

# Democratic Control of European Foreign Policy

*Roland Bieber* \*

## Introduction

The Committee on External Economic Relations, the Political Affairs Committee and the Committee on Institutional Affairs have been considering the way in which the European Parliament's role in shaping Community foreign policy can be increased.

The following study is designed to provide a basis for these reflections. It is divided into three parts, the first examining the conditions governing and the limits of parliamentary influence on political and treaty-based foreign relations, the second dealing with the current legal situation following the entry into force of the SEA and the problems arising therefrom, and the third discussing several models for the further development of the current law.

## I. Bases

### A. The Concept of a European Foreign Policy

The European Community's extensive legislative and policy-making powers are not confined to the Community's internal affairs. The Community is empowered and in a position to maintain relations with non-member countries and international organizations as well. It is a subject of international law. Several Treaty objectives provide expressly for such external activities.<sup>1</sup>

The forms of the Community's activities in the field of foreign policy do not differ fundamentally from the instruments at the disposal of other subjects of inter-

\* Legal Adviser, European Parliament.

<sup>1</sup> See Art. 3(c) and Preamble, paras. 6,7,8 EEC Treaty; Art. 2(4) Euratom Treaty.

## Democratic Control of European Policy

national law, from the conclusion of multilateral treaties governed by international law to the autonomous expression of political principles.

European foreign policy cannot, however, be reduced to the activities exclusively attributable to the Community institutions. From the substantive and procedural viewpoint it is closely interlinked with the foreign policy pursued by the Member States individually or collectively. The Single European Act<sup>2</sup> is designed to enable planned coordination of these different sources for a *single* European foreign policy. In the area of legal acts, specific aspects of foreign policy were in the past coordinated by the use of the 'mixed agreement' in which the Community and its Member States were simultaneously contracting parties to those with non-member countries.<sup>3</sup>

In this context, 'European foreign policy' means treaty-based and autonomous legal acts and other measures emanating from the European Community and/or its Member States as a whole and intended to or capable of producing effects outside the Community.<sup>4</sup>

### B. Democratic Control as an Aspect of Constitutional Law

#### 1. Control

Control of the acts of an organization covers a multitude of subjects, types of acts, and procedures. It can be internal to the organization or also include external controls. It may consist of scrutinizing the compatibility of acts of the organization or its individual institutions with overriding provisions, especially those of the organization's constitution (judicial review). In addition, one institution may have powers of sanction *vis-à-vis* another institution which in practice results in rights to obtain

<sup>2</sup> Preamble, paras. 2, 5 and Art. 30, Single European Act of 17 and 28 February 1986, OJ (1987) L 169/1.

<sup>3</sup> Example: The 'Lomé Convention' with developing countries. For a detailed analysis of problems related to this type of agreement see D. O'Keefe & H. Schermers (eds.), *Mixed Agreements* (1983).

<sup>4</sup> On the foreign policy of the EC, see Beutler, Bieber, Pipkom, Streil, *Die Europäische Gemeinschaft – Rechtsordnung und Politik* (3rd ed. 1987) 504; Bourgeois, 'Les relations extérieures de la Communauté européenne et la règle de droit', in Capotorti, Ehlermann *et al.* (eds.), *Du droit international au droit de l'intégration, Liber Amicorum Pierre Pescatore* (1987) 59; Brückner, 'Foreign Affairs Powers and Policy in the Draft Treaty establishing the European Union', in Bieber, Jacqué, Weiler (eds.), *An Ever Closer Union* (1985) 127; P. Demaret (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: Aspects juridiques et fonctionnels* (1986); De Vree, Coffey, Lauwaars (eds.), *Towards a European Foreign Policy* (1987); Groux, Manin, *La Communauté Européenne dans l'ordre international* (1984); Lak, 'Interaction between European Political Cooperation and the European Community', *CML Rev.* (1989) 281-299. Louis, Brückner, 'Relations extérieures', in Megret, Waelbroeck *et al.* (eds.), *Le droit de la Communauté Economique Européenne* (Vol. 12, 1990); S. Perrakis, 'Les relations extérieures de la Communauté Européenne après l'Acte Unique Européen', *RMC* (1989) 488; Vedder, *Die auswärtige Gewalt des Europas der Neun* (1980).

information and indirectly to control over the acts of that institution. Control may be restricted to reconstruction or review of acts. It may also include the grant of powers of rectification and the right to issue directives by means of which an institution exercises joint decision-making powers or the right to have the last say. The concept of control is used here in a wide sense to include both supervision and control.<sup>5</sup>

Control of the external acts of an organization can cover the following:

- the substance and implementation of treaties governed by international law entered into by the organization;
- the substance and implementation of autonomous measures adopted by the organization;
- the formulation and enforcement of foreign policy principles;
- membership of other international organizations and participation in conferences;
- the conduct of bilateral and multilateral relations.

## 2. Democracy

Democratic control mechanisms are those which implement the characteristic principles of democratic systems. These consist first and foremost of the right of supervision and control exercised by an elected parliament, supplemented by procedures ensuring separation and limitation of powers, the legality of acts of the institution, and transparency and efficiency.<sup>6</sup>

<sup>5</sup> See K. Loewenstein, *Political Power and the Governmental Process* (1957) 45. A narrower definition is used by G. De Vergottini, *Diritto Costituzionale Comparato* (2nd ed. 1987) 428. For international organizations Henry Schermers describes institutional control as 'influence on the policy of the organization', H. Schermers, *International Institutional Law* (2nd ed. 1980) 315; 'control' in a wider sense is used as well by R. Monaco, 'Principes régissant les rapports entre les institutions d'organisations internationales', in *Scritti di diritto delle organizzazioni internazionali* (1981) 279.

<sup>6</sup> See E.W. Böckenförde, 'Demokratie als Verfassungsprinzip', in Isensee, Kirchhof (eds.), *Handbuch des Staatsrechts* (Vol. I) (1987) 887. On democracy in the EEC see J. Frowein, M. Hilf, 'Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß', *Europarecht* (1983) 301, (1984) 9; P. Pescatore, 'Les exigences de la démocratie et la légitimité de la Communauté Européenne', *Cahiers de Droit Européen* (1974) 499; J. Weiler, 'Parlement Européen, Intégration Européenne, Démocratie et Légitimité', in Louis, Waelbroeck (eds.), *Le Parlement européen dans l'évolution institutionnelle* (1988) 325; M. Zuleeg, 'Der Verfassungsgrundsatz der Demokratie und die Europäischen Gemeinschaften', 17 *Der Staat* (1978) 27; G. Ress, 'Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften', in Fiedler, Ress (eds.), *Verfassungsrecht und Völkerrecht, Gedächtnisschrift W. Geck* (1989) 625.

### C. Foreign Policy and Democratic Principles of the European Community

#### 1. General

One of the fundamental and now formal requirements for membership in the European Community is observance of the 'principles of democracy',<sup>7</sup> democracy being understood as 'parliamentary democracy'.<sup>8</sup> This means first of all the legislative power of a parliament elected by free, secret elections.<sup>9</sup> Democracy is not, however, a formal concept which can be restricted to individual aspects of sovereignty; it includes the control and supervision of the exercise of power. A democratic constitution is distinguished by the fact that it has at its disposal mechanisms binding all exercise of power on behalf or with the support of the organization to the consent of those affected or at any rate to their control.

This includes the 'institutionalization' of the exercise of power and the restriction, as regards time and nature, of individually granted negotiating powers. These objectives are achieved chiefly by assigning different roles to the institutions (separation of powers), by instituting checks and balances between the institutions and external control due to the public, transparent nature of decision-making procedures. In the interests of self-preservation, a democratic system also requires institutional arrangements enabling it to base its practical action on previously defined principles, in other words, to act purposively and thus efficiently. This is, *inter alia*, a justification for the principle of majority rule.

The balance necessary in each case between the consent of those affected on the one hand, and control of the power and efficiency of the system, on the other, can be reached in various ways and by various means. However, the principle of democracy applies overall. This means that particular areas of action, for example, foreign policy, cannot be made exempt in principle from the democratic legitimacy and control, one reason being that the internal and external acts of an organization or state are interlinked and cannot therefore be separated.

Above all, however, the two essential material objectives of foreign policy, to safeguard the existence of the system on the internal level and to enunciate principles on the external level, require constant direct legitimacy, which can be derived only from the consent of the governed. Without any parliamentary control or super-

<sup>7</sup> See Single European Act, Preamble, para. 3; Declaration on Democracy, European Council of 8 April 1978, EC Bulletin No. 3 (1978) 5; see also ECJ cases 138, 139/79 *Roquette, Maizena v Council* (1980) ECR 3333, para. 33 and case 54/75 *de Dapper v European Parliament* (1976) ECR 1381, para. 20/25.

<sup>8</sup> EP Resolution of 17 June 1988 'on the democratic deficit of the EC', OJ (1988) C 187/244; Weiler demonstrates that the existence of Parliament is a necessary but not sufficient criterion for democracy in Louis, Waelbroeck, *supra* note 5.

<sup>9</sup> See Art. 3 Additional Protocol No. 1, European Convention on Human Rights.

vision, the system's foreign policy is not sufficiently legitimate, thus endangering its stability.

Eighteenth and nineteenth-century European constitutional theory did not share this broad concept of democracy. The power to conduct foreign policy was regarded as belonging to the executive power to be exercised by the monarchy.<sup>10</sup> Despite the model of the combined action of the Senate and President developed by Hamilton and Jay for the United States Constitution,<sup>11</sup> European national constitutions were slow to involve parliaments in the shaping of foreign policy.<sup>12</sup>

The case-law of the German Federal Constitutional Court, which is described as being favourable to the executive authority and according to which the Bundestag only has foreign policy powers where the constitution has expressly conferred the subject-matter and content of such powers on parliament, is characteristic of the reserve which can still be seen in this day and age.<sup>13</sup> This view is no longer justified by reference to the rights reserved to the monarch but by the need for efficiency and consistency in foreign policy decision-making.

It is true that at first sight the fact that various institutions take part in the formulation and enunciation of foreign policy positions seems to constitute an obstacle to the clarity and feasibility, in other words, the efficiency, of foreign policy. However, complex systems such as the European Community can only formulate permanent objectives if the complexity of the situation is accounted for and incorporated in the decision-making process by means of a correspondingly specialized institutional system. In foreign policy matters, political consistency is often merely a fiction. The scope for change in foreign policy drawn up in legal instruments or formulated only at political level is one of the built-in factors in every political act. The more a political system allows of institutionalized formulation of varying options for the conduct of foreign policy, the more precisely can the importance of specific measures and attitudes be gauged, so that the range of variation itself be-

<sup>10</sup> See, e.g., Friedrich Hegel: 'Seine Richtung nach außen hat der Staat darin, daß er ein individuelles Subjekt ist. Sein Verhältnis zu anderen fällt daher in die fürstliche Gewalt, der es deswegen allein und unmittelbar zukommt, die bewaffnete Macht zu befehligen, die Verhältnisse mit anderen Staaten durch Gesandte usw. zu unterhalten, Krieg und Frieden und andere Traktate zu schließen.' in F. Hegel, *Grundlinien der Philosophie des Rechts* (1849), para. 329. For further references see Grewe, 'Auswärtige Gewalt', in Isensee, Kirchhof (ed.) *Handbuch des Staatsrechts* (Vol. III) (1988) 921, 924.

<sup>11</sup> See L. Henkin, *Foreign Affairs and the Constitution* (1972); Bestor, "'Advice" from the beginning, "consent" when the end is achieved', 83 *AJIL* (1989) 718; Richardson, 'Checks and Balances in Foreign Relations', 83 *AJIL* (1989) 736.

<sup>12</sup> For a comparative study on Parliament's powers in foreign policy see A. Cassese (ed.), *Parliamentary Foreign Affairs Committees, the National Setting* (Vol. I) (1982). See also L. Wildhaber, *Treaty Making Power and the Constitution* (1971); S. Weiß, *Auswärtige Gewalt und Gewaltenteilung* (1971); Dhonmeaux, 'Le rôle du Parlement dans l'élaboration des engagements internationaux: Continuité et changements', *Revue du Droit Public* (1987) 1449; V. Lippolis, *La costituzione italiana e la formazione dei Trattati internazionali* (1989); Grewe, *supra* note 10.

<sup>13</sup> Federal Constitutional Court Collection, 1, at 372, 394; 68, at 1, 87.

comes a factor in foreign policy which enhances its dependability and thus its authority overall.

One of the building blocks of democratic systems is the scope for alternative action and thought. As regards domestic policy, this is institutionally enshrined in the constitutions of democratic European states (the possibility of amending draft legislation, regular elections etc.). As far as foreign policy is concerned, this only applies to a limited extent. In general this is justified by the special conditions surrounding foreign policy, which would allegedly preclude, to a large extent, its being made subject to parliamentary procedures.<sup>14</sup> The example of the combined action of the United States President and Senate shows, nevertheless, that it is perfectly possible for institutional changes to be made in the procedures for shaping foreign policy to enable parliament to participate. The efficiency of the conduct of foreign policy does not seem to be appreciably lessened provided that mechanisms exist which clearly determine the importance of the action of each institution for the organization as a whole and, in particular, enable coordination of the action of the various institutions in creating legally binding acts.

The specific capacity of action of institutions varies, however, on the basis of objective operating conditions, for example, the number of members. If these differences are taken into account when conferring powers on the institutions, each institution can represent, even in foreign affairs, an intrinsic value in their respective constitutional system. A parliament's main contribution to the shaping of foreign policy should therefore not be in matters requiring finesse, for example the negotiation of treaties. Nevertheless, it would be premature to deny a parliament on principle the power to negotiate treaties or to take other foreign policy measures. Even a parliament could entrust such tasks to a small group of people by means of internal specialization and make the outcome of negotiations subject to approval by the whole body. The foreign policy activities of governments can be regarded as an institutionalized specialization of this kind. The particular contribution of parliaments to the control and supervision of foreign policy lies, on the other hand, in the formulation of principles, the approval or rejection of the outcome of negotiations, and the monitoring of the activities of the executive.

In contrast to the policy making system within a state, democracy within the institutional structure and foreign policy making process of the EC suffers from a inter-institutional conflicts as well as from the tradition of autonomous foreign policy of the Member States.<sup>15</sup> Nor does the European Community's foreign policy require control to be concentrated in one institution by virtue of the existence of similar majorities in the various institutions. On the contrary, since Community foreign

<sup>14</sup> See, e.g., Grewe, *supra* note 10, at 942.

<sup>15</sup> For a comparison between foreign policy making in a state (USA) and the EC, see Stein, Henkin, 'Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution', in Cappelletti, Seccombe, Weiler (eds.), *Integration Through Law* (Vol. I, book 3) (1986) 3.

relations, unlike national foreign relations, are not based on stage-by-stage agreement on a set of principles operating internally and represented externally, the demands placed on the capacity of the Community's institutional system to legitimate its foreign policy are appreciably greater.

As long as it is ensured that as many options as possible can be expressed during the policy formulation procedure and that that procedure enables a choice to be made between those options, the involvement of the various institutions, especially extensive cooperation on the part of the elected parliament, increases the legitimacy and thus in the long term the acceptance, both internally and externally, of foreign policy positions, which is a requirement of their feasibility.

## *2. Control of European Foreign Policy Outside the European Parliament*

Accordingly, although it seems unjustified either on grounds of efficiency or of democratic theory to deny the European Parliament the power to control European foreign policy, such a power by itself is insufficient to fulfil the demands of a developed democratic system. Two features in particular required for democratic policy-shaping are a restriction on the powers of action of the various institutions and reciprocal checks and balances.<sup>16</sup> With this in mind, the Community's treaty-based foreign relations are subject to review by the Court of Justice of the European Communities in the context of opinions pursuant to the second sub-paragraph of Article 228(1) of the EEC Treaty<sup>17</sup> and on the basis of actions brought under Article 173 of the EEC Treaty.<sup>18</sup> The distribution of the powers of the Council and Commission in the context of the procedure for the conclusion of agreements pursuant to Articles 228(1) and 113 of the EEC Treaty and Article 101 of the EAEC Treaty is another means of ensuring a democratic exercise of foreign policy powers.

This internal control system is supplemented by external control exercised on the one hand by the bringing of actions before the Court of Justice of the European Communities by individual states in connection with the Community's acts, and on the other by the national parliaments' control over the conduct of their respective governments within the context of EPC and the Council of the European Communities. These indirect control mechanisms exercised by national parliaments over Community policy interlock with direct control where the Member States and the Community jointly enter into what are known as 'joint agreements' with non-member countries.

The effect of the indirect controls exercised by national parliaments over the Community's foreign policy activities varies from one Member State to another ac-

<sup>16</sup> Loewenstein, *supra* note 5, at 127; De Vergottini, *supra* note 5, at 252; Böckenförde, *supra* note 6.

<sup>17</sup> Examples: ECJ Opinions 1/76 (*Laying-up Funds* - 1977) ECR 741; 1/78 (*Natural Rubber Agreement* - 1979) ECR 2871.

<sup>18</sup> Example: ECJ case 45/86 *Commission v Council* (1987) ECR 1493.

## Democratic Control of European Policy

According to the constitutional position of the individual parliaments with regard to foreign relations and their attitude towards the role of their respective governments in the Council of the European Communities. The combined effect of distance from actual decision-making centers and of parliamentary restraint in controlling foreign policy activities is to reduce the significance of this decentralized form of democratic control. At the same time the survival of the powers of national parliaments to exert indirect control over Community foreign policy is a source of potential conflict which, in the absence of appropriate coordination mechanisms, can act as a sheer impediment to the Community's foreign policy activities rather than as proper control.

Although the governments of the Member States are institutionally incorporated in the Community's decision-making procedure, the national parliaments have not been similarly included in that system since direct elections to the European Parliament. As a consequence, the national parliaments exercise their powers, including those in the field of foreign policy, without any coordination with the European Parliament. The resulting conflicts are different in nature from internal conflicts between the institutions of a single organization, as the similarity of their tasks promotes between the various systems fundamentally opposing or, at the very least, isolated procedures. Only formal mechanisms and institutionalized constraints to joint solution of conflicts could prompt the parliaments of different systems to cooperate. So far, however, there are no structures for this. For this reason the European Parliament and the national parliaments are simultaneously involved in exercising democratic control over European foreign policy, at least where measures are involved which do not fall clearly within the exclusive remit of either the national parliaments or the European Parliament, for example the two-fold parliamentary influence in the context of EPC. It would however be erroneous to regard this institutional overlapping solely in negative terms, as the risk of inconsistency and of reduced efficiency is offset by the increase in legitimacy which can be engendered by involving national parliaments in the shaping of European foreign policy. In addition, even the loose association between the two parliamentary levels acts as a check on extreme positions and as a spur to those which are too passive. Increased coordination, for example by establishing an institution at Community level in which the national parliaments are represented,<sup>19</sup> might however increase the positive effects of cooperation between the institutions of various organizations.

<sup>19</sup> Such a model of a 'third chamber' had been submitted by the 'ad hoc Assembly' in 1953 but was not taken up again in the European Parliament's Draft Treaty for a European Union of 1984. See Schwarze, Bieber, *Eine Verfassung für Europa* (1984) 397, 317.

### *3. The Importance of the European Parliament in the Control of European Foreign Policy*

The inclusion of representatives of the peoples in the institutional system of the Community constitutes a tangible expression of the principle of democracy, which is one of the cornerstones of the Community. It makes the Community fundamentally different from traditional supranational organizations, in which only representatives of the governments of the Member States are involved in making policy decisions. The participation of direct representatives of the peoples in principle constitutes autonomous and democratic sanctioning of the Community's exercise of power.

In accordance with Article 137 of the EEC Treaty, the European Parliament consists of 'representatives of the peoples of the states brought together in the Community'. It has been directly elected since 1979. Although its powers are laid down in the Treaty, Parliament has long sought to amend the Treaties in order to extend these powers. Several amendments to the Treaties have met some of these demands,<sup>20</sup> whilst other amendments are sought within the context of the plan for the creation of a European Union.<sup>21</sup>

Parliament's position in the Community constitution does not therefore reflect a rigid concept of institutionalized supranational democracy. Variations in Parliament's position *vis-à-vis* the other Community institutions are the result of its impermanent and changeable nature, laid down in the Treaties and still applying: the institutions are the subjects and objects of continuous change to a much greater extent than under national constitutional law. Formal treaty amendments and practical application of the Treaty show that this process of change is intensifying.<sup>22</sup> This applies in particular to its role in the shaping of Community foreign policy and its position as regards cooperation between the Member States over foreign policy matters.

Since the directly elected Parliament is the strongest source of legitimacy in the Community system, it is an obvious move to give it a central position in the formulation of European foreign policy. The European Parliament was, however, according to the original treaties, not conceived as an institution exercising a decisive role in the shaping of EC policies. This applied to foreign policy as well.<sup>23</sup> The

<sup>20</sup> See, e.g., Treaties of 22 April 1970, OJ (1971) L 2/1 and of 22 July 1975, OJ (1977) L 359/1 on budgetary powers; Act of 20 September 1976, OJ (1976) L 278/1 (Direct Elections); Treaty of 17 and 28 February 1986, OJ (1987) L 169/1 (Single European Act).

<sup>21</sup> See EP Resolution of 23 November 1989, OJ (1989) C 323/111.

<sup>22</sup> See *supra* note 19; on changes by way of constitutional practice see Bieber, 'note on Art. 137', in Groeben, Thiesing, Ehlemann (eds.), *EWG-Vertrag Kommentar* (4th ed. 1990).

<sup>23</sup> On Parliament's roles and powers in the shaping of the EC foreign policy before the Single European Act, see Neunreither, 'Die Rolle des Europäischen Parlaments innerhalb der Außenbeziehungen der Gemeinschaft', in Hasenpflug (ed.), *Die EG-Außenbeziehungen, Stand und Perspektiven* (1979) 75; Weiler, 'The European Parliament and Foreign Affairs', in A. Cassese (ed.), *Parliamentary Control over Foreign Policy* (1980) 151; J. Weiler, *The European*

## Democratic Control of European Policy

most recent Treaty amendments and additions introduced by the Single European Act show that the need for parliamentary sanctioning of European foreign policy is acknowledged and accepted more and more. Since then the European Parliament has enjoyed power in the field of foreign relations going far beyond its legislative powers.

Parliament's involvement in the conclusion of treaties can take five different forms, which reach from non-compulsory and non-binding consultation to co-decision. Major international treaties concluded by the Community require the *assent* of Parliament. The European Parliament thus achieves a role of independent importance in treaty relations governed by public international law, as its rights of participation must, at any rate to this extent, be regarded as a 'rule of [its] internal law of fundamental importance' within the meaning of the Vienna Convention on the Law of Treaties<sup>24</sup> as regards the validity of Community treaties.

In addition, Parliament can exercise its institutionalized powers of supervision over the Commission and Council to control Community foreign policy. Parliament is, moreover, increasingly enunciating its foreign policy principles independently of the other institutions and also representing those principles *vis-à-vis* non-member countries. This reveals a special feature of the Community's institutional system: the foreign policy activities of the Community institutions are not uniformly moulded by the political forces holding the majority at any given time. The composition of the various institutions bears no relation to the majorities in the European Parliament. As a result, different foreign policy principles are given priority in the Council and Commission so that differences arise between the institutions which are not accounted for by political substructures and are for this reason revealed to the outside world as well. Precisely this independence enables the European Parliament to develop and put forward its own independent foreign policy attitude which, despite its limited feasibility in formal terms, is becoming an important factor in the formulation of foreign policy by the other institutions.

Incidentally, the independence of the institutions is an important contribution to the *transparency* of the formulation of foreign policy objectives; it is thus an element which promotes democracy.

Parliament and its Foreign Affairs Committees (1982); Jacqu , Bieber, Constantinesco & Nickel, *Le Parlement europ en* (1984) 247. For a summary of the European Parliament's major activities in foreign affairs until 1977 see EP report on the European Community in International Law (draftsman: Mr Jozeau-Marigne) Doc. EP 567/77. The two major reports on self-understanding of its institutional role in external relations were the report 'on the competences and powers of the European Parliament' (draftsman: Mr Furler) Doc. 31/1963-1964, Resolution of 27 June 1963, OJ (1963) 1961 and report 'on the role of the European Parliament in the negotiation and ratification of treaties of accession and of other treaties and agreements between the European Communities and third countries' (draftsman: Mr Blumenfeld) Doc. 1-685/81, Resolution of 18 February 1982, OJ (1982) C 66/68.

<sup>24</sup> Article 46, paragraph 2, Vienna Convention on Treaties between States and International Organizations of 1986.

The activities of the European Parliament are not restricted to the scope of the Community treaties. On the contrary, the Community Member States have granted the European Parliament the right to have a say in and to supervise the cooperation in foreign policy matters agreed between themselves in treaties governed by public international law.<sup>25</sup> Parliament's power, in the context of the formation and conduct of policy (which is strongly influenced by the executive at national level) to define and enunciate principles at the international level is crucially important for intra-Community legitimacy of the foreign policy which produces external effects by virtue of that very legitimacy.

Since the focus of democratic control of foreign policy within the Community's institutional system has shifted to the European Parliament, we shall now examine more closely the mechanisms at Parliament's disposal.

## II. The European Parliament's Foreign Policy Instruments

### A. Parliament's Participation in the Conclusion of EC Agreements

#### 1. *Treaties of Accession and Association Agreements*

Since the entry into force of the Single European Act on 1 July 1987, neither *accession treaties* (Art. 237 EEC Treaty) nor *association agreements* (Art. 238 EEC Treaty) may be concluded without the assent of the European Parliament. The corresponding provisions of the Euratom Treaty<sup>26</sup> and the rules concerning accession laid down in Article 98 of the ECSC Treaty remained, however, unaltered and do not provide for parliamentary assent.

In the light of applications for membership and the recent renaissance of association agreements as an instrument for new relations with Eastern European states, Parliament has gained for the first time a formal power in an area which has become of highest importance for the future development of the European Community. In this respect parliamentary control over foreign policy spills over to a control of the future constitution of the EC.

Before the entry into force of the SEA, Article 238 of the EEC Treaty merely provided that the European Parliament was to be *consulted* before association agree-

<sup>25</sup> Art. 20 Single European act, see J. Frowein, *Die vertragliche Grundlage der Europäischen Politischen Zusammenarbeit (EPZ) in der Einheitlichen Europäischen Akte*, and Mischo, 'Les efforts en vue d'organiser sur le plan juridique la coopération des Etats membres de la Communauté en matière de politique étrangère', in Capotorti *et al.* (eds.), *Liber Amicorum Pierre Pescatore* (1987) 247 and 441; Nuttall, 'Interaction between European Political Cooperation and the European Community', *7 Yearbook of European Law* (1987) 211.

<sup>26</sup> Art. 205, 206 Euratom Treaty.

ments were concluded.<sup>27</sup> The old version of Article 237 of the EEC Treaty made no provision at all for Parliament's participation in the accession procedure. Paragraph 2.3.7 of the Solemn Declaration on European Union of 20 June 1983 contained the undertaking of Member States to consult and inform Parliament in good time to treaties of accession.<sup>28</sup> Accordingly, Parliament was consulted before the conclusion of the Treaties of Accession with Spain and Portugal.<sup>29</sup>

Whilst Parliament's assent, required according to Article 238 of the EEC Treaty, applies directly to the conclusion of association agreements, in the context of the accession procedure laid down in Article 237 of the EEC Treaty, Parliament's assent is required only for the acceptance of the membership *application* and not for the conclusion of the treaty of accession. The difference is explained by the fact that accession agreements are concluded by the Member States and not by the Community itself. Therefore the Parliament of each Member State exercises the ultimate democratic control over accession of new members. The European Parliament's role with regard to the substance of accession treaties is, however, much more relevant. Since Article 237 of the EEC Treaty does not state that the decision on the accession application should precede negotiations on the conditions of accession, the European Parliament can await the conclusion of the accession negotiations before deciding whether to give its assent to the application for accession.<sup>30</sup> Parliament can now exercise control over the substance of the negotiations since it may condition its assent on the results of those negotiations.<sup>31</sup>

The Treaties require in both articles 'an absolute majority of its component Members'. Hence 260 votes in favour of an assent are necessary in order to enable the Council to conclude the agreement. This majority can only be reached if the two largest political groups in Parliament are in favour and a large number of Members can be reached. It should be noted, however, that the new formal requirement did not alter the previously existing requirement for unanimous assent of Council. Taken together, the conditions for accession and association to the EC will therefore be more difficult to meet since the increase in democratic control by way of Parliamentary assent has taken place.

27 On the procedure applicable before 1987 see Louis, 'Le rôle du Parlement européen dans l'élaboration et la conclusion des accords internationaux et des traités d'adhésion', *Liber Amicorum Frédérique Dunon* (1983) 1153; Rengeling, 'Zu den Befugnissen des Europäischen Parlaments beim Abschluß völkerrechtlicher Verträge der Gemeinschaftsverfassung', in vom Münch (ed.), *Festschrift Schlochauer* (1981) 887.

28 Bulletin EC No. 6-1983, at 26.

29 See EP Resolution of 8 May 1985, OJ (1985) C 141/130.

30 See Art. 32 EP Rules of Procedure, see also EP Resolution of 17 June 1988 'on the role of the European Parliament in external policy within the framework of the Single European Act', OJ (1988) C 187/233.

31 Until present the formal decision of Council on the application for membership was not adopted before the conclusion of the negotiations on the Treaty of accession.

Further details of the assent procedure are laid down in Articles 32 and 33 of Parliament's Rules of Procedure. Both provide for two debates to be held on association and accession agreements. One debate in plenary can be held *before* the negotiations take place. In the case of association agreements the debate is intended to result in an opinion on the negotiating mandate which the Council confers to the Commission. The second debate shall take place when the negotiations are completed but before any agreement is signed. This debate is concluded by the decision on the assent. The Treaty is less precise about the moment of Parliamentary assent because it requires the assent only to be given *before the conclusion*. The 'conclusion' may be determined either by the signature or by the exchange or deposit of the ratification instrument.<sup>32</sup> A Parliamentary decision on the draft agreement at an earlier phase of the procedure lies still within the terms of Articles 237 and 238 EEC Treaty.

No deadline is specified for Parliament's assent pursuant to Articles 237 and 238 of the EEC Treaty. Contrary to consultation within the legislative procedure, which has to be concluded within a reasonable period, the veto power in the assent procedure means Parliament is free to choose the moment when to decide whether to give its assent to an application for accession or an association agreement forwarded by the Council. Until Parliament has explicitly given its assent, the Council may not accept an application for accession, nor may it conclude an association agreement. For reasons of legal security Parliament may not effectively give its assent until the application or agreement concerned has been formally referred to it by the Council. On the other hand, the application or agreement is under referral to Parliament only until it has decided whether or not to give its assent. If Parliament has refused to give its assent once, it can give it at a later date only if the Council resubmits to it the accession application or association agreement.

Parliament exercised its power of decision under Article 238 of the EEC Treaty for the first time on 16 September 1987, when it gave its assent for the conclusion of a total of 10 protocols to the association agreements with 5 states.<sup>33</sup> In December 1987, in protest at the arrest of a number of politicians in Turkey, Parliament postponed voting on whether to give its assent to two agreements between the Community and Turkey;<sup>34</sup> it eventually gave its assent in January 1988.<sup>35</sup> In March 1988, Parliament for the first time refused to give its assent for the conclusion of agreements pursuant to Article 238 of the EEC Treaty.<sup>36</sup> These were three agreements with Israel, which were subsequently approved by Parliament in October 1988 after the Council had referred the agreements to it again.<sup>37</sup> Parliament had

32 See Art. 11-17 Vienna Convention on the Law of Treaties (1986).

33 OJ (1987) C 281/92.

34 OJ (1988) C 13/28.

35 OJ (1988) C 49/52.

36 OJ (1988) C 94/55.

37 OJ (1988) C 290/59; see Adam, 'I Protocolli CEE-Israele davanti al Parlamento europeo', 71 *Rivista di diritto internazionale* (1988) 691.

## Democratic Control of European Policy

meanwhile received assurances from Israel on the use of the funds which were to be granted under the agreement.

Formally, Parliament does not have a say in the *substance* of either association agreements or accession treaties. Its influence is felt only indirectly as a result of the right of refusal. In fact, as shown by experience in the United States, the real importance of the right of assent is revealed in the period leading up to Parliament's assent. As the Council, Commission and Member States are anxious to avoid frustrating the treaty negotiations, they are at pains to involve Parliament at an early stage by means of an information procedure whereby the Commission and Council notify the parliamentary committees responsible at regular intervals of the progress of the negotiations. This Luns-Westertep procedure was originally introduced with no formal legal basis by means of an inter-institutional agreement as a substitute for giving Parliament more extensive rights of assent.<sup>38</sup> Within the context of the assent procedure it assumed fresh practical importance in terms of influence over the substance of the treaty negotiations, since the parliamentary committees responsible obtain not only information on the course of the negotiations but themselves make proposals with regard to substance which may be based on guidelines adopted by the Parliament before the negotiations began, using Parliament's power of holding debates on any topic which it considers important.

Parliament is only gradually discovering that the power attached to its right of assent can also be used to impose conditions only indirectly relating to the treaty itself. It laid down such conditions for the first time in the period preceding consultations on Austria's application for membership. In a resolution of February 1989 it stated that assent could be given to this application for membership only if the existing Member States first increased Parliament's rights.<sup>39</sup> Such package deals may appear unusual but are not in breach of the treaty because they are always less of a stumbling block than a refusal, which is permissible.

### 2. Other Agreements

#### a) The Scope of Parliament's Powers

According to article 228 of the EEC Treaty, Parliament must be consulted in all instances referred to in the Treaty before the conclusion of an international agreement. This means that Parliament must be consulted not only with regard to the conclusion of agreements which are expressly provided for, e.g., environmental agreements pursuant to Articles 130r and 130s of the EEC Treaty, but also whenever the Community power to conclude an international agreement derives from a Treaty provi-

<sup>38</sup> See EP Report Doc. 1-685/81, *supra* note 23; text also in Louis, *supra* note 27 and Quintin, 'Participation de l'Assemblée parlementaire européenne au déroulement de la procédure de négociation des accords commerciaux', *RMC* (1975) 211.

<sup>39</sup> OJ (1989) C 69/145, para. 9.

sion which requires Parliament to be consulted, such as Article 43 in the field of agricultural policy, or when an agreement is based also on Art. 235 EEC Treaty, like the agreements with the Soviet Union and other Eastern European states (of 1989/90).

No consultation is, however, provided for trade agreements (Art. 113 EEC Treaty). Confirming previously established practice, the Solemn Declaration on European Union of 20 June 1983 extended the obligation to consult Parliament to the conclusion of all 'significant international agreements by the Community'.<sup>40</sup> No definition of this notion is given but it seems to intend to cover mainly agreements based on Article 113. The 'significance' may in fact derive from either the political background or from its economic substance. Therefore also agreements which are concluded on the basis of secondary legislation, for example, fisheries agreements, could require consultation.<sup>41</sup> Since the extension of consultation results from an inter-institutional agreement, and since no procedure has been set to determine the nature of a given agreement, it appears to be up to the institutions to agree on whether the requirements for extended consultation are fulfilled. According to Parliament's internal rules (Art. 34), it should be Parliament which decides whether any agreement is to be considered as 'significant'. Until the beginning of 1990 no such decision has been adopted by Parliament.

Furthermore, Parliament's Rules of Procedure also envisage the possibility of discussing agreements which are not covered by the notion 'significant'.<sup>42</sup> The power to discuss those agreements and to adopt resolutions in this respect results from its general power of deliberation.<sup>43</sup>

#### b) Procedure

Where the Community treaties provide for the *consultation* of Parliament before an agreement is concluded, this is done by analogy with Parliament's participation in the Community legislative process, in accordance with two procedures, the 'cooperation procedure' or simple consultation. Supplementary procedural rules relating to Parliament's involvement in the preparations for concluding a treaty have been laid down in inter-institutional agreements. The EP's Rules of Procedure contain more detailed implementing provisions.

<sup>40</sup> EC Bulletin No. 6-1983, at 26, see EP Rules, Articles 34, 35.

<sup>41</sup> *Fisheries* agreements are often concluded on the basis of Regulation 170/83, OJ (1983) L 24/1 which provides for a simplified decision-making procedure (see Article 11). Parliament repeatedly criticized its exclusion from these agreements; see Resolution of 20 February 1987, OJ (1987) C 76/180, No. 29-32. It is indeed doubtful whether the authorization for *legislation* according to a simplified procedure applies in the same way to international agreement.

<sup>42</sup> Rules of Procedure, Art. 35.

<sup>43</sup> See Solemn Declaration of 20 June 1983, *supra* note 28, No. 2.3.2 and Bieber, *supra* note 22, No. 9.

## Democratic Control of European Policy

The cooperation procedure laid down in Article 149(2) of the EEC Treaty is inadequate to meet the special conditions required for the conclusion of international agreements. The significant feature in this new procedure is the introduction of a formal examination of the amendments proposed by Parliament, which enables the latter's views to prevail whenever it has the support of the Commission and a qualified majority in the Council. These rules are, however, ineffectual in the case of international agreements because at the time the agreement is put before Parliament it is not as a rule open to further amendment. Thus, Parliament's role under the cooperation procedure does not allow it to exercise in the field of foreign relations an influence similar to the one it has over internal legislation.

On the other hand, another special feature of this procedure enables Parliament, by rejecting the common position of the Council (in other words the decision to ratify the agreement), to force the Council to vote unanimously on this decision instead of by the qualified majority provided for where it is approved by Parliament.<sup>44</sup> This possibility might pave the way for further development of Parliament's right of simple consultation. Surprisingly enough, Parliament has not adopted any rules in its Rules of Procedure to take account of the special characteristics of the international agreements to be concluded in accordance with this procedure.

*Simple consultation* of Parliament before the conclusion of international agreements allows still less influence to be exerted over its substance than the cooperation procedure, because the Council consults Parliament only after these agreements have been signed. Parliament's opinion can therefore affect only the approval or rejection of that agreement. In contrast to association treaties, accession treaties and treaties concluded within the context of the cooperation procedure, an unfavourable opinion delivered by Parliament during the simple consultation procedure has no legal effect. It is therefore unlikely for this reason even to influence the conduct of the Council and the Commission. This explains why Parliament has long, but in vain, sought to extend direct democratic control by asking to be consulted earlier, so that its opinion can still in theory have an effect in shaping the substance of the treaty.<sup>45</sup> The fact that the European Parliament's opinion does not have any substantive legal effect does not however mean that the Council could conclude a treaty even if Parliament had not delivered an opinion. Consultation constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty, infringement of which might lead to annulment of the ratification decision by the Court of Justice of the European Communities. In the view of the Court of Justice

<sup>44</sup> See Ehlermann, 'L'acte unique et les compétences externes de la Communauté: Un progrès?', in Demaret, *supra* note 4, at 79 (90) and Timmermans, 'Le Parlement face à la Commission en matière de relations extérieures de la CEE', in Louis, Waelbroeck (eds.), *Le Parlement Européen* (1988) 147.

<sup>45</sup> See Resolutions of 1963 and 1982, *supra* note 23.

of the European Communities, consultation is intended to enable Parliament to play an effective part in Community law-making.<sup>46</sup>

The procedure used in the case of simple consultations on the basis of the institutional agreements does not correspond to the procedure described in the EP's Rules of Procedure. Thus at the beginning of the parliamentary procedure, it is as a rule notified *in confidence* of the negotiating mandate given to the Commission by the Council. On the other hand, Rule 33(1) of the EP's Rules of Procedure provides for the possibility of formal consultation on that mandate. At this stage Parliament may hold a policy debate, although it rarely does so.<sup>47</sup> During the negotiations the Commission keeps the appropriate committees informed. When the negotiations are completed but before any agreement is signed a Council representative notifies the appropriate committees in confidence and unofficially of the essential content of the agreement. The agreement is formally submitted to Parliament only after it has been signed (in contrast, Rule 33(4) of the EP's Rules of Procedure assumes that it will be consulted before the agreement is signed).

None of the various procedures for the conclusion of treaties provides for Members of Parliament to take part personally in treaty negotiations. Although it would be possible in principle to include Members of Parliament as observers in each negotiating delegation, it is doubtful whether this form of cooperation would be compatible with Parliament's working methods. On the other hand, Article 113(2) of the EEC Treaty might provide a starting-point for closer formal involvement of Members of the European Parliament in treaty negotiations. In drawing up trade agreements, the Commission must conduct these negotiations 'in consultation with a special committee appointed by the Council to assist the Commission in this task'. The Treaty is silent as to the composition of the committee, which is therefore left to the Council's discretion. It would therefore be permissible to fill the committee wholly or partially with Members of the European Parliament.<sup>48</sup>

## B. Parliament's Participation in the Implementation of EC Agreements

The Treaties contain no specific provisions regarding Parliament's participation in the implementation of agreements. Nevertheless a number of Community Association Agreements provide for the setting up of a joint body consisting of Members of

<sup>46</sup> ECJ cases 138, 139/79 *Roquette, Maizena v Council*, ECR 1980, 3333, para. 33.

<sup>47</sup> Recent example: Request by Parliament of 20 November 1989 to be consulted on the negotiation mandate for cooperation agreement with the Gulf-States, OJ (1989) C 323/2.

<sup>48</sup> See Sasse, 'Report', in Dehousse (ed.), *Le Parlement européen* (1976) 68. The Commission, in 1990, has agreed to include EP Members as observers in the delegation which negotiates agreements, see Agence Europe, No. 5194 of 15 February 1990, at 13.

the European Parliament and representatives of the Parliaments of the Associate States with supervisory and advisory tasks in connection with the implementation of the agreement.<sup>49</sup> Of particular practical importance is the 'Joint Assembly of the Lomé Convention', with 132 members, which meets twice a year.<sup>50</sup> Parliament would now also like to see the reinstatement of the EEC Turkey Joint Parliamentary Committee which ceased to meet following the military coup in 1980.<sup>51</sup>

Besides the – exceptional – institutional framework for Parliamentary control over the implementation of certain agreements, Parliament has unilaterally established a complex network of 'interparliamentary delegations which operate separately from specific agreements but which may exercise influence on their operation since it is implementation which is normally discussed when those delegations visit a given state.<sup>52</sup>

Apart from this direct participation, Parliament uses its powers in the budgetary procedure and its general advisory and supervisory powers to influence indirectly the implementation of international agreements.<sup>53</sup> Most international agreements which contain precise financial obligations for the EC budget are considered as establishing compulsory expenditure.<sup>54</sup> Parliament can, in this respect, choose not to use its power of ultimate decision which Article 203 para. 6 EEC Treaty provides for non-compulsory expenditure. Many agreements establish, however, only a framework for measures with financial implications for the EC budget. Those expenses are to be considered as non-compulsory and require therefore Parliament's assent to the corresponding budgetary appropriations. Furthermore, Parliament's power to grant discharge to the Commission for the implementation of the budget provides an opportunity for scrutiny of financial aspects of the implementation. Parliament may re-

49 Association agreements with Greece of 9 July 1961 (obsolete since accession); Turkey of 23 December 1963 (Parliamentary cooperation suspended); Malta of 5 December 1970; Cyprus of 18 December 1972; Lomé IV of 1990. See EP Report 'on the collaboration between the European Parliament and the Parliaments of associated states', Doc. 66/1963-64 (draftsman Mr Goes van Naters).

50 See Chabot, 'L'Assemblée Consultative ACP-CEE', *RMC* (1985) 154. Reports on the meetings of the Assembly are published in the EC OJ, for example, OJ (1989) C 5/1.

51 EP Resolutions of 8 July 1982, OJ (1982) C 238/56, para. 11 and 14 September 1988, OJ (1988) C 262/126.

52 25 delegations cover either individual states or groups of states. One delegation has the task to maintain contacts with the UN. For a list of the delegations see EP Decision of 26 July 1989, OJ (1989) C 233/36.

53 Examples:

- Adoption of resolutions: Resolution of December 1983 on the cooperation agreement with Yugoslavia, OJ (1984) C 10/93;
- Questions to Council and Commission: Questions on relations with Israel, OJ (1983) C 277/81;
- Hearings in Committees (e.g., on European Security), December 1987, see Report of the Political Committee, PE 119.433.

54 See Joint Declaration of Parliament, Council and Commission, 30 June 1982, OJ (1982) C 194/32, 33.

quest, according to Article 85 of the EC budget regulations<sup>55</sup> that its observations made in the context of the discharge procedure are to be followed by the Commission.

### C. Participation in Decisions on Autonomous Community Measures

Autonomous Community measures producing external effects concern in particular the combating of dumping and other prohibited trade and pricing practices. These measures are in most cases based on Article 113 of the EEC Treaty and do not therefore require consultation of the European Parliament for their adoption. In the past, important regulations have in fact been adopted without consultation of the European Parliament.<sup>56</sup> However, the Council and the Commission have recently shown a tendency to involve Parliament by consulting it on such regulations. This occurred *inter alia* in the case of Regulation No. 2641/84 on the new commercial policy instrument,<sup>57</sup> and Regulation No. 4057/86 on unfair pricing practices in maritime transport.<sup>58</sup>

### D. Non-Contractual Relations with Third Countries

Parliament also uses its advisory power and its right to determine its own procedural methods in order directly to influence the Community's relations with third countries, since it maintains direct contacts with the governments and Heads of State of these countries. One of its ways of doing this is by making its plenary sessions available as a forum to the Heads of State or other eminent representatives of third countries, where they may present their ideas on foreign policy. The Heads of State of Portugal (Eanes in 1978), Venezuela (Campins in 1980), Egypt (Sadat in 1981), Jordan (King Hussein in 1983), Argentina (Alfonsin in 1984), Israel (Herzog in 1985), have all addressed the European Parliament. In 1990, Alexander Dubcek, President of the Czech Parliament, delivered a speech to the European Parliament.

The European Parliament also maintains direct relations with parliaments of third countries through the conference of presidents of parliaments.<sup>59</sup> In particular, they are maintained by the European Parliament's at present 26 permanent interparliamentary delegations, each of which is responsible for one country or group of

<sup>55</sup> OJ (1977) L 356/1.

<sup>56</sup> See, e.g., Regulation 2603/69 on Common Rules for Export of 20 December 1969, OJ (1969) L 324/25; Regulation 2423/88 on Protection against Dumping, OJ (1988) L 209/1.

<sup>57</sup> OJ (1984) L 252/1.

<sup>58</sup> OJ (1986) L 378/14.

<sup>59</sup> See European Parliament (ed.), *Forging Ahead*, European Parliament 1982-1988 (1989) 195.

countries.<sup>60</sup> As a rule, these delegations meet at least once a year with members of the parliaments of the countries for which they are responsible and discuss with them mainly questions concerning relations between the Community and their countries.

## E. Relations with International Organizations

### 1. Council of Europe

The Treaties originally presumed that there would be a close link between the European Parliament and the Parliamentary Assembly of the Council of Europe. The rules laid down in this respect in a special protocol to the ECSC Treaty have however largely lost their significance<sup>61</sup> or are no longer observed.<sup>62</sup> Article 230 of the EEC Treaty, moreover, provides a general framework for institutionalized relations between the two organizations. Although the Council of Europe and the Community seem to have drawn closer recently, as witness the rekindling of the debate on accession to the European Convention on Human Rights, this has not yet had any effect on the EP's attitude.

### 2. Other Organizations

Parliament has long been interested in direct contacts with the United Nations and the GATT. This can be seen at the practical level from the appointment of a special delegation for relations with the United Nations.<sup>63</sup> Direct formal contact with the GATT was possible for the first time when the Commission stated in 1988 that it was prepared to include five members of the European Parliament as observers in the Community delegation to the GATT Conference of Ministers from 5 to 7 December 1988 in Montreal.<sup>64</sup> Since 1988 the European Parliament has also been an associate member of the Interparliamentary Union and is thus entitled to attend its meetings, though without the right to vote.

<sup>60</sup> See *supra* note 52. Composition and tasks of the delegation are determined by Resolutions of 22 April 1982 and 11 October 1984, OJ (1982) C 125/113 and OJ (1984) C 300/50.

<sup>61</sup> Article 1 of the Protocol on Relations with the Council of Europe annexed to the ECSC Treaty (identity of members of both Assemblies).

<sup>62</sup> Article 2 of the Protocol (Joint meetings). For details see European Parliament (ed.), *Forging Ahead*, *supra* note 59, at 197.

<sup>63</sup> *Supra* note 52. On the substance and procedure of the relations see EP Report Doc. A 2-0293/87 (draftsman Mr Medina Ortega), Resolution of 11 March 1988, OJ (1988) C 94/192.

<sup>64</sup> Council in March 1987 adopted a guideline on the participation of EP Members as observers in delegations to international organizations, Do. 5162/87, Ass. 7 not published, see also *supra* note 48.

## F. Participation in European Political Cooperation

Parliament's formal involvement in European Political Cooperation is the most intricate area of democratic control over European foreign policy, since Parliament cannot exercise any formal power over the foreign ministers of the Member States or the EPC Secretariat. The relations between EPC and European Parliament are set out in Article 30(4) of the SEA, which states that the Presidency is to keep Parliament regularly informed and ensure that the views of the European Parliament are taken into consideration in EPC.<sup>65</sup>

In addition to this, Parliament's rights in the context of EPC are based on unilateral undertakings made by the Member States.<sup>66</sup> The European Parliament has the right to put questions to the Foreign Ministers meeting in EPC corresponding to the right to question the Commission and the Council, the procedure for which is laid down in Rules 58-62 of the Rules of Procedure.<sup>67</sup> The Foreign Ministers also undertook to hold colloquies with Parliament's Political Affairs Committee twice yearly and, through its presidency, to report annually on EPC to Parliament, in plenary sitting and to submit the annual report in writing. In addition to this the Solemn Declaration on European Union of 19 June 1983 states that the presidency, at the beginning of its six-month term of office, will address the European Parliament and present its programme and report to it at the end of its term on the progress achieved. This had in fact already been the practice since 1973. Finally, the European Council – which is also competent in the field of EPC – agreed in 1981 to inform Parliament after each of its meetings in the form of a declaration in plenary.<sup>68</sup>

For several reasons these foreign policy activities of Parliament are of crucial importance as regards the democratic legitimacy of the international activities of the Community and its Member States. First of all, Parliament has never restricted its debates to the field delimited by the powers of external action laid down in the Community treaties. As long ago as 1961 the Heads of State and Government formally recognized, as requested by Parliament, its full power to debate foreign policy matters.<sup>69</sup> To an ever increasing extent, especially since the first direct elections in 1979, Parliament has regarded itself as a forum for debating European aspects of international political issues. In so doing it is enunciating its own views and estab-

<sup>65</sup> See also Solemn Declaration of 20 June 1983, *supra* note 28 and Art. 56, 57 EP Rules of Procedure.

<sup>66</sup> See Decision of the Foreign Ministers of 28 February 1986, EC Bulletin, Doc. 86/090.

<sup>67</sup> Parliamentary questions dealing with EPC matters are published in the *EPC Bulletin*, edited by the European Policy Unit at the European University Institute, Florence, and the Institut für Europäische Politik, Bonn.

<sup>68</sup> Solemn Declaration of 20 June 1983, *supra* note 28, No. 2.3.5.

<sup>69</sup> See Final Communiqué of the Heads of State and Government Conference of 18 July 1961.

lishing specific principles increasingly clearly, as is becoming particularly evident from its resolutions on the protection of human rights in the world.<sup>70</sup>

In addition to its activities manifestly concerned with issues and principles, Parliament has extensive autonomy of action. Within the context of EPC, Parliament is totally free to fix its priorities for debate and choose its topics and approach. It may adopt certain positions publicly even before the corresponding proceedings within the structure of EPC have been concluded. In this respect the weight of Parliament's statements results from the combined effect of internal legitimacy and external publicity. Third states show great interest in Parliament's attitudes toward them.<sup>71</sup> Parliament's position is thus becoming an independent political factor and, despite its formal distance from the decision-making process, has a greater influence on the formulation of objectives in EPC than most opinions on draft agreements in the Community context. On the other hand, Parliament's activities in the context of treaty-based foreign relations are clearly a response to the measures adopted. Parliament's role in EPC shows in particular the importance of transparency and the establishment of principles as a feature of democratic control of foreign policy.

#### G. Interim Conclusions

Foreign policy activities are not in principle excluded from democratic control. On the contrary, foreign policy which has been shaped and legitimated democratically carries more weight in the outside world and strengthens the democratic structures internally. Although democratic control covers a large number of institutions and procedures, parliamentary involvement constitutes a necessary and indispensable requirement.

In so far as democratic control of European foreign policy is understood to mean *parliamentary* involvement, two levels of action can be basically envisaged and could be combined: national parliaments and the European Parliament. However, the European Parliament alone is in a position and, moreover, has a democratic mandate by virtue of being directly elected, to formulate a viewpoint valid for the whole Community on a given issue. To be legitimate, the Community's foreign policy

<sup>70</sup> See EP Resolution of 18 January 1989, OJ (1989) C 47/61 and Report of its Political Committee (draftsman Mr De Gucht), Doc. A 2-329/88. Other topics of recent Resolutions:  
– *Security in Western Europe*, Doc. A 2-410/88 (draftsman Mr Penders), Resolution of 14 March 1989, OJ (1989) C 96/30.  
– *Arms export of European States*, Doc. A 2-398/88 (draftsman Mr Ford), Resolution of 14 March 1989, OJ (1989) C 96/34.  
– *Activities of the International Committee of the Red Cross*, Doc. A 2-43/89 (draftswoman Mrs Van Den Heuvel), Resolution of 14 April 1983, OJ (1989) C 120/342.  
– *Export Control of Strategic Products*, Doc. A 2-31/89 (draftsman Mr Toussaint), Resolution of 14 April 1989, OJ (1989) C 120/347.

<sup>71</sup> See N. Gresch, *Die außenpolitischen Funktionen der EP-Fraktionen, integration* (ed. Institut für Europäische Politik, Bonn) (1983/1) 24.

activities require democratic control by the European Parliament. Thus the European Parliament is entitled to play a central part in determining, on the basis of externally applied principles, legitimating and elucidating the external activities of the Community and of the Member States acting in common.

Parliament's procedural autonomy (which includes autonomy to draw up its agenda) enables it to take measures independently of other institutions and to formulate independent positions on foreign policy matters. These positions are not yet formally binding on the governments of the Member States with regard to their cooperation in foreign policy matters, but the European Parliament's statements carry considerable weight as a political factor.

As far as the Community's treaty-based foreign relations are concerned, Parliament's scope for involvement, in addition to that on the informal level also applicable in this context, varies greatly according to the subject-matter.

Since the Single European Act there has been a recent tendency to grant Parliament decision-making rights in connection with the conclusion of a treaty. The preliminary effects of this are that, where possible, Parliament's views are taken into consideration in the treaty negotiations. However, in many areas of foreign relations based on treaties, Parliament is merely consulted and unable to influence the substance of those treaties.

In the context of its right to organize its own activities, Parliament has entered into direct relations with a large number of non-member countries. These relations have repercussions on the implementation of agreements and on the general quality of Community foreign relations. Other control instruments take the form of rights to supervise the Commission's activities in respect of the budget and other fields.

### III. The Expansion of the European Parliament's Role in Foreign Policy<sup>72</sup>

Suggestions for reforms are determined by three factors:

- Modern trends towards transparency and an increased need for legitimacy in international relations,
- comparison with the role of Parliaments within state systems,

<sup>72</sup> Parliament has submitted proposals in its report 'On the role of the European Parliament in external policy within the framework of the Single European Act', Doc. A 2-86/88 (draftsman Mr Planes Puchades), Resolution of 17 June 1988, OJ (1988) C 187/233. Suggestions for an increased role of Parliamentary participation in the conclusion of international agreements in the light of the procedure provided by the Dutch Constitution (Art. 60) are discussed by Weiß, *supra* note 12, at 228. See also EP Resolution of 8 October 1986, OJ (1986) C 283/39 and of 20 February 1987, OJ (1987) C 76/180, suggesting inter-institutional agreements for improvements of its role in the conclusion of international agreements. The Commission has taken up some proposals in the presentation of the annual programme for 1990; *supra* note 48.

## Democratic Control of European Policy

– solutions to inherent contradictions in the present EC procedures.

A considerable margin of evolution for an increased democratic control over foreign policy results from the flexibility of the decision-making procedure as laid down by the European Community Constitution. Modifications can be achieved both through changes in the present practice and by way of treaty amendments.

### *1. Scope for Expansion Requiring a Reform of the Treaties*

(a) Parliament's right to give its assent to international treaties ought to be extended beyond the field of association agreements to *all important* agreements. In other words, instead of the formal criterion of 'association', a substantive criterion should be used for the purposes of identifying all agreements of an overwhelmingly technical nature for which parliamentary assent is not necessary.

From the technical point of view this could be achieved by means of a general definition of the parliamentary cooperation procedure in Article 228 of the EEC Treaty and the adoption of the expression 'significant international agreements' used in the Solemn Declaration of the European Council of 20 June 1983 (with a mention of association agreements only by way of example).

(b) The mandate for the negotiating of 'significant' agreements and accession treaties should be forwarded to Parliament for its approval.

(c) If proposal (a) above is adopted, the special type of parliamentary participation in the case of treaties concluded under the cooperation procedure will not apply. If the option outlined in (a) above cannot be put into effect, a special procedure for parliamentary participation could be arrived at by adjusting the cooperation model laid down in Article 149(2) of the EEC Treaty (taking Article 130n of the EEC Treaty as a precedent).

(d) All other treaties to be concluded by the Community should be forwarded to Parliament *for information* so that it can deliver an opinion before the treaty is signed.

(e) The procedure for the conclusion of treaties laid down in the EEC Treaty and EAEC Treaty should be parallel.

(f) Article 228 of the EEC Treaty must be amended to give Parliament the right to request the Court of Justice to deliver an opinion on the compatibility of an intended agreement with the Community Treaties.

(g) Article 229 might be amended to make it clear that Members of the European Parliament can take part as observers in Commission delegations to international organizations.

## *2. Scope for Expansion Without a Reform of the Treaties*

(a) Agreements on the notification of Parliament of the progress of treaty negotiations could be extended to all treaty negotiations and strengthened.

(b) Parliament could be consulted *before* the signature of agreements.

(c) Since the scope of Art. 238 is extremely wide<sup>73</sup> this article could be used more often as legal basis for agreements thus rendering Parliament's power of co-decision more effective.

(d) The Council could include representatives of the European Parliament in the committee set up pursuant to Article 113 of the EEC Treaty.

(e) Even in the case of agreements concluded within the context of the adoption of implementing provisions, the Council could provide for Parliament to be involved, at least in the form of consultation.

(f) Parliament itself could introduce greater structural coherence in its deliberations on foreign policy issues.

(g) Parliament could also make greater use of its autonomy in the choice of foreign policy initiatives. In particular, it could extend its debates to security issues.

(h) An agreement could be reached with the presidency of EPC on continuous cooperation, especially by means of regular and active participation in plenary sittings.

(i) Parliament could itself make greater use of the means of supervision available to it *vis-à-vis* the other institutions in order to impose certain foreign policy options.

## *3. Conclusions*

The Community's institutional structures and procedures have not yet come of age. This applies particularly to the field of foreign policy, which is not reinforced by clear internal guidelines.

The quality of democratic control has not kept pace with the expansion of the Community's identity. In particular, the governments and institutions concerned still have no rational notion of the role which the European Parliament should play in the control of foreign policy.

<sup>73</sup> See ECJ case 12/86, *Demirel* (1987) ECR 3710, para. 9.

## Democratic Control of European Policy

Rationality does not, however, mean that Parliament's ideal role in shaping foreign relations can be reduced to a simple formula, if only because the concepts of 'supervision' and 'control' cover complex processes involving the interaction of a large number of different parties and necessarily requiring structural and procedural flexibility.

Plans for increasing the EP's role in foreign policy need to take account of the following variables:

- the large number of instruments operating in the field of foreign policy;
- the different methods of supervision;
- the various legal sources of the powers and procedures relating to foreign policy activities.

The prospects for procedural change are favourable because a governmental conference on the amendment of the Treaties as regards the EP's future role is scheduled for 1990/1991.