not applicable to a decision of the European Council on a vote-blocked matter. The term "unanimity" as used in Article J.13(2)'s reference to European Council voting means absolute unanimity. Within the European Council, decisions are taken by "common accord," which means that all 16 of the members, the 15 Member States, and the President of the Commission must agree to the decision with no abstentions and no negative votes.

175. See *supra* notes 39-40 and accompanying text ("Member states will . . . avoid preventing a unanimous decision where a qualified majority exists in favour of that decision.").

176. *Id.*

no such deference. By its terms, each Member is entitled to act unilaterally and with reference only to its own interests when deciding whether to block the taking of a vote on a measure.

Article J.13(2)'s voting procedure applies only to those measures specified in the section, and the section is said to be in derogation of the general voting rule of Article J.13(1). The general voting rule of Article J.13(1) provides that all actions taken under Title V are to be adopted by unanimous vote of the Council. Thus, all measures except those specified in Article J.13(2) are to be voted on under Article J.13(1). The abstention rule of Article 148(3) of the EC Treaty is restated in Article J.13(1); that is, abstention by a Member State does not prevent adoption by unanimity. Abstention is deemed not to be a vote cast, and unanimity among the votes cast is required for adoption.<sup>177</sup> It was necessary to restate this rule since a qualification has been placed on it for purposes of Title V, a qualification which may make it easier to achieve unanimity and thus minimize deadlock in CFSP matters. An abstaining Member may qualify its abstention by making a formal declaration.<sup>178</sup> If it does so, the Member State will not be obligated to apply the decision taken. The abstaining member would acknowledge that the decision is adopted and is an act of the Union, but it would not be obliged to apply or implement it.<sup>179</sup> In the spirit of mutual solidarity, however, this Member would be obliged not to take any action that is in conflict with or likely to impede the Union action.<sup>180</sup>

While the rule of Article J.13(2) that provides for qualified majority voting with the right to block a vote applies only to the measures specified therein, these measures are in fact all of the important implementing measures: adoption of common positions, joint actions, measures implementing such, and decisions based on common strategies. This qualified majority procedure, which allows a single Member State to block a vote, seems designed to favor the protection of the prerogatives of each Member State rather than to encourage collaborative action. The rationale for this procedure is that making a decision over the opposition of a Member affects the legitimacy of the decision, at least insofar as that Member is concerned. Under this rationale it is better not to vote than to risk weakening the legitimacy of the process, unless there is unanimous support for the measure.<sup>181</sup>

177. AT, art. J.13(1).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Reflection Group's Report*, *supra* note 5, at ¶¶ 154-55. Some members of the Reflection Group thought this approach was too open-ended, and that it could be strengthened by some definition or delineation of which issues are sufficiently fundamental to allow for its use. *Id.*

From another perspective, the procedure means that there can be no effective response by the European Union to a foreign policy situation without the unanimous support of all the Member States. Moreover, this procedure resurrects and legitimizes within CFSP a controversial decision-making process employed by the Council more than thirty years ago under the Luxembourg Accords.<sup>182</sup> In those Accords, the Member States agreed that where voting within the Council was to be by majority vote and when particularly important interests of one or more of the Member States were at stake, the members of the Council would endeavor to reach solutions that could be adopted by all the members.<sup>183</sup> The French position, which became the prevailing practice, interpreted this understanding to mean that discussions would continue until unanimous agreement was reached.<sup>184</sup> Thus, no vote would be taken unless there was unanimous support for the measure.<sup>185</sup>

The significant matters to be agreed upon under Article J.13(1)'s procedure (unanimity with constructive abstention) are the broader, overarching policy questions, decisions on the definition of the principles and guidelines for the common foreign and security policy, and the decisions on a common strategy. Because of the constructive abstention rule of Article J.13(1), it may be easier to reach a unanimous decision on these overarching matters. However, if an abstaining Member State is not bound by such a decision, the efficacy of the decision is open to question.<sup>186</sup> It is true that this provision may lessen the possibility of deadlock. The Union could proceed to define general principles without the support of one or more Member States. But any action to implement those principles could be thwarted by the non-supporting Members under Article J.13(2)'s rule that a vote not be taken on the stated matters if a Member intends to oppose it.

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182. 1966 BULL. E.C. No. 3, 8.

183. *Id.*

184. *Id.*

185. See T. C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (3rd ed. 1994), 20-21; STEPHEN WEATHERHILL, *LAW AND INTEGRATION IN THE EUROPEAN UNION*, 63-64 (1995). The Accords were controversial in part because they were not found in the Treaty, and because they sanctioned, under the French view which became the practice, a decision-making process at odds with the majority voting provisions explicitly stated in the Treaty.

