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# THE ALLOCATION OF COMPETENCES: FOREIGN RELATIONS BETWEEN THE EUROPEAN UNION AND THE FEDERAL REPUBLIC OF GERMANY

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## I. PROVISIONS OF THE BASIC LAW RELATING TO FOREIGN RELATIONS

### A. THE LAW

**M**ANY of the Basic Law provisions refer directly or indirectly to foreign relations. Article 32, paragraph 1 provides that “[r]elations with other States shall be conducted by the Federation.”<sup>1</sup> Subsequent paragraphs deal with the Länder’s portion of and participation in foreign relations. I will come back to this in more detail later.

Article 24 deals with the transfer of sovereign powers to international organizations and the consent to have these powers limited for the benefit of collective security systems, which was the basis of both Germany’s participation in the European integration until the Maastricht Treaty and Germany’s accession to NATO. For the European integration, Article 24 was replaced in December 1992 by the new Article 23, which apart from being the result of a successful blackmail on the part of the Länder, completely lacks the sympathetic clarity of Article 24.<sup>2</sup> In addition, Article 24 deals with agreements providing for obligatory international arbitration, a provision which never materialized.<sup>3</sup> Since 1992, Article 24 deals with new possibilities for foreign or at least transboundary activities of the Länder, which will be discussed later.

Articles 45 and 45(a), which foresee a Committee on European Union and a Committee on Foreign Affairs of the Federal Diet, only indirectly relate to foreign relations. The provision, under which the Committee on European Union could exercise the Federal Diet’s rights in relation to the Federal Government in accordance with Article 23, gave rise to some

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1. Grundgesetz [Constitution] [GG] art. 32, para. 1 (F.R.G.).

2. See generally BRUN-OTTO BRYDE ET AL., GRUNDGESETZ-KOMMENTAR (3d ed. 1995) [hereinafter *Commentary on the Basic Law*].

3. See H. MOSLER ET AL., HANDBUCH DES STAATSRECHTS DER BUNDEREPUBLIK DEUTSCHLAND VII, § 179 (2d ed. 1998) [hereinafter *MANUAL OF CONSTITUTIONAL LAW*].

constitutional debate.<sup>4</sup>

Under Article 59 paragraph 1, the Federal President represents the Federation in its international relations, concludes treaties with other States on its behalf, and both accredits and receives envoys.<sup>5</sup> Of horizontal importance on the constitutional level are Article 59, paragraph 2 and Article 73, No. 1. The former provides for participation of the legislative bodies in the treaty-making process, and the latter vests the Federation with exclusive legislative power in foreign affairs.

If the President of the European Parliament, José Maria Gil-Robles, was correct in recently saying that "a true foreign policy needs an army," then Article 87(a) of the Basic Law, dealing with the establishment and employment of Armed Forces, also has indirect links to foreign relations. The President of the European Parliament, deploring that the European foreign policy is limping behind United States ("U.S.") foreign policy, said: "You only have a foreign policy if you have an army that makes itself respected. Otherwise foreign policy is not credible." Americans may agree with that statement more than Germans, but no matter whether this statement is true or not, I mention Article 87(a) of the Basic Law for another reason. Since the Amsterdam Treaty introduced the so-called "Petersberg Tasks" into the Treaty of the European Union (the "EC Treaty") as part of the common security or common defense policy,<sup>6</sup> the decision whether to deploy German armed forces, as a reserved national domain, may be decided, at least in part, by the European Union.<sup>7</sup> The articles previously mentioned are the law on the books. The reality is, at all times, a little different.

## B. THE REALITY

In terms of sovereignty, the core provision of the Basic Law on foreign relations is certainly a provision that has never been amended since the adoption of the Basic Law.<sup>8</sup> But it never told the plain truth. When Article 32 paragraph 1 came into force on May 23, 1949, the Federal Republic of Germany was all but sovereign.

When Germany was occupied, the occupying powers conducted or gave consent for Germany's foreign relations, if there was any. Some of

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4. See Commentary on the Basic Law, *supra* note 2, at art. 45, marg. no. 2.

5. Until the day when a President of the United States or Europe will receive foreign ambassadors in Brussels, this article of the Basic Law will neither be changed in its wording nor in its meaning.

6. See generally TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992) 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

7. The so-called "Petersberg Tasks," which are humanitarian, rescue tasks, peacekeeping, and tasks of combat forces in crisis management (including peacemaking forces), were first adopted by the Council of Ministers of the West European Union ("WEU") in their "Petersberg-Declaration" of June 19, 1992. Recent plans foresee a merger of the European Union ("EU") and the WEU. See *Recommendation 642 on WEU and European defence: beyond Amsterdam*, Assembly of WEU, Proceedings, 45th Sess., at 17 (June 1999).

8. See GG art. 32, para. 1 ("Relations with foreign States shall be conducted by the Federation").

this remained even after the treaties of 1954, although the Convention on Relations between the Three Powers and the Federal Republic of Germany stated in Article 1 paragraph 2 that “[t]he Federal Republic shall have accordingly [after the termination of the Occupation regime] the full authority of a sovereign State over its internal and external affairs.”<sup>9</sup> But Article 2 of that Convention already provided that “in view of the international situation . . . the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement.”<sup>10</sup> These rights included, for example, a residual, non-derivative right to station armed forces in Germany. The German government was reminded of that right in 1966 when France unilaterally withdrew from NATO’s military integration. In response, the German government declared France’s right to station armed forces in Germany under the 1954 Convention on the Presence of Foreign Forces unexercisable, and it offered a new agreement that France bluntly refused by reference to its retained rights.<sup>11</sup>

The incompleteness of Germany’s external sovereignty became apparent with respect to any treaty with its neighbors that contained provisions concerning Germany’s borders. Not only the famous “Ostverträge”<sup>12</sup> with neighbors in the east, but also small and rather technical rearrangements of the borders to the West required a Three Powers consent and were deemed to apply only provisionally.

The residual powers of the Allies were not overly important in everyday life, but the united Germany achieved full sovereignty over its internal and external affairs only by the Treaty on the Final Settlement with respect to Germany of September 12, 1990 (the “2+4” Treaty).<sup>13</sup> Article 7 paragraph 2 of that treaty repeats what had already been provided in the Relations Convention of 1954, but this time it meant what it said.<sup>14</sup> President Bush stated that this Treaty “creates the basis for the emergence of a . . . sovereign Federal Republic of Germany, capable and ready to assume a full and active partnership in the North Atlantic Alliance [and] the European Community . . . .”<sup>15</sup> Relations with foreign States were no longer

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9. BGBl. II S.305.

10. *Id.* at art. 2.

11. See BULLETIN DES PRESSE-UND INFORMATIONSAMTES DER BUNDESREGIERUNG No. 60 at 469, No. 161 at 1304.

12. See Agreement Between the Polish People’s Republic and the Federal Republic of Germany Concerning the Basis for Normalization of Their Mutual Relations, Dec. 7, 1970, 830 U.N.T.S. 327, Czechoslovakia, Dec. 11, 1973, U.N.T.S. Reg. No. 13589, the Soviet Union, Aug. 12, 1970, BGBl. II, S. 353, and the former GDR, June 6, 1973, BGBl. II, S. 421.

13. BGBl. II, S. 1317. See also Torsten Stein, *External Security and Military Aspects of German Unification*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 451 (1991).

14. The European Community had already put out its feelers quite far towards the foreign relations of its Member States.

15. See *Message to the Senate Transmitting the Treaty on the Reunification of Germany*, 39 WEEKLY COMP. PRES. DOC. 1443 (Oct. 1, 1990).

exclusively conducted by the Federation, at least if one understands foreign policy as not being limited to its strictly political, security, or general aspects, but including foreign trade relations, which have always been a foreign policy instrument.

## II. FOREIGN RELATIONS OF THE EUROPEAN UNION

Since the Maastricht Treaty, the difference between the external relations of the European Community ("EC") and the foreign policy of the European Union ("EU") need discussing.

### A. EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY

The EC Treaty confers only a few express external relations powers, which are mostly treaty-making powers, to the Community. The former Article 111, which provided for the negotiations of tariff agreements with non-EC States, was abolished by the Maastricht Treaty. Currently, Article 133 allows for the negotiation of treaties relating to the common commercial policy of the Community, and Article 310 allows for the conclusion of association agreements with non-EC States or international organizations with the aim of establishing reciprocal rights and obligations, in addition to common action and special procedures. Finally, Article 301 allows for an action by the EC to interrupt or reduce, in part or completely, economic relations with one or more third-party countries for reasons of common foreign and security policy. Until the introduction of the then Article 228(a) into the EC Treaty in Maastricht, the EC and its Member States debated whether such economic sanctions, which were not motivated by economic, but by foreign policy considerations, fell under the jurisdiction of the EC or remained within the powers of the Member States. Article 228(a), which is currently Article 301, ended that debate and formally enacted the two-step procedure previously applied. Member States make the political decision to apply sanctions, while the necessary legal measures to implement the decision are taken by the EC, mostly in the form of regulations. There remain, nevertheless, some problems which will be discussed later.<sup>16</sup>

Of greater importance than the powers expressly attributed in the Treaty are the implied powers developed by the European Court of Justice (the "Court"). A strict interpretation of the few provisions on external relations might have led to the conclusion that the Treaty was intended to be exhaustive on the EC's international role, but the Court developed the doctrine of parallelism where the EC's external relations powers are co-existent with its internal legislative powers.<sup>17</sup> This doctrine was developed in the *European Road Transport Agreement* (ERTA)<sup>18</sup>

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16. See Torsten Stein, *Außenpolitisch motivierte (Wirtschafts-) Sanktionen der Europäischen Union – nach wie vor eine rechtliche Grauzone?*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 1129 (Ulrich Beyerlin et al. eds., 1995).

17. See CHARLESWORTH & CULLEN, EUROPEAN COMMUNITY LAW 63 (1994).

18. See Case 22/70, *Commission v. Council*, 17 E.C.R. 263 (1971).

case, where the Council and the Commission disagreed on who was competent for negotiating and concluding the agreement, the EC or the Member States, represented by the President of the Council. The Court said that in the absence of a specific attribution of external relations competence in this area, the general system of external relations in the Treaty should be examined. From this, the Court concluded that "in external relations, the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in the Treaty," so that a treaty-making power may also flow "from other provisions of the Treaty *and* from measures adopted within the framework of those provisions, by the Community institutions."<sup>19</sup> Since the Court referred to both the Treaty and acts of institutions, the question remained whether implied external relations powers require at least some more explicit internal legislation. The answer was first given by the Court in the *Kramer* case<sup>20</sup> (conservation of marine resources) and later in the *Inland Waterway Vessels Opinion*,<sup>21</sup> where the Court stated that external relations powers of the EC arise "by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is *necessary* for the attainment of one of the objectives of the Community."<sup>22</sup> Thus, the existence of EC legislation on any given policy area is not a prerequisite for the external relations power to exist. This necessity alone preempts Member States' jurisdiction, even if the EC has not yet exercised its competence internally. At best, Member States could act in these fields on the international level as "trustees" of the EC and in close coordination with the latter.

Under the Court's case law, there is not much foreign relations power for Member States in constantly extended areas where the EC Treaty provides for an EC Policy. Thus, necessity of future EC action is required. Where competence is shared between the EC and the Member States, the international agreements entered in these fields are known as "mixed agreements," and both the EC and the Member States may be parties.<sup>23</sup>

## B. COMMON FOREIGN AND SECURITY POLICY OF THE EU

In contrast, the general foreign policy, unrelated to trade, remained "*domaine réservé*" of the Member States for many years. During irregular and informal meetings, heads of state or government tried to coordinate their foreign policies in areas of assumed common interest, but they

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19. *Id.* (emphasis added).

20. Joined Cases 3, 4 and 6/76, *Kramer*, 1976 E.C.R. 1279.

21. Opinion 1/76, *Inland Waterways Vessels*, 1977 E.C.R. 741.

22. *Id.* (emphasis added).

23. See Craig de Búrca, EU Law 117 (2d ed. 1998); Allan Rosas, *Mixed Union – Mixed Agreements*, in INT'L LAW ASPECTS OF THE EUROPEAN UNION (Martti Koskenniemi ed., 1998).

did not commit themselves to execute what they had agreed upon in theory.

The Single European Act of 1987 first tried to establish a European cooperation, not integration, in the sphere of foreign policy. The obligations flowing therefrom, if any, were obligations under public international law, not obligations under EC law. Furthermore, the obligations were sufficiently vague. For example, the High Contracting Parties should "endeavour" jointly to formulate and implement a European foreign policy. They undertook "to inform and consult each other" before deciding "on *their* final position." Common positions were not more than "a point of reference" for national policies.<sup>24</sup> Even though heads of state and foreign ministers were to meet regularly, they could still go home afterward and execute a contrary position to what they seemingly had agreed upon before.

Title V of the Treaty on European Union (the "second pillar") introduced the "Common Foreign and Security Policy"<sup>25</sup> ("CFSP") which was apparently closely connected to Germany's reunification, even though Germany wanted to demonstrate that it remained a reliable ally and a dedicated partner in European integration. Title V slightly tightened the rules applicable to foreign policy but did not introduce many changes, as compared to the previous European Political Cooperation. Foreign policy remained on the lower level of intergovernmental cooperation, although closer links were established to the "integration pillar" through institutional identity, a single institutional framework (the Council of the EC Treaty also became the Council for the CFSP), and through treaty provisions on consistency between the different pillars.

Member States from that point on had to actively and unreservedly support the EU's external policy and refrain from any action contrary to the interests of the EU or that impaired its effectiveness. Member States had to inform and consult one another on foreign and security matters of general interest, and ensure that their national policies conformed to eventual common positions adopted by the Council. Furthermore, joint actions adopted in the Council committed the Member States in the positions they adopted and in the conduct of their activity. But these obligations were still under international, not EC law, and decisions in the Council on common positions and joint actions were to be taken by unanimity. Any abstention prevented the decision from being taken.

The balance of the CFSP in the five-and-a-half years' reign of the Maastricht Treaty is not overly impressive. Joint actions primarily related to such exciting topics as monitoring elections in far-away countries, and common positions in many cases simply duplicated binding resolutions of the United Nations ("UN") Security Council in the context of the conflict

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24. See Single European Act, Feb. 28, 1986, Eur. Union, Title III, art. 30, 1987 O.J. (L 169) (emphasis added).

25. See Rosas, *supra* note 23, at 3-85.

in former Yugoslavia.<sup>26</sup> Neither the EU, nor the Western European Union ("WEU"), its new "integral part" for decisions and actions having defense implications, brought peace or a cease-fire to Bosnia. It was the North Atlantic Treaty Organization ("NATO") that did so, and NATO still and primarily means the United States.

The Treaty of Amsterdam tried to improve Title V<sup>27</sup> by introducing a presumably more effective decision-making procedure. Unanimity remains a precondition, but abstentions no longer prevent the adoption of decisions. Member States, which qualify their abstention by making a formal declaration, shall not be obliged to apply the decision but shall accept that the decision commits the EU. They shall refrain from any action likely to conflict with or impede EU action based on that decision. Later, I will discuss the difficulties which may be related to this new decision making procedure.

If Member States with more than one-third of the weighted votes in the Council qualify their abstention, the decision shall not be adopted. The Council may even act by qualified majority when taking a decision on the basis of a so-called "common strategy" decided by the European Council (heads of state or government and President of the Commission). In that case, however, a Member State may oppose the adoption of a majority decision on grounds of important reason of national policy. This is the first time that the notorious "Luxembourg Compromise" of the mid-sixties was expressly mentioned in the Treaties. A qualified majority in the Council may then refer the matter to the European Council for decision by unanimity, but this probably means referring it "*at calendae graecas*."

Be this as it may, the question at the end of this brief survey of EC and EU competences in the field of foreign relations is whether there is a conduct of relations with foreign States for Germany under Article 32 paragraph 1 of the Basic Law, apart from accrediting and receiving envoys.

### III. WHAT IS LEFT FOR NATIONAL FOREIGN POLICY?

At first glance, the EU occupies most of what counts in foreign relations, not in the sense that Europe alone decides, but in the sense that Member States cannot do many solo runs. Whenever the EC is vested with treaty-based or implied external relations power, the Council, with few exceptions, acts by a qualified majority so that foreign relation interests of some Member States are outvoted. Whenever matters of foreign and security policy are deemed to be of general interest, Member States have to inform and consult the others. They simply cannot go forward alone. They would have to veto any intended Council decision on a common position or joint action to regain their freedom of national foreign

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26. See LARS MÜNCH, *DIE GEMEINSAME AKTION ALS MITTEL DER GEMEINSAMEN AUßEN- UND SICHERHEITSPOLITIK* (Duncker & Humboldt 1997).

27. See Jaap de Zwaan, *Community Dimensions of the Second Pillar*, in *THE EUROPEAN UNION AFTER AMSTERDAM* 179 (Ton Heukels et al. eds., 1998).



policy. Whether a mere qualified abstention could produce the same result is doubtful.

Member States may still play a role in foreign relations, even in areas otherwise falling under EC jurisdiction. Article 20 of the EC Treaty deals with diplomatic or consular protection of citizens of the EU in the territory of a third country by the authorities of any Member State of the EU if their home State is not represented there.<sup>28</sup> The required negotiations to secure acceptance of that kind of protection by third States are for the Member States, not for the EC. There remains the escape clause in Article 297, not granting, but presupposing, Member States' right to take unilateral action in the field of international relations in internal or external emergency situations or to carry out obligations under international law. Unfortunately, one may say, the Court of Justice took the Macedonia Case (*Commission v. Greece*)<sup>29</sup> off its list. This was the first case that could have brought some clarity to the amount of discretion Member States enjoy under Article 297.

Member States retain the freedom to decide whether they want to engage their armed forces in an operation led by Europe. As previously mentioned, the CFSP includes the so-called "Petersberg-Tasks," which are humanitarian, rescue, peacekeeping, and tasks of combat forces in crisis management (including peacemaking forces). For the elaboration and implementation of these tasks, the EU "will avail itself of the Western European Union."<sup>30</sup> In the Petersberg Declaration of June 19, 1992, WEU Member States confirmed their readiness to make military units available from the entire spectrum of their conventional forces for WEU-led operations. Only two years later, the Federal Constitutional Court cleared the way for Germany's participation in such operations and ended the controversial debate on whether the Basic Law allowed the engagement of the armed forces for other tasks other than the defense of the country or of the alliance.<sup>31</sup> In its July 12, 1994 decision,<sup>32</sup> the Court left unanswered the question of whether Germany alone, or together with one or more other States, could engage its armed forces in any military operation that would be legal under international law. But the Court stated that such an engagement would be compatible with the Basic Law in all cases where it would take place under the authority of a "system of

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28. See Torsten Stein, *Die Regelung des diplomatischen Schutzes im Vertrag über die Europäische Union*, in *DER DIPLOMATISCHE SCHUTZ IM VÖLKER-UND EUROPARECHT* 97 (Georg Röss et al. eds., 1996).

29. See the application for interim measures in Case 120/94, *Commission v. Greece*, 1994 E.C.R. 3077. The Commission withdrew its case before the Court's ruling and after a political solution had been obtained. The order of the Court's President and the opinion of the Advocate General can be found in Case 120/94, *Commission v. Greece*, 1996 E.C.R. 1513.

30. EC Treaty, *supra* note 6, art. 17, para. 7.

31. See generally *RECHTLICHE ASPEKTE EINES BETEILIGUNG DER BUNDESREPUBLIK DEUTSCHLAND AN FRIEDENSTRUPPEN DER VEREINigten NATIONEN* (Jochen Frowein & Torsten Stein eds., 1990).

32. See Bundesverfassungsgericht [BverfGE] 90, 286 (F.R.G.) [hereinafter Federal Constitutional Court].

collective security.” In no uncertain terms, the Court described the UN and NATO as being such systems. The decision is not equally clear with respect to the WEU, which is also mentioned. Thus, one can conclude that Germany’s participation in WEU operations would be possible under the constitution.

This does not, however, mean that there is also an obligation to participate. The Petersberg Declaration states that “[m]ember States will decide whether to participate in specific operations as sovereign States, according to their respective constitution.” In Germany, according to the 1994 Constitutional Court decision, which amended rather than simply interpreted the Basic Law, prior approval by the Federal Diet is required. The EC Treaty brings no change in this respect. All decisions in the EU Council having military or defense implications have to be taken by unanimity.<sup>33</sup> The same is true for the WEU Council. Even if the new decision-making process, with respect to the CFSP and the principle of “consistency,” gives rise to some ambiguities, it could not overrule the previously quoted provision in the Petersberg Declaration.

Apart from this, all other highly political topics seem to be taken away from purely national foreign relations and have to at least be discussed, and preferably coordinated, in the EU’s council. Investment protection agreements, cultural relations, and the promotion of small and medium size enterprises remain with foreign affairs.

#### IV. PROBLEM AREAS

The allocation of foreign policy competences between the EU and its Member States, as previously described, does not solve all possible conflicts. Let me just name economic sanctions as an example. Since the Maastricht Treaty came into force, economic sanctions as a foreign policy, and not a purely economic measure, require a unanimous decision (common position) in the Council acting under Title V of the CFSP. Next, a proposal from the Commission and a subsequent decision with the qualified majority of the Council acting under Article 301 of the EC Treaty is required. All Members of the Council that vote for the common position have, according to the principle of “consistency,” to vote in favor of the regulation designed to implement the common position. If a qualified majority of Member States do not vote in favor of the regulation, then the regulation cannot be adopted.<sup>34</sup> There is no way to oblige Member States to vote in favor of the second step. Neither Title V, the CFSP, nor Article 3 paragraph 2 of the EC Treaty (“consistency”) fall under the jurisdiction of the Court of Justice.<sup>35</sup>

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33. See EC TREATY, *supra* note 6, art. 23, para. 2.

34. See Torsten Stein, *Das Zusammenspiel von Mitgliedstaaten, Rat und Kommission bei der Gemeinsamen Außen- und Sicherheitspolitik der Europäischen Union*, in 2 EUROPARECHT 69 (1995).

35. See EC TREATY, *supra* note 6, art. 46. See generally IRIS CANOR, THE LIMITS OF JUDICIAL DISCRETION IN THE EUROPEAN COURT OF JUSTICE: SECURITY AND FOREIGN AFFAIRS ISSUES (1998).

If the Security Council of the U.N. imposes economic sanctions, and Member States fail to achieve the required majorities for the common position or the implementing regulation, the burden of implementing the Security Council decision returns to the Member States because they are responsible for carrying out the decision of the Security Council.

The situation may become even more complicated under the new decision-making procedure introduced by the Amsterdam Treaty. If one or more Member States, in a vote for a common position on certain sanctions, abstain and qualify their abstention by way of a formal declaration, they are not obliged to apply the decision, but they are obliged not to impede it. If, for example, the sanction is directed against a foreign state airline for no overfly or landing, can those who abstained continue to grant landing rights? Or could this amount to impeding the action of the EU, with the consequence that those who abstained have to go along? If so, what good is the abstention? The EU faced that situation in 1998 with respect to sanctions against the Yugoslav Airline, JAT.

Take the case where the common position or joint action concerns a decision having military or defense implications, a decision that has to be implemented by the WEU. Does a Member State of the EU, which abstained in the qualified manner in the EU Council and who is a member of the WEU and NATO, have to vote in favor of all decisions in WEU and NATO that require unanimity in order not to impede or act contrary to the decision adopted in the EU? Could that State even have to engage its own military assets if they were vital for the success of the action of the EU or WEU? What is the effect of a qualified abstention? I could go on inventing scenarios which would make it quite clear that the whole system of distributing foreign relation powers between Europe and its Member States will only work if the Member States profoundly agree on the objecting and the means required. Two aspects remain, the federal aspect and the judicial control over the foreign relations power shared between the EU and its Member States.

## V. THE FEDERAL ASPECT

The component states of the Federal Republic of Germany, the Länder, constantly complain that their powers are increasingly usurped by the EU. This may be true for other areas, but not for foreign relations. Under Article 32 of the Basic Law, the Länder, insofar as they have power to legislate internally, may conclude treaties with other States with the consent of the Federal Government. A collection of those treaties published in 1994<sup>36</sup> demonstrates that in a number of cases, the Federal Government has not refused to give that consent. The European integration has not changed that picture. On the contrary, the Länder seems to

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36. See generally ULRICH BEYERLIN ET AL., SAMMLUNG DER INTERNATIONALEN VEREINBARUNGEN DER LÄNDER DER BUNDESREPUBLIK DEUTSCHLAND (1994).

have gained additional foreign relation competence in the course of European integration.

They have achieved considerable influence on the integration policy of the Federation under the new Article 23 of the Basic Law. Article 23, paragraph 6, in particular, as well as the respective laws providing the details, establish that the exercise of the rights of the Federal Republic of Germany as a Member State of the EU shall be transferred by the Federation to a representative of the Länder, whenever an intended EC measure essentially affects the exclusive legislative jurisdiction of the Länder. The Länder, under Article 24, paragraph 1(a), which was introduced into the Basic Law during the process of ratification of the Maastricht Treaty, have also obtained the right to transfer their sovereign powers to trans-frontier institutions, as far as they have the right to exercise state powers and to discharge state functions. The Länder does, however, need the consent of the Federal Government for that transfer. An example of the implementation of Article 24, paragraph 1(a) is the so-called "Karlsruhe Agreement" of 1996 among the Federal Republic of Germany, France, Luxembourg, and Switzerland on transboundary cooperation between territorial communities and local authorities. Additionally, the Länder established representatives in Brussels who behave like embassies, so that it seems fair to conclude that the role of the Länder in the field of foreign relations has not been weakened by the European integration but, on the contrary, has been strengthened.

## VI. JUDICIAL CONTROL

The last question is who is to exercise judicial control over the foreign relations power shared between the EU and its Member States. I will not deal with judicial control over the compatibility of the EC Treaty and an agreement which the EC intends to conclude with a third-party State or organization. This could be done under Article 300, paragraph 6 of the EC Treaty, through a binding opinion of the Luxembourg Court. The national Constitutional Court may be called upon to decide whether a matter falls within the limited competence of the Länder and not in that of the federation.

The question I will deal with is whether the partition of foreign relations powers between the EU and its Member States creates lacuna with regard to the judicial protection of individuals whose rights may be infringed by foreign relations measures. In principle, measures of a State which fall under its foreign relations power are not exempt from judicial control,<sup>37</sup> even though a constitutional court's standard of scrutiny depends on the nature of the challenged act. The closer to the core area of the foreign relations power, the less it involves direct encroachment on an individual's fundamental rights, and the more a constitutional court could

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37. See HANS-JOACHIM CREMER, DER SCHUTZ VOR DEN AUSLANDSFOLGEN AUFENTHALTSBEENDENDER MAßNAHMEN 223 (1994).

limit itself to a mere rationality standard. The more, however, direct and serious encroachment on the fundamental rights of an individual are at stake, the stricter the scrutiny by the constitutional court must be. Serious infringements on importers' or exporters' rights may be at stake with regard to embargos decided upon by the EU's Council, first as a common position within the framework of the CFSP, and then later under Article 301 of the EC Treaty, when a regulation is adopted which bans all imports from and exports to a given country.

In such a situation, the European Court of Justice would be competent to judicially control the second step, the regulation. But the Court is not competent, according to Article 46 of the EC Treaty, to decide whether the first step was legal under international law. If an importer or exporter claims that the embargo decision in the CFSP council was illegal under international law because it constitutes a disproportionate reprisal, or because the EU had no right to interfere at all under international law, which court will hear that argument? The European Court could deal with that problem incidentally, deciding that the law whose observance it has to ensure in the interpretation and application of the Treaty when dealing with the subsequent regulation, including public international law. It is, however, doubtful whether the European Court is prepared to do this based on present case law.

Another possibility would be to challenge the embargo before a domestic court, and ultimately before the Constitutional Court. Even if one accepts the second step, that the regulation falls within the exclusive competence of the European Court, the first step (common position) remains intergovernmental cooperation, which is not subject to the jurisdiction of the European Court. It would, however, not be easy to draw clear distinction between those two steps. Then, the national Constitutional Court would be seen as exercising judicial control over the regulation.

The remedy may come from a different institution, the European Court of Human Rights. Until recently, the supervisory bodies of the European Convention on Human Rights refused to control acts of Member States taken within the European integration, saying that such acts could not be challenged because the EC is not a Contracting Party. This result was unambiguous in the *French Trade Union* case.<sup>38</sup> Later, in the *Melchers* case,<sup>39</sup> the Commission stated that judicial control over acts of Member States within the framework of the European Communities were not per se excluded, but that the European Court in Luxembourg enjoyed priority.

The new and single permanent European Court of Human Rights recently decided in the *Matthews* case<sup>40</sup> that the European Convention on

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38. *Confédération Française Démocratique du Travail v. European Communities*, App. No. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 231, 239-40 (1978).

39. App. No. 13258/87, 64 Eur. Comm'n H.R. Dec. & Rep. 128 (1988).

40. *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. (ser. B) at 361 (1999). The judgment is published in its most important parts in *EUROPÄISCHE ZEITSCHRIFT FÜR WIRT-*

Human Rights does not exclude the transfer of jurisdiction to international organizations, provided that the convention rights continue to be secured, and that Member States' responsibility continues even after such transfer. That court, consequently, held the United Kingdom responsible for securing the voting rights guaranteed by Article 3 of Protocol 1 in Gibraltar, regardless of whether the elections were purely domestic or european.

This decision might indicate that, in view of the "shared sovereignty" in Europe between Member States and the EU, and with regard to several "partial european constitutions," including those of the Member States, the EC Treaty and the European Convention on Human Rights form a "Constitution of Europe." The European Court of Human Rights could, in the future, fill those gaps in judicial protection which might, inter alia, arise out of the allocation of foreign relations powers between the EU and its Member States.

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SCHAFTSRECHT 308 (1999), with an annotation by the former Advocate General of the European Court of Justice, Lenz.

