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**The Process of Ratification of the Constitutional Treaty and the
Crisis Options: A Legal Perspective**

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The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective

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I. The Emergence of the Notion of a 'Ratification Crisis'

As the work of the Convention progressed, and as the Intergovernmental Conference was struggling to turn the Convention's Draft into a commonly agreed Treaty text, the political attention came to be drawn to the conditions under which the Constitutional Treaty would enter in force and effectively fulfil the grand ambition of replacing the existing wordy and complicated Treaties with a reorganized and improved fundamental document. The text prepared by the Convention and adopted by the IGC contains a gigantic but unavoidable gamble caused by the fact that the entry into force of the Constitutional Treaty is subject to the same rigid legal conditions as the Treaties of Maastricht, Amsterdam and Nice before. Since the new Treaty is an amendment of the existing EC and EU Treaties (the Constitutional Treaty aims to repeal those treaties, but a repeal is just the extreme form of amendment), the revision procedure described in Article 48 EU necessarily applies. In accordance with Article 48, the new Treaty will only enter into force, *normally speaking*, if approved by *all* the member state governments in the framework of an IGC (which is now done), and if ratified by *all* states according to their constitutional requirements (which remains to be done). The latter requirement multiplies the chances of an *accident de parcours*

comparable to, or worse than, what happened with the Treaty of Maastricht in Denmark and with the Treaty of Nice in Ireland. Indeed, the question of what would happen if all member state governments approve a revision treaty, but one of the countries is unable to ratify it, arose already for the Maastricht Treaty, after the first Danish referendum, and for the Nice Treaty, after the first Irish referendum. In neither of these two cases did the other member states, or the EU institutions, officially argue that the other member states could go ahead without the recalcitrant state. They managed to find a 'soft law' solution which did not modify the agreed text but enabled these two countries eventually to approve the revision treaty in a second referendum, so that the EU legal rules for entry into force were entirely respected.

This time around, the argument that the majority of states should be able to go ahead with a Treaty revision even in the absence of some countries' ratification has been openly made, on three different occasions: during the work of the Convention, after the European Council of December 2003 that failed to conclude the IGC, and after Tony Blair's announcement that the United Kingdom would submit the Constitutional Treaty to a referendum. I will briefly review the political considerations made on those occasions and then explore, in a second part, the legal scenarios that would be available in case a ratification crisis actually happened.

Before looking at the most recent debates, it may be useful to recall an earlier example of a 'plan B', namely that proposed in the European Parliament's draft Treaty on European Union in 1984. This document sought to by-pass the EEC Treaty revision procedure by claiming that the new Treaty would be a fresh start setting up an entirely new organization.¹ Its Article 82 provided that the proposed Treaty on European Union would enter into force if ratified by a majority of member states representing two-thirds of the total population,² but it remained silent on what would happen if the non-ratifying states refused to accept the creation of this new organization and insisted on the preservation of the existing framework of the European Communities. As we know, the question remained entirely hypothetical at that time, because the member state governments ignored the Parliament's Draft and set out to revise the Treaties according to a traditional intergovernmental conference providing for universal ratification of the revision treaty by all states. This traditional

¹ See J.P. Jacqué, 'The Draft Treaty Establishing the European Union', *Common Market Law Review* (1985) 19, at pp. 40-41.

² See R. Corbett, *The European Parliament's Role in Closer EU Integration* (1998), at 170-172.

method was not only successful then in 1986 (with the adoption of the Single European Act) but was equally successful, formally at least, on three successive occasions, with the Treaties of Maastricht, Amsterdam and Nice. The fact that, each time, all member states could eventually be kept on board, prevented a full-fledged confrontation with the non-ratification problem.

However, in the Draft Constitution adopted in 1994 by the Institutional Affairs Committee of the European Parliament, but not formally by the EP itself (the so-called ‘Herman report’), it was stated, in Article 47, that those States failing to ratify the Constitution ‘shall be obliged to choose between leaving the Union and remaining within the Union on the new basis. Should one of these States decide to leave the Union, specific agreements shall be concluded, designed to grant it preferential status in its relations with the Union.’³ This idea resurfaced in the course of the constitutional Convention of 2002/3. Whether it was because of the large increase of national ‘veto players’ after the latest enlargement, or because of the ambitious nature of the Convention’s work which seemed likely to cause parliamentary or popular opposition in one or other country, the fact is that already during the Convention’s life a current of opinion developed that advocated a circumvention of the rigid amendment rules fixed by Article 48 EU Treaty. One of the expressions of this unorthodox view was an editorial comment of Ferdinando Riccardi in *Bulletin Quotidien Europe* of 29 October 2002, in which he wrote that the Convention must affirm that ‘the constitutional treaty will not need the ratification of all Member states to take effect between countries having approved it, as long as the latter represent a very high percentage (yet to be defined) of the total.’ He added: ‘It is indeed unthinkable that future Europe’s essential project, and two years of negotiations, can end up in the “dustbin of history” because at the last hour the Parliament of a small country changes its mind, or because the Labour Party returns to power in Malta (...)’.