186. Moreover, since the AT assigns responsibility for some of the means of pursuing CFSP to the European Council and responsibility for others to the Council of Ministers, it is not clear how often the Council of Ministers would vote on these overarching matters. See *supra* notes 197-98 and accompanying text.

B. *Institutions*

The role of the European Council is made more explicit and is heightened in the AT. By doing so, the AT shifts the balance in the control of the CFSP process to a responsibility shared between the European Council and the Council of Ministers. The European Council's role is the broader policy role, and the Council of Minister's role has become more of an operational one. The European Council is to define the principles and general guidelines for the common foreign and security policy, as was its role under the TEU.<sup>187</sup> But the European Council is also assigned the more specific role of deciding on common strategies to be implemented by the Union in areas in which the Member States have important common interests.<sup>188</sup> These strategies are to be fairly concrete as they are to include objectives, duration, and means of implementation.<sup>189</sup> In turn, the Council of Ministers makes (1) the decisions necessary for defining and implementing the policies based on the general guidelines defined by the European Council and (2) the decisions necessary to implement the common strategies developed by the European Council.<sup>190</sup>

This allocation of responsibility seems to assign the European Council the prime role in the first two means by which the CFSP is to be implemented, defining the principles and guidelines and deciding on common strategies,<sup>191</sup> while the Council of Ministers is assigned primary responsibility for implementing those decisions through the adoption of common positions and joint actions.<sup>192</sup> This more operational role of the Council of Ministers is reinforced by its right to recommend common strategies to the European Council.<sup>193</sup>

The voting procedures of Article J.13(1) and (2) have consequences for the allocation of responsibilities. The operational decisions which the Council of Ministers take will be made pursuant to the rule of Article J.13(2)—qualified majority with the right to block a vote. The more strategic decisions of defining the principles and guidelines and deciding on common strategies would be taken under Article J.13(1). But the allocation of responsibilities set forth in Article J.3 dictates that those more strategic decisions are to be made by the European

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187. AT, art. J.3(1).

188. *Id.* art. J.3(2).

189. *Id.*

190. *Id.* art. J.3(3).

191. *Id.* art. J.3(1)-(2).

192. *Id.* art. J.3(3).

193. *Id.*

Council, and the voting rules of Article J.13 do not apply to it.<sup>194</sup> Thus, it seems that most of the decisions taken under Title V will be under the qualified majority with right to block a vote procedure.

From the allocation of responsibilities in Articles J.3 and 4, it is not clear where the initiative for action lies. The European Council's role of defining the principles of and general guidelines for the policies and deciding on common strategies is set out fairly clearly in Article J.3(1) and (2). The next subsection, Article J.3(3), charges the Council of Ministers with making the decisions necessary to define and implement the common policies on the basis of the general guidelines. These sections seem to place the initiative with the European Council. The sections could be read to mean that the Council of Ministers should only act with respect to a matter after the principles and general guidelines for it have been set by the European Council. This would be similar to the process that the TEU established for the taking of a joint action.<sup>195</sup> Article J.4, which deals with joint actions, contains no reference to the European Council. In that section, the Council of Ministers is charged with adopting joint action which "shall address specific situations where operational action by the Union is deemed to be required."<sup>196</sup> Here the initiative seems to be placed with the Council of Ministers. This is a change from the TEU, wherein the European Council's more immediate role was with respect to joint actions.<sup>197</sup>

From one perspective, this difference in initiative makes sense. A common position generally requires the Member States to implement it by national action. Accordingly, the coordinating and initiative role of the European Council is more appropriate. The joint action is generally a single act of the Union. In a sense, it is an institutional act, rather than fifteen national implementing acts, and having the initiative rest with the Council of Ministers is more important. The AT provides no guidance as to when the common policies should be implemented by a common position rather than a joint action. The terms are reasonably well-defined in the AT, however.<sup>198</sup> Thus, the choice of means will depend on which of these two defined methods best meets the objective. Either would be approved under the Article J.13(2) procedure utilizing a qualified majority with the right to block a vote.

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194. See *supra* note 179.

195. See *supra* notes 45-47 and accompanying text.

196. AT, art. J.4(1).

197. See *supra* notes 45-47 and accompanying text.

198. See *supra* note 170.

The AT creates an ambiguity with its introduction of the common strategy. A common strategy is to be decided upon by the European Council in areas in which the Member States have important common interests. The common strategy adopted is to set forth the objectives, duration, and means of accomplishment.<sup>199</sup> But a common position, a device by which the "approach of the Union to a particular matter . . ." <sup>200</sup> is defined, is to be decided by the Council of Ministers voting under Article J.13(2).

