II. EXTERNAL RELATIONS

I. THE TREATY OF AMSTERDAM IN ACTION

The last account of developments in the external relations of the European Union, described how the Treaty of Amsterdam, which had just entered into force, had reformed the Common Foreign and Security Policy. Three years on one can begin to assess the impact of these changes.

The primacy of the European Council as the driving force of the Union's foreign policy has been confirmed. The European Council has issued three Common Strategies under its new powers; on Russia[1] and Ukraine[2] in 1999 and on the Mediterranean in 2000.[3] While common strategies have been criticised as doing no more than codify existing policies,[4] they do from an outside perspective give a clear overview of current and prospective actions across all three pillars of the Union, they open the way to implementation by qualified majority voting in the Council and they do at least offer the opportunity for strategic initiatives by Heads of State and Government.

The Common Strategy on Russia set out strategic goals for the European Union—open and pluralistic democracy in Russia underpinned by a prosperous market economy and the maintenance of European stability, global security and intensified cooperation in response to common challenges—followed by more precise objectives. Subsequent relations with Russia have had rough patches due to the bombardment of cities in Chechnya, but threats to review the Common Strategy and to suspend provisions of the Partnership and Co-operation Agreement have not been carried out. Since 11 September 2001, the European Union has softened its condemnation of Russia's methods of fighting terrorism and there has been intensification of common action against crime.[5]

Following the attacks of 11 September, a special European Council reaffirmed solidarity with the American people and the international community in combating terrorism. A plan of action was adopted which, like common strategies, required implementation across all three pillars of the European Union. Rapid action took place across the Union on the freezing of terrorist assets, and in December the Council reached political agreement on the European arrest warrant—which will mark a quantum leap in the speed and security of extradition within Europe—as well as a common definition of terrorist crimes. Many EU Member States are participating in the international security force authorised by the Security Council to help stabilise Afghanistan and to establish and train new Afghan security forces.[6]

There is a greatly increased public profile for the Union as a result of the appointment of Javier Solana, a former Foreign Minister of Spain and Secretary-General of NATO, as the High Representative for the common foreign and security policy. Even the United Kingdom, which had earlier favoured appointment of a lower-key figure, paid warm tribute to his effectiveness as a negotiator, saying that 'he is worth his salary

[1] 1999/414/CFSP, OJ L 157, 24.6.1999; Bulletin of the EU 6 -1999 point 1.3.97.
[2] 1999/877/CFSP, OJ L 331, 23.12.1999; Bulletin of the EU 12-1999, point 1.4.91.
[3] Annex V to Conclusions of Santa da Feira European Council, June 2000.
[4] For example by Spencer 'The EU and Common Strategies: The Revealing Case of the Mediterranean' (2001), *EFAR*, 31.
[5] Under the EU Action Plan on Common Action for the Russian Federation on Combating Organized Crime, OJ C 106/5, 13 Apr 2000.
[6] Conclusions of European Councils in Brussels on 21 Sept 2001 and at Laeken, 15 Dec 2001.

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several times over.[7] The new style Troika representing the Union abroad comprises the Presidency, Solana as High Representative for the CFSP and Christopher Patten as Commissioner for External Relations. Good working relations between Solana and Patten have helped to improve the level of continuity and cross-pillar coordination in the external activities of the Union. The Council has also made increasing use of its powers to appoint Special Representatives—for example Bodo Hombach as Coordinator for the Stability Pact for South-East Europe and Nils Eriksson as European Union Adviser to oversee the assistance programme to support the Palestinian authority in efforts to counter terrorist activity.

Coordination over arms exports by Member States appears to be increasingly effective. A Code of Conduct was adopted by the Council in 1998 'to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability'. Detailed criteria included respect for human rights and international commitments, the existence of armed conflicts in the country or region of destination and the risk of diversion or re-export.[8] The Code set out machinery for notification to other Member States of refusals of licences and consultation in case another Member State wished to grant a licence. Although the Code was deliberately drafted in non-binding language, successive Annual Reports on its operation indicate many refusals to authorise, especially by France and the UK, wider consultations and in consequence some decline in political controversy over arms exports.[9]

As for dual-use goods—capable of either civil or military use—the Council in 2000 replaced the 1994 cross-pillar regime with a Community Regulation.[10] The cross-pillar approach in this area was finally judged by the Council to be inadequate to safeguard the uniformity and effectiveness of Community rules.[11] The new Regulation, which took into account case law of the European Court of Justice, stressed the need for an effective common system of authorisations by national authorities that would ensure compliance with international commitments of the Member States and also free movement of dual-use goods within the Community. Member States for the time being retain rights to control transfer of certain items to safeguard public security.

II. DEFENCE POLICY

In December 1998 the Heads of State and Government of France and the United Kingdom issued at St Malo a Joint Declaration that began the process of making a reality of the defence provisions in the Treaty of Amsterdam.

They stated that

> the Union must have the capacity for autonomous action, backed up by credible military forces, the means to use them, and a readiness to do so, in order to respond to international crises.

[7] Minister of State, Foreign and Commonwealth Office, in evidence to House of Lords Select Committee on the European Union, 3rd Report, 1999–2000, HL Paper 22, 10.

[8] Text in Conclusions of the Council of 25 May 1998 and in Bulletin of the EU 5–1998 points 1.3.5 and 6.

[9] Second Annual Report, *OJ C* 379, 20.12.2000.

[10] Council Regulation 1334/2000, OJ L 159, 30 June 2000 and Decision 2000/402/CFSP, OJ L 159/218, 30 June 2000.

[11] For a detailed account of the controversy preceding the new Regulation see Koutrakos: *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart Publishing, 2001).

This would involve the capacity for analysis, sources of intelligence and strategic planning, taking account of existing assets of Western European Union. It would be essential to be given recourse to NATO assets. The so-called Rapid Reaction Force should be supported by a strong and competitive European defence industry and technology. In April 1999 the Washington Summit of NATO, celebrating its fiftieth birthday, offered consultations with a view to European access to NATO planning capabilities and common assets, and acknowledged the concept of a European Security and Defence Identity (ESDI) within NATO.

The European Council at Helsinki in December 1999 agreed that

> cooperating voluntarily in EU-led operations, Member States must be able, by 2003, to deploy within 60 days and sustain for at least one year military forces of up 50,000 to 60,000 persons capable of the full range of Petersberg tasks [the Headline Goal].

The Council set up in February 2000 an Interim Political and Security Committee (replacing the Political Committee which carried out preparatory work on foreign affairs for the Council) with a mandate to prepare for the functioning of the European policy on security and defence. The Political and Security Committee would be advised by an Interim Military Body and national military experts would be seconded to the Council Secretariat.[12]

A Capabilities Commitment Conference in Brussels in November 2000 put some flesh on these aspirations. The commitments made in theory met the requirements of the Helsinki European Council, but it was privately acknowledged that there was a need for improvements and for restructuring of European defence industries. The question of relations with NATO and of access to NATO assets has remained controversial, and Turkey has blocked conclusion of a long-term agreement.[13]

The Treaty of Nice signed in February 2001 would revise Article 17 of the Treaty on European Union by omitting references to Western European Union.[14] WEU—which can only be formally wound up by Parties to the 1948 Brussels Treaty (who include non-members of the EU) continues its increasingly shadowy existence.[15] The intention is that the Union will take its own decisions on crisis management and Petersberg tasks and rely at least for the time being on *ad hoc* access to NATO capabilities. The Petersberg tasks are now set out in Article 17.2 of the Treaty. There is no expectation that the Union will take on defence of the Member States from armed attack—that will remain the prerogative of NATO.

The structures and resources now being assembled have not yet been put to the test and it may well be a sign of the overall success of the CFSP in conflict management if it is unnecessary to have frequent recourse to them. The serious military players within the Union will have to provide long-term financial as well as political support if the European Union is to have a credible defence policy.

[12] OJ 2000 L/49, 22 Feb 2000. The Committee was later established on a permanent basis.

[13] Yesson 'NATO, EU and Russia: Reforming Europe's Security Institutions' (2001), *EFAR* 197; Conclusions of the European Council at Laeken.

[14] Cm 5090; OJ C 80, 10 Mar 2001.

[15] UKTS No 1 (1949) and 1954 amending Protocols, UKTS No 39 (1955).

III. THE FIFTH ENLARGEMENT

Over the last three years disillusion with progress towards union in the 'Common European House' has intensified, and the thirteen candidate States could be forgiven for thinking that the European Union's attitude is that to travel hopefully is better than to arrive. The European Council in December 1999 at Helsinki abandoned their earlier policy of dividing the candidates according to their readiness into a first and a second wave and replaced it with what was termed a 'regatta approach', in which States could catch up and overtake others in the fulfilment of the criteria for accession established by the European Council at Copenhagen in 1993. The four Copenhagen criteria are political (democracy and respect for human rights), economic compatibility, adoption of the *acquis* into national law, and administrative ability to implement the obligations of membership.

The European Council at Laeken in December 2001 restated their determination to bring negotiations with 'candidate countries that are ready' to a conclusion by the end of 2002. This timetable would in theory permit them to take part as Member States in European Parliament elections in 2004 as well as the appointment of a new European Commission. The view was expressed that ten candidates—Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, the Czech Republic, and Slovenia—could be ready if the current momentum of negotiations and strengthening of administrative and judicial institutions was maintained. But rigorous scrutiny shows understaffing of administrations in many candidate States, as well as inadequacy in control of new external borders and of organised crime. In Poland—strategically crucial—there is anger at the prospect that agricultural subsidies at the current level applying within the Union may not be available until after a long transition.

If these ten States took part in a big bang enlargement of the Union to twenty-five Members, this would leave Romania, Bulgaria, and Turkey as stragglers. Turkey was formally accepted as a candidate State in December 1999, and amendments to its constitution have improved its prospects for meeting the political criteria for accession, so that substantive negotiations could begin.

IV. THE COTONOU PARTNERSHIP AGREEMENT

In June 2000 the Community and the Member States concluded a new Agreement to replace the Fourth Lome Convention that governed trade, aid, and political and economic relations with the African, Caribbean, and Pacific States. The Europeans were successful in securing a new Agreement which incorporated the policy principles which they hoped would lead to better results in terms of development and democracy. Non-reciprocal trade preferences had led to disappointing results and it had become essential to bring them more into line with World Trade Organisation rules.

Five themes run through the new Agreement. First, an enhanced political dimension is expressed in emphasis on dialogue to assist good governance, reduce corruption, and resolve conflicts and in making observance of human rights an 'essential element' of the Agreement. Secondly, a more integrated approach to poverty reduction centres around consolidation and better use of European Development Fund money, reduction in tied aid and more focus on private investment. Thirdly, participation by the wider society outside ACP governments in new policies and reforms is to be built up. Fourthly, the Agreement incorporates better procedures to control corruption and

misuse of funds as well as to police human rights. Finally, allocation of funds is to be more selective in terms of the needs and performance of individual ACP States.[16]

This all amounts to a tougher and more realistic way to help the least developed countries. The question will be whether the Member States and the Commission can enforce these rules so as to promote sustainable development and contribute to poverty eradication in the ACP States.

V. EXTERNAL COOPERATION AGREEMENTS

In the case *Portugal v Council* the European Court of Justice were invited to reconsider their earlier finding that GATT rules do not have direct effect, except in special circumstances, within the Community legal order.[17] Portugal argued that the World Trade Organisation Agreements, including GATT 1994, were significantly different, in particular because they radically altered the dispute settlement procedure. The Court held that the new procedures still accorded importance to negotiation between parties to a dispute, so that to accord direct effect 'would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility . . . of entering into negotiated arrangements even on a temporary basis'. The important partners of the Community in the WTO did not regard the Agreements as having direct effect in their own legal systems, and for the Community to take such a step might undermine the uniformity of the WTO rules.

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (one of the results of the Rio de Janeiro Summit in 1992) is intended to regulate the safe transfer of genetically modified living organisms (LMOs), particularly across national boundaries. A dispute arose between the Commission and the Council as to the appropriate legal base for signature and conclusion of the Protocol by the European Community. The Commission proposed a double legal base of Articles 133 (common commercial policy) and 174.4 of the EC Treaty (which gives power to the Community to conclude agreements on the environment). The Council on the other hand unanimously maintained that Article 175.1 alone was the correct legal base. The Commission sought the opinion of the European Court of Justice under Article 300.6 EC. The choice of legal base would determine whether Community competence was exclusive or shared.

The Court held in Opinion 2/2000 *(Cartagena Protocol)* that in the light of its own decisions it was necessary to determine whether the Protocol was an agreement mainly concerning environmental protection, but liable to have incidental effects on trade in LMOs, whether international trade policy was the preponderant purpose or whether it was inextricably concerned with both.[18] It concluded from close examination of the context, aim and content that its main purpose was the protection of biological diversity against the harmful effects that could result from transboundary movement of LMOs. It was not an instrument to promote, facilitate or govern trade. It followed that it should be concluded on a single legal base specific to environmental policy and that the Community and its Member States shared competence.

[16] See Martenczuk 'From Lome to Cotonou: The ACP–EC Partnership Agreement in a Legal Perspective' (2000), *EFAR* 461.
[17] Case C-149/96 [1999] ECR I-8395.
[18] Delivered on 6 Dec 2001.

Article 133.5 EC as revised by the Treaty of Amsterdam gave the Council power, by unanimity, to extend the commercial powers of the Community to negotiations and agreements on services and intellectual property. There was thus no need for the Heads of State and Government at Nice to revisit the provision, particularly since the objective of this Treaty was 'to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union'. The Treaty of Nice, however, would extend Article 133 by spelling out certain matters of established Council and Commission practice and by setting out a compromise regarding trade in services and commercial aspects of intellectual property. This compromise, of Byzantine complexity, is inconsistent with a Treaty that is generally drafted in broad and comprehensible terms. It is wholly at odds with the stated determination of its authors that the European institutions 'must be brought closer to its citizens'. Although ten Member States have now ratified the Treaty of Nice it is some way off entering into force, and on that basis elucidation will be left aside.[19]

VI. CONCLUSION OF CFSP AGREEMENTS

Article 24 of the Treaty on European Union as revised by the Treaty of Amsterdam gave the Council a new power to conclude external agreements with States and international organisations. Proposals at Amsterdam to give the Union express international legal personality were rejected, but Article 24 has given rise to a lively debate between those who argue that the Union has been accorded not only treaty-making capacity but implied legal personality and those who argue that treaty-making capacity is in substance exercised by the Council as agent for the Member States.[20] There are problems with the 'implied legal personality' approach—in particular as to how non-member parties to any agreement might secure redress. The European Union cannot be taken before the International Court of Justice, the European Court of Justice has no jurisdiction over CFSP agreements and there are no treaty provisions ensuring that the Union will accept responsibility for any obligations to be assumed or incurred.[21]

In April 2001 the Council concluded its first agreement under Article 24—an Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY.[22] The Union is named as the Contracting Party, strengthening the argument that the Member States have delegated treaty-making capacity to the Union.[23] The Treaty of Nice compounds the uncertainty. A new Article 24 would not expressly confer legal personality on the Union or address the question of potential responsibility. It would

[19] In Belgium, seven parliamentary assemblies must approve, and in Ireland a second referendum is required.

[20] See Wessel in *The European Union's Foreign and Security Policy*, c 7 and in 'Revisiting the International Legal Status of the EU' (2000), *EFAR*, 109; Neuwahl 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam' (1998), *EFAR*, 177. For the contrary positions see the UK Government's submission of an Explanatory Memorandum to Parliament after conclusion of Treaty of Amsterdam.

[21] Contrast Art 288 (ex Art 215) EC.

[22] OJ L 125, 5.5.2001. A similar agreement with the Former Yugoslav Republic of Macedonia (FYROM) concluded in September 2001 is in OJ L 241, 11 Sept 2001.

[23] Dashwood, in *Legal Issues of the Amsterdam* Treaty, says at p 220 that if the Union is expressed to be the party, 'there will no longer be any room for doubt about the intention of the Member States . . .' but also sets out several questions that are left unclear.

enable the Council to act by qualified majority where it could by qualified majority adopt internal measures on the issue in question or where the agreement envisaged would implement a joint action or common position. It introduces a number of questions beyond those arising from the Amsterdam text as to the legal effects of any agreement.

VII. ENVOI: FOR EUROPE'S CITIZENS

The provisions of the Treaty of Amsterdam on external relations effectively remedied most of the deficiencies in those of the Treaty of Maastricht. On the whole they are working well, though it is in the nature of most foreign policy that success is silent. The amendments set out in the Treaty of Nice in this area are unnecessary, confusing or both.

EILEEN DENZA*

III. LAW AND ENVIRONMENTAL GOVERNANCE IN THE EU

In December 1999, in Helsinki, the European Council requested the Commission 'to prepare a proposal for a long-term strategy dovetailing policies for economically, socially and ecologically sustainable development'. The Commission presented this proposal to the Gothenburg European Council in June 2001,[1] resulting in the launch of the European Union's strategy for sustainable development.[2] In keeping with the resolution that the annual spring European Council take on board responsibility for reviewing progress in developing and implementing the sustainable development strategy, and for offering further policy guidance to promote sustainable development, the Barcelona Presidency conclusions place emphasis upon the internal and external aspects of sustainable development, including the environmental dimension thereof.[3] Looking at these documents, it is readily apparent that the political profile of sustainable development has been raised over the last year, with the European Council coming to play an important leadership function. Looking more closely at these, and other core documents,[4] it is clear that the theme of environmental governance is very much to the fore, and that a number of strands emerge as crucial to European Union thinking in this respect. This short survey note will highlight a number of these strands, examining them within the framework of more general developments concerning 'governance' in the EU, and in particular in the light of the Commission's White Paper on governance

* University College London

[1] COM(2001) 264 final *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*.

[2] Presidency Conclusions, Gothenburg European Council, 15 and 16 June 2001, esp 4–8.

[3] Presidency Conclusions, Barcelona European Council, 15 and 16 Mar 2002, esp 27–39. See also the Commission's 'synthesis report' submitted to the meeting: COM (2002) 14/final, *The Lisbon Strategy— Making Change Happen*, esp 12–13 and 15–16.The global dimension currently enjoys a high profile in view of preparations for the World Summit on Sustainable Development, to be held in Johannesburg from 26 Aug to 4 Sept 2002.

[4] See, eg, COM (2001) 31/final, *On the sixth environment action programme of the European Community: Environment 2010: Our future, our Choice*.

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