Several of the private draft-Constitutions presented during the Convention’s work made the same point. Thus, for example, the Draft Constitution presented by the European Policy Centre stipulated, in its Article 77, that it would enter into force if supported ‘by three quarters of the Member States of the Union representing 75% of the population according to their own constitutional requirements.’⁴ This view was shared by some central actors of the European constitutional debate. Giscard

³ OJ 1994, C 61/155.

⁴ <http://www.theepc.be/Word/EUconst.doc>

d'Estaing himself was quoted⁵ as agreeing with it, and to have offered the following tentative justification: 'The probability is that of 25 or 27 member states [after EU enlargement] 23 would accept [the constitution] and two or three will refuse. (...) We have to abrogate the treaties that exist. If a country says that it does not like the new treaty, there's no existing structure for them to cling to, they cannot seek refuge in the old agreement.' So, in his view, the enactment of an ambitious constitutional treaty would be some kind of *refoundation* of the project of European integration rather than a *revision* of the existing Treaties. He reiterated this view more recently, stating ominously that if a large majority of the citizens of Europe and of the member states approve the Constitution, problems will arise for the states that refused to ratify it, and not for the Constitution itself.⁶

References to this question could also be found in documents of the European Parliament and the European Commission. In the *European Parliament*, a motion for a resolution presented by rapporteur Jean-Louis Bourlanges proposed the following new rule, which was similar to what was proposed in the EPC Draft Constitution:

'The ratification procedure should be revised with a view to ensuring that a small minority cannot block the ratification of the future constitutional treaty – for example, ratification could be secured by a dual qualified majority comprising at least three-quarters of the Member States representing at least three-quarters of the Union population – even if, in return, specific forms of cooperation must be negotiated with any Member State which does not ratify the Treaty.'⁷

However, this particular paragraph of the motion for a resolution was deleted by a vote of the plenary in its December 2002 session, and the resolution as adopted by the European Parliament does not refer at all to the question of entry into force of the Constitutional Treaty.⁸

As for the *European Commission*, its official contribution to the Convention simply argued that entry into force is 'a matter to be studied in depth'.⁹ However, the

⁵ *Financial Times*, 11 November 2002, p.4.

⁶ V. Giscard d'Estaing, 'Vite, la Constitution de l'Europe!', *Le Monde*, 10 July 2004.

⁷ *Report on the typology of acts and the hierarchy of legislation in the European Union* (rapporteur: Jean-Louis Bourlanges) of 3 December 2002, Motion for a resolution, point 5.

⁸ Amendment tabled by S.-Y. Kaufmann MEP and adopted by 266 in favour, 236 against and 4 abstentions (see *Agence Europe* 19 December 2002, p.4).

⁹ European Commission, *For the European Union – Peace, Freedom and Solidarity. Communication of the Commission on the Institutional Architecture*, COM(2002) 728 of 5 December 2002, at p.22.

accompanying Draft Constitution of the same day (commonly known as ‘Penelope’) – which emanated from the Commission but was emphatically presented as *not* being the Commission’s official opinion – made an elaborate proposal to facilitate the entry into force of the Constitutional Treaty.¹⁰ Indeed, this is certainly the most sophisticated construction ever made in order to circumvent the unanimity rule for Treaty revision. The Penelope document proposes that the adoption of the ‘Treaty on the Constitution’ (as they call it) be accompanied by the simultaneous adoption of a separate short treaty called *Agreement on the Entry into Force of the Treaty on the Constitution of the European Union*. The sole purpose of this additional agreement would be to facilitate the entry into force of the Constitutional Treaty. The additional agreement, although adopted at the same time, would be ratified first, so that it could pave the way for the Constitutional Treaty. That Treaty would only enter into force one year after the additional agreement. The purpose of this delay is to allow each single member state, when ratifying the additional agreement, to express a choice between either accepting the content of the Constitutional Treaty, or (while not accepting it) leaving the European Union if the Treaty is accepted by three-quarters of the member states. If, at the end of the transitional year, it appears that at least three-quarters of the states have indeed made the positive statement of acceptance, then the Constitutional Treaty enters into force between them and the other states comply with their earlier commitment of leaving the EU, while starting negotiations with the EU on the organisation of their future relations.

However, the rub with this ‘gentle exit strategy’ is that, as the Penelope study accepts, the preliminary agreement should itself be agreed upon and ratified by all member states before it can enter into force and effectively replace the current revision procedure of Article 48 EU. It seems quite likely, though, that a member state opposed to the *content* of the Constitutional Treaty would also refuse to ratify an agreement that is designed to facilitate the *entry into force* of that Constitutional Treaty, particularly if that could imply that it would be ‘kicked out’ of the European Union. Therefore, the Penelope group also included a last resort clause: if by a given date, the preliminary agreement has been ratified by at least five-sixths of the member states (so, presumably, 21 out of 25 states), then it will enter into force for all, disregarding the normal ‘overall ratification’ rule. So, when all is said, the Penelope

¹⁰ *Penelope* can be found on http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf

Study *does* affirm the need to adopt the ‘constitutional rupture’ approach, that is, the right for the overwhelming majority of states to move ahead with a Constitutional Treaty even against the opposition of up to four countries.¹¹

The Penelope mechanism was not inserted in the Draft Treaty proposed by the Convention in July 2003. However, when the Intergovernmental Conference, at the Brussels European Council meeting of December 2003, failed to reach agreement on the text of a draft Constitutional Treaty, the President of France immediately recalled the idea of a two-speed Europe, in which a pioneer group of countries led by France and Germany would show the way to the others. That pioneer group could set out to achieve the ambitious objectives of the draft Constitutional Treaty proposed by the Convention on the Future of the Union, in the absence of an agreement by all twenty-five national governments.¹² Approving noises could be heard from the side of the German and Belgian governments. Strictly speaking, this was not a scenario for a ratification crisis, but a scenario for an ‘adoption crisis’. Already in the Spring of 2004, when agreement on the Treaty became likely again, France and Germany had buried any thought of setting in place a vanguard group. However, the prospect of a ratification crisis became very real again once Tony Blair announced, in April 2004, that the Constitutional Treaty would be submitted to a referendum in the United Kingdom and opinion polls indicated that, if the referendum were to be held then, it would result in an overwhelming ‘No’. As more and more countries announced that they would hold a referendum as a binding or consultative part of their national ratification process, the likelihood of a ratification crisis increased further. By the time final agreement on the Constitutional Treaty was reached, in June 2004, it was at the front of all European Council members’ minds, but it found only a feeble reflection in the texts which they agreed at the Brussels summit.

¹¹ The Penelope document argues (at p.XII) that insertion of this ‘last resort’ clause would itself require the agreement, at the time of *signature* (as opposed to ratification) of all the governments and would therefore be a departure from Article 48 EU that would be compatible with international law (because all states would agree to substitute one revision rule by another). But, apart from the fact that overall agreement to include such a clause seems politically very unlikely, the replacement of Article 48 through an agreement between *governments* (without national parliamentary approval) would be in clear violation of the constitutional law of most member states.

¹² For references to this aspect of the Brussels summit and some immediate reactions, see ‘Support for two-speed Europe gathers momentum’, *Financial Times*, 15 December 2003; ‘Après le fiasco de Bruxelles, Paris relance l’idée d’une Europe à la carte’, *Le Monde*, 16 December 2003; ‘Dutch lead criticism of two-speed Europe plan’, *Financial Times*, 16 December 2003; H. Grabbe, ‘The siren song of a two-speed Europe’, *Financial Times*, 16 December 2003; ‘Who killed the constitution?’, *The Economist*, 20 December 2003; P. Ponzano, ‘Après l’échec du Sommet de Bruxelles: Constitution européenne ou coopérations renforcées?’, *Revue du Droit de l’Union Européenne* (2003) 549.

That feeble trace is the intriguing Declaration nr 30 *on the ratification of the Treaty establishing a Constitution for Europe* (to be annexed to the Final Act of the IGC)¹³: ‘The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.’ At one level, this Declaration only states the obvious, namely that the European Council deals with any serious problem arising in the path of European integration. But at another level, it expresses the hope that, if such a situation will occur, the European Council will be able to devise a cunning plan to save the Constitutional Treaty despite the opposition expressed in some parts of the Union’s territory.

Let us now assume that something indeed ‘goes wrong’ during the national ratification phase, in the sense that one or more member states have ‘difficulties’ with the ratification process, because (presumably) the treaty has been rejected in a referendum. For now, the most likely candidate for causing such difficulties is the United Kingdom, but since its referendum is scheduled only for 2006, it is quite possible that a ratification crisis may erupt earlier due to other countries: Denmark or Ireland (the earlier culprits), or perhaps the Czech Republic, or France, or Poland, or the Netherlands. In view of the volatility of national electorates, there are in fact plenty of unknown national political constellations as regards the coming referendums. One of the questions arising then is which legal scenarios are available, under the present rules, for dealing with such a ratification crisis.¹⁴

¹³ To be found, for now, in CIG 87/04 ADD 2 of 6 August 2004. The Declaration corresponds, practically word for word, to what the Convention itself had proposed in an annex to its Draft Treaty.

¹⁴ For an earlier discussion of such scenarios, see E. Philippart and M. Sie Dhian Ho, ‘Flexibility and the New Constitutional Treaty of the European Union’, in Pelkmans, Sie Dhian Ho and Limonard (eds), *Nederland en de Europese grondwet*, Amsterdam University Press (2003) 109, at p.137 ff. See also L.S. Rossi, *What if the Constitutional Treaty is not Ratified?*, EPC Commentary, 30 June 2004 (www.theepc.net, click on ‘Political Europe’).

II. The Legal Scenarios for Dealing with a Ratification Crisis

1. Some Legally Unavailable Options

a) Partial Entry into Force and Creation of an ‘Enhanced Union’

It is by no means unusual for universal treaties to be subject to ratification in all participating states. The danger of excessive rigidity is, however, often countered by the fact that those treaties provide for their entry into force after a certain number of parties have ratified, with the other states having the option of joining the first group later on in the life of the treaty. So, for example, the Montego Bay Convention on the Law of the Sea entered into force after 60 ratifications had been lodged (12 years after its signature), the Vienna Convention on the Law of Treaties required 35 ratifications for its entry into force, which happened 11 years after signature, and the Rome statute on the International Criminal Court came into force after 4 years, upon the 60th ratification.¹⁵ It is therefore accepted, in international law, that many treaties remain ‘limping’ for many years after their adoption.¹⁶

Would this be feasible for the Constitutional Treaty? Would it be possible for the willing states to forge ahead with the Constitutional Treaty, and create an ‘enhanced Union’ between themselves, while remaining parties, together with the unwilling states, of the old European Union and European Community? It is clear, on a moment’s reflection, that such an option is not feasible for the European Treaties. European revision treaties deal with an organization that already exists, comprising member states who have existing rights and obligations. Allowing for the partial ratification of a revision treaty (such as the Constitutional Treaty) would lead to different circles of members, some bound by the new rules and others by the old rules. The EU institutions could not function under the new rules and the old rules simultaneously,¹⁷ so the revision must necessarily apply to all states or to none of them. The intermediate option of partial entry into force is not available.

¹⁵ I take these figures from P. Tavernier, ‘Comment surmonter les obstacles constitutionnels à la ratification du Statut de Rome de la Cour Pénale Internationale’, *Revue trimestrielle des droits de l’homme* (2002) 545, at pp. 547-8.

¹⁶ The expression is used, and the phenomenon described, by A. Aust, ‘Limping Treaties: Lessons from Multilateral Treaty-Making’, *Netherlands International Law Review* (2003) 243.

¹⁷ For some examples of this ‘impossible cohabitation’ between the old and the new system, see L.S. Rossi, *op.cit.*, at p.3.

b) Refoundation

If a coexistence of the old and the new is impossible, could the argument not be made that signature of the Constitutional Treaty leads to the abolition of the old European Union, and ‘refounds’ the Union on an entirely new basis through the Constitutional Treaty? Since the old regime is cancelled, the non-ratifying countries have nothing to hang on and exclude themselves from the EU system, so to speak. It is clear, I think, that this reasoning reverses the legal reality. In fact, the states who want to move ahead have nothing to hang on as long as the new Treaty has not properly entered into force in accordance with the rules of Article 48 EU. The repeal of the old Treaties presupposes, and is preceded by, the entry into force of the new Treaty, not the other way round.

It is true that the Vienna Convention on the Law of Treaties allows for some of the parties to a treaty to decide to adopt another treaty modifying the first, without the participation of the other original state parties (a so-called *inter se* modification). However, this is only allowed if that modification does not affect the rights that the non-participating states draw from the original treaty. This is obviously not the case for the Constitutional Treaty whose enactment unavoidably affects and modifies the existing rights of all the EU members. Therefore, under the current rules of Article 48 EU, all the member states must give their agreement to the changes.

2. The ‘Nice Plus’ Scenario

The most orthodox scenario in the case of a clear failure by one or more member states to ratify the Constitutional Treaty is that the European Council acknowledges that the Constitutional Treaty will not enter into force and that the relations between the member states (and the legal position of the EU institutions and the citizens) will continue to be governed by the EC and EU Treaty as last amended by the Treaty of Nice and the Accession Treaties. The European Council would be free to set in motion, immediately, a new Treaty revision process starting from scratch (which, obviously would be governed by Article 48 EU Treaty and not by the new revision clause provided by the Constitutional Treaty). In the mean time, there would be ample scope for tinkering with the current post-Nice Treaty regime, so that the contents of

the Constitutional Treaty need not be completely dropped. This could be done in, essentially, two different ways: through application of parts of the Treaty by means of secondary law or mere institutional practice, and through the use of forms of closer cooperation.

a) Informal Application

With ‘informal application’, I mean the application of some of the institutional or substantive rules contained in the Constitutional Treaty without basing it on the formal authority that would have resulted from the entry into force of that Treaty. Today, we are already familiar with this phenomenon with regard to one important part of the Constitutional Treaty, namely the second part containing the text (with minor modifications) of the Charter of Fundamental Rights. This part of the Constitutional Treaty is already being applied by the political institutions of the Union (who committed themselves to do so when solemnly proclaiming the Charter in December 2000) and its content is effectively being used by the European Courts, although formally they continue to apply those rights as ‘general principles of Community law’. A recent example of the formal enactment of a Constitutional Treaty innovation under current law is the establishment of the European Defence Agency.¹⁸ More generally, a number of innovations contained in the Constitutional Treaty that are not incompatible with the present Treaties could be enacted. For example, the role of national parliaments could be enhanced by a combination of reforms in national laws and inter-institutional agreements between the EU institutions. The inter-institutional agreement is a legal instrument that has been used repeatedly in the past to anticipate later Treaty reforms, and could be used again to achieve a variety of reforms proposed in the Constitutional Treaty. The states could, similarly, agree among themselves to forego the use of their veto power in areas in which the Constitutional Treaty replaces unanimity by qualified majority voting. The Ioannina Agreement of 1995 can be invoked as a precedent of an agreement between states dealing with the exercise of their voting rights in Council.

¹⁸ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004, L 245/17. Recital 6 of the Joint Action mentions that the Agency ‘is also envisaged in the draft Treaty establishing a Constitution for Europe’.

Obviously, such informal applications of the Constitutional Treaty would require the agreement of all the member states. The government of a country that failed to ratify the Constitutional Treaty would have to tread with particular care for domestic constitutional and political reasons. And of course, informal application of an un-ratified Constitutional Treaty would increase even further the present opacity of the EU system, and therefore run counter to one of the main objectives which the Constitutional Treaty was set to achieve, that of increasing simplicity and transparency.

b) Closer Cooperation

The consequences of a ratification debacle could also be faced through increased recourse to forms of closer cooperation, both inside and outside the European Union system.¹⁹ The *enhanced cooperation mechanism*, which exists since the Treaty of Amsterdam but has remained unused, could operate in order to perform one of its original aims, namely to allow ‘willing and able’ member states to pursue deeper integration without passing through an intergovernmental conference.²⁰ In using the enhanced cooperation mechanism, the pro-Constitution states would be constrained by the numerous rules and conditions set by the Nice Treaty (even though that treaty relaxed the even more stringent rules set by the Amsterdam Treaty).²¹ First, the Nice Treaty would not allow the ‘pioneers’ to select the members of the club, since enhanced cooperation regimes must be open to all states who wish to participate. Secondly, the Nice rules require enhanced cooperation initiatives to be taken by at least eight countries, so that for instance an initiative of the six original member states of the EC would not qualify. Thirdly, the Nice rules do not allow for enhanced cooperation in areas that are outside EU competences as defined by the Nice Treaty, and also expressly prohibit enhanced cooperation with military or defence

¹⁹ For some stimulating recent reflections on this, see F. Dehousse, W. Coussens and G. Grevi, *Integrating Europe: Multiple Speeds – One Direction?*, EPC Working Paper No. 9, April 2004; and E. Philippart and M. Sie Dhian Ho, op.cit.

²⁰ A. Stubb, *Negotiating Flexibility in the European Union. Amsterdam, Nice and Beyond* (2002), at p.165.

²¹ For comments on the enhanced cooperation rules as reformed by the Treaty of Nice, see J. Shaw, ‘Enhancing Cooperation After Nice: Will the Treaty Do the Trick?’, in M. Andenas and J.A. Usher (eds), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform* (Hart, 2003), 207; H. Bribosia, ‘Les coopérations renforcées au lendemain du Traité de Nice’, *Revue du Droit de l’Union Européenne* (2001) 111; L.S. Rossi, ‘Cooperazione rafforzata e Trattato di Nizza : quali geometrie per l’Europa allargata?’, in A. Tizzano (ed), *Il Trattato di Nizza* (Giuffrè, 2003) 41; F. Tuytschaever, ‘Nauwere samenwerking volgens het Verdrag van Nice’, 11 *SEW* (2001) 375.

implications. This means, for instance, that the Nice mechanism could not be used for the ambitious new defence policy delineated in the draft Constitution.

Hence, in view of the restrictions imposed by the Nice regime for enhanced cooperation, the states wishing to move ahead in accordance with the content of the Constitutional Treaty could also launch forms of cooperation between smaller groups of member states *outside the EU institutional framework*. I have examined the legal issues raised by such partial agreements in another publication.²² *Inter se* international agreements between two or more member states of the EU are allowed, but only within the limits set by EU law obligations. Briefly said, this means that such agreements may not be concluded in areas of exclusive EU competence (e.g. in the field of trade or monetary policy), that they may not affect the normal operation of the EU institutional mechanisms (in view of the duty of sincere cooperation) and that they may not include any provisions that conflict with EU law or undermine existing EU policies, e.g. by discriminating on grounds of nationality in favour of citizens of some member states only. If, for instance, Belgium and Germany conclude a cultural cooperation agreement on the basis of which they grant education scholarships to each other's nationals, then the citizens of the thirteen other member states of the EU are excluded from the benefit of such a scholarship. This is in breach of EC law to the extent that citizens of other member states, residing in Belgium or Germany, may not apply for a scholarship.²³

Intergovernmental cooperation between a limited number of member states of the EU is thus perfectly possible, but membership of the EU imposes certain legal constraints on the scope and content of such cooperation. The formation of a true core group, adopting binding laws in a large range of crucial policy areas, is hardly imaginable because it would unavoidably affect the rights which the other member states and their citizens have under current EU law. Even a more limited regime of extra-EU closer cooperation, restricted for example to the area of defence, would have the negative side-effect of creating political fragmentation between member states, and of undermining the institutional balance.²⁴ It would also add to the complexity

²² B. de Witte, 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU – From Uniformity to Flexibility?* (Hart, 2000) 31. See also the study by L.S. Rossi, *Le convenzioni fra gli Stati membri dell'Unione europea* (Giuffrè, 2000).

²³ These are the legal facts of the *Matteucci* judgment of the ECJ (Case 235/87, *Annunziata Matteucci v Communauté française of Belgium et al.*, [1988] ECR 5589).

²⁴ This aspect is highlighted, from a Commission perspective, by P. Ponzano, *op.cit.*, at p. 554.

and opaqueness of the EU system and reduce the scope for democratic control of the decision-making process.

3. Voice: The Renegotiation Scenario

Rather than admit defeat and proceed on the basis of the Nice Treaty, the European Council could also decide to face the misgivings emerging from a ratification crisis in one or more countries, while trying to keep the Constitutional Treaty alive. This is the 'voice' scenario, in which the views of the dissenters are taken into account by the supporters of the Constitutional Treaty with a view to achieve a mutually acceptable compromise.

The first option is to try to accommodate the dissenting state (or its dissenting electorate) within the bounds of the Constitutional Treaty as agreed by all governments at the IGC. This is, in fact, what happened after the unsuccessful Danish and Irish referendums earlier on. The diplomatic 'dialogue', in those two cases, was not aiming at a modification of the treaty as signed, but at a separate legal or political agreement that could pave the way for a second referendum on that same treaty.²⁵ In the case of Denmark, this separate agreement was the Decision on Denmark approved during the European Council meeting in Edinburgh (December 1992), which was presented as a binding legal document, and therefore can best be qualified as an international agreement in simplified form.²⁶ It did not purport to modify the Treaty of Maastricht, but only to offer a particular interpretation of it. However, it is undeniable that the Decision on Denmark has cast its shadow on the European Union: it is directly responsible for the complicated and almost unworkable Protocol on Denmark agreed in connection with the Treaty of Amsterdam, and the Constitutional Treaty, again, contains a special Protocol on Denmark as well as a Declaration on that Protocol. So, one cannot deny that the negative Danish referendum in 1992 has affected every other state as well and has made the European Union more complicated

²⁵ See also the reflection on the legal ways of dealing with the Irish case, based on an analysis of the earlier Danish case, by W. Hummer and W. Obwexer, 'Irlands "Nein zu Nizza"; Konsequenzen aus dem negativen irischen Referendum vom 7. Juni 2001', *Integration* (2001) 237.

²⁶ See, on this legal qualification, A. Dashwood, 'States in the European Union', *European Law Review* (1998) 201, at p. 203; D. Curtin and R. van Ooik, 'Denmark and the Edinburgh Summit: Maastricht without Tears', in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994) 349, at 353-358.

than it would have been otherwise. The effects of the first Nice referendum in Ireland are much less visible at EU level. Common action at the European level took the form of two Declarations made at the European Council meeting of Seville (the ‘Seville Declarations’),²⁷ one by the Irish government and one by the European Council as a body. Both stated that the Treaty of Nice would not prevent Ireland from preserving the essence of its neutrality despite the development of a common security and defence policy. However, the neutrality question was arguably not the central concern for most no-voters, and the main measures to convince the electorate to approve the Nice Treaty in a second referendum were taken at the domestic level, namely the creation of a National Forum on Europe, and the strengthening of national parliamentary control mechanisms on Irish EU policy-making.²⁸

The question whether the Danish or Irish scenario could be repeated this time, in the case of a ratification crisis, depends very much on the circumstances. On those previous occasions, the crisis was caused by one single state, that happened to be a small state, and after rejection of the Treaty by a rather small margin of votes. If, this time, the Constitutional Treaty were to be rejected in a large member state, or in more than one state, or by a huge majority of the electorate, then an easy accommodation would be more difficult. What one could envisage, then, is a true *renegotiation* of the Constitutional Treaty, trying to accommodate the concerns that provoked its rejection in one or more countries (provided one can identify such concerns with sufficient precision) by modifying its text. Since the Constitutional Treaty will come into legal existence upon its signature, renegotiation means drawing up another treaty that would replace the Constitutional Treaty as well as revise the current EC and EU Treaties. That new treaty could either, if the disagreement relates to specific policies, provide opt-outs for the recalcitrant state(s) without modifying the content for the other states, or, if the disagreement relates to the general principles or the institutional reforms, it would change the relevant rules for all.

All states would then have to lodge a new act of ratification in the international law sense, but they would not necessarily have to repeat the entire national ratification process preceding that act. In particular, if the original Constitutional Treaty had already been approved by a referendum in country X, that

²⁷ Annexes III and IV to the Presidency Conclusions of the Seville European Council, 21 and 22 June 2002.

²⁸ See B. Laffan, *Ireland and Europe : Continuity and Change*, Notre Europe, Research and European Issues No. 30, December 2003, at pp. 22-26 (www.notre-europe.asso.fr).

country would not necessarily have to organize another referendum for Constitutional Treaty-mark II. All would depend on the nature of the changes made to the original text (whether a mere opt-out for the dissenters or more), in the light of national constitutional requirements and national political dynamics.

The delay involved in all this could be mitigated, possibly, by resorting to the *provisional application* of the Constitutional Treaty as originally agreed at the IGC. According to Article 25 of the Vienna Convention on the Law of Treaties, a treaty or a part of a treaty may be applied provisionally, pending its entry into force, if the Treaty itself so provides (which is not the case with the Constitutional Treaty) or if the negotiating States have in some other manner so agreed. This device is often used in the European Community's external relations, particularly for mixed agreements, where provisional application allows for the 'EC part' of the agreement to be applied while the member states are busy ratifying the 'member state part' of it. The 'other manner of agreement', mentioned by the Vienna Convention, can also be expressed after signature. So, the member states could, at the European Council ratification crisis meeting or afterwards, decide to apply parts of the Constitutional Treaty provisionally – namely, those parts that are uncontroversial politically and from a domestic constitutional perspective, and have not caused the rejection by the electorate in the country or countries 'with difficulties'. However, the provisional application of a treaty is supposed to be ... provisional. If a contracting party is, or becomes, definitely unable to lodge its ratification act, it cannot possibly agree to the provisional application of the treaty. So, provisional application must be coupled with ongoing negotiations to save the essence of the Constitutional Treaty, otherwise it is a nonsense.²⁹

4. Exit: The Withdrawal Scenario

If the states who agree to ratify the Constitutional Treaty do not, or cannot, listen to the 'voice' of the recalcitrant states, then the opposite scenario could be considered,

²⁹ See, for a more elaborate presentation of the international law background and conditions, R. Lefeber, 'The Provisional Application of Treaties', in J. Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties* (Kluwer, 1998) 81.

namely that of one or more (or most) states exiting from the European Union as we know it, so as to enable the Constitutional Treaty to come into operation.

a) Individual Withdrawal

Article I-60 of the Constitutional Treaty allows for the unilateral withdrawal from the Union by a member state, subject only to some procedural conditions.³⁰ This withdrawal clause is, obviously, not applicable before the Treaty itself has entered into force and would therefore not be available, as such, in the case of a ratification crisis. The withdrawal from the European Union by a non-ratifying state is therefore a matter to be dealt with under current EU and international law. The European Treaties do not expressly allow for withdrawal by a member country. In the absence of an express clause, the general rule of Article 56 of the Vienna Convention on the Law of Treaties could be invoked. It holds that a treaty that contains no express provision on withdrawal is not subject to withdrawal ‘unless (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.’ On that basis, many authors have argued that unilateral withdrawal is not allowed in the case of the European Union,³¹ but that is not entirely evident. It could also be argued that the silence of the EEC Treaty (and its subsequent revisions) on this matter leaves open the possibility of withdrawal given the very ambitious nature of the treaty. An element of state practice pointing in that direction is the fact that, when in 1975 the British government called a referendum on whether the UK should remain in the European Communities, none of the other member states lodged a formal protest, and they acted as if they would accept the withdrawal that would result from a negative outcome of the referendum (in the end, of course, the question of withdrawal did not effectively arise).³²

Apart from unilateral withdrawal, Article 54 of the Vienna Convention allows a country to terminate a treaty also if all its co-contracting parties agree so. This hypothesis is more likely to arise in the context of the Constitutional Treaty. If

³⁰ For discussion of this provision (which was numbered as Article 59 in the Draft of 2003) in a comparative perspective, see R.J. Friel, ‘Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution’, *ICLQ* (2004) 407.

³¹ For example, L.M. Díez Picazo, ‘Les pièges de la souveraineté’, in R. Dehousse (dir.), *Une constitution pour l’Europe?* (Presses de Sciences Po, 2002) 39, at p.59 ff.

³² L.S. Rossi, *op.cit.*, at p.7.

country X fails to ratify and declares its wish to leave the European Union, the other countries might agree with that intention. The withdrawal of country X would, however, not directly pave the way for the entry into force of the Constitutional Treaty. Indeed, Article IV-8 makes entry into force conditional upon ratification by all the *signatory states*, and country X is a signatory state ... Therefore, what would be needed is a combination of two legal texts: an agreement in which all member states accept the withdrawal of country X and organize the future relations between country X and the remaining states, and a treaty concluded between the remaining states in which they adopt Constitutional Treaty-bis, which is identical to the original CT, with the exception of all the articles referring directly or indirectly to the withdrawing state. Both these legal texts would have to be approved by the national parliaments, but would probably not have to be submitted to a referendum.

b) Forced Withdrawal

The previous option is based on the hypothesis that a non-ratifying state would be ready to exit from the European Union, if it could do so on sufficiently attractive terms. In fact, this is a hypothesis which some commentators have seen gaining consistency during the first stages of the UK referendum campaign. But it is equally, if not more, likely that a non-ratifying state would not be prepared to leave the Union but rather stick to the current Treaties. Could it then be forced out of the window by the other states?

As was bluntly stated by a judge of the German Constitutional Court: ‘The talk that a rejection of the Constitutional Treaty would lead to the respective state’s exclusion from the Union is nonsense.’³³ The threatening words of Giscard d’Estaing, quoted above, that a non-ratifying state would create a problem for itself, and not for the Constitutional Treaty itself, are legally wrong and politically unjustifiable. It may seem difficult to accept that a small minority of the electorate of Denmark, Malta or even the UK could thwart the desire of the vast majority of European citizens to proceed with the Constitutional Treaty, but this is the rule of the game as it was agreed and re-agreed many times in the past, and which for every country has formed the basis of its membership. It cannot simply be set aside without the agreement of all

³³ U. Di Fabio, ‘The European Constitutional Treaty: An Analysis’, in *German Law Journal* (2004) 945, at p. 956 (available online).

member states. So, excluding a country from the European Union because it fails to ratify the Constitutional Treaty is out of the question.

c) Enhanced Union after Collective Withdrawal

There is a third form of withdrawal, though, which could achieve the same results as exclusion of the recalcitrant state but in a legally more orthodox (though highly acrobatic) manner. Faced with the inability of one or more states to ratify, the remaining states could decide to collectively withdraw from the European Union (including the European Community) and reconfigure a new organization, the Enhanced Union³⁴. That would leave the original rump-EU unable to function in the absence of most of its member states. The withdrawing states would have to justify their action on the basis mentioned in Article 62 of the Vienna Convention, namely that a *fundamental change of circumstances* makes it impossible for them to continue as parties of the original EU and EC Treaty.³⁵ More particularly, they would have to argue that the original objectives of the European Treaties can no longer be achieved under the current Treaties and require the kind of *saut qualitatif* provided by the Constitutional Treaty.³⁶ I would personally find this argument very dubious, given the fact that the content of the Constitutional Treaty is not so radically different from the EC and EU Treaties in their post-Nice version. Even if the argument were considered acceptable in principle, the break-away states would still have a duty to negotiate adequate terms for their future relations with the left-behind state(s), because those states could not be accused of having breached their existing treaty obligations.

³⁴ I borrow the term used by Philippart and Sie Dhian Ho, op.cit., for the sake of convenience. The new organisation would obviously not be called like this!

³⁵ L.S. Rossi, op.cit., at pp. 7-8. This is also known as the *rebus sic stantibus* principle.

³⁶ This legal argument is mentioned by P. Demaret and D. Hanf, 'Le projet "Pénélope": un "Federalist Paper"?' Quelques observations sur l'entrée en vigueur du nouveau traité constitutionnel et sur le futur des clauses de coopération renforcée', in A. Mattera (dir.), *Penelope – Projet de Constitution de l'Union européenne* (Clément Juglar, 2003) 89, at p.92.

Conclusion

There are, thus, a number of ways to save the Constitutional Treaty, partly or wholly, in the case of a ratification crisis. None of those ways is easy and all of them require complicated legal arrangements that would be difficult to explain to the European citizens. The feasibility of the various options would depend on where the ratification crisis originates, and how many states and voters are involved in it. The fact that the legal scenarios depend closely on the political constellation of the day explains why many commentators flatly distinguish between a *legal* and a *political* approach to this matter, as exemplified by the following words of Giuliano Amato: ‘Si un de nos pays vote contre la Constitution, légalement cela signifiera qu’elle ne sera pas approuvée. Politiquement, rien n’empêchera ceux qui l’ont approuvée de signer entre eux un nouveau traité ayant le même contenu, en laissant les dissidents dehors. Ce serait très dur mais la seule solution possible.’³⁷

Indeed, many of the statements calling for the Constitutional Treaty to go ahead in case of a ratification crisis indicate that such an initiative should not be stopped by ‘legal technicalities’. In other words, the ‘vanguard states’ could also choose to ‘ignore the law’ and sweep away the current EU and international law rules if this were needed to extricate themselves from a ratification crisis. The countries willing to forge ahead would be prepared to break the law and explode the long-established institutional arrangements on the ground that the un-reformed European Union no longer allows them to pursue their most cherished political goals and interests. Such a revolutionary move requires strong political resolve and close cohesion among the members of the break-away group. At the present time, neither the resolve nor the cohesion seem to be there. In the absence of this revolutionary spirit, it may be a good idea to keep an eye on the legal technicalities, and patiently explore the resources that they can offer.

³⁷ Joint interview with Giuliano Amato and Dominique Strauss-Kahn, *Le Monde* of 30-31 May 2004.