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(Third Part)

Changes to the Charter and Rules of Procedure of the Assembly with a view to accommodating associate members and associate partners of WEU

REPORT

submitted on behalf of the Committee on Rules of Procedure and Privileges
by Lord Finsberg, Rapporteur

*Changes to the Charter and Rules of Procedure of the Assembly
with a view to accommodating associate members and
associate partners of WEU*

REPORT¹

*submitted on behalf of the Committee on Rules of Procedure and Privileges²
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1. Adopted in committee by 9 votes to 3 with 2 abstentions.

2. *Members of the committee:* Mr. Thompson (*Chairman*); Mr. Amaral (*Vice-Chairman*); Mrs. Aguiar, MM. Berendt, Bolinana, Mrs. Brasseur, MM. Carcarino (*Alternate: Benvenuti*), Couveinhas, Cuco, Deniau, Lord Finsberg, MM. Haack, Hughes (*Alternate: Wray*), Junghanns (*Alternate: Lummer*), Liapis, Lejeune, van der Maelen, Mignon, Mrs. van Nieuwenhoven, Sir Irvine Patnick (*Alternate: Baroness Gould of Potternewton*), MM. Sainz Garcia, von Schmude, Mrs. Scopelliti, MM. Soldani, Sofoulis (*Alternate: Korahais*), Speroni, Weyts, Zijlstra.

Associate member: Mr. Mimaroglu.

N.B. *The names of those taking part in the vote are printed in italics.*

Draft Decision

on changes to the Charter and Rules of Procedure of the Assembly with a view to accommodating associate members and associate partners of WEU

The Assembly,

- (i) Having taken note of the arrangements agreed between the WEU Council and associate members of this organisation on the one hand and between the Council and associate partners on the other;
- (ii) Anxious to receive in appropriate conditions representatives of associate member and associate partners of WEU and to take account of the wishes expressed in this respect by the Council on 9th May 1994;
- (iii) Recalling that Article IX of the modified Brussels Treaty empowers the Assembly, composed of representatives of the Brussels Treaty powers to the (Parliamentary) Assembly of the Council of Europe to examine the annual report on the WEU Council's activities;
- (iv) Considering that the representatives of the member countries of the Atlantic Alliance must have a more favourable status than that of countries which are not members of that alliance,

DECIDES

- I. To amend its Charter as follows:
 - In Article II (c) of the Charter of the Assembly, delete " without voting rights in plenary sessions ";
- II. To amend its Rules of Procedure as follows:
 - 1. In Rule 15.3, delete " without voting rights " and insert " and deliberate ";
 - 2. In Rule 17, add a new paragraph (h) to read as follows:

" Rules 50 and 51 on budgetary questions shall not apply to representatives of associate member countries. "

Former paragraph (h) becomes paragraph (i).
 - 3. In Rule 41, paragraph 2, delete " fourth ". After " the United Kingdom (5) " add a new sentence to read as follows: " The fourth permanent committee shall be composed of 28 members divided as follows: Belgium (2), France (4), Germany (4), Greece (2), Italy (4), Luxembourg (1), the Netherlands (2), Portugal (2), Spain (3), United Kingdom (4). "
 - 4. In Rule 18 on observers, number the existing paragraph (a) and add two new paragraphs as follows:

" (b) Representatives of parliaments of WEU observer and associate partner countries to the Assembly shall have permanent observer status.

(c) Permanent observers of associate partner countries shall sit in committees without voting rights. The Presidential Committee shall fix the number of their representatives in sessions and in committees and the way they shall participate in the activities of the Assembly. "

Explanatory Memorandum

(submitted by Lord Finsberg, Rapporteur)

1. The Committee on Rules of Procedure and Privileges has had the task of making proposals to the Assembly so as to set out the voting rights of associate members. In spite of three attempts, it has not been possible to reach finality, and since work began as long ago as 1993, a category of associate partner has been created.
2. It is a matter of regret that these new forms of membership, associate member, observer and partner, were created by the Council of Ministers without any form of prior consultation with the Assembly. Common courtesy – and common sense – would surely have dictated this course of action so that the Assembly, which is an integral part of WEU, could have given some preliminary thought to the subject. The fact that the associate partner status followed on merely compounded – and confused – the situation and prior consultations with the Presidential Committee should have been held.
3. Too much time has already been wasted in fruitless discussion on issues which have no direct bearing upon the duty given to the Committee on Rules of Procedure and Privileges, and unless the Assembly is to look incompetent and incapable of resolving these issues swiftly, decisions must now be taken.
4. It may be argued that we start from a decision taken earlier and which has, to some extent, been overtaken by events, but the Assembly is master of its own procedure and cannot continue pursuing fruitless points any longer.
5. It seems pointless to rehearse at length the history of what has happened to earlier recommendations of the Committee on Rules of Procedure and Privileges as many events have been overtaken.
6. Logic and common sense dictate the following:
 1. Full members have all rights accorded to them in the charter, statute and rules.
 2. Associate members must, therefore, have less rights than full members.
 3. Associate partners have, therefore, to be given less rights than associate members.
7. Thus, I suggest that associate members should possess full rights in committees and plenary sessions including voting, except upon budgetary matters and on the reply to the annual report of the Council.
8. Associate partners shall be entitled to attend and speak at committees and in plenary but without voting rights.

APPENDIX

Voting rights of associate members in the WEU Assembly¹

*prepared at the request of the Clerk of the Assembly
distributed at the request of Lord Finsberg, Rapporteur*

1. Should representatives of associate members in the WEU Assembly have voting rights there? Does their status, as defined by the various acts of the WEU Council of Ministers, grant them the right to speak and vote?

It is proposed to examine this question from a strictly legal standpoint; a political assessment of such matters falls outside the aims and scope of this study.

2. In order to be able to answer this question, it must first be established which rules of law are applicable and their sources. These sources are:

- (a) The 1954 modified Brussels Treaty;
- (b) The 1991 Maastricht declaration of the Brussels Treaty powers on the invitation to European members of NATO to become associate members of WEU;
- (c) The Petersberg declaration of 19th June 1992 on relations between WEU and the other European member states of the European Union or the Atlantic Alliance;
- (d) The document on associate membership approved at the WEU Ministerial Council on 20th November 1992 and given substance on the same date by the adoption of a text called the document on associate membership of WEU concerning the Republic of Iceland, the Kingdom of Norway and the Republic of Turkey, by the ministers for foreign affairs of the latter three countries and the countries known as the Brussels Treaty powers. The content of this document was supplemented by an addendum inserted in the minutes of the above meeting of the WEU Ministerial Council on 20th November 1992 in connection with the document on associate membership;

(e) The Kirchberg declaration of 9th May 1994 of the countries known as the Brussels Treaty powers "following on from the document on associate membership of 20th November 1992".

3. The Brussels Treaty obviously does not contain rules governing associate member status. Moreover, the document adopted in Rome stipulated (in paragraph 3) that it would not involve any modification of the Brussels Treaty. Furthermore, the Council of Ministers, in its answer to the Assembly's Written Question 300, recalled the terms of the Petersberg declaration according to which associate members had not become contracting parties to the Brussels Treaty. However, it cannot be adduced from the foregoing that the modified Brussels Treaty has no application whatsoever in relations between the aforementioned powers and associate members, once the former have acted and agreed relations with members styled as associate, in accordance with and by application of the said treaty.

Furthermore, given that the "document" expressed a reservation as to the application of Article VIII of the treaty, is any interpretation possible other than that the remaining provisions are exempted from the reservation?

4. It should also be noted that the Brussels Treaty of 17th March 1948, following its revision on 23rd October 1954, became the founding document, the charter, of an international organisation (Articles VIII and IX). The high contracting Parties became members of WEU, with a system, an ordering of relations which ceased to be contractual and instead became organisational or institutional, at least as far as relations stemming from certain provisions of the aforementioned treaty were concerned. Thus when referring to the status of associate member we should not lose sight of this change, brought about, in part at least, in the relations between the signatories of the Brussels Treaty. It might be appropriate to place the status of associate member in this new context of the Brussels Treaty, in accordance with Article 31.2.a of the United Nations Convention on the Law of Treaties.

5. It would be legally erroneous to claim that associate members are and should remain apart

1. Legal opinion by Professor Henri Adam, former legal specialist with the Council of Europe and the United Nations (UNCTAD).

from the Brussels Treaty, the charter of an international organisation, of which they are now members – albeit associate members – but members nevertheless. It would be difficult to argue that associate members have no relational rights with the contracting parties to the Brussels Treaty, when there is no legal basis for the organisation known as WEU other than the abovementioned treaty. How could they have been invited to become associate members of an organisation, in other words to become part of it, while not being, in principle at least, parties to the founding legal documents by means of which it is governed (*inter alios acta*)?

6. Such an interpretation might encounter several difficulties: first, the principle of good faith in interpreting international agreements (Article 31.1 of the convention referred to above); second, the link established between the Brussels Treaty and the invitation to become an associate member of WEU and acceptance thereof. This link was expressly underlined by the WEU Council of Ministers in its answer to the Assembly's Written Question 300 (end paragraph 4). Indeed, according to the aforementioned answer the invitation to become an associate member was based on the principle laid down in the preamble of the Brussels Treaty to the effect that the contracting parties were resolved to promote the unity and encourage the progressive integration of Europe. Because of this reference to the Brussels Treaty, it becomes very difficult to sustain the thesis of the absence of any connection between associate members and the Brussels Treaty.

7. Lastly, the links between associate members and the Brussels Treaty follow from the concept, expressed by an image, of WEU as the European pillar of the Atlantic Alliance. The idea of the "European pillar" has been taken up and repeated, starting with The Hague platform (27th October 1987), in the Maastricht declaration (10th December 1991), the Petersberg declaration (19th June 1992), the Rome declaration (20th November 1992) and in the document of the same date adopted in Rome and finally in the Kirchberg declaration of 9th May 1994. This concept dominates relations with associate members, who are all necessarily members of the Atlantic Alliance, and members of WEU. From this established link the latter has deduced two legal consequences: first the inapplicability of Article V of the Brussels Treaty in relations between members of WEU and members of NATO that have become associate members (Petersberg declaration); and second the reciprocal strengthening of the security guarantees and defence commitments under Article V of the Brussels Treaty and Article 5 of the Treaty of Washington as stated in the Kirchberg declaration of 9th May 1994.

8. It is clear that, in rejecting any formalist approach, any literal method of interpreting the

Brussels Treaty, the contracting parties have expressed their intention of allowing associate members to benefit from military and other assistance under Article V, on the basis of their assistance obligations under Article 5 of the Treaty of Washington. It is by the technical procedure of referring back to the latter that the Brussels Treaty is to be interpreted and applied. Hence associate members might be defended and assisted, in the event of their being the victims of aggression, in the same conditions as WEU member states². Such is the plausible legal interpretation of the concept expressed by the image of WEU as the European pillar of the Atlantic Alliance.

9. Thus one notes the successive contradictory interpretations of the Brussels Treaty within the space of two years, between Peterberg and Kirchberg, doubtless corresponding to the evolution of the concept of European defence, governed by a notion that the latter should be restricted solely to the Community that seems to have developed from one declaration to the next. All these changes are occurring because Article VIII of the modified Brussels Treaty of 1954 had made two alterations to the legal régime of the treaty:

First, it had transformed contractual relations into institutional and organisational relations, and this modification allowed expressly for a power of implementation, on the basis of interpretations of the Brussels Treaty, which could not otherwise have existed, at least as an attribute of an organisation or a function of an institution.

10. Then the progressive integration of Europe, initially a ground for the Brussels Treaty powers, became a power, an area of responsibility of WEU – enshrined not only in the preamble but also in the substantive text of the treaty. Therefore, through the exercise of a responsibility conferred on WEU under Article IV of the protocol signed in Paris on 23rd October 1954, and again referred to under Article VIII of the modified Brussels Treaty, it has been possible to define the legal position of the European states not parties to the Brussels Treaty and create an associate member status, entirely outside any procedure for revising the Brussels Treaty.

