EcoFuturum – Europe's Democratic Challenge

Actively Shaping European Environmental Policy

– Briefing Paper on the Draft Constitution for Europe –

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1 Introduction

In July 2003 the Convention on the Future of Europe presented the full draft Treaty establishing a Constitution for Europe,[1] with a view to its adoption and eventual ratification by the EU Member States. The draft builds on earlier texts produced first in October 2002, and then in February 2003, and is an impressive document bearing in mind the nature of the challenge and the limited timeframe.

The Inter-Governmental Conference (IGC) started at the beginning of October, and is to decide on the final form and content of the new European constitution. Though some Member States believe the Constitution should be pushed through in its current form, the IGC is unlikely simply to "rubber stamp" the text. Instead, some provisions of the draft will most probably be re-examined and eventually modified. If that does happen, it will present one last and important opportunity to improve the draft, from an environmental standpoint.

With this in mind, the following presents an analysis of the draft Treaty. The intention is to inform those involved, both directly and indirectly, in the IGC negotiations, of the environmental implications of the current draft and key opportunities for improvement.

2 Background

If adopted in its current form, the draft Treaty will replace the existing EU Treaties and merge the European Union and the European Community, creating one Union with a legal personality. The provisions of the existing Treaties would also be reorganised, and the Charter of Fundamental Rights formally incorporated within the constitutional framework (see insert).

Draft Constitution for Europe: the new structure

Having brought together, reshaped and reworked provisions in the existing European Treaties, the draft constitution now consists of the following four Parts:

- **Part I [no title]** – contains the definitions and objectives of the Union, a catalogue of "competencies", as well as basic provisions on the Union's institutions, the exercise of competence, finance and the democratic life of the Union;
- **Part II The Charter of Fundamental Rights of the Union** – formally incorporates the Charter into the Treaty, three years after it was finalised but only "welcomed" by the Member States;
- **Part III The Policies and Functioning of the Union** – contains the more technical provisions concerning citizenship, objectives and procedures for adopting legislation in both internal and external Union policies, details on the Union's institutions and

[1] CONV 850/03, dated 18 July 2003, see www.european-convention.eu.int/.

their role, and financial provisions;

- **Part IV Final Provisions** – defines the procedure for future amendments to the constitution, as well as the Union flag (circle of twelve golden stars on a blue background), anthem (Beethoven's Ode to Joy), motto (United in Diversity) and "Europe day" (9 May); and
- **Protocols** attached to the draft constitution, including the Protocol on the application of the principles of subsidiarity and proportionality, and one amending the Euratom Treaty.

Although this restructuring appears on the surface to be rather dramatic, to a large degree it represents no more than a simplification and codification of European primary law. Among the more substantive (and contentious) changes are those relating to the European institutions and instruments, both of which are being reformed in order to cope with a Union of 25 or more States. However, contrary to numerous press articles, the draft constitution does not represent a massive loss of sovereignty, or a transformation of the Union into a "European Super-state". Indeed, the new name – Constitution for Europe – arguably does little more than reflect the existing character of the Treaties.

3 Putting the environment into the Constitution

The first draft of Part I of the treaty presented in February 2003 raised alarm bells within Europe's environmental community. Having secured and then successively strengthened the Treaties' environmental provisions during the 1980s and 1990s, environmental interests were suddenly faced with a draft that represented a major step backwards. The response was an unprecedented level of Treaty-focused advocacy work, which led to the successful reinstatement of key aspects of the environmental *acquis communautaire.* The final draft constitution now contains the following main "environmental" provisions:

- **Union objectives:** Article I-3 now refers to all three aspects of sustainable development and states that the Union should work for a "high level of protection and improvement of the quality of the environment", thus maintaining the provisions currently contained in Article 2 of the EC Treaty. Fostering global sustainable development is also to be made an explicit objective of the Union's external policies, Article I-3(4), Article III-193(2).
- **Environmental integration requirement:** The provision on integrating environmental considerations within Community policy areas (currently in Article 6 EC Treaty), has been moved to Part III, Article III-4, where it sits alongside other "cross-cutting" provisions. While the prominent position at the front of the Treaty is lost, the requirement would apply to *all* Union policies (not just Community policies). A slightly stronger integration requirement is also contained in Part II, within the Charter of Fundamental Rights (Article II-37).

- **Environmental policies and objectives:** The environmental policy provisions currently set out under the "Environment Title" of the EC Treaty remain largely unchanged, but are now in Section 5 Article III-129 to 131. The main changes that have been put forward seek simply to clarify which measures require unanimous agreement in the Council.

Securing these provisions is a major achievement in itself, but further improvements are needed if the new constitution is to reflect the environmental imperative of the 21st century. Key weaknesses in the draft constitution can be found in several **policy** sections, notably those relating to transport, agriculture and fisheries, cohesion and common commercial policies. The opportunity has not been taken to widen the scope for **public access to justice** in environmental matters. The **Euratom Treaty,** whose primary aim is to promote nuclear energy, remains fundamentally unreformed. There is also no reference to the EU's **Sustainable Development Strategy**, nor the procedures for its development and regular review.

While environmental concerns will naturally focus on the core questions identified above, it is important to consider also the many strategic issues raised by the draft constitution, which could have an enormous impact on European environmental policy-making. These include the proposed new institutional architecture and instruments of the Union, application of the subsidiarity principle, the Union's external policies, as well as the procedure for future revisions of the constitution. Each of these topics remains controversial and is likely to be discussed during the IGC.

4 The Institutions of the Union

Suggesting changes to the Union's institutional set-up to ensure its functioning after enlargement was one of the most important and controversial tasks for the Convention. The final draft text foresees some major changes, including among others:

- the establishment of a semi-permanent President of the European Council;
- the creation of the post of Union Minister for Foreign Affairs;
- the reform of the Council, including a new Legislative and General Affairs Council and a new presidency system;
- limiting the number of fully-fledged Commissioners to fifteen; and
- extending the powers of the European Parliament.

Together these proposals could have serious implications for future European environmental policy.

4.1 The European Council and its President

The draft constitution suggests that the European Council, consisting of the Heads of State and Government, will elect a President by qualified majority for a term of two and a half years (renewable once), Article I-21. The President would:

- ensure the preparation of the European Council meetings, in co-operation with the President of the Commission;
- on the basis of the work of the General Affairs Council, drive its work forward; and
- ensure the external representation of the Union on common foreign and security policy issues, Article I-21.

The new post of European Council President now has widespread support, with apparently no Member State fundamentally opposed to its creation. The implications, from an environmental perspective, will depend on whether future presidents recognise the importance of environmental policy. This is particularly critical given the president's function of preparing the meetings of the European Council, which has a guiding role for all European policies and which has been instrumental in driving the EU Sustainable Development Strategy (SDS) and the Cardiff environmental integration process. The SDS and Cardiff commitments are only set out in conclusions of the European Council, and the European Council also has responsibility for their periodic review.

4.2 The Union Minister for Foreign Affairs

The Union Minister for Foreign Affairs, to be appointed by the European Council in agreement with the President of the Commission, would conduct the Union's common foreign and security policy. In this role, he/she would also chair the Foreign Affairs Council, Article I-23(2), and simultaneously, be one of the Vice-Presidents of the Commission responsible for handling external relations and for co-ordinating other aspects of the Union's external policies, Article I-27(3). The Minister of Foreign Affairs contributes to the development of a common European Foreign Policy.

Despite their multiple offices, the power of the Minister appears to be rather limited. He/she would have to carry out the foreign policy "as mandated by the Council of Ministers" which, consisting of the national Ministers of Foreign Affairs, will "flesh out the Union's external policies", Article I-23(2). Thus, despite "conducting" the Union's foreign policy, the Minister would nevertheless depend on the Council for its mandate.

In addition, the division of work between the Minister and the President of the European Council is less than clear. The Foreign Minister would be entitled to develop and conduct the foreign policy, as well as to represent the Union. The European Council President would need to ensure the external representation of the Union on common foreign and security policy issues "at his or her level", Article I-21(2). What is not evident is who would take decisions and who would be politically responsible. If the Minister of Foreign Affairs is to be mandated by the Council and entitled "to conduct" and "to carry out" the foreign policy, then the European Council President's role would be limited to a purely representative one. And yet it seems odd

that a Union Minister mandated by the European Council should be able to overrule the President of the *European* Council he/she was elected by.

4.3 The Council of Ministers

The draft Constitution formally establishes two different Council formations, notably:

- the Legislative and General Affairs Council – preparing for and following-up on European Council meetings, and adopting European legislation jointly with the European Parliament; and
- the Foreign Affairs Council – focusing on the Union's external policies.

Other formations of the Council are to be agreed by the European Council at a later stage. The number of Council formations was reduced in 2002 by amalgamating related policy domains within one Council. Although environment policy retained its own Council on that occasion, there is no guarantee that this will continue in the future.

4.3.1 The Role of the Legislative and General Affairs Council

Reflecting an idea of the Italian Vice-President of the Convention, Giuliano Amato, the draft constitution introduces a special Council formation - the Legislative and General Affairs Council - which is to perform two main tasks:

- in its general affairs function, preparing, in liaison with the Commission, the meetings of the European Council, and
- in its legislative function, enacting, jointly with the European Parliament, European laws and European framework laws, Article 23(1).

Legislative Council

The wording of the draft constitution makes it unclear whether the aim is to create a Legislative Council as such or whether it is just a name for the Council's role when acting as legislator. The Praesidium had initially wanted to counter the risk of overly specialised legislation, by ensuring more coherence and consistency between initiatives (CONV 477/03). The first proposal (CONV 691/03) was for a permanent ministerial representative to attend a Legislative Council, "assisted" by other ministers reflecting the business of the day. Faced with fierce opposition to this approach, the final draft text now requires national delegations to include "one or two representatives at ministerial level with relevant expertise, reflecting the business on the agenda".

The possibility that Member States always send the relevant sectoral Minister, comparable to the current practice, seems to be threatened for two main reasons. Firstly, a general representative would need to attend anyway, to handle the general affairs functions of the Legislative and General Affairs Council. Perhaps more importantly, the objective behind the creation of the Legislative Council was to seek continuity and to abolish the current rather sectoral system. If every sectoral Council

once in a while convened as a Legislative Council to adopt legislation in its field of expertise this would appear to undermine the continuity objective. Member States might therefore send, for example, their Minister for European Affairs as a "permanent" member, as well as other Ministers according to the business on the agenda.

The wording of the text is less than clear, but is certainly generating some concern, particularly since it could result in sectoral (including environment) Ministers being subordinated to European Ministers. If this were to happen, it would be crucial to identify who would be negotiating on behalf of the Member State. Though if ministers other than the “European Minister” were able to negotiate, this could again be argued to undermine the objective of increasing consistency.

Finally, the draft is inconclusive in terms of *how* the Legislative Council would ensure consistency. Merely adopting legislation and preparing the meetings of the European Council will not guarantee coherent and consistent policies emerge from the different Council formations. To fulfil this role, the Legislative Council would need powers to co-ordinate and supervise all other Council formations (see below).

General Affairs Council

The General Affairs Council would consist of the same ministers as the Legislative Council and would be responsible *inter alia* for the review of the EU Sustainable Development Strategy (SDS), since it is the focal point for co-ordinating its implementation. The existing General Affairs and External Relations Council (GAERC), partly due to its workload and heavy political agenda, has not adequately addressed “horizontal” issues such as sustainable development and environmental integration. Splitting the current GAERC into a horizontal General Affairs Council and a Foreign Affairs Council could contribute to strengthening its role and even compensate for the lack of a single presidency.

The Legislative and General Affairs Council’s role as joint legislator together with the European Parliament could turn out to be one of the most significant changes introduced by the Constitution. In its double function as Legislative and General Affairs Council, it is likely to sideline other Council formations, including an environment Council. It might therefore become more difficult to get environmental legislation adopted. On the other hand, the Legislative and General Affairs Council’s role of ensuring consistency could foster the integration of environmental protection requirements within other European policies and might therefore help to prevent European legislation that contradicts environmental EU objectives.

The issue of the Legislative and General Affairs Council will almost certainly be addressed by the IGC, with Member States clearly divided on the question. If it is

accepted, it could play a crucial role in future European policies, not only in relation to ensuring consistency in the Council, but also because it would prepare the European Council meetings.

4.3.2 The New Presidencies

One of the most "visible" structural changes set out in the draft constitution would be the abolition of the current system of six-monthly rotating Presidencies, to be replaced by rotating year-long Presidents of the other formations of the Council. These would exist in addition to the President of the European Council and the Union Minister for Foreign Affairs.

The Presidency of the Council of Ministers is to be held on the basis of "equal rotation" by Member State representatives for periods of at least one year, Article I-23(4). But what does "equal rotation" mean in this context? The draft text is rather elusive on this point, simply giving the European Council the task of establishing rules of rotation, Article I-23(4). In so doing, the European Council has to take into account the European political and geographical balance and the diversity of the Member States, Article I-23(4).

In principle, there are two options: a) to have different presidencies for the different Council formations; or b) to maintain the current system of one country assuming the presidency of the Council of the European Union as a whole, except the Foreign Affairs Council (see above). The latter option seems unattractive since this would result in Member States holding the presidency only every quarter of a century. Yet the former option raises the spectre of selecting "presidents" for each of the different Council formations, plus all the other European committees, including the influential Committee of Permanent Representatives. The easiest option may be to allow each Council formation to select its President from within its ranks (see COM(2003) 548 final), although it is not clear how an appropriate political or geographical "balance" would be ensured.

The new system could lead to different and perhaps even contradictory emphases in closely linked policy fields. This would appear to demand an even greater coordination role for the Legislative and General Affairs Council. Consistency at any one time, in so far as it exists, is currently ensured by the Presidency, and consistency *between* presidencies has been sought through the troika.

It is difficult to say what impact multiple Council presidencies would have on European environmental policy. Environmental policy initiatives could certainly lose the momentum previously injected by "green" presidencies, although the upcoming enlargement would potentially have led to large gaps between the historically most committed "green" presidencies. While the longer term and overarching role of the European Council President should provide some political and strategic guidance,

the President would not preside over the Council formations. As a consequence, the integration of environmental policy in other policy areas as promoted by the Cardiff Integration Process and the Sustainable Development Strategy might become more difficult, and the role of the Legislative and General Affairs Council all the more critical.

4.4 The European Commission

Controversial changes have also been proposed in relation to the European Commission. The College would in future consist of a President, the Minister of Foreign Affairs as one of its Vice-Presidents, and thirteen *European* Commissioners, ie 15 members, compared to the existing approach of at least one Commissioner per Member State (currently making 20 in all). The Commission President, selected as at present, would choose thirteen European Commissioners on the basis of an equal rotation system, Article I-25(3). These would be chosen from a list of names forwarded by each Member State. Non-voting, plain Commissioners, Article I-25, would come from the remaining Member States. In an EU of 25 Member States, this would mean ten non-voting Commissioners.

What distinguishes the two kinds of Commissioners seems to be membership of the College and the associated right to vote. The introduction of non-voting Commissioners demands a complex rotation system which will do little to simplify the institutional architecture, nor make the Union more transparent. In addition, as Romano Prodi has said, “No people of the Union deserve to be represented by a second-class Commissioner” (Speech/03/381, European Parliament, 3 September 2003). The proposed system would also increase the power of the President of the Commission, as he/she should have more influence over the selection of the voting and non-voting European Commissioners.

From an environmental perspective it will be of a crucial importance that environmental issues are fully reflected within the college, by making the environment Commissioner a voting member of the college. Otherwise, the consequences for EU environmental policy and the “greening” of sectoral policies could be very significant.

4.5 The European Parliament

The draft constitution suggests important changes to the powers of the European Parliament, extending co-decision to additional policy areas, including most aspects of agriculture and fisheries, regional development (after 2006), as well as giving it full budgetary control, Article I-19(1). The latter will certainly strengthen the role and weight of the Parliament within the Union.

The Parliament has in the past been noted for its relatively progressive stance on environmental issues, at least when compared to the Council. An extension of the

Parliament's co-decision powers could therefore be expected to make a positive contribution to European environmental policy, particularly in relation to agriculture and fisheries. However, there is no guarantee that decisions taken by the various committees and the Parliament as a whole will take on board environmental concerns. The likely approach of the Parliament is particularly uncertain given impending enlargement.

5 Reforming the Union's Instruments

Under the existing European Treaties, regulations, directives, decisions, recommendations and opinions of the Commission, Council and Parliament are among the main instruments available for the Union to act. Use is also made of a number of other instruments, some mentioned in the Treaty and some not.

The draft constitution seeks to reduce the number of instruments at the Union's disposal and to define these more clearly. "Directives" would thus be renamed "European framework laws", "regulations" would become "European laws"; decisions, recommendations and opinions would remain unchanged. The Convention also suggests the introduction of a "European regulation", a so-called "non-legislative" act of general application for the implementation of legislative acts, Articles I-32, I-34.

Furthermore, the Convention hopes to limit the number of instruments by urging the Council of Ministers and the European Parliament to refrain from adopting acts in a form that is not explicitly provided for in the Treaty. Whether the proposed reforms really lead to a simplification or improved transparency is questionable.

5.1 European Framework Law – more room for Member States?

As the main instrument in European environmental policy is the directive, a key question is whether the new European Framework Law would simply result in the renaming of directives or would actually change the character of such legislation.

Draft Constitution	**EC Treaty**
Article I-32(1) defines a European Frame-work Law as	According to Article 249 a directive
"a legislative act binding as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities *entirely free* to choose the form and the means of achieving that result",	"shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

The word "Framework" in itself suggests a strengthening of the framework character of this instrument, and implying a less prescriptive and detailed approach, leaving more room for Member States to decide how to achieve the agreed objectives. This

is strengthened by Member States being “entirely free” to choose the form and means of delivering the objectives. The name and wording of the new framework law thus underlines the desired character of the instrument, suggesting that framework laws should not contain binding provisions on the means and the forms of achieving the required result.

It is less clear what is meant by “means and forms”. Member States would appear to be free to choose how to organise themselves on a national level, for example, in relation to permitting procedures or the setting of air quality thresholds. But the stronger wording does not necessarily mean that instruments such as permits or environmental impact assessments could not be prescribed at EU level. It merely indicates that national authorities should have a wider margin concerning the implementation of these instruments.

Whether the new provision will stand in the way of very detailed framework laws that in fact do not leave the Member States much of a margin, remains to be seen. If the Commission were to interpret the new framework law in its strictest sense, then it might simply make greater use of the new European law (currently the regulation) that is directly applicable in all Member States or the new regulation.

5.2 Regulation – preventing or encouraging details?

The draft Constitution not only reforms existing instruments as described above, but also introduces a new form of instrument, to be called the regulation. The regulation is a non-legislative act, ie a binding act adopted by the Council or Commission alone, which provides further details for the implementation of European laws or framework laws. It can take the following two forms:

- **delegated regulation,** Article I-35 - to be adopted by the Commission to “supplement or amend certain non-essential elements of the European law or framework law”. The European Parliament and Council could potentially revoke the delegated powers or reject a delegated regulation, thus preventing its entry into force; or
- **implementing regulation,** Article I-36 – normally to be adopted by the Commission, in cases where uniform conditions for implementing EU acts are needed. No special procedure is outlined in the draft constitution but it is assumed that the “comitology” or similar procedure would be applied.

Two specific issues could arise in the context of these new regulations. The first concerns the way these measures are adopted. The new regulations would be adopted as “daughters” of a European law or framework law, and in environmental and other cases could involve elaborating controversial elements of the law. The result could be that key provisions are decided upon without involving either the European Parliament or the Council, and consequently without public participation.

The second issue concerns the “principle of implementation by the Member States.” The explicit mention of “non-legislative” or executive laws in the draft Constitution could lead to their more frequent use, thereby limiting Member States’ freedom to implement. This might have particular impacts at the sub-national level, since application of European measures often falls to local or regional authorities.

6 Application of the Principle of Subsidiarity

The subsidiarity principle – that measures be taken at the lowest appropriate level - was introduced into the European Treaties in 1987, in an attempt to limit the reach of Community legislation. The subsidiarity provisions have since been modified, most recently by the Amsterdam Treaty, which introduced a Protocol on subsidiarity and proportionality. Despite previous attempts to define the Principle, however, it has remained an ambiguous concept, not least because decisions regarding the “appropriate level” are often political in nature. This is also why the European Court of Justice (ECJ) has avoided giving an opinion or ruling on the Principle.

There have nevertheless been calls for better application of the Principle and, as a consequence, the draft constitution contains a revised Protocol on the *Application* of the Principles of Subsidiarity and Proportionality (PAPSP) (emphasis added). The monitoring requirements call for annual Commission reports on the application of the principle, but the innovative aspects relate to an *ex-ante* monitoring system involving national Parliaments, as well as an explicit role for the ECJ.

Under the proposed *ex-ante* monitoring system, the Commission would have to send its proposals to national Parliaments, in addition to the Council and the European Parliament. Any national Parliament or chamber of a national Parliament could then issue a reasoned opinion stating why it considered the proposal to be in conflict with the subsidiarity principle. Furthermore, where reasoned opinions represented “at least one third of all the votes allocated to the Member States’ national Parliaments and their chambers, the Commission shall review its proposal” (PAPSP, Paragraph 6). Each national Parliament would essentially have two votes, with one vote per chamber in the case of bicameral systems.

The Commission's review can either result in it maintaining, amending or withdrawing the proposal, the decision resting with the Commission. However, should Member States, national Parliaments or (in some cases) the Committee of the Regions decide that a legislative act does not comply with the principle of subsidiarity, they may bring their case before the ECJ.

The proposed system for monitoring the subsidiarity principle could result in the following:

- First and foremost, national Parliaments would take on a new role. Until now, national Parliaments influenced European decision-making primarily through

their own respective national governments. The new constitutional provisions would allow them to directly send reasoned opinions to the Commission, Council and European Parliament.

- The provisions would enhance the role of regional parliaments with legislative powers, which are to be consulted by national Parliaments where appropriate. This is reinforced by the Committee of Regions' right to bring actions on grounds of infringement of the principle before the ECJ. Furthermore, the second chamber of national Parliaments in some cases, such as in Belgium, France, Italy, Spain and Germany, represents regional and local interests.
- The introduction of the *ex-ante* system could undermine efforts to enhance the efficiency of EU decision-making, since national Parliament consultation would need to be co-ordinated and overseen. Additional demands would also be placed on national Parliaments, which may focus on subsidiarity questions to the detriment of other pressing issues. That said, their new role could lead to greater attention being given to EU affairs more generally.

The overall effect of these new provisions appears to depend largely on the ECJ's ability to rule on the principle of subsidiarity. The draft constitution has not made this any easier, leaving the definition of the principle unchanged. Even if ECJ involvement were limited, the explicit provision for national Parliament, Committee of the Region and ECJ intervention could act as a disincentive against "borderline" Commission proposals. If so, this could also have implications for the extent of environmental policy measures proposed and adopted by the EU.

7 External Relations

Although the draft constitution does not introduce extensive amendments relating to the EU's internal policies, it does suggest a series of new provisions relating to the objectives and methods to govern the EU's external relations.

The Union's objectives, according to the draft constitution, include upholding and promoting the Union's values in its relations with the wider world. Contributing to the sustainable development of the earth is among the more specific tasks, alongside free and fair trade, eradication of poverty, protection of human rights and strict observance and development of international law, Article I-3(4). These broad objectives are elaborated subsequently (Title V of Part III), under the heading "The Union's External Action". Here, the draft suggests that the Union should work for a high degree of cooperation in all fields of international relations, not least to foster sustainable development of development countries, and to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development, Article III-193(2).

These new objectives provide a strong basis for promoting the environmental dimension of EU external relations. It is, furthermore, emphasised that these objectives are to be pursued in the development and implementation of the different areas of the Union's external action, for example, trade but also the external aspect of policies such as agriculture, fisheries and transport. Indeed, the draft constitution explicitly demands consistency between external actions, and between external and internal action.

As is presently the case, the draft constitution contains separate provisions for implementing the common foreign and security policy, which is to cover, amongst others, "all areas of foreign policy", Article I-15(1). This matters because the method for adopting legislation under the CFSP differs from the standard method set out in the draft constitution, remaining predominantly inter-governmental in nature, and leaving little room for the Commission or Parliament. Thus, while the Union Minister can submit proposals to the Council in the field of the CFSP on the basis of a Council mandate, only a Commission mandate can result in proposals in "other fields of external action".

Drawing a line between foreign policy (under the CFSP) and other fields of external action is potentially problematic under the draft constitution. This is important not least because it would for the first time be possible for international agreements to be concluded under the CFSP, based on the Union's legal personality. It therefore appears possible, in principle, for international environmental agreements to be concluded on the basis of the CFSP, to the exclusion of key institutions and key actors.

For this reason in particular, the Union's external representation in CFSP related issues may take on greater importance, yet the draft constitution is, as noted above, rather unclear on this issue. The European Council President is to ensure the external representation of the Union – at their level - on issues concerning the CFSP, Article I-21(2), while the European Council as a whole is to identify the strategic interests and objectives of the Union, including both the CFSP and "other areas of external action". The Union "shall be represented by" the Union Minister, who will conduct political dialogue and shall express the Union's position in international organisations and at international conferences, Article III-197(2). The Union Minister would be responsible for coordinating other aspects of the Union's external action, Article I-27(3), and for ensuring consistency between the Union's external and internal actions, Article I-23(2) and Article III-193(3). It is evident, therefore, that both the Union Minister and the European Council President would be critical to ensuring not only appropriate external representation of the Union, but also coherence and complementarity between the Union's activities, including in relation to sustainable development and environmental protection.

The Union's competence to conclude an international agreement is exclusive "when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act", Article I-12(2). The last part of the phrase would appear to give the Union rather sweeping powers. However, it could be interpreted as being limited to those areas of exclusive competence listed in Article I-12(1), including the common commercial policy and "the conservation of marine biological resources under the common fisheries policy". Whether competence is exclusive or not, the draft constitution states that in future, the Union's international negotiator would be nominated by the Council. Under existing arrangements, it is the Commission that negotiates on behalf of the Community. Under the constitution it remains unclear who is going to negotiate. Moreover, the Council would adopt a decision to sign or approve an agreement "on a proposal from the negotiator". If this were to happen, efforts would need to be made to ensure Union negotiators were fully cognisant of the cross-cutting policies of the Union, so that consistency and coherence with other policies could be ensured.

8 Looking Ahead to Future Treaty Amendment

The draft constitution does not simply restructure and amend the substantive provisions of the existing Treaties, but also suggests new procedures for amending the Treaty itself.

Any national government, the European Parliament or the Commission would, according to the draft constitution, be entitled to submit proposals to amend the constitution, Article IV-7(1). If the European Council decided, by simple majority, that these proposals warranted further examination, it would need to convene a convention to recommend changes for the Inter-Governmental Conference (IGC) to discuss and eventually adopt, Article IV-7(1). Like the Convention on the Future of Europe, future conventions would consist of representatives of the Commission and the European Parliament, as well as national Parliaments and Governments of the Member States, Article IV-7(2). Final amendments to the constitution would enter into force following signature and ratification by every Member State, as at present.

Although there is much to recommend the Convention method, it may not be desirable when only relatively minor changes are being sought. The draft constitution therefore allows for the possibility of going directly to an IGC in cases where amendments do not justify a Convention. Such a "fast-track" procedure would need to be agreed by consensus with the European Parliament.

This two-track approach essentially establishes the Convention as the normal procedure for amending the constitution. The effect would be to make the process more transparent, with discussions and negotiations largely held in the public domain, rather than behind closed doors as is characteristic of the IGCs. The fact that parliamentarians are directly involved also serves to strengthen the democratic

nature of the process. At the end of the day, however, all depends on whether the 2003 IGC does in fact observe the recommendations of the Convention in this regard.

9 Conclusions

The IGC negotiations over the coming months will be of great importance for environmental interests, as well as those concerned with broader European affairs. To date, much emphasis has rightly been placed on securing the “sustainability” language at the beginning of the draft constitution, and the environmental integration requirement. There is now also a growing debate about the European policies set out in Part III, with recent Commission proposals calling for stronger environmental language in these areas. This work is important but it may simply prove too difficult for the IGC to re-open these sections. Meanwhile, there is a danger that some of the most important implications of the draft constitution arising from the new institutional arrangements could be neglected. These issues are very much on the agenda and those concerned with the environment need to be closely engaged with them. They may not at first sight appear so relevant, but in fact have crucial long-term implications.

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