The distinction between a common strategy and a common position with respect to a particular situation may not be readily apparent. The consequence of this ambiguity is heightened by the AT's confusing voting procedures. Article J.13(1) provides that voting within CFSP shall be by the Council of Ministers, whereas Article J.3 provides that the European Council shall decide on common strategies. The voting procedures of Article J.13(1) and (2) do not apply to the European Council.<sup>201</sup> Defining a foreign policy matter as the subject of a common position allows for its consideration under the clear rules of Article J.13(2), while defining the matter as the object of a common strategy leaves the voting procedure unstated.

The Council is given the express and operational power to appoint a special representative with a mandate for particular issues.<sup>202</sup> The Council had previously made such assignments under the TEU. For example, it appointed a special representative for the administration of the city of Mostar<sup>203</sup> and an envoy to the Middle East Peace Process.<sup>204</sup> In these instances the Council made the appointment through a joint action.<sup>205</sup>

Article C of the TEU obligated the Council and the Commission, each within its sphere of competency, to assure consistency of policy and action. The AT expands on this theme.

199. AT, art. J.3(2).

200. *Id.* art. J.5.

201. *See supra* note 179.

202. AT, art. J.8(5).

203. Council Decision 96/442/CFSP of 15 July 1996 On the Nomination of a Special Envoy of the European Union in the City of Mostar, 1996 O.J. (L 185) 2.

204. Council Decision 96/676/CFSP of 25 November 1996 In relation to the Nomination of an EU Special Envoy for the Middle East Peace Process, 1996 O.J. (L 315) 1.

205. Under the TEU such appointments were made by a joint action, since common positions and joint actions were the means by which the CFSP was carried out. The AT seems to allow for the appointment separate from either, although obviously the appointment could still be through a joint action. However, if the appointment is not made through a joint action, the voting procedure for the matter is not clear: the appointment might come within either one of the specified measures to be voted on under Article J.13(2), or it might come under the general rules of Article J.13(1).

In the revised Article C, the Union is charged with ensuring the consistency "as a whole in the context of its external relations, security, economic and development policies."<sup>206</sup> Presumably, this sentence refers both to consistency among various spheres, such as external relations and economic and development policies, as well as consistency among the three pillars in the approach taken on a particular issue. The Council and Commission are called upon to assure such consistency and to cooperate to this end.<sup>207</sup> To emphasize this point specifically with respect to CFSP, the AT, in its version of Title V, charges the Council with the responsibility of ensuring the unity, consistency, and effectiveness of action by the Union.<sup>208</sup> As was the case under the TEU, there is no reference in this Article to the Commission.<sup>209</sup> This exhortation to the Council is contained in article J.3, which sets out the Council's role in implementing the common policy on the basis of guidelines from the European Council. Presumably, this reference is to consistency of activities within the CFSP, not to consistency between the CFSP and the EC, whereas the more general charge of Article C would address consistency among the pillars and spheres of activity.

The Commission's role in CFSP has not been significantly altered. It is to be fully associated with the work.<sup>210</sup> The Commission and the Member States may submit questions and proposals to the Council,<sup>211</sup> and the Commission and the Member States may request an extraordinary meeting of the Council to consider emergency matters.<sup>212</sup> These provisions are all the same as under the TEU. One additional prerogative is that the Council may request the Commission to submit proposals to ensure implementation of joint actions.<sup>213</sup> The Commission's role in fact has been diminished to the extent that the AT creates new responsibilities within the CFSP process and assigns them to another entity.<sup>214</sup>

206. AT, art. C, replacing TEU, art. C, ¶ 2.

207. Article C of the TEU called for the Council and the Commission to achieve this consistency.

208. AT, art. J.3(3), ¶ 3.

209. It had been suggested that the likelihood of achieving consistency would be enhanced if the Commission were also charged together with the Council. *Reflection Group's Report, supra* note 5, at ¶ 151. Presumably this suggestion was not adopted out of a concern that the second pillar would become too institutionalized. However, the Commission did have such a charge under the EPC process. SEA, art. 30.5.

210. AT, art. J.17.

211. *Id.* art. J.12.

212. *Id.* art. J.12(2). The TEU contained a similar procedure. TEU, art. J.8(4).

213. *Id.* art. J.4(4).

214. *See infra* notes 227-31 and accompanying text.

The administrative organization of the CFSP has been strengthened in several respects. As under the TEU, the Presidency represents the Union in matters coming within CFSP.<sup>215</sup> The Presidency is responsible for implementing decisions taken as well as representing the Union's position in international organizations and conferences.<sup>216</sup> The troika, which under the TEU was to assist the Presidency (the immediate past and incoming President together with the Commission),<sup>217</sup> has been replaced by the incoming Member State as President and the Commission.<sup>218</sup>

In an effort to assure continuity, and in support of the Member State holding the office of President of the Council, the AT assigns the Secretary General of the Council the significant role of assisting the two tasks of representation and implementation.<sup>219</sup> The Secretary General is to "exercise the function of High Representative for the common foreign and security policy."<sup>220</sup> Creation of this responsibility was in response to a broadly based concern that the administration of CFSP needed strengthening.<sup>221</sup> This position could be viewed as the "figurehead" of CFSP,<sup>222</sup> which may be an apt characterization. Given the structure and the role of the European Council, the Council of Ministers, and the Presidency in CFSP, it seems unlikely that the Secretary General will become the "CFSP czar." However, the AT does assign the General Secretary an ambitious and prominent role in the CFSP process. As High Commissioner for common foreign and security policy, the Secretary General is to assist the Council in matters coming within the scope of common foreign and security policy by contributing to the formulation, preparation, and implementation of the policy.<sup>223</sup> When requested to do so by the President, the Secretary General can conduct negotiations with third parties.<sup>224</sup> At base, however, in this role the Secretary General is to assist the Council and the Presidency.

In so far as this role relates to the Presidency, the involvement of the Secretary General will be redefined every six

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215. AT, art. J.8(1).

216. *Id.* art. J.8(2).

217. TEU, art. J.5(3).

218. AT, art. J.8(4).

219. *Id.* art. J.8(3).

220. *Id.*

221. See *Reflection Group's Report*, *supra* note 5, at ¶ 156. The suggestion that this support be provided by increasing the Commission's involvement was rejected. *Id.*

222. Langrish, *supra* note 3, at 13.

223. AT, art. J.16.

224. *Id.*



months as the Presidency rotates to another Member State.<sup>225</sup> The Secretary General's role as High Commissioner will probably be more prominent when the office of the Presidency is held by certain Member States and less prominent when held by others. As it relates to the Council as a whole, this role will be more stable and will allow for a more continuous monitoring of the CFSP process than was possible under the TEU.

Another provision intended to bolster the administration of the CFSP is the creation of a policy planning and early warning unit within the General Secretariat of the Council.<sup>226</sup> This unit is under the control of the Secretary General in his capacity as High Representative for the CFSP, and it is staffed by personnel from the Secretariat, the Member States, the Commission, and the Western European Union.<sup>227</sup> Its tasks include monitoring and analyzing developments in areas relevant to the CFSP, assessing and warning about events that may have repercussions for Union policies, and producing policy option papers that could include recommendations and strategies for CFSP.<sup>228</sup> The Political Committee established under the TEU is carried over into the AT, with virtually the same function.<sup>229</sup> The constitutive documents make no reference to the relationship between the policy planning/early warning unit and the Political Committee, but the overlap is apparent.

The concerns regarding the need for more administrative support and continuity of the CFSP have been taken seriously in the AT. The High Commissioner and the policy planning/early warning unit provide the CFSP with more sustained personnel, thereby improving its administration and effectiveness. From another point of view, however, the intergovernmental nature of the CFSP has been altered as these two augmentations add an institutional dimension to the process that was previously absent.

### C. Other Provisions

One unresolved aspect of CFSP as it existed under the TEU was the negotiation and execution of any formal agreements necessary to effect a joint position. Under the TEU, the Union is

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225. See MATHJSEN, *supra* note 9, at 51.

226. Declaration of the Establishment of a Policy Planning and Early Warning Unit. 1997 O.J. (C340) 132.

227. See *id.*

228. See *id.*

229. AT, art. J.15; see *supra* notes 90-92 and accompanying text (describing the role of the Political Committee under the TEU).

not a legal person.<sup>230</sup> In contrast, the EC by virtue of Article 210 of the EC Treaty does have legal personality.<sup>231</sup> Consequently, the Union, through the Commission, may negotiate agreements within Community competence, and the Council through the President can execute them on behalf of the Community. Under the TEU, if an agreement is required to effect joint action within the CFSP, the Community may enter into it only in the unlikely event that the agreement's subject matter is within the Community's competency. Otherwise the agreement would have to be negotiated and executed by the Member States and its effectiveness would depend on the ratification process within each of the Member States.

Article J.14 of the AT is an attempt at overcoming this cumbersome situation. It allows the negotiation of agreements by the Union which might be binding on the Member States. By the terms of this Article, if an agreement with other states or with international organizations is necessary to implement a CFSP decision, the Council, acting unanimously, can request the Presidency (with the assistance of the Commission) to negotiate the agreement.<sup>232</sup> The final text must be unanimously approved by the Council,<sup>233</sup> acting on a recommendation from the Presidency.<sup>234</sup> The agreement is not binding on any Member whose representative in the Council states that the agreement can only be binding if its internal constitutional procedures are satisfied.<sup>235</sup> The other Members may acknowledge that the agreement provisionally binds them.<sup>236</sup>

This Article does not confer legal personality on the Union, and the Article's exact legal consequence is unclear.<sup>237</sup> The provision authorizing the Union to negotiate and conclude agreements, coupled with the Member States' acknowledgment that they may be bound by such agreements without separately executing or ratifying them, does seem to vest the Union with

230. See *Reflection Group's Report*, *supra* note 5, at ¶ 150; MCGOLDRICK, *supra* note 31, at 36-39; M.R. Eaton, *Common Foreign Security Policy*, in *LEGAL ISSUES*, *supra* note 28, 215, at 224.

231. E.C. Treaty, as amended, art. 210; see MACLEOD, *supra* note 91, at 29-36.

232. AT, art. J.14.

233. Presumably, Article J.13(1)'s unanimity with constructive abstention rule applies.

234. AT, art. J.14.

235. *Id.*

236. *Id.*

237. For suggestions to the Intergovernmental Conference that the treaty confer legal personality see *Reflection Group's Report*, *supra* note 5, at ¶ 150. Five such suggestions were rejected in favor of this Article.

some form of legal personality.<sup>238</sup> Alternatively, it may be argued that the Council is concluding these agreements merely as an agent for the Member States; and because it is the Member States which may be bound by the agreements, there is no implication of a separate legal personality for the Union.<sup>239</sup> Moreover, the Article provides that Member States that do not constitutionally require separate ratification of agreements may acknowledge that they are bound by the agreement.<sup>240</sup> Apparently, they are also free not to acknowledge that the agreement binds them.<sup>241</sup>

This issue of legal personality for the Union as well as the status of any such agreements is muddled by a Declaration the signatories attached to the AT. In this Declaration, the signatories indicate their understanding that agreements resulting from Article J.14 do not imply any transfer of competency from the Member States to the Union.<sup>242</sup> Essentially, in Article J.14 the Member States have agreed that unless required by internal constitutional procedures, separate ratification by them of an agreement concluded by the Council is not required. As a result, they acknowledge that they may be bound by the agreement. But it is not clear whether the Union is primarily bound, and the accepting Member States are bound as members of the Union, or whether only the Member States are bound.

The AT has placed the financing of the CFSP on a much surer footing. Under the TEU, the financing of each CFSP had to be separately negotiated.<sup>243</sup> Pursuant to an Inter-Institutional Agreement, CFSP matters, administrative and operational, are to be charged to the EC budget, unless the Council otherwise agrees. Based on the Commission's annual preliminary draft budget, the Parliament and the Council will annually agree upon the amount to be set aside for CFSP expenditures and the appropriate allocation of that sum among the various types of activities.<sup>244</sup>

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238. It can be inferred from the negotiation process that the conclusion of such agreements is on behalf of the Union. See Langrish, *supra* note 3, at 13-14 (arguing that Articles J.14 and K.10 imply that the Council may conclude agreements on behalf of the Union).

239. Manin, *supra* note 3, at 16 n.66.

240. See *supra* note 239.

241. See *id.*

242. Declaration in Relating to Articles J.14 and K.10 of the Treaty on European Union, 1997 O.J. (C 340) 131.

243. *Commission Opinion*, *supra* note 5, at ¶ 33.

244. *Id.* at ¶ C.

## IV. CONCLUSION

The AT significantly alters some aspects of Union law and practice.<sup>245</sup> Its provisions regarding CFSP are much more modest. Issues critical for the success of CFSP were put on hold for another day, specifically the unanimous voting provisions. Nevertheless, improvements were made to the process through the strengthening of administrative support and budgeting. Beyond that, the Intergovernmental Conference and the AT must both be viewed as a step in an ongoing process of definition of common policies. Hopefully, the provisions of the new Title V, the collaborative efforts of the Member States, and the Council and the Commission's work within the treaty framework over the next years will add to the confidence base among the participants necessary to develop the shared goals which may make the next steps possible.

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245. This is particularly true of the provisions bringing asylum, immigration and employment principles of the third pillar within EC jurisdiction and expanding the legislative role of the Parliament.

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