11. It should be noted that the Brussels Treaty did not provide for any procedure for its revision except in the case of new members acceding to the treaty. A revision was brought about in the protocol of accession of Greece, signed in Rome on 20th November 1992 following insertion of a reference in Part III, A, of the Petersberg declara-

2. There is an expressed intention to apply the procedures laid down in Article V of the Brussels Treaty in implementing Article 5 of the Treaty of Washington. The associate members having noted this expressed intention, an international agreement was thereby concluded. It remains to be seen whether reciprocity applies in the absence of a declaration on the part of the associate members.

tion to prevent that state having the benefit of Article V in its differences with NATO member states³. Thus, in the absence of any provision for revision of the Brussels Treaty, the latter operated implicitly in the three cases mentioned (taking account of those referred to in the footnote below). The contracting parties therefore applied Article 39 of the United Nations Convention on the Law of Treaties, adopted in Vienna on 22nd May 1969.

12. It is also noteworthy that the Brussels Treaty was also modified, not only implicitly or by an ad hoc revision procedure, but also by way of interpretation contrary to law (*contra legem*) in its application. This precedent is that of the transfer of the exercise of WEU's responsibilities in social and cultural matters to the Council of Europe in 1959.

13. In a communication to the Assembly of WEU dated 24th April 1959 (Document 987), the Ministerial Council notified it of the transfer decision as follows: "The exercise of the powers of WEU in the social and cultural fields will be transferred to the Council of Europe ..." (Assembly Document 149, paragraph 13). The Assembly protested against this decision, which was not merely a violation but also a revision of the Brussels Treaty, specifically of Article II, from the moment WEU relinquished, in favour of another organisation, the exercise of responsibilities assigned to it under its Charter, its founding document (Document 149, paragraph 33). This reduction in WEU's statutory activities was therefore denounced on grounds of respect for the treaty.

However, the Council of Ministers challenged the Assembly's competence in this matter. It informed the Assembly that it considered the transfer decision wholly valid and as falling within the scope of Article VIII.1 which provides that the Council may consider matters concerning the execution of the treaty and of its protocols and annexes (Document 149, paragraph 50).

14. This constitutes an application of the rules provided for under the Vienna Convention referred to above. In point of fact, according to Article 31.3 of the latter, the content of a treaty is not limited to its text. It also includes "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" [sub-paragraph (a)]. Similarly, any subsequent practice in the application of the

3. It should be noted that the protocols of accession of Greece, Portugal and Spain had revised Article XII of the Brussels Treaty, which provided that any state invited to accede to the treaty became party to it by depositing an instrument of accession with the Belgian Government. However, the aforementioned protocols dated accession from the date of receipt of the last ratification, acceptance or approval, notified to the Belgian Government.

treaty may be considered as supplementing the content of the latter modifying the very text of the agreement (see Article 31.3 sub-paragraph (b) of the above United Nations Convention). Thus the 1959 precedent of relinquishing the exercise of WEU's social and cultural activities illustrates the extent of the Council of Ministers' powers of interpretation and revision.

15. To the power generated by the dynamics of the contractual relationship, well described in Article 31 of the United Nations Convention, must be added the implicit powers inherent in international institutions which make it necessary to resort to a functional rather than a textual interpretation of the treaty.

Indeed, by taking up, in the 1954 revision, in the substantive text of the Brussels Treaty the function provided for in its preamble, namely the adoption of the necessary measures to promote the unity and encourage the progressive integration of Europe (new Article VIII) the Council was provided with the necessary implicit and functional powers to encourage such unity and promote integration of Europe extending beyond the frontiers of the Brussels Treaty powers. The procedure to be followed to this end involves, not signature and ratification of protocols, but a Council decision taken in conformity with the provisions of the treaty wherein lies its substance (Article VIII).

16. There is no need whatsoever for the Brussels Treaty to have instituted an associate member status for European allied states that are not Brussels Treaty powers to join WEU, by unanimous decision of the Council of Ministers, as associate members, under a status defined also by the Council of Ministers, from the moment it is a measure adopted for the purpose of "encouraging the progressive integration of Europe" whose limits extend far beyond Western Europe.

It is precisely the Europe that stretches to the East and North of the most westerly point of the continent to which the status of associate member is directed as an instrument of unity and progressive integration.

Associate members or partners may therefore be admitted to WEU without revision of the Brussels Treaty by virtue of the powers expressly and implicitly acknowledged as belonging to the Council of Ministers.

17. However, these powers are limited, first by the purposes attributed to their exercise and then by the unanimity required in each case for the adoption of the measures envisaged. Furthermore let us add, for the record, without insisting overly upon it, that since the treaty provides for a revision procedure only with regard to the accession of members, it follows that the treaty does not require signature or ratification of an international

agreement, the theory of the contrary act⁴ apart, for the creation of a WEU associate member status, the Council of Ministers having to this end the necessary powers and competences at its disposal.

18. Associate member status was defined by the declarations adopted by the Council of Ministers (Petersberg, Kirchberg and Maastricht) and given substance, and its content enriched, in the various "documents" adopted in Rome. It should be noted that these declarations and documents are in no way what are termed political documents, with no binding effects or consequences for conferring status or developing subjective legal positions [in this respect, see the judgment of the International Court of Justice of 1st July 1994 in a case between Qatar and Bahrein, paragraph 25 (2)].

19. This is the case despite the idiosyncratic form of these instruments. The document on associate membership was not in the conventional form of a bilateral or multilateral instrument between contracting parties. The document was subject first to an approval procedure by the WEU Council of Ministers, meeting in Rome on 22nd November 1992. The same document was then adopted at the joint meeting, also held in Rome on the same day, of the ministers for foreign affairs of WEU member states (acting individually) with the ministers for foreign affairs of the three states which had accepted the invitation in the Maastricht declaration to become associate members of WEU.

20. Admittedly, there was also to be a second approval by the WEU Council of Ministers, which met after the joint meeting of the twelve ministers referred to (9 + 3), according to minutes summarising the discussions between the twelve ministers and providing a material record of the agreements reached during these discussions. These oral agreements became written ones by being referred to in the abovementioned minutes of the Council of Ministers and through their physical link with the document by the publication of the latter as an addendum, as an instrument (minutes), approved in connection with the document on associate members.

21. To this document, in turn approved, adopted and supplemented by approved minutes, was added a declaration by the WEU Council of Ministers, meeting at Kirchberg on 9th May 1994, entitled: Declaration following on from the docu-

4. The applicability of the contrary act theory is debatable in the present case where an international organisation is involved. The law on international organisations makes provision for admissions and accessions without revision of the founding treaty. Article XI of the Brussels Treaty, which constitutes a departure from this, may be explained by the idea of various forms of accession to a system which has remained essentially contractual.

ment on associate membership of 20th November 1992. The statutory implications of this new declaration of the Council of Ministers cannot be challenged, nor can its juridical value, its binding commitment be denied. Third states, beneficiaries of these declarations having accepted and acted in conformity with the provisions of the declaration, international agreement is thus established between the authors and beneficiaries of these declarations without further joint adoption procedure as there had been at Rome, at a meeting which, moreover, will not be held.

22. If there is the slightest doubt about the contractual nature of the process followed, one only has to refer to the above minutes signed in Rome which state: "The document on associate members cannot be modified without the assent of the associate members" (Addendum, final sentence).

Similarly, the Kirchberg declaration, which can be likened to a second addendum, contained not in the minutes but in a declaration, includes a provision which reads as follows: "Ministers confirm that the arrangements contained in the present declaration cannot be modified without the consent of the associate members" (penultimate paragraph of the declaration).

An agreement undeniably exists between the members of WEU (not WEU as such) and its associate members that are not full members, in other words contracting parties to the Brussels Treaty (in the strict sense of the latter) defining the legal status of these associate members. This agreement is inviolable and cannot be amended unilaterally. It is an instrument containing international commitments within the meaning of Article 1 of the abovementioned convention. Thus, the International Court of Justice, in its decision of 1st July 1994 in the case between Qatar and Bahrein, gave relative value to the importance of form in bearing out an international agreement by referring to the Vienna Convention (see paragraph 23 of the abovementioned decision).

23. The absence of a signature at the bottom of the document or of its subsequent ratification, in other words the procedure normally followed for concluding international agreements, does not detract in any way from the binding juridical nature of the untitled instrument that has been called the "document". This is the case in as much as the states concerned had agreed that the process used should express their consent to be bound by the status thus defined (See Article 11 of the aforementioned Convention on the Law of Treaties).

24. We have here an international agreement governed by the principle of *pacta sunt servanda*. It must be executed in good faith by all the states concerned or involved (Article 29 of the same convention). The procedure employed, the forms

of expression used, the names given to the instruments drawn up have little influence on the content of the agreement and the consent given. A particular diplomatic context which, as we have noted, has evolved with the progression from one declaration to the next, Petersberg to Kirchberg, and certain reservations in national opinions over contracting new alliance obligations and offering new military assistance guarantees, seemingly explain the peculiarities of the procedures, names and definitions used to describe the relations between WEU and NATO and the status of associate members of the European members of the latter organisation vis-à-vis WEU. However, legal analyses enable one to see clearly that the "documents" adopted are definitely international agreements or treaties. Similarly it is possible to build up an entire régime of legal relations for the states known as associate members of WEU, without revising the Brussels Treaty, from the moment the institutional competences acquired by the Brussels Treaty powers can be exercised for the purposes of creating an associate member status in WEU.

25. The first question raised by such a status concerns its content. What are the rights of associate members in WEU? These rights obviously do not derive from the Brussels Treaty which did not provide for such a status, nor furthermore for member status, since the establishment of WEU as an international organisation was based on the new Article VIII of the treaty and as a result of decisions taken by each of the two bodies that were created, namely the Council of Ministers and the parliamentary Assembly.

26. The 1948 Brussels Treaty did not provide for full member status, much less therefore for that of associate member. Member status as an institutional status is the outcome of a succession of decisions taken by the Council of Ministers since its creation by the protocol signed in Paris on 23rd October 1954. This member status, which is of a "jurisprudential" nature reflects the conditions under which the international organisation, WEU, was created. At the outset this had, properly speaking, no founding document or charter. It found legal support in a new provision inserted in a treaty which had provided only for contractual, but certainly not institutional, relations between the parties. The entire organisational and institutional framework, including the status of (needless to say full) member is the product of a series of decisions adopted by the Council of Ministers, established as the principal and indeed to a certain extent the constituent body of WEU in accordance with the (new) article of the Brussels Treaty.

27. Obligations of members of WEU are not identical to those of the contracting parties of the Brussels Treaty. The latter obligations derive from the text of the treaty itself while the former

include, additionally, what is known as a derived right, arising from the exercise of the powers of the organisation under its statutes⁵. The standing of member is not completely merged with that of contracting party. The same applies to joining WEU as compared with accession to the treaty. It should be noted furthermore that an important part of the organisation, namely its budget – the contributions which members are bound to make and which are necessarily voted by national parliaments – has its legal origin in the competences and powers granted to the Council of Ministers.

28. By keeping exclusively to the text of the treaty whose ratification they had authorised, could national parliaments refuse to approve the necessary sums to pay the contributions to WEU's budget? They could not. For with the changes and the transformations that have occurred between the Brussels Treaty powers from the fact of the creation of an organisation (WEU), this seems hardly possible. One might even wonder how Article V might be applied given the transformation of relations from contractual to organisational and institutional. In-depth consideration should certainly be given to this issue.

29. What can be the content of associate member status? Any answer to this question must start from full member status. Reference in this connection must be twofold: first, the source of that status and then its content.

30. First, the source. Full member status has been largely defined by decisions of the Council of Ministers. The Brussels Treaty applies *mutatis mutandis* in this definition, which for the rest derives from the decisions and jurisprudence of the Council of Ministers. It goes without saying that the same must necessarily apply to the definition of associate member status. This is, moreover, what happened with the successive declarations adopted by the Council, at Maastricht, Petersberg, Rome and finally at Kirchberg. The source of the status is identical⁶ in both cases too: the Council of Ministers as the WEU's principal organ has the necessary powers to define the content of WEU member and associate member status; but with one difference, however: full member status is fixed and modified by the exercise of a "regulatory" power of the Council of Ministers within the organisation as a whole, whereas for associate members there is a further contractual element in addition to this regulatory dimension. The same process is employed at least in part in respect of associate members as that

5. The Council's competence to consider matters *relating* to the application and not just the application of the treaty. (Article VIII, paragraph 1 of the Brussels Treaty.)

6. The establishment of an organisational system obviously has not had the effect of making obsolete the purely contractual provisions of the treaty.

used for members that have acceded to the treaty, whose status is determined contractually, in full, between them and the Council of Ministers by institutionalised application of Article XI of the modified Brussels Treaty.

31. Second, the reference also applies in defining the content of the status of associate member. Indeed the very notion of associate member requires differentiation of the respective content of member and associate member status. The rights and duties implied by the latter will be of lesser scope than the rights and duties implied by the former.

This differentiation is dependent on the decisions adopted by the Council of Ministers and does not in any sense derive from the fact that associate members would not be party to the Brussels Treaty since everything, or almost everything, is conducted at organisational level, at the level of the organisation of the alliance and not at the level of the Brussels Treaty as the legal basis of WEU.

32. The principle on which the status of associate member is based was set out at Maastricht and Petersberg and given substance in the Rome document: namely full participation in WEU's activities. It follows that non participation is the exception and as such must result specifically from a special decision of the Council of Ministers. All this is the logical consequence of a fundamental rule according to which a European defence identity must be compatible with the Atlantic Alliance. Thus any departure from the principle of full participation conflicts with this requirement for compatibility. It represents the trade-off offered to the European allies of the Atlantic Alliance, not members of the European Union, for the development of WEU as the defence component of the latter without weakening the said alliance. The principle is therefore the commitment by associate members to participate fully in WEU's activities.

33. In the "document" the Council of Ministers introduced certain limitations to this participation, although not to the commitment which is the basic component of associate member status. There was first the limitation on participation in WEU's main organ, the Council of Ministers. In the first place the latter might meet without the participation of associate members, if a majority of member states, possibly determined by the casting vote of the Chairman, decides to hold a meeting among themselves without the associate members. They will have the right to speak *ex officio*. They will also have voting rights but these will be of limited effect. Their votes will be of no significance if, from the outset, there is unanimity or a consensus among the full members. They therefore have the right to vote but no right of veto, while full members can each, individually,

block a unanimous decision, a consensus reached among the other members, unless the decision concerns a matter to which another (majority) voting procedure applies or for which one has been agreed. In such cases, by virtue of their status the votes of associate members would automatically be taken into account. In general they could participate in implementing the decisions adopted unless a majority of full members, or half their number with the casting vote of the President, objected.

34. An ambiguity should be noted in the rules on the voting rights of associate members. The "document" (par. 3) refers to their association in decisions taken by member states. Does this mean in all decisions of the Council or those taken when they are excluded from voting or when they are manifestly opposed by a consensus? It would indeed appear that the cases when it would be possible for them to be associated in a decision are those when decisions are adopted in their absence (when they have been excluded from the meeting) or adopted in their presence but without their supporting vote but, having subsequently changed their minds, they then had reason to support the majority or consensus position previously reached by the full members.

35. This was the decision-making process the principle of which the WEU Council of Ministers had sanctioned when transferring the exercise of its social and cultural activities to the Council of Europe in 1959 (see paragraph 14) – the so-called partial agreement procedure established in Resolution (51) 62 of the Committee of Ministers of the Council of Europe. This process enables unity and cohesion to be maintained among the members of the Council of Europe when there is no unanimity and there are divisions among members, some wishing to go ahead and others opposed to such a course. In such event, the resolution enables the decision on which members are not unanimous to be adopted, but only by those who are in favour, all its implications, including those relating to expenditure, being assumed by them. However, those who were opposed continue to be informed of the progress of work undertaken on behalf of the Council of Europe under the so-called partial agreement arrangement. The latter are also able to be associated subsequently with the action taken in accordance with the partial agreement system and also with the agreements themselves. Hence the Council of Europe's re-establishment fund for refugees and surplus populations was created with a limited number of member states and subsequently extended to other member states who changed their position on this fund. They were associated with the decision creating the fund.

36. This association of associate members in certain decisions or in their implementation, as

provided for in the "document", is clearly based on the idea of partial agreements. It meets the same need for unity in the organisation and acts as a corrective to the same consequences of excluding those in the minority. It is an institutional remedy in the voting system. There is no other obvious explanation for the "document's" ambiguity.

37. Other restrictions on full participation by associate members in decisions and actions of WEU have been provided for expressly and are set out in the "document".

They concern the Planning Cell, communications (WEUCOM) and budget contributions. However matters regarding space and the activities in which associate members participate already, the latter have been placed on an equal footing with new members (at least until the end of the experimental period) or full members. This is for reasons of institutional continuity. In any event their participation in military operations with commitment of forces is on the same basis as full members, including forces' security, planning and associated exercises.

And, emphasising the evolving nature of this status, the Council had no hesitation in deciding at Kirchberg to withdraw the restrictions on participation in the Planning Cell. Associate members henceforth participate not from the outside, through liaison officers, but from the inside through their own officers within the Cell.

38. Moreover, in order to allow associate partners the fullest possible participation permitted by their status, the Council went as far at Kirchberg as to grant associate members the same guarantees of aid and assistance as to the member states. However, faced with the difficulty of extending the application of Article V of the Brussels Treaty to associate members, the Council resorted to a stratagem. The difficulties were due to the fact that granting military assistance to an associate member might, under the constitutional system of certain members, require the intervention of their respective parliaments, which might not perceive the international obligations of the state concerned in the same way as the Council, in the absence of an act of ratification of the status of associate member of WEU⁷. Thus provision was made for any associate member subject to aggression to be assisted by WEU members on the basis of Article 5 of the Washington Treaty, although the obligation to assist in the event of aggression is not iden-

7. Yet, following the International Court of Justice, internal constitutional considerations have relative importance. Challenges to the compulsory value of an international commitment based on its unconstitutionality are rejected. For the Court, the intention expressed by a party to commit itself prevails over provisions in force in its constitution (see the abovementioned judgment in the case between Qatar and Bahrain dated 1st July 1994, paragraph 24).

tical in both cases, but the obligation to provide assistance in face of aggression being identical, the final source still being Article 51 of the United Nations Charter. This is an example of the technique of referral which, by the use of an inclusive reference, allows a text other than the one which should be applied to be used in determining the applicable rule⁸.

39. This represents a major effort at convergence, not to mention unification of full and associate member statuses in a highly sensitive area – that of security guarantees. Thus, by operating, not at a formal level, which, under certain constitutions, would have required signature of a diplomatic instrument subject to ratification, but at a practical one, that of providing assistance, the desired result is achieved.

Moreover the Council was fully empowered, through the referral procedure, to extend the provisions of Article V of the Brussels Treaty to the WEU associate members, from the moment it had acquired powers to "consider matters concerning the execution of the treaty". Under this provision of Article VIII of the treaty, it is not a matter of purely and simply applying the treaty, but of questions concerning such application, which goes far beyond the text itself.

40. Taking the process of assimilation of the two statuses still further on a practical level, at Kirchberg the Council also re-affirmed its will fully to take into consideration the security interests of associate members. This decision affects the preventive phase should associate members be victims of aggression. It recognises, implicitly but clearly, the ability to convene the Council to consult with regard to any threat to peace (Article VIII.3 of the Brussels Treaty).

41. Clearly this provision is directed only towards consultation between the contracting parties to the Brussels Treaty which should not involve the associate members. However such a literal interpretation need not necessarily apply once relations between the said parties have become organisational and cease to be exclusively contractual. WEU associate members are part of these organisational relations. The combination of the Rome decisions (the document plus the minutes providing in particular for the possibility of making proposals in accordance with the principle of full participation in Council meetings) and the Kirchberg decisions on including the security interests of the associate members in the

8. Although at Kirchberg the ministers obviously did not expressly and formally state that Article 5 of the Treaty of Washington was applicable to associate members as a component of their status, they nevertheless gave a clear hint in stating that the security guarantees of the Treaty of Washington and of the Brussels Treaty were mutually *and fully* reinforcing not only in relations between members themselves but also between the latter and associate members.

objectives pursued in the Council's action, in accordance with Article VIII.1 of the treaty, should enable associate members to exercise the ability provided for in Article VIII.3 to convene the Council to consult with regard to any threat to peace. Any other interpretation seeking to reserve this ability to the contracting parties alone (the full members) might, moreover, prove unrealistic and of no practical value. Indeed, in the event of such a threat, it would always be possible for an associate member to approach a fairly understanding full member to convene the Council and, at the ensuing meeting, submit its proposals.

42. The above developments on the participation of associate members in the Council's work are presented in order to provide a certain reference for the definition of associate member status in the Assembly. However, the Assembly's work on the status of associate members there, as set out in the report dated 3rd November 1993 (Document 1390) clearly led the Council of Ministers to suggest, at its Kirchberg meeting, a reappraisal of the direction taken, the more so since, as the Assembly is itself aware (see Document 1416 dated 10th May 1994), this had raised extreme displeasure among certain associate members (paragraph 9). It is to be noted that at Kirchberg, the ministers, out of consideration for the Assembly, did not wish to request it to undertake such a reappraisal. The governments preferred to invite the Assembly to do so "through its national delegations". This raises the question of the parliamentary Assembly's room for manoeuvre in this respect.

43. Several points of law need to be taken into account in defining the status of representatives of associate members in the Assembly: first the rights deriving from the parliamentary functions exercised by the Assembly which have enabled it to give itself a charter. The aforementioned functions are not those of a national parliament nor of a "supranational" parliament such as the European parliament. Suffice it to say in this connection that the WEU Assembly is the equivalent of the parliamentary assembly of an intergovernmental organisation, for example that of the Council of Europe. This likeness is the more valid as the WEU parliamentarians are the same persons as those of the Council of Europe. The Assembly is an "organ of Western European Union" (second paragraph of the Preamble to the Charter). It is undoubtedly the organisation's parliamentary body. As in any organisation described as intergovernmental, there is a principal organ with responsibility for the execution⁹ of the founding treaty, the budget and what may be termed the organisation's external relations, each of the other organs retaining the autonomy inherent in their functions (parliamentary, juridical, technical etc.).

9. Also the interpretation, application and revision of the founding documents of the organisation.

44. The Council of Ministers has responsibility for settling questions relating to associate member status in the light of the changes brought about in the relations between the Brussels Treaty powers. In the absence of provisions for an associate member status in the organisation's founding instrument, such status is governed by a form of "praetorian" law, through decisions of the Council of Ministers. However these decisions are limited to the status of representatives of associate members in the Council and its subsidiary organs and the Council has refrained from interfering in the operation of the Assembly out of respect for the latter's autonomy, as it has formally acknowledged.

45. There are rules for the guidance of the Assembly which constitute the point of departure for defining the status of associate parliamentarians. They stem from the "praetorian" law of the association régime and are of general application and not specifically to any given organ of WEU. There are texts which have been adopted by the Council of Ministers as WEU's principal organ. They, or at least some of them, are intended for the organisation as a whole. They are well known: those adopted at Maastricht, Petersberg, Rome and Kirchberg in as much as they are not specifically concerned with any particular WEU organ. Among these texts, the subject of ministerial declarations in the four cities mentioned, there are certain provisions for WEU as a whole which apply to the Assembly, even in its definition of the status of the parliamentarians appointed to sit in the Assembly by the associate members of the Assembly of the Council of Europe (or to other parliamentary representatives); and this despite Article IX of the Brussels Treaty which limits the composition of the WEU Assembly to parliamentary representatives of the Brussels Treaty Powers to the Assembly of the Council of Europe. By ministerial declarations, such as Maastricht and Kirchberg, WEU's principal organ has adopted measures and concluded agreements with the member states described as "associate". The Assembly cannot just ignore these by not admitting their parliamentarians to its deliberations, the more so since the Council has, for its part, admitted to its fold ministers from associate member countries. By virtue of their presence they have the right to speak and vote. The Assembly cannot therefore create a status which would result in the parliamentarians of associate members being excluded from its deliberations. Their participation might be different, and differentiated, from that of full members. However, in the main, the Assembly has to follow, although exceptions may be made which do not call the principle into question.

46. The ministerial declarations also cannot be ignored because they are central to the aims of WEU. Through this association, it is intended to pursue the progressive integration of Europe and to strengthen the European pillar of the Atlantic

Alliance. To the extent that the status of associate member in the Assembly for allied European states fails to serve this purpose, it cannot be considered as in conformity with the law of the organisation.

47. To exclude parliamentarians from the associate members of the WEU Assembly would be to fail to acknowledge the Council of Ministers' powers under Article VIII of the modified Brussels Treaty. One could not proceed to interpret Article IX literally while failing to take account of the powers contained in new Article VIII. It is in application of the same Article VIII that the ministerial decisions contained in the aforementioned declarations have been taken and they are valid for all WEU bodies.

48. According to the Maastricht declaration, associate member status must be such as to allow full participation in WEU activities. Such full participation has been achieved in the Council of Ministers, in accordance with the forms and procedures set out in the Rome document. Hence this full participation must also find expression in the associate member status the Assembly is called upon to establish.

To refuse the parliamentarians of associate members the right to vote, i.e. to speak and vote, would be tantamount to refusing the full participation of parliamentarians of associate members in its proceedings. To what extent does the status worked out by its Committee on Rules of Procedure and Privileges in 1993 and 1994 reflect this requirement for fullness? Put another way, what are the statutory restrictions placed on the régime of parliamentarians of associate members that would accurately reflect the difference between member and associate member, given the requirement for voting rights in a parliamentary body?

49. The Council of Ministers had foreseen certain restrictions on participation of Ministers of associate countries in its work. The Assembly might therefore draw on this example while taking account of the fact that in the Council the unanimity rule applies, whereas in the Assembly there is no right of veto or requirement for unanimity, all decisions being on the basis of a majority, absolute or relative. A dominant rôle, incompatible with the associate status of members termed associate in the Council of Ministers, as a result of their right of veto, was considered as excessive, and excluded. In the Assembly there is no veto to exclude. The Council had the more reason to be restrictive given that it is a principal body of the organisation with responsibility for questions that are vital to its members, with powers that are both executive and "legislative" exercised on behalf of the organisation as a whole.

The Assembly having no such powers, the proposed restrictions on the rights of associate members therefore seem difficult to justify.

50. Indeed, the Assembly is not a principal body and its powers are consultative, despite its political importance. Reference to the régime in the Council of Ministers would therefore seem to be necessary, given the respective powers of the two WEU bodies.

51. Another reference by way of information for the Assembly in defining the status of parliamentarians of associate members is provided by that of the parliamentarians of states associated with the Assembly of the Council of Europe. Reference to this latter is instructive. Indeed, the parliamentarians of associate members are part of the composition of the Assembly and have the same rights as the parliamentarians of full members (see Article 5.b of the statute of the Council of Europe). Associate members do not participate and are not represented in the Committee of Ministers¹⁰ but in the Assembly they are represented on an equal footing with full members. This precedent of the Council of Europe, although not legally binding on the WEU Assembly, cannot not be taken into consideration as a reference by the WEU Assembly in its political assessments. It is of course for the Assembly to assess whether it is politically timely to allow associate members voting rights, but it must also take account of the requirement of the rule of full participation for them.

52. An initial interpretation of this made in Document 1390 was not approved by the ministers who wished the matter to be examined further. A second interpretation, given in Document 1416, could not be adopted for lack of the necessary quorum. Moreover the parliamentary debates took place concomitantly with those of the ministers and therefore in ignorance of the latter. Can the request for re-examination although not addressed directly to the Assembly but communicated to it (Assembly Document 1422) remain outside its discussions, bearing in mind its autonomy? The implications of that autonomy and the political importance of the parliamentary functions of its members do not allow the legal analyst to offer strictly legal conclusions on the basis of which the Assembly would have to reach a decision on the question raised, while the latter also acts in accordance with a policy conceived within the context of its political autonomy vis-à-vis the ministers.

53. However this may be, a new factor has to be taken into account in any legal and political analysis, namely the exercise by the ministers of the powers conferred on them by Article VIII of

10. Associate member status is provided for international bodies with limited sovereignty.

the Brussels Treaty in new fields and to an extent unequalled in the past. The Maastricht, Petersberg, Rome and Kirchberg declarations undoubtedly demonstrate in the clearest possible way the will of the Council of Ministers to build a new European architecture, taking account both of the evolution of the European Union and its identity requirements and that of the Atlantic Alliance and the over-riding concern to preserve it. The Council has therefore been able to exercise all the responsibilities and competencies belonging to it as an authority empowered to consider not only the application of the treaty but also matters concerning its application and obviously its interpretation, in accordance with well established juridical practice.

54. Strengthening the security of the Brussels Treaty powers would certainly be among the aims to which the exercise of these responsibilities newly attributed to it by the 1954 protocol might be directed. The 1948 treaty had provided the Council with the powers of a diplomatic conference, enabling it to consult on all matters dealt with under that treaty. Moreover, the 1954 Council acquired the power to consider "the progressive integration of Europe". Its powers were thus widened to the whole of Europe. Under these conditions, all action taken by it to offer a status, not foreseen by the treaty, to states that are not signatories of the Brussels Treaty, is entirely in accordance with its wider territorial and functional powers.

55. To this enlargement must also be added the change in the legal nature of the Council, which first became ministerial and subsequently ceased to be "consultative" as it had been in the text of Article VII of the 1948 Brussels Treaty. The Council, created by the 1954 protocol is empowered to take binding decisions on behalf of the contracting parties, without having to resort to the procedure of drafting and ratifying a new international agreement, supplementing and modifying the previous one, i.e. the Brussels Treaty. These new powers were discharged for the first time in 1959, when WEU ceased to exercise its functions in social and cultural matters in favour of the Council of Europe.

56. A further change in the nature of the Council occurred with the creation of an international organisation, called WEU, of which the Council became the principal organ. This status of principal organ is expressed, in particular, by the fact that it became the supervisory body of the Armaments Agency which it was mandated to create and was required to present an annual report to an Assembly which had no right to censure it but could only adopt opinions and recommendations. Thus, in accordance with the law of intergovernmental organisations, it obtained the competence attributed to the principal organ of the organisa-

tion. As such, the Council recognised the autonomy of the parliamentary Assembly of WEU, deriving from the nature of its functions.

57. The Council, as principal organ, acquired the necessary powers to create (or generate) subsidiary or non subsidiary bodies (Agency for the Control of Armaments) whose legal nature is worthy of overall consideration. Therefore, with its wider territorial powers, extending to states not signatories of the Brussels Treaty, its power to take obligatory, binding decisions which are both executive and "legislative" and its status as principal organ of WEU, it was possible for it to establish an associate member status, with rights and duties, in the legal order both internal and external to WEU.

58. Consequently it would seem questionable to maintain that the "document" and "declarations" are political texts not enforceable in regard to the Assembly. The Brussels Treaty has doubtless not been revised in accordance with a revision procedure which, furthermore, was not provided for, but which could possibly be followed by applying the theory of the contrary act.

It was possible for the Council to create an associate member status in full conformity with the Brussels Treaty. This status is binding on all the governments and all the national parliaments of the Brussels Treaty powers. It is what might be termed a right derived from the 1954 modified Brussels Treaty and, as such, subject always to certain peculiarities linked with the derived nature of this right, it produces the same legal effects as the Brussels Treaty. These effects are enforceable in the states known as the Brussels Treaty powers and their parliaments and in other WEU bodies, from the moment they are grounded in the powers granted to the Council of Ministers in the protocol signed in Paris in 1954 and these powers have been exercised in accordance with the ends for the purpose of which they were granted, namely to strengthen the security (of the Brussels Treaty powers), promote the unity and encourage the progressive integration of Europe (see Article VIII.1 of the 1954 modified Brussels Treaty).

59. Associate member status undeniably fulfils the purposes assigned to the exercise of the powers granted to the Council of Ministers following the revision of the Brussels Treaty.

Indeed, it strengthens the security of the Brussels Treaty powers; it promotes the unity of Europe and encourages its progressive integration, in other words that of all the allied European states that are not signatories of the Brussels Treaty. Furthermore, a progressive process could not be achieved through rules fixed (*ne variatur*) by the treaty but through successive decisions adopted by an authority or institution of the organisation, empowered to act thus. This is achieved since the associate members reaffirmed at the

same time as the WEU member states (in the declaration made in Rome and included in the preamble of the document signed there on 20th November 1992) the commitments which bind their countries in order to ensure peace and security in Europe. There is no better way of repeating the first paragraph of Article VIII.1 of the Brussels Treaty.

Conclusions

60. a. The various decisions of the Council of Ministers incorporated in the Maastricht, Petersberg, Rome and Kirchberg declarations and partly given substance in the "document" signed in Rome, provide an adequate legal foundation for any possible decision by the Assembly to allow the participation of parliamentary representatives of the associate members of WEU. To this end the Assembly has no need to implement any formal revision procedure of the 1954 modified Brussels Treaty.

b. The Assembly may base any decision it reaches not on a literal interpretation of Article IX of the aforementioned treaty but rather on the successive decisions of the Council referred to above, adopted in accordance with Article VIII of the treaty. The explanatory interpretation of Article IX which seems to prevail among certain members is clearly in contradiction with present-day international law as handed down by the International Court of Justice. According to that body, charters of international organisations must be interpreted dynamically and teleologically, taking account of the powers inherent in the organs of the latter (see Case: Certain expenditure, 1962, paragraph 157).

c. Voting rights granted to parliamentary representatives of associate members are based on the principle of full participation by associate members in the actions and work of WEU. This principle governs associate member status in the various WEU organs, subject to possible exceptions and differentiations. The right to speak and vote of representatives of associate members may not be counted among permissible derogations, as the report adopted by the Committee on Rules of Procedure and Privileges moreover recognised (Document 1390). Indeed, there are two fundamental parts to a presence in a deliberative body¹¹: debate plus vote. There is no participation in the deliberation of such a body without intervention in debates and in voting, two operations which mark a presence inside and not outside the Assembly. The

11. Article IX of the Brussels Treaty is quite brief regarding the mission of the Assembly. As an indication in this respect, one might refer to Article 22 of the statute of the Council of Europe which defines its Parliamentary Assembly as a deliberative organ of the Council. The identity of representatives from one Assembly to the other authorises this reference as guidance for analysing the status of the Assembly of WEU.


latter is the case of observers, whereas the former is that of members of the Assembly. If the status of a parliamentary representative of an associate member of the organisation allows him to sit in the Assembly, this presence does not need to be identical to that of the representatives of full members. The difference is *de jure*. The extent of differences or derogations is determined in accordance with political and parliamentary considerations. Such considerations are at the discretion of the WEU Assembly. It is an autonomous but not separate body. In international organisations, the parliamentary body is not a separate power in face of the principal organ. Yet compared with the other organs in face of the principal organ, it is an organ that has autonomy that the others do not have. This autonomy stems from its composition and its function. Because of its parliamentary composition, the Assembly can only operate as a supervisory body and one of moral censure. Its task is to translate the opinion of the national parliaments as a whole on the question under discussion as expressed through their delegations.

The autonomy of the Assembly allows it to determine, discretionarily and independently of the decisions of the Council of Ministers, the régime of the parliamentarians of associate members in its forum with differences that may not be those retained by the Council for the participation of ministers of associate members in its own work. Thus a certain number of differentiations retained in the draft decision of the Committee on Rules of Procedure of the Assembly (Document 1390), those set out in section II (paragraph 3, sub-paragraph 3.6) for defining the principle for the participation of associate members in the activities of the Assembly may be based on the autonomy of the Assembly. This is so as long as the essential aspect of participation in the deliberative power has not been challenged. Likewise, the Assembly cannot insist on the status of representