

**MULTI-LEVEL GOVERNANCE IN  
EUROPEAN UNION TREATY FORMATION**

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The debate over the nature of governance in the European Union marches on with the two major "schools" being those of the "state-centrists" and of "multi-level governance". Where the two fundamentally disagree on whether the politics of the EU continues to be dominated by national governments or has evolved into a nascent polity which incorporates actors at multiple levels, even proponents of multi-level governance are willing to concede "member states remain the sovereign participants in the treaty process.." although "...Treaties are not representative of the ongoing process of institution building" (Marks 1993). They may disagree as to whether the nature of the Europolity is defined by treaty making or whether it should be assessed using institutional analysis to examine multiple policy areas (Garrett and Tsebelis, 1996), but they do agree that the governments of nation-states dominate the treaty making process.

In this paper, I demonstrate that adherents of multi-level governance should not be so willing to concede central government dominance in treaty making to state-centrists and should challenge the assertion that the EU is characterized by intergovernmentalism based on treaty formation. An investigation into the role of the German Länder in the negotiation and ratification of the Treaty on European Union (TEU) reveals that multi-level governance was indeed present in treaty formation through: the active participation of the Länder in the domestic structures of German EC decision making for the Maastricht negotiations, their direct participation in the transnational negotiations as members of the German delegation, and their interaction and cooperation with other "regions" to achieve their goals. These procedures for Länder participation in EU Treaty formation do not end with the Maastricht Treaty but became part of the German Basic Law (constitution) so that all future treaty negotiations will contain these same elements. By demonstrating the presence of multi-level governance in the formation of the TEU I present a crucial case for testing state-centric versus multi-level governance approaches. By finding the

existence of multi-level governance in the "high" politics of treaty making, I am thereby able to advance the approach and theorization about the multi-level governance of the European Union.

Furthermore, this analysis reveals a visible influence of the Länder on the outcomes of the Treaty negotiations. As will be discussed below, the Länder were not able to achieve all that they wished to include in the Treaty through their participation in the negotiations but their input was evident in the inclusion of three articles which address their specific interests, namely: 1) the clarification of the principle of subsidiarity as embodied in Article 3b of the Maastricht Treaty; 2) the creation of the Committee of the Regions (regardless of its effectiveness) under Article 198 of the Treaty; and 3) Article 146, which allows officials from the states and regions to represent member-states in the Council of Ministers in those areas which touch on their competencies or interests. Therefore, this case reveals not only the presence of multi-level structures in the treaty making process but a visible impact of these structures on treaty outcomes thereby suggesting the strength of analyzing the EU through the lens of multi-level governance.

The multi-level governance approach may be advanced to incorporate treaty making by altering the view of European policy making. Rather than viewing the EU as "foreign policy", the Germans have viewed it as "European Domestic Policy". The Länder have used this distinction to solidify their position in both internal EU decision making and at the supranational level by using the existing constitutional guarantees for internal participation, as will be discussed below. This constitutes a changing definition of sovereignty which has been incorporated into the German Basic Law (constitution) with the inclusion of a new Article 23 in 1993 as a result of the implementation of the Maastricht Treaty.

A realist definition of sovereignty which sees it as unitary and resting with the national government no longer exists and has been replaced with a sovereignty which is "perforated" such that different entities possess the sovereignty on a particular issue (e.g. supranational, national, subnational, or municipalities)<sup>1</sup>. The result is the involvement of multiple levels of government in the formation of domestic policy toward

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<sup>1</sup> See Duchacek (1988, 1990) and Soldatos (1990).

Europe and, hence, multiple levels engaged in policy formation at the EU level since subnational authorities interact with the EU through the national government and directly with the institutions of the EU. Thus, as will be demonstrated below, the connotation of "European Domestic Policy" also encompasses treaty making because changes to the European treaties become changes to domestic constitutions. Therefore, treaties would need to be addressed under the domestic structures governing constitutional amendment.

In presenting the argument of this paper, I will proceed in developing a theory of multi-level Governance in treaty formation by outlining the two major contending approaches: multi-level governance and liberal intergovernmentalism. I then supplement these theories by incorporating insights culled from studies of interdependence and the subsequent rise of "perforated sovereignty" and I hypothesize as to the effect on European integration. This discussion will be followed by a case study of German federalism and its impact on the TEU negotiations and outcomes to demonstrate that multi-level Governance indeed permeates European Union decision making—even the "high politics" of treaty formation. Finally, I conclude with a synopsis of the theoretical approach and the case study as a means of presenting an agenda for further research.

## **MULTI-LEVEL GOVERNANCE VERSUS LIBERAL INTERGOVERNMENTALISM**

I have chosen to counterpose multi-level governance with liberal intergovernmentalism because, among the state-centrist arguments, liberal intergovernmentalism improves theorizing about the EU to the greatest degree and incorporates arguments concerning interdependence which are valuable for extending multi-level governance to include treaty making. Therefore, rather than being contending approaches, liberal intergovernmentalism can inform theorizing about multi-level governance.

To do a thorough exposition and comparison of multi-level governance and liberal intergovernmentalism is beyond the scope of this paper and has already been done (See Marks, et. al. 1996a). However, I will outline the basics of each approach as a starting point for analyzing the German

Länder in the formation of the Maastricht Treaty and augment them to provide a better explanation of the process.

Liberal intergovernmentalism, as proposed by Moravcsik (1993: 480) contains "three essential elements: the assumption of rational state behaviour [sic], a liberal theory of national preference formation, and an intergovernmentalist analysis of interstate negotiation". Based on these elements and analyses of treaty formation, national governments are deemed to remain the primary actor in the EU. Therefore, negotiations are conducted by autonomous national governments seeking to maximize their sovereignty and autonomy vis a vis Europe or domestic politics. Although this case study demonstrates that national government dominance is not entirely true, the strength of liberal intergovernmentalism lies in the incorporation of a theory of national preference formation. This opens up the realist "black box" of the nation state and presumes that the member states adjust their negotiating position in supranational bargaining to accommodate domestic interests and preserve their position in domestic politics. The result is a theory which sees the politics of European integration as a "two-level game" (Putnam, 1988) in which there remains one locus of contact between member states and the supranational level--through central governments. As a result, the member state governments are strengthened by the process of European integration.

On the other hand, multi-level governance (MLG) posits "...the existence of overlapping competencies among multiple levels of governments and the interaction of political actors across those levels" (Marks, et. al. , 1996a: 167). Thus, the two-level game is replaced by a "set of overarching multilevel policy networks" which vary in make-up and in the locus of power according to policy area (ibid). A variety of actors, including subnational governments and interest groups may come into direct contact with the supranational institutions of the EU through these policy networks, resulting in multiple loci of interaction between the domestic and the supranational spheres. Furthermore, European integration

results in a devolution of power to both subnational units and EU institutions while national governments retain a significant amount of control over resources (Hooghe 1996: 18).

Moravcsik (1993: 481) correctly asserts that "An understanding of domestic politics is a precondition for, not a supplement to, the analysis of the strategic interaction among states" in the EU. But, like others within the international political economy tradition in which he is working, he views domestic interest groups as functionally similar in the ways in which their interests are mediated and communicated by the central government. Therefore, Moravcsik's analysis is missing an important element: a recognition of differential resources among groups due to institutionalization into the political structure.

Similarly, multi-level governance recognizes that the access which subnational actors (governments as well as interest groups) have to the EU varies with their available resources for the policy making process such as information and expertise (Hooghe, 1996: 19). However, in contrast to liberal intergovernmentalism, multi-level governance theorists acknowledge that the legal-constitutional position (read institutionalization) of subnational authorities in federated or decentralized states has been important for those authorities to gain greater access to the European arena, although it is neither a necessary nor a sufficient condition for many policy areas within the EU (ibid). As will be demonstrated, institutionalization is an important precondition for subnational involvement in treaty formation as redefining EU policy making as "European Domestic Policy" allows NCGs to assert the legitimacy of their inclusion in the process. Because changes to the EU treaties can serve to change national constitutions, treaty revisions may in fact be extra-constitutional by allowing for constitutional changes without acceptance by the proper decision making bodies, such as the subnational governments.

By nature, subnational governments or authorities are different from societal or associative interest groups in lobbying and influence on the EU. Associative groups represent a particular societal or business interest in lobbying either the national government or the EU such that their activities are limited to a

relatively small subset of policy. In contrast, institutionalized interests such as subnational governments are more likely to have broader based interests which span party-political differences and may color the perception of national interest as they are part of the institutions of the government. Furthermore, institutionalized interest groups have greater access due to the interdependence between the subnational group and the central government where the central government may need to rely on subnational authorities to implement policy (as is the case with the German Länder) making it in the interests of the central government to incorporate these groups and their interests in policy to ensure that proper implementation. Relatedly, the information and expertise which these groups possess are key for the formation of effective policy.

Therefore, institutionalization of subnational authorities, be it constitutional as in a federal system or de facto, presents them with greater opportunities to influence the treaty making process. We would expect:

H1: Institutionalized interest groups will have greater access to the national government than associative groups and, hence, more potential for a substantive impact on the treaty making process in the EU; and

H2: For treaty revisions, institutionalized interest groups are more likely to be concerned with issues which affect the perceived interests of the central government and which are greater in scope than those of associative interest groups by spanning party-political differences.

Building upon the thesis that subnational governments as "interest groups" in the EU differ from associative interest groups, one may hypothesize as to how these groups will articulate their interests in the light of treaty making, such as in the Maastricht Treaty. In light of a more "realist" or power maximization perspective, one would expect the subnational authorities to try to preserve their position within their

political sphere. Thus, in a constitutionally federal system, one would anticipate greater interest and influence from the constituent units on the treaty making process than in other areas because treaty making may be seen as a form of constitution building which places their core powers and competencies in jeopardy of being "silently amended" by any changes to the EU treaty.

Based on this assumption of a desire for self-preservation, it may be hypothesized that subnational units will want to preserve or strengthen their position within the integrated political system. It could be expected for subnational governments to have common interests in maintaining their competencies and that they choose to pursue self-preservation in unison. As a result, subnational authorities may aggregate their interests and present them as a united front to the domestic and supranational authorities. In this way, they can use their access to influence outcomes through the power in their numbers. There will also be greater agreement on a stance of the constituent units regarding treaty revision than for other policies because in many issue areas, the constituent units are in competition with each other for the scarce resources of the EU. However, for treaty negotiations, the constituent units are more likely to have a common goal—self preservation. Therefore:

H3: During treaty negotiations, subnational authorities are likely to have more interest in the process within (and possibly across) nations. Because treaty revisions can affect the domestic distribution of power by silently amending national constitutions, NCGs are more likely to be in agreement and aggregate their interests to exact greater influence on national and EU policy and bargaining processes.

### **Interdependence, Perforated Sovereignty, and MLG**

An important contribution of liberal intergovernmentalism for EU theory is a recognition of the importance of interdependence for the process of integration as well as the intermediation and representation of interests within the domestic political structures of member states (Moravcsik 1993: 478).



However, by focusing on the primacy of the nation state in the EU, Moravcsik incorrectly concludes that domestic politics has become "internationalized" when, in fact, international relations have been domesticated -- an important distinction. For Moravcsik, the incursion of EU policy on competencies of subnational authorities results in their transfer to the supranational level and the subsequent policy is the result of bargaining among autonomous nation states. Instead, when EU policy, including treaty making, falls within the legislative or implementation competency of the subnational authority as determined by the constitution or through other legal means, it becomes European domestic policy and is handled in the same manner as domestic policy on the same issue.

As I will demonstrate, this was the case for the German negotiating position for Maastricht as the German Länder argued that changes in the treaties constituted de facto changes to the Basic Law and, hence, required the consent of the Länder through the Bundesrat. Therefore, the German government had to negotiate a position which was acceptable to the Länder and which did not violate the Basic Law. Their autonomy to act in the international negotiations was constrained by the constitutional requirements to preserve the federal order in Article 79 of the Basic Law. Thus, the international politics of treaty negotiation became subject to domestic political structures, rather than the domestic structures becoming subject to the supranational as posited by liberal intergovernmentalism.

The difference between these two positions of domesticated international politics or internationalized domestic politics really hinges on the definition of sovereignty--liberal intergovernmentalism supports a unitary sovereignty which lies with the nation state whereas the definition supported here is one of a perforated sovereignty in which different political entities (subnational, national, and supranational) have the ultimate authority depending on the policy area.

This notion of perforated sovereignty is taken from Duchacek (1990)<sup>2</sup> who argues that international interdependence effects the economies and economic bases of subnational units. Thus,

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<sup>2</sup> See Fountain (1995) for an analysis of this literature.

subnational governments feel the effects of foreign affairs and want to influence them. In the absence of unitary sovereignty, we would expect subnational units to become directly or indirectly involved in international affairs. Valuable as this concept is, Charlie Jeffery (1997: 213) is correct in his assessment that the work of Duchacek and others on "constituent diplomacy" does not apply to the EU because they view subnational actors as operating in interstate bargains independent of, and unmediated by, the national government. Instead, the data has shown that the indirect, "intrastate" activities of subnational authorities through the central government have had the greatest impact on the EU policy formation.

Although the studies by Duchacek and others are not directly applicable to the EU, they should not be entirely dismissed. Perhaps they have over-emphasized the novelty and impact of direct foreign policy activities of subnational actors, but this approach is useful for developing a general theory of subnational activity in international affairs because the writers have hypothesized motivations for subnational activity in the face of increasing interdependence. Unlike the relative newness of the concept of multi-level governance in the literatures on European integration, constituent diplomacy has been developed for more than a decade and, thus, could inform the development of the multi-level governance approach and enhance its generalizability.

Particularly useful in the furtherance of multi-level governance is the caveat posited by Michelmann (1990: 310) regarding direct constituent diplomacy in which he argues: if structures exist which allow NCGs to influence the domestic development of foreign policy on issues which affect their interests, they are less likely to pursue direct contact with other states, their subnational units, or supranational organizations like the EU and rely on intrastate measures. This has been especially true for Germany, as there are numerous avenues for *Länder* input into all areas of foreign affairs, not just EU and they have, as a result, been less active in direct foreign policy activities<sup>3</sup>.

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<sup>3</sup> To go into the various forms of *Länder* participation in foreign affairs is beyond the scope of this paper. For an overview, see Michelmann (1990), Leonardy (1992), and Chapter 3 of this author's forthcoming dissertation, German Federalism and European Integration: The Evolution of a Multi-Level Polity.

Also of use is the work of Brian Hocking (1986, 1993) who developed the concept of "multilayered diplomacy" which considers both the interstate and intrastate activities of non-central governments and is more applicable to the EU. Whereas the studies of multi-level governance focus on an attempt to define a governing structure for the EU, Hocking focuses on general theorizing regarding the formation of domestic foreign policy which recognizes that all political actors "find it increasingly necessary to operate at all levels of political activity to achieve their objectives" (Hocking 1993: 34). This therefore assumes increasing complexity of the foreign policy process as it involves interactions between subnational, national, and supranational authorities. By making use of the work of Hocking and his predecessors such as Duchacek, scholars writing on multi-level governance could strengthen acceptance of the approach through generalizability<sup>4</sup>.

From the general studies of constituent diplomacy and multi-layered diplomacy we can hypothesize:

H4: Increasing integration will increase the probability that subnational units will become involved in foreign affairs as they become more directly affected by political and economic outcomes.

H4a: Subnational authorities become directly involved in foreign affairs when they feel that the national government can not, or will not, represent their economic, political, social, or cultural interests.

H4b: If institutions exist which allow the subnational authorities to significantly influence the development of domestic foreign policy, they are less likely to pursue direct contact with other states, subnational governments, or international organizations.

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<sup>4</sup> I attempt to do this in Chapter 5 of my forthcoming dissertation.

Based on the above hypotheses and extensions of liberal intergovernmentalism and multi-level governance, I will now present the case study of the German Länder in the Maastricht Treaty negotiations and demonstrate that increasing integration, the position of the Länder within the domestic political system (institutionalization), and concern that the federal government would not protect their interests led the Länder to pursue both inter- and intra- state means of influencing the treaty making process, with the interstate process being the most effective. Therefore, I am able to conclude the presence of multi-level governance in treaty making in the EU and hence, the dominance of multi-level governance as a modality for the EU.

## **THE LÄNDER AND EUROPEAN INTEGRATION**

The process of negotiation and ratification of the Treaty on European Union in Germany resulted in an absolute definitional and constitutional change in sovereignty. As will be shown below, perforated sovereignty was codified in the Basic Law with the new Article 23 and the other European amendments which came into force at the enactment of the TEU.

A role for the German Länder in the development of the TEU grew out of the ratification procedures of the Single European Act which were at least partially attributable to an already existing form of multi-layered diplomacy in German foreign policy prior to 1986. Foreign Affairs in Germany is governed under Article 32 of the Basic Law. Article 32 (1) gives the federation final responsibility for the conduct of foreign relations, as would be under a definition of unitary sovereignty, but it is tempered by sections 2 and 3 of Article 32, which require the federation, to consult the Länder on treaties which affect their interests or competencies and allow the Länder to conclude treaties with foreign states (with federation approval) for those issues which fall within their sole legislative competency, respectively.

The 1949 German constitution recognized the importance of German federalism through these sections in Article 32 and through the principle of Federal Comity (*Bundestreue*) embodied in Article 79 (3). The Principle of federal comity requires that no law be made which alters the federal structure of Germany and that neither the federation nor the Länder may enter into agreements which endanger this structure. As a result, Article 79 (3) obliges the federation to heed Länder opinions during treaty negotiations to preserve the federal order (Leonardy 1992: 126).

Perforated sovereignty is further embodied in the German Basic Law in the specified role of the Bundesrat in foreign affairs. The Bundesrat is not a "second chamber" or "upper house" of the German parliament, in the traditional sense, but is a part of the parliamentary process in Germany. The Bundesrat is the embodiment of the Länder in the federal legislative process as it is made up of representatives of the Länder governments voting as Länder rather than individuals. The Bundesrat has the right to vote on and, in some cases, veto domestic legislation and international treaties which touch on their competencies or essential interests<sup>5</sup>. Therefore, the Basic Law provides for the Länder to be directly involved in the domestic ratification process of international treaties. Whereas the Bundesrat remains part of the national government, it nonetheless represents a perforated rather than unitary sovereignty because the Länder may tie the hands of the federal government in the negotiation of treaties because ratification requires Bundesrat support.

Interestingly enough, prior to the ratification of the Single European Act, the Länder actually had fewer rights of participation and avenues of influence on the domestic development of European policy stances than for other areas of foreign affairs. This is because other areas of foreign affairs were governed by the Lindau Agreement<sup>6</sup> while European integration was dominated by Article 24 (1) of the Basic Law

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<sup>5</sup> For detailed discussions of the Bundesrat, see Beyme (1974), Scharpf (1989), Wehling (1989), Laufer (1992), and Thaysen (1994)

<sup>6</sup> The 1957 Lindau Convention was a negotiated agreement between the federation and Länder which permitted the federation to act on the behalf of the Länder in international affairs while providing avenues of

which reads: "The Federation may by legislation transfer sovereign powers to international organizations".

Bonn maintained that this Article gave them the competence for all relations with the EC, not just the transfer of sovereignty (Michelman 1990, 222). As a result of Article 24 (1), the federation was able to sign on to the Paris and Rome Treaties creating the European Coal and Steel Community and the European Economic Community, respectively, without a vote in the Bundesrat. The difference between decision making processes for the EC and other forms of international affairs may be attributed to the desire of the framers of the Bonn Republic to demonstrate Germany's commitment to all forms of post-war international cooperation through a constitutional guarantee. Therefore there was a conflict regarding issues of sovereignty (unitary versus perforated) embodied in the Basic Law when Article 24 is considered with Articles 32 and 79. The conflict, however, began to change in favor of perforated sovereignty with the Single European Act and was completed with a new definition of sovereignty embodied in the new Article 23 of the Basic Law after the enactment of the Maastricht Treaty.

As would be predicted by above hypothesis, H4, increasing integration through the SEA proved to be an important impetus for the Länder to become involved in European policy making. The Länder had minor influence on the domestic European decision process prior to the SEA as they had the position of the "Länder Observer" (*Beobachter der Länder*) to inform them of EC decisions and legislation of interest to them and through the "Bundesrat Procedure" (*Bundesratsverfahren*) which was an information procedure requiring the federation to inform the Bundesrat of pertinent legislation and allowing the Bundesrat to provide the federation with non-binding opinions. These two informational institutions existed since the ratification of the Rome Treaty in 1958 but provided the Länder little direct influence<sup>7</sup>.

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influence for the Länder on the decision making process. For a more detailed description of the Convention, see Blumenwitz (1985), Michelmann (1990), and Leonardy (1992).

<sup>7</sup> It is interesting to note that the position of the Länder Observer was not codified until the ratification of the Single European Act, 30 years after the creation of the institution. For more information on the "Länder Observer", see: On the Bundesrat Procedure see: Hannaleck-Schumann (1983).

Prior to the SEA, the Länder had pressed for other, incremental changes to their participation but they did not pursue them very strongly nor were they necessarily united in their endeavors. Of particular interest was that in 1976 a group of academics, known as the Enquête Commission on Constitutional Reform, were charged with examining the Basic Law and suggesting areas for reform. This group perceived a danger to the Länder and the federal structure in the "open flank" represented by Article 24 (1) if European integration proceeded. However, in a period of "Euro-sclerosis", the Länder did not perceive the danger and pursue it. The case was different with the Single European Act.

Although the Länder played no role in the formulation of the SEA, they were very aware of the transnational negotiations surrounding its creation and feared the incursions it, and the Single Market, would make into their few remaining legislative competencies and powers of implementation. In response to the perceived threat, they began to formulate the changes they wanted to see made in domestic structures to allow them greater input in the future. The Länder were able to effect these changes because they asserted that the SEA directly affected their competencies and interests, hence it should have to receive Bundesrat approval for ratification. This was initially contested by the federal government but, when faced with a fight before the Federal Constitutional Court, they compromised by agreeing that a simple majority of the Bundesrat must approve the SEA instead of the two-thirds majority that would have otherwise been required and more difficult to achieve<sup>8</sup>.

The Länder were able to use this requirement for Bundesrat support to encourage the federal government to institutionalize and legalize procedures which would strengthen their participation in decision making regarding the EC. These procedures were embodied in Article 2 of the "Statutes of Ratification"<sup>9</sup> of the SEA and their implementation in an "Agreement between the federation and Länder"<sup>10</sup>.

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<sup>8</sup> Interview.

<sup>9</sup> "Gesetz zur Einheitliche Europäischen Akte vom 28. Februar 1986". Bundesgesetzblatt 1986, Teil II p. 1102 ff.

These laws required the Federal Government to inform the Bundesrat at the earliest possible moment about Community activities and legislation which might fall under the interests or competencies of the Länder. Furthermore, in such matters the Bundesrat must have the opportunity to formulate a position which the Federal Government must represent at the Community level. This essentially meant that the Länder, through the Bundesrat, would have the final say as to the German position on issues which affect the Länder. Additionally, the Bundesrat gained the ability to vote on all EC issues and not just those which touch on the interests and competencies of the Länder<sup>11</sup>. Finally, the Article makes it possible for representatives of the Länder to be part of the negotiations in the consultative committees of the Commission and the Council as members of the German delegation. Through this provision, the Länder are now able to take part in the "Intergovernmental Conferences" through which the Maastricht Treaty and the current treaty revisions are being negotiated.

It is relevant to note here, albeit beyond the scope of this paper to fully address, that the advent of the SEA served as an impetus for the Länder to establish individual "Information" or "Liaison" (Verbindung) Offices in Brussels. The Länder were the first of the regions to establish these offices but, subsequently, 54 have followed suit (Marks, et. al. 1996b, 164). The primary purpose of these offices has been to facilitate communication with the Länder governments regarding issues of relevance to their interests which are being handled at the European level. Whereas the representatives in these offices are unable to directly affect policy, they do play an informational and lobbying role with the Commission. These offices may be seen as the Länder pursuing inter-state activity as opposed to intra-state when confronted with the inadequacy of existing internal structures in the face of increased integration<sup>12</sup>.

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<sup>10</sup> "Vereinbarung zwischen der Bundesregierung und den Regierungen der Länder über die Unterrichtung und Beteiligung des Bundesrates und der Länder bei Vorhaben im Rahmen der Europäischen Gemeinschaften in Ausführung von Art. 2 des Gesetzes vom 19. Dezember 1986 zur Einheitlichen Europäischen Akte vom 28. Februar 1996" in Bauer (1992), pp. 104-109.

<sup>11</sup> This has resulted in nearly two-thirds of all *Bundesrat* business being devoted to EC issues.

<sup>12</sup> See Marks, et. al (1996b) for a description and analysis of the regional offices.



Out of this discussion, we may see that the Länder did indeed become more involved in European integration as they began to see the potential impact on them, and they were concerned that their interests would not be preserved by the central government who put interests in European integration ahead of the competencies of the Länder. Moreover, the revisions to the Rome Treaty obtained through the SEA were viewed by the Länder *en masse* as a threat to their core interests and powers. In response, they aggregated their interests and pursued activities which were in common interest and were not divided by party-political differences.

## THE LÄNDER AND MAASTRICHT

The effects of the domestic political changes resulting from the Statutes of Ratification for the SEA were played out in the preparations for, and ratification of, the Maastricht Treaty. While on the surface it might appear that the most exciting achievement for the Länder coming out of the SEA would be the inter-state form of direct participation in the Intergovernmental Conferences for the preparation of the TEU, its importance should not be over-estimated. The direct impact of the Länder on the negotiations was limited because, as members of the German delegation, they did not have an independent vote. Therefore, their influence was limited to that which they were able to exert on how the German delegation used their one vote. The real value for the Länder of their presence at these meetings lay more in their immediate access to information about the negotiations which they were able to communicate to the other Länder and use to influence the German position in the negotiations.

### Inter- and Intra-state Influence

The formation of a unified German position for the IGCs was necessarily a complicated one and undeniably multi-layered since it involved the coordination of 17 separate governments (16 Länder and the national government). Coordination was necessary among the Länder and between the Länder and Bonn so

that a unified position could be presented at the IGCs<sup>13</sup>. Four Länder representatives<sup>14</sup> were responsible for presenting a common Länder position in the negotiations with the federal government and in Brussels. To achieve a common position, coordination among the Länder occurred under a new institution known as the Europe Commission (*Europakommission*) created by the Länder Minister Presidents (governors) in December 1990<sup>15</sup>. Through this commission, all 16 Länder partook in meetings with: the Conferences of the Länder Ministers in the various policy areas (*Fachminister Konferenzen*), with the various federal ministries (*Bundesressorts*), and even with the Chancellors Office--thereby interacting within and among all levels of government in the Federal Republic. Because the Länder were concerned with the potential incursions of the TEU on their interests and competencies the Länder were able to find a common ground on which to negotiate and aggregate their interests through the Commission to represent at the national and EC levels.

The aggregation of interests preceded the beginnings of the Intergovernmental Conferences using both inter- and intra-state measures. The first such effort was a meeting of the Länder Minister Presidents in October 1987 at which they presented the "10 Munich Theses" laying out desires and plans for "federalism in Germany and Europe"<sup>16</sup>. This was followed by October 1989 and December 1990 meetings of the Conference of Europe of the Regions and the Assembly of the European Regions, respectively, in

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<sup>13</sup> An example of the coordination involved for the IGC on Political Union is that the two *Länder* representatives for the IGC were present in the Foreign Office every Monday and took part in the federal discussion of the issues to be negotiated that week. The German position was then prepared for the Ambassador to take and negotiate in Brussels on Wednesday, with the two *Länder* representatives present as part of the German delegation. Then, on Thursdays or Fridays, the *Länder* representatives met with all 16 *Länder* to discuss what had happened that week and to coordinate a position to take to the government on Monday.

<sup>14</sup> The Länder were represented by Baden-Württemberg and North-Rhine Westphalia in the IGC on political union and by Hamburg and Bavaria for economic union and the representatives from these *Länder* represented all of the *Länder* in national discussions preceding the meetings of the IGCs.

<sup>15</sup> For a detailed account of the *Europakommission* see Kalbfleisch-Kottsieper (1992).

<sup>16</sup> This document may be found in the Appendix of Borkenhagen, et. al. (1992: 233-235).

which specific demands for the clarification of the subsidiarity principle, creation of a chamber of the Regions in the EC institutions, the ability of regions to participate in the Council, and a right for regions to take complaints directly to the European Court of Justice without having to go through the national government were laid out<sup>17</sup>. The same desires were voiced by the Minister Presidents in the protocol from their December 1990 Conference in which they were more specific in how these changes should be adopted and implemented<sup>18</sup>.

It may appear that the creation of these demands for regional representation in Europe is the result of intra-state cooperation and bargaining. Although intra-state communication was important for the advancement of these ideas and for the inter-state influence of the various regions on the positions of their central governments in the negotiations, these ideas must be seen as originating with the German Länder as they initiated the discussion of these principles in the Assembly of the European Regions and the Conference of the Europe of the Regions<sup>19</sup>. By putting these issues on the table for other regions to consider and attempt to influence their own governments, it appears that the Länder engaged in inter-state activity. But, it must be acknowledged that no other region possessed the same degree of influence as the Länder over their central government such that their own intra-state activities likely had less impact than those of the Länder. Thus, it presents a weak inter-state link with strong intra-state influence through ratification in the Bundesrat.

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<sup>17</sup> These documents are also reprinted in Borkenhagen, et. al. (1992). For a discussion of the creation and operation of the Assembly of the European Regions and the Conference of Europe of the Regions concerning the Treaty revisions, see Weyand (1997) and Bruns-Klöss and Semmelroggen (1992).

<sup>18</sup> Again, see the Appendix in Borkenhagen, et. al. (1992: 236-244).

<sup>19</sup> The Conference on the Europe of the Regions, a German creation, was originally conceived as a competitor to the Assembly of European Regions when the Munich Minister President proposed the creation of a separate body consisting of the "strong" (constitutionally and economically) regions. The Conference was later disbanded (Weyand 1997: 176-177).

It is undeniable that the issues which were later included in the TEU: the clarification of subsidiarity, the creation of the Committee of the Regions, and the ability of regions to represent member states in the Council of Ministers; were the result of Länder interests and influence. These issues would not have been put on the table had it not been for the Länder who perceived increasing integration as leading to "European domestic policy" instead of foreign policy. Arguably, the leadership role taken by the Länder in these issues was a result of their already strong constitutional position within Germany and the desire to preserve it through entrenching the regions in the European Union.

The results of the Länder influence on the Treaty itself is seen by many as either "mixed" or minimal because: the definition of subsidiarity remains obscure; the Committee of the Regions includes localities and is not the "third chamber" originally envisioned by the Länder; national governments largely retain control over regional participation in the Council; and, finally, the ability to take issues directly to the Court of Justice was entirely rejected. However, the Länder have viewed the outcome very positively as it allowed for the recognition of a regional level of politics in the official Treaties of the EU for the first time and they look to the further entrenchment of these ideas in future treaty revisions. Nevertheless, the Länder knew that this was not sufficient to protect them within domestic politics and pursued changes there as well, namely through the influence accorded by required ratification by the Bundesrat.

#### **Interstate Influence and the Bundesrat**

Like during the negotiation for the SEA, the Bundesrat itself did not have a direct role in the formation of the German position concerning the TEU, but ratification required the support of two-thirds of that body and of the Bundestag. However, there was a fundamental difference between the effect of the Bundesrat on each of the Treaties since a vote by the Bundesrat was not required for the SEA until after the treaty was negotiated, the federal government did not have to keep an eye to the Länder position on the Treaty itself to ensure ratification and had to make concessions on domestic measures only. For the TEU,

on the other hand, the federation had to address Länder concerns throughout the negotiation process as well as in domestic measures to ensure ratification because the Ratification Statutes of the SEA already required Bundesrat support for future Treaty revisions. Länder positions had to be addressed both domestically and within the German delegation because the federal government knew that if the Länder did not agree to the Treaty revisions, it could be rejected in the Bundesrat. Rejection in the Bundesrat would have prevented German ratification of the Treaty thereby creating problems for the further development of the EC and for the credibility of the Germans in future negotiations.

As was the case with the ratification of the SEA, the Länder used the influence available to them through the Bundesrat to make changes in domestic political processes to further entrench and institutionalize multilayered diplomacy on EC matters. This was accomplished through constitutional changes included in the Statute of Ratification<sup>20</sup> and through procedures included in a Statute on the Cooperation of Bund and Länder in EU affairs<sup>21</sup> and a new Bund-Länder Agreement<sup>22</sup>. Although the Länder were pleased with the increased ability they had to work within the EU through the Maastricht Treaty, they still recognized that Maastricht meant that more of their competencies could be transferred to the EU. Hence, they sought once again to ensure their rights within the domestic processes of Germany.

It must be acknowledged that the constitutional changes coming out of the ratification of the Maastricht Treaty would have not been possible if the Treaty negotiations, which began in December 1990, did not follow closely on the heels of the October 1990 unification of Germany. As a result of unification,

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<sup>20</sup> "Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union" Bundesrat Drucksache 810/92. For the actual constitutional changes see "Gesetz zur Änderung des Grundgesetzes vom 21. Dezember 1992" Bundesgesetzblatt 1992 Teil 1, S. 2086-2087.

<sup>21</sup> "Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union" vom 12. März 1993. Bundesgesetzblatt 1993 Teil 1, pp. 313-314.

<sup>22</sup> "Vereinbarung vom 29. Oktober 1993 zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der Europäischen Union in Ausführung von § 9 des Gesetzes vom 12. März 1993 über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union" Bundesanzeiger (45) 26, 2. Dezember 1993, S. 10425-10426.

the Germans had to change the Basic Law to account unification and to include what the Minister Presidents termed "cornerstones" for federalism in a united Germany and a united Europe (Thaysen 1990).

The constitutional changes adopted with the ratification of the EU Treaty emerged from the recommendations of the Joint Constitutional Commission of the Bundestag and Bundesrat which presented all proposals for post-unification constitutional reform. The primary concern with the Basic Law centered around the open flank created by Article 24 Paragraph 1 and its provision that the federal government may transfer sovereign powers to intergovernmental institutions. Moreover, they wanted constitutional guarantees of the rights of participation the Länder gained through the ratification of the Single European Act. Therefore, it was decided to write a new Article 23, a "European Article" in place of the former Article 23 which was repealed by unification.<sup>23</sup>

The new Article 23 of the Basic Law is paramount in assuring Länder participation in matters of European integration and, at its core, embodies the concept of perforated sovereignty—at least with respect to European integration. With a few exceptions, Article 23 largely puts into constitutional law provisions which were simple law through the ratification of the SEA. An extremely important exception for changing the definition of sovereignty is Paragraph 1 of Article 23 which allows the federal government to transfer rights of sovereignty to the EU (as provided in Article 24) but only with the consent of the Bundesrat. Thus, the federation no longer has carte blanche with national sovereignty but must consult the Länder.

The consideration of European policy making as "European Domestic Policy" is clearly embedded in Article 23 (3) which reads: "The Bundesrat shall be involved in the decision-making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the Länder would be internally responsible". Through this provision, it is abundantly clear that a unitary sovereignty with respect to European integration is not recognized.

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<sup>23</sup> For history and in-depth description of Article 23, see Fischer (1993).

Of further importance for the limitation of unitary sovereignty were provisions included within the Statute of Cooperation between the Bund and Länder and the new Bund-Länder Agreement which are particularly important and useful to the Länder in the implementation of the new Article 23. For example, Paragraph 5, Section 3 of the Statute of Cooperation concerns Article 235 of the EC Treaties which allows the EC to give itself the powers it needs to make the Common Market a reality in those cases when the powers are not already given them by the Treaties. Under Paragraph 5, when Article 235 is enacted the national government can only agree to it with the support of the Bundesrat. Thus, without this change, the powers of the Länder could have been transferred over to the EU without treaty revisions and therefore, without Länder input through the Bundesrat. An open flank for the Länder was thus closed.

#### **TOWARD A MULTI-LEVEL EUROPEAN POLITY?**

The preceding analysis demonstrates that there has been a fundamental shift in the definition of sovereignty as a result of European integration. Interdependence, to the level which exists in Europe, leads to a situation in which transnational relations make incursions into policy areas which were once the sole domain of subnational actors. In the case of the EU, this has led to the treatment of policy and treaty making as European domestic policy, rather than foreign affairs.

This case study of the German Länder clearly demonstrates that, as institutionalized entities within the domestic political system, they are able to use the system to benefit their position unlike societal/associative interest groups. Because they have constitutional guarantees and rights, they are able to use these self-same rights to ensure their role in domestic decision making regarding Europe by arguing that it has become domestic policy because it impinges on the distributions of power delineated in the constitution.

The Länder did, indeed, pursue policies within Europe and domestically which were not subject to party-political differences at the time of treaty negotiations, as was hypothesized. They focussed largely on

issues of self-preservation which allowed them and other regions to cooperate and aggregate their interests as a means of getting them placed on the negotiation table.

The increased interest of the Länder in European integration evolved out of the move toward a Single Market in the SEA. They pursued interstate means of influence to the degree possible, but when domestic measures began to seem inadequate, they pursued intra-state as well with the establishment of Information Offices in Brussels and through interactions with other regions in the Assembly of the European Regions and the Conference of European Regions.

Through the domestic processes and through intra-state cooperation in the Assembly of the European Regions, the Länder were able to influence the construction of the Treaty on European Union through the creation of the Committee of the Regions, the refined definition of subsidiarity, and the right of participation on the Council. Moreover, the German constitution, in Article 23, was changed to recognize the role the Länder must play in European decision making. It acknowledges that interdependence through the advancement of political and economic integration changes the definition of sovereignty from the traditional realist, unitary sovereignty to a sovereignty which is "perforated" in which different levels retain sovereignty which varies according to issue area.

These means of influence for the Länder has application elsewhere within the EU. For example, the Austrians adopted many of the provisions of Article 23 of the Basic Law into their own constitution with their accession to the EU. Hence, the Austrian Länder have the institutionalized influence accorded to the German Länder in the Basic Law although their impact may be more limited due to the smaller size of Austria.

I must make clear that the means of Länder influence on European Affairs does not entirely translate to other areas of foreign affairs. Multi-layered diplomacy exists in so far that it is embodied in Article 32 and the actions of the Federation are constrained by the provisions of "Federal Comity" in Article 79. Moreover, individual Länder have established information offices in non-EU countries and



have had official visits with officials of other countries or subnational governments. However, German sovereignty in other areas of foreign affairs is not perforated to the same degree as for Europe--not from lack of effort by the Länder. The Länder attempted to word many of the provisions of Article 23 and the other changes to the Basic Law such that they would apply to all areas of foreign affairs. However, this was not acceptable to the federal government. The limitation of subnational activity to the EU is further acknowledgement of the special case presented by European integration and the logic of looking at European policy as "European domestic policy" rather than foreign affairs.

The concept of "European domestic policy" feeds directly into the concept of multi-level governance in the EU. The incursions made by the EU into the domestic distribution of power across levels of government and agencies leads to a de facto amending of national constitutions to effect these changes. Therefore, it is expected that subnational governments would become increasingly involved in the treaty making process through inter- and intra- state means to preserve their own interests. The incursions into domestic politics made by the EU are not limited to specific policy areas as was hypothesized by both liberal intergovernmentalism and multi-level governance as outlined above. Rather, by considering European policy as "European domestic policy" national constitutions may no longer be "silently amended" through treaties because the Länder are vocal participants in the process as they would be for domestically initiated constitutional amendments as well as through the limited influence of the Committee of the Regions.

Thus, the observed presence of multi-level governance in treaty formation is a crucial case through which the considered dominance of intergovernmentalism in the EU may be challenged. If multi-level governance is present in the most "rational" of all EU policies, treaty formation, it would be expected to appear in all other forms of European policy making.

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