

CONV 708/03

BEGELEIDENDE NOTA

van: het secretariaat

aan: de Conventie

Betreft: Verslag van het Select Committee van het Hogerhuis over de Europese Unie,
ingediend door Lord Tomlinson en Lord MacLennan
"De toekomst van Europa: constitutioneel verdrag
- Ontwerp-artikelen 43-46 (lidmaatschap van de Unie) en algemene en
slotbepalingen"

De secretaris-generaal van de Conventie heeft van Lord Tomlinson en Lord MacLennan, plaatsvervangende leden van de Conventie, het verslag van het Select Committee van het Hogerhuis over de Europese Unie ontvangen, dat zij namens henzelf als bijdrage aan de besprekingen van de Conventie indienen.

HOUSE OF LORDS

SESSION 2002–03
18TH REPORT

**SELECT COMMITTEE ON
THE EUROPEAN UNION**

**THE FUTURE OF EUROPE:
CONSTITUTIONAL TREATY—DRAFT
ARTICLES 43-46 (UNION MEMBERSHIP)
AND GENERAL AND FINAL PROVISIONS**

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REPORT

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By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLES 43-46 (UNION MEMBERSHIP) AND GENERAL AND FINAL PROVISIONS

CONV 648/03 Title X: Union membership

CONV 647/03 Part Three: General and final provisions

PART 1: INTRODUCTION

1. This is our fourth¹ Report on the draft Treaty Articles now being discussed in the Convention on the Future of Europe.² It deals with two groups of Articles: (a) those concerning Membership of the Union, and (b) certain General and Final Provisions. The former comprise four Articles to be contained in Part One (Constitutional Structure) of the draft Constitutional Treaty:

—Article 43: Criteria to be eligible for Union membership

—Article 44: Procedure to apply for Union membership

—Article 45: Suspension of Union membership rights

—Article 46: Withdrawal from the Union

Of these only Article 46 is completely new.

2. The second group of Articles, as yet unnumbered, would be included in the Third Part of the new Treaty. They deal with the following matters:

—Repeal of earlier Treaties (Article A)

—Legal Continuity in relation to the European Community and the European Union (Article B)

—Scope (Article C)

—Regional unions (Article D)

—Protocols (Article E)

—Procedure for revising the Constitutional Treaty (Article F)

—Adoption, ratification and entry into force of the Constitutional Treaty (Article G)

—Duration (Article H)

—Languages (Article I)

¹ For our earlier Reports in this series see, *The Future of Europe: Constitutional Treaty—Draft Articles 1-16* (9th Report, Session 2002-03, HL Paper 61), *The Future of Europe: Constitutional Treaty—Draft Articles 24-33* (12th Report, Session 2002-03, HL Paper 71) and *The Future of Europe: Constitutional Treaty—Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)* (16th Report, Session 2002-03, HL Paper 81).

² See Appendix 1 for membership of the European Union Committee.

3. The text of the new Constitutional Treaty is appearing in stages and there remain some substantial gaps.¹ It is somewhat unusual for General and Final clauses to be considered so early in the process of preparing a Treaty. They are usually taken at the end of the substantive negotiations and are often considered as being “lawyers’ law”. Typically they address technical treaty law matters such as entry into force, territorial scope, conditions of participation, ratification², deposit³ and duration. As will be explained in Part 3 of this Report a number of these draft provisions raise points of some political and/or practical concern. The fundamental nature of the change which the new Treaty would bring about requires greater attention than usual to be focussed on these technical clauses. This Report highlights some of the potential problems.

4. The format of this Report follows that of our earlier Reports in this series. Each Article is followed by an Explanatory note⁴ (the text of which has been prepared by the Convention Secretariat) and a Commentary added by the Committee.

5. We make this Report to the House for information.

¹ For example we have yet to see the group of Articles dealing with the Institutions.

² *ie* the international procedure bringing a treaty into force by exchange or deposit of the instruments of ratification. Not to be confused with ratification in the domestic sense, *ie* the act of the appropriate organ of State, that is the Crown in the UK. See Brownlie, *Principles of Public International Law* (5th Edition) at 611.

³ The written instruments evidencing ratification, reservations, declarations etc are placed in the custody of a depository who is normally a State of an international organisation. See Brownlie *op cit* at p 616-7.

⁴ The Convention document uses the term “Comments”.

Article 43: Criteria to be eligible for Union membership

The Union shall be open to all European States whose peoples share the values referred to in Article 2, and who respect them and are committed to promoting them together. Accession to the Union implies acceptance of its Constitution.

Explanatory note

“This provision establishes the criteria which any European State must fulfil in order to apply for Union membership. The first sentence of this Article reproduces Article 1(3) of the Constitution, specifying that the values referred to are those in Article 2 of the Constitution.”

Commentary

6. This Article derives in part from the first sentence of Article 49 TEU and largely reiterates what is said in the new Article 1(3): “The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together”. “European States” is nowhere defined. The absence of any such definition leaves the position of countries to the east of the Union as soon to be enlarged decidedly ambiguous.

7. As we noted in our first Report on the Treaty Articles, the criterion for membership would be defined by reference to “peoples sharing” the same values as the Union rather than “States respecting” those values.¹ Article 43 underlines the importance of the definition of the “values” to be set out in Article 2 of the Constitution. Further, the reference to ‘promoting’ these values, an active stance beyond mere ‘respect’, may demonstrate the ambition of the Union not just to be an area of freedom, security and justice but also to have a strong external dimension.

8. Neither the text of Article 43 nor the Praesidium’s Explanatory note refers to the so-called Copenhagen criteria. In June 1993, the European Council, meeting in Copenhagen, recognised the right of the countries of central and eastern Europe to join the European Union when they had fulfilled three criteria: “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for protection of minorities; ... a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; [and] the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union”. It is for consideration whether Article 43 might include a statement of these criteria in the new Treaty.

Article 44: Procedure for applying for Union membership

Any European State which wishes to become a member of the Union may address its application to the Council. The European Parliament and the national parliaments shall be notified of this application. The Council shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions and arrangements for admission shall be the subject of an agreement between the Member States and the applicant State. That agreement shall be subject to ratification by all the contracting States, in accordance with their respective constitutional requirements.

Explanatory note

“This provision establishes the procedure for accession to the Union. The procedure corresponds to that laid down in Article 49 of the TEU. However, it introduces a new provision that the European Parliament and the national parliaments should be informed concurrently of any application for accession as soon as it has been received by the Council.”

¹ See footnote 1 above, 9th Report, Session 2002-03, HL Paper 61, at paragraph 11.

Commentary

9. This Article is based on Article 49 TEU. The requirement to inform national parliaments and the European Parliament is new. It would remain the position that accession agreements would be entered into between the Member States (and not the Union, though it will have legal personality) and the applicant State.

Article 45: Suspension of Union membership rights

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values mentioned in Article 2. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may address recommendations to that State.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council¹, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of values mentioned in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Constitution to the Member State in question, including the voting rights of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Constitution shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two thirds majority of the votes cast, representing a majority of its Members.

Explanatory note

“This provision reproduces the content of Article 7 of the TEU, with the technical adjustments needed to take account of the merger of the Treaties. It replaces Article 7 of the TEU and Article 309 of the TEC. The only change in relation to those Articles is that the possibility for the Council to request a report from independent persons is not mentioned: self-evidently so.”

Commentary

10. Article 45 consolidates provisions currently found in the TEU and TEC. Article 6 TEU reaffirms the importance of the fundamental principles of democracy and human rights² for the Union and its Member States. Article 7 TEU enables sanctions to be taken against a Member State that seriously and persistently breaches these principles. Following the Austrian episode in 2000 (the proposed coalition to form a government between Austria's People's Party and Mr Jorg Haider's Freedom Party sparked widespread protest and criticism within the Union and also outside Europe³), discussions in the IGC held later that year included consideration of the introduction of an early warning mechanism to forestall any breach of Article 6. This led to the amendment of Article 7 TEU by the Nice Treaty.

11. Two points are noteworthy. First, it would remain the case that a four fifths majority in the Council of Ministers is needed to find a risk of a serious breach. Second, while Article 7 TEU currently refers to breaches of the "principles" in Article 6 TEU (*ie* liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law), Article 45 refers to a breach of the "values mentioned in Article 2". Article 2 contains two sentences. The first sentence lists values identical or similar to those currently in Article 6 TEU. The second sentence states that the Union's "aim is a society at peace, through the practice of tolerance, justice and solidarity". Reactions to the draft Article 2 in the Convention suggest that the list of "values" in the first sentence may be extended and that the function of the second sentence (whether its content will constitute "values" for Article 45 purposes) is uncertain.⁴ The definition and content of the Union's values must be clear (for instance, is "solidarity" to be a value?) so as to avoid proceedings being initiated unjustifiably against a Member State.

¹ Depending on the articles on the European Council in the section on the Institutions.

² Compliance with these principles is a precondition for membership of the Union—see Article 49 TEU which would be replaced by Article 43 above.

³ EC Bull. 1/2-2000, point 1.10.18.

⁴ Docs CONV 601/03 and CONV 574/1/03 Rev 1.

Article 46: Voluntary withdrawal from the Union

1. Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the Council of its intention. Once that notification has been given, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the assent of the European Parliament.

The withdrawing State shall not participate in the Council's discussions or decisions concerning it.

3. This Constitution shall cease to apply to the State in question as from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2.

Explanatory note

“This provision does not appear in the current Treaties. It establishes the procedure to be followed if a Member State were to decide to withdraw from the European Union. The procedure laid down in this provision draws on the procedure in the Vienna Convention on the Law of Treaties.

The Convention's attention is drawn to three points:

—while it is desirable that an agreement should be concluded between the Union and the withdrawing State on the arrangements for withdrawal and on their future relationship, it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance;

—the legal consequences of withdrawal where there is no agreement between the Union and the withdrawing State have to be examined and, if appropriate, provisions on this question could be added to this Article;

—the decision-making procedures for the conclusion of a withdrawal agreement (and above all the Council's voting method) need further consideration. The text foresees a qualified majority procedure within the Council. However, another solution might be to adopt the voting rule corresponding to the substantive content of the agreement. It is likely that if this withdrawal clause were currently in force, the Council's decision would require unanimity.”

Commentary

12. Article 46 is new and enshrines, for the first time in the Treaties, a procedure for withdrawal. The inclusion of such a provision is controversial and concerns have been expressed about the possible abuse of the procedure.¹

13. Withdrawal by a State from the EC/EU is unprecedented.² Article 46 makes clear the autonomous right of a State to leave the Union. The title of this Article makes clear that withdrawal would be “voluntary” (*ie* it is not dependent on the consent of the other Contracting Parties). Withdrawal would not necessarily require the conclusion of an agreement between the withdrawing Member State and the Union. This is clear from Article 46(3) which contemplates withdrawal after two years if no agreement can be reached. In practical terms it is

¹ See Giscard forum set to unveil controversial EU ‘exit clause’. European Voice, 3-9 April, p 1.

² The “departure”, for example, of Algeria and Greenland did not involve the withdrawal of a Member State, rather the definition of the territorial application of the Treaties. The membership of France and Denmark respectively continued.

difficult to envisage withdrawal without an agreement as to the future relationship between the withdrawing State and the Union.

14. It is noteworthy that the Council would act by qualified majority voting (QMV) in this context. The Praesidium offers “another solution”, “to adopt the voting rule corresponding to the substantive content of the agreement”. It is unclear what this means and therefore what would be its implications for Member States.

PART 3: GENERAL AND FINAL PROVISIONS

Article A: Repeal of earlier Treaties

The Treaty establishing the European Community of 25 March 1957, the Single Act of 17 February 1986, the Treaty on European Union of 7 February 1992, the Treaty of Amsterdam of 2 October 1997 and the Treaty of Nice of 26 February 2001 shall be repealed as from the date of entry into force of the Constitutional Treaty. The acts and treaties listed in the Annex shall also be repealed.

Explanatory note

“The purpose of this Article is to repeal the 1957 Treaty of Rome (TEC), the 1986 Single Act, the 1993 Treaty on European Union (TEU) and the Amsterdam and Nice Treaties, and all the other treaties which have amended them insofar as their provisions are replaced by the Constitutional Treaty.

A reference is proposed to an Annex listing other treaties and acts amending the TEC and the TEU, to be repealed following the Constitution's entry into force.

The drafting of such an Annex is no easy task, given that it will require examination of all the treaties amending the TEC and the TEU and the acts of accession, to check whether they contain provisions which remain applicable and which would either have to be reproduced somewhere in the Constitution or allowed to continue to exist separately.

It is suggested that the Convention should not draw up such a list, but that it should remind the European Council that the list needs to be drawn up before the end of the IGC's proceedings.”

Commentary

15. This Article raises two major issues: first, the fundamental nature and extent of the change being proposed and, second, the status of the European Atomic Energy Community (EURATOM).

16. Former Treaty amendment/revision (the Single European Act, and the Maastricht, Amsterdam and Nice Treaties) have built on the foundations of the basic Treaties, and especially the Treaty of Rome. Sometimes, as in the case of the Maastricht Treaty, the changes have been major and reshaped the overall design of the structure. Nevertheless the basic Treaty foundations have remained and, subject sometimes to a detailed historical textual research, can be identified.

17. The new Constitutional Treaty envisages, with one possible exception (EURATOM, dealt with in paragraph 19), the replacement *in toto* of the current Treaties. Even though much of the substantive content of Union policies and many existing competences would remain unchanged, this would be an heroic step and not without substantial political risk. For those States where a referendum may be required or has been promised (or where a general election may intervene) the people will be asked to choose. Recent history shows that there is nothing certain in such a process and the risk of casualties cannot be dismissed. Such risks were deliberately avoided in the Dashwood draft, which proposed that a new Part One (Constitution of the European Union) be “bolted onto” reorganised and amended elements of the existing Treaties.¹

18. The Praesidium's Explanatory note reveals that much work still has to be done in order to identify all the acts and treaties to be repealed and, most importantly, which provisions in them may need to be saved and how that should be done. Article A does not, for example, refer to the Acts of Accession. They will need to be examined carefully to identify provisions which should remain applicable.²

¹ *The Draft Constitutional Treaty of the European Union prepared, at the invitation of the Foreign and Commonwealth Office, by a team headed by Professor Alan Dashwood. The text of the Treaty has been published in the European Law Review: (2003) 28 E.L.Rev. 3.*

² *See, for example, footnote 20 below dealing with the position of Gibraltar.*

19. The European Atomic Energy Community (EURATOM) was established in 1957, at the same time as the EEC, with the aim of promoting the development of the nuclear industries in the Member States. With the exception of certain technical institutional and financial matters to enable the EURATOM to be part of the new Treaty/Constitutional schema, it is not being proposed that the substantive provisions of the EURATOM Treaty should be amended.¹ It is politically sensitive—the EURATOM Treaty contains strong commitments to nuclear energy which some Member States may not now find attractive and/or want to put to a referendum. Renegotiation of the EURATOM Treaty may not be a realistic option having regard to the rigorous timetable governing the Convention, the forthcoming IGC and Enlargement. It may therefore be convenient for both the Convention and Member States to rely on the fact that the Laeken declaration, which triggered the present Convention process, makes no mention of the EURATOM Treaty and there is therefore no formal mandate to amend it substantially. Putting EURATOM in the “too difficult” tray makes good sense in all the circumstances.

Article B: Legal continuity in relation to the European Community and the European Union

The European Union shall succeed to all the rights and obligations of the European Communities and of the Union, whether internal or resulting from international agreements, which arose before the entry into force of the Constitutional Treaty by virtue of previous treaties, protocols and acts, including all the assets and liabilities of the Communities and of the Union, and their archives.

The provisions of the acts of the Institutions of the Union, adopted by virtue of the treaties and acts mentioned in the first paragraph, shall remain in force insofar as they are compatible with the Constitution. The case-law of the Court of Justice of the European Communities shall be maintained as a preferential source of interpretation of the Constitution and acts prior to its entry into force.

Explanatory note

*“The purpose of this provision is to arrange for the new European Union entity to succeed to the rights and obligations of the European Community and European Union, and to maintain the existing *acquis* on the date when the Constitutional Treaty enters into force (international agreements, secondary law, case-law, rights and obligations of third parties), assuming that the Constitutional Treaty is ratified by all the Member States.*

It is proposed that the principle of succession should be established in this Article, with a reference to a protocol listing the numbers of acts which must be taken over by the new entity.

It is suggested that the Convention should not draw up such a protocol, but that it should draw the attention of the European Council to the need for it to be drawn up before the end of the IGC.”

Commentary

20. This Article, dealing with legal continuity, raises a number of issues. The second paragraph, which seeks to preserve *inter alia* the existing *acquis*, is noteworthy in two respects. First, acts (including legislation) would remain in force “insofar as they are compatible with the Constitution”. We question whether this qualification is necessary. What the provision seems to be addressing is the substantive compatibility of the present *acquis*. If so, we consider that all existing measures should remain valid until they are replaced or repealed. The inclusion of the words “insofar as they are compatible with the Constitution” would open up a ground for legal challenge which we believe would, in the interests of legal certainty, be wholly undesirable.

21. Second, there is the reference to the Court of Justice. Its case-law is “to be maintained as a preferential source of interpretation of the Constitution and acts prior to its entry into force”. It is important in the interests of legal certainty that the existing jurisprudence of the Court should be retained so far as possible. The utility of this saving for the Court’s case-law has, however, to be put in context. A continuity rule would not exclude the possibility of change where, for example, the Constitution uses new language, amends existing Articles or

¹ A summary of the options considered by the Convention is contained in Doc CONV 621/03.

purports to consolidate the case-law of the Court. Further, the new Treaty Articles will have to be read in the light of the Union's values and objectives set out in Articles 2 and 3.

22. As the Praesidium notes, the purpose of this Article is to establish the principle of succession. One issue which the Praesidium does not address is the response of third States. Whereas the Member States as contracting parties can agree between themselves that they will be parties to the new legal order/organisation and that it will take over the rights and responsibilities of the former, that will not bind third States. International recognition of the new Union and the enforceability of the very many and diverse international agreements, bilateral and multilateral, to which the European Community is party would seem to be dependent on which and how other (third) States react to the change.

23. There are, in international law, notions of "continuity and "State succession". As Brownlie notes: "Treaties may be affected when one state succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors, including the precise form and origin of the "succession" and the type of treaty concerned".¹ There is, however, no universally accepted approach to State succession and even if there were it would not, on the face of it, apply to the EC/EU because the EC/EU is not a State.

24. Even though not a State the EC² has been almost universally accepted as an actor on the international scene and as having treaty making powers. However, we know of no precedent for such a change of shape by an international organisation/body as is now being contemplated. Would the new Union be regarded as a new body or still the old one with some changes made? From a functional standpoint there is likely to be much in common between the old and the new. The new Union would have, subject to the Enlargement, the same members/parties. It would, in large part, carry out the same functions and policies. It would have the same institutions/agencies. The converse is that the new Treaty will intentionally create a new body, repealing all the existing Treaties (except EURATOM see paragraph 15 above). Politically, a new start is intended.

25. This is uncharted territory and perhaps a potential minefield. The response of third States to the new political and legal order created by the Constitutional Treaty must be awaited.

¹ *Op cit* at p. 620.

² The position of the EU, which does not at present have legal personality, is less clear.

Article C: Scope

1. The Constitutional Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland, ...

2. The Constitutional Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands in accordance with Article ... of Part Two.

3. The special arrangements for association set out in Part [Four of the TEC] of the Constitutional Treaty shall apply to the overseas countries and territories listed in [Annex II to the TEC].

The Constitutional Treaty shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included on the aforementioned list.

4. The Constitutional Treaty shall apply to the European territories for whose external relations a Member State is responsible.

5. The Constitutional Treaty shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

6. Notwithstanding the preceding paragraphs:

(a) the Constitutional Treaty shall not apply to the Faeroe Islands;

(b) the Constitutional Treaty shall not apply to the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus;

(c) the Constitutional Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community, signed on 22 January 1972.

Explanatory note

“This provision reproduces Article 299 TEC (with the requisite technical amendments), except for the second subparagraph of paragraph 2 of this Article. It was felt that since this subparagraph was a legal basis, it should be placed in Part Two of the Constitution together with the other legal bases.

The Convention's attention is drawn to the fact that Article 299 of the TEC does not apply to the TEU. As a result, replacement of "Treaty" by "Constitutional Treaty" in this provision raises the question of the scope of the Constitutional Treaty.

This provision will need to be adjusted following entry into force of the accession treaties.”

Commentary

26. This Article might better be entitled “Territorial scope”. It is derived from Article 299 TEC. Possibly the most interesting issue from a UK standpoint is the future position of Gibraltar. Gibraltar is within the scope of the EC Treaty by virtue of Article 299(4) TEC¹, though some rules do not apply to it.² The position under the Treaty on European Union is less clear. In response to a recent query from the Select Committee, the Government described the position as follows:

“The Treaty on European Union has no territorial provision. It is therefore necessary to determine the position on territoriality by applying the principles of international law. Under international law a treaty is binding upon each country in respect of its entire territory unless a different intention appears from the treaty or is otherwise established. The practice of expressly dealing with the application of Third Pillar instruments to Gibraltar has established this different intention. Thus we take the view that Third Pillar measures ... do not automatically apply to Gibraltar. We therefore consider the application of Third Pillar measures to Gibraltar on a case by case basis.”³

Substituting “Constitutional Treaty” for “Treaty” in Article C(4) would, as the Praesidium notes, have consequences for the territorial scope of application of the new Treaty. If the present position of Gibraltar (*ie* in the EC subject to certain exceptions and outside the TEU except when expressly included) is to remain, it will need to be addressed expressly in the new Treaty.

Article D: Regional Unions

The Constitutional Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Constitutional Treaty.

Explanatory note

“This provision reproduces Article 306 TEC. In any future discussions on enhanced cooperation, the Convention may wish to examine the significance of this article and/or its relationship with provisions on enhanced cooperation. However, it is recommended that the text of the article remain unchanged for the time being.”

Commentary

27. We have nothing to add to the Praesidium’s Explanatory notes on this Article.

Article E: Protocols

The protocols annexed to this Treaty shall form an integral part thereof.

Explanatory note

“This is a provision which already exists in the TEU and the TEC.

The existing protocols, whether annexed to the TEU or TEC or to both Treaties, should continue to be annexed to the new Constitutional Treaty.

The Convention may wish to draw the IGC's attention to the fact that it needs to consider what is to happen to the protocols.”

¹ That Article provides: “The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible”.

² By virtue of Article 28 of the 1972 Act of Accession. The need to make a saving for this and other provisions of the Accession Treaties is a further issue to be considered.

³ Letter of 28 March 2003 from Mr Bob Ainsworth MP, Parliamentary Under Secretary of State, Home Office, to Lord Grenfell.

Commentary

28. A notable feature of the development of the Treaties has been the increased use of protocols and declarations. While the former are legally binding on Member States as much as Treaty provisions (Article 311 TEC), the legal force of declarations is less certain.¹ The Maastricht Treaty annexed seventeen protocols (plus the Agreement on Social Policy—a protocol in all but name). The Amsterdam Treaty annexed thirteen and Nice a further four. They have been used for a number of purposes, but significantly to enable political and/or constitutional difficulties in certain Member States (especially Denmark and the United Kingdom) to be overcome in order to facilitate the introduction and development by the majority of Member States of new and major Community policies. Examples are the establishment of Monetary Union and, in the field of Justice and Home Affairs, the transfer of immigration and asylum policy from the Third to the First Pillar and the integration of the Schengen *acquis* into the Union.²

29. Article E would replace Article 311 TEC and would provide the legal peg on which to hang protocols annexed to the new Treaty. The Presidium's Explanatory note is silent on what matters might be contained in such protocols. There are proposals to include protocols on National Parliaments and on Subsidiarity.³ Another candidate for a protocol is the Charter of Fundamental Rights. This is one of the options for the Charter envisaged by Article 5 of the new Treaty.⁴ Further, the Government has indicated that it has no intention of giving up the special position it has in relation to Schengen, its border controls and Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons) now contained in TEU Protocols 3 and 4.⁵ The future of these (and possibly other) protocols will, as the Praesidium notes, be a matter for the IGC and must be clarified.

¹ Declarations may assist in the interpretation of treaties (see Vienna Convention on the Law of Treaties, Article 31(2)). In a Union context, declarations made jointly by all Member States are significant.

² The special arrangements applicable to the UK are explained in our Report *The Future of Europe: Constitutional Treaty—Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)* (16th Report, Session 2002-03, HL Paper 81), at paragraphs 9-13.

³ See our Report *The Future of Europe: National Parliaments and Subsidiarity—The Proposed Protocols* (11th Report, Session 2002-03, HL Paper 70).

⁴ See our Report *The Future of Europe: Constitutional Treaty—Draft Articles 1-16* (9th Report, Session 2002-03, HL Paper 61), at paragraph 29.

⁵ Evidence of Mr Peter Hain MP to the Select Committee on 25 March 2003.

Article F: Procedure for revising the Constitutional Treaty

1. The government of any Member State, or the Commission, may submit to the Council proposals for the amendment of the Constitutional Treaty. The national Parliaments shall be notified of these proposals.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Constitutional Treaty. The Council of the European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Explanatory note

"1. This Article reproduces Article 48 TEU. We could, as suggested by the Working Group on National Parliaments, envisage the insertion into this provision of a second paragraph reading as follows:

"The Conference of the Representatives of the Governments of the Member States may be preceded by a preparatory Convention convened by the President of the European Council and composed of representatives of the national Parliaments, the Heads of State or Government of the Member States, the European Parliament, the Council and the Commission. At the close of its proceedings, the Convention shall adopt by consensus a recommendation to the Conference of the Representatives of the Governments of the Member States."

2. The Convention's attention is also drawn to the following:

– If the Convention wishes to consider a procedure other than that referred to in Article 48 TEU or that currently used to draft the Constitution, there would, however, be a number of procedural questions to decide beforehand:

Could the Constitution be amended by the Council, or would there still need to be a Conference of Member States?

(a) Who would have the right to initiate such amendment?

(b) Amendment by unanimity or a qualified majority?

(c) What would be the arrangements for participation by the Commission and the European Parliament?

(d) What would be the arrangements for participation by national Parliaments?

(e) What would be role of the Congress, if such a body were set up?

– If the Convention opts for a procedure other than that referred to in Article 48 TEU, it could consider the possibility of a procedure providing for recourse to the IGC alone for very limited amendments. It could also consider the possibility that certain provisions might stipulate that they may be amended by the Council or the European Council, by unanimity or qualified majority, in line with existing practice in some cases (for example Article 213 TEC as regards the number of commissioners).

– This provision raises the question of what to do if any Member State fails to ratify a revision of the Treaty."

Commentary

30. The first point to note is that the Article draws no distinction between amendments of Articles in Part I (Constitutional Structure) on the one hand and the Articles in Part 2 (Union Policies and their Implementation) on the other. There have been suggestions that provisions in Part 2 might be subject to a less onerous revision procedure. Under the text now being proposed amendment to any Article of the Constitutional Treaty would require unanimity. There would be no short cuts, no qualified majority voting nor, most importantly, avoidance of national ratification and parliamentary procedures. Indeed national parliaments would, under Article F, have been notified of any proposals to amend the Constitutional Treaty. The Praesidium's Explanatory note, however, raises the question whether provision should be made for Treaty amendment by the Council, even possibly acting by QMV. Two approaches are offered for consideration. The first is the "entrenchment" of some provisions in the new Treaty. If an Article were not entrenched it could be amended by the Council (or European Council) without need for an IGC. The second is to stipulate in particular Articles that they could be amended by the Council (or European Council) and if so the voting procedure. We recommend that a generalised two tier system for Treaty amendment should be resisted. Only exceptionally should Articles of the Constitutional Treaty be capable of amendment without an IGC, and then only by the Council (or European Council) acting by unanimity. We would not envisage such a procedure being used to amend the core provisions of the Union's Constitution or to extend any Union competence.

31. Second, the Praesidium's Explanatory note invites consideration of an additional paragraph which contemplates any revision of the Constitutional Treaty being the subject of discussion in a Convention (constituted along the lines of the present Convention on the Future of Europe). We believe that the Convention procedure has so far been a success. It has encouraged an open debate and ensured that a wide variety of views have been heard. It has, moreover, involved a democratic consideration of draft Articles of the proposed Constitutional Treaty in public, which has been particularly valuable. We note that paragraph 1 of the Praesidium's note suggests that the Convention might "adopt by consensus a recommendation". We wait to see whether the present Convention can deliver on time the text of a new Treaty which commands general agreement. It is a formidable task and we are pleased that national parliaments are playing an active role in the process.

32. Finally we note that the Praesidium refers to the role of the "Congress". The Preliminary draft Constitutional Treaty,¹ a skeleton text presented to the Convention last October by its President, Valéry Giscard d'Estaing, envisages the possible establishment of a Congress of the Peoples of Europe (Article 19). The Government appears to be sympathetic to the idea. In a joint UK Spanish submission to the Convention, it has said:

"The proposal to set up an European Congress, in which representatives of both the European Parliament and the national Parliaments are to take part, is, in this context, worth considering, if a useful role for it is agreed. It could meet in principle once a year and could be entrusted with debating the European Council's guidelines and the Commission's work programme. In any event, it should be an informal body, not an Institution, entitled to adopt resolutions or recommendations only."²

33. As we said in earlier Reports³ we do not favour the creation of a Second Chamber or of another institution for meetings of national parliamentarians. We wait to see the detail of the proposal for a Congress. This is a subject to which we shall return when considering draft Article 19.⁴

¹ Doc CONV 369/02. The text is printed at Appendix 2 to our Report *The Future of Europe: Constitutional Treaty—Draft Articles 1-16* (9th Report, Session 2002-03, HL Paper 61).

² Doc CONV 591/03. Contribution by Mrs Ana Palacio and Mr Peter Hain, members of the Convention; "The Union institutions".

³ *1996 Inter-Governmental Conference* (21st Report, Session 1994-95, HL Paper 105) and *A Second Parliamentary Chamber for Europe: An Unreal Solution to Some Real Problems* (7th Report, Session 2001-02, HL Paper 48).

⁴ *ie* in that group (Title IV in the skeleton text of the new Treaty) of Articles relating to the Institutions.

Article G: Adoption, ratification and entry into force of the Constitutional Treaty

1. The Constitutional Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.

2. The Constitutional Treaty shall enter into force on ..., provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.

3. If, two years after the signature of the Constitutional Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Explanatory note

"This provision is in substance the same as Articles 52 TEU and 313 TEC.

Article 48 TEU, on the procedure for revising the Treaty, states that: "The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements." The Constitutional Treaty cannot therefore enter into force unless it has been ratified by all the Member States which signed it: if at least one of the signatory States did not ratify the Constitutional Treaty, it could not enter into force and the current Treaties would continue to apply.

In that case, the Member States and the institutions of the Union would have to assess the political consequences. This article contains a provision (paragraph 3), which does not appear in the current Treaties, designed to cover the eventuality that, after two years, one or more Member States have still not completed their internal ratification procedures, for whatever reason. The European Council would then have to assess the political consequences of that situation.

Some of the contributions submitted to the Convention propose that the Constitutional Treaty should, outside the scope of the Article 48 TEU procedure, enter into force for those States which have ratified it once a threshold, to be determined in the Constitutional Treaty itself, has been reached (cf. Article x + 6(§2) of the PPE text; Article 6 § 2 and 3 of the Agreement on the entry into force of the Treaty on the European Constitution submitted by the Commission; Article 47 of the Spinelli draft).

From a legal point of view, although this possibility is provided for in Article 24 of the Vienna Convention on the Law of Treaties ("a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree"), it would create problems as regards the former Treaties if one or more signatory States did not ratify the Constitutional Treaty. The failure of one or more signatory States to ratify the Constitutional Treaty would raise the question of what was to happen to the current Treaties. The Vienna Convention on the Law of Treaties (Art. 54) states that a treaty can be terminated only in conformity with its provisions or by consent of all the parties. The current Treaties are silent on the question of their repeal, so that repeal is possible only with the consent of all the Member States party to them (i.e. the 15 at present, the 25 after entry into force of the accession treaties). Unless repealed by agreement of all the Member States of the Union, the former Treaties would remain in force."

Commentary

34. The Praesidium's Explanatory note helpfully sets out, by reference to the Vienna Convention on the Law of Treaties, the treaty law problems which might arise from a partial adoption of the new Treaty and repeal of the existing Treaties. Paragraph 3 of this Article, though not strictly necessary, provides a clear signpost to a mechanism for resolving what would undoubtedly be a serious political problem for Europe.

Article H: Duration

The Constitutional Treaty is concluded for an unlimited period.

Explanatory note

“This provision is the same as Article 51 TEU and Article 312 TEC.”

Article I: Languages¹

The Constitutional Treaty, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish, Swedish and ... languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Explanatory note

“This provision comes from Article 53 of the TEU and Article 314 of the TEC. It will have to be adapted following the entry into force of the accession treaties.”

Commentary

35. We have nothing to add to the Praesidium’s Explanatory notes on these two Articles.

¹ To be adjusted in accordance with the Act of Accession.

APPENDIX 1
The European Union Committee

The members of the Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
The Earl of Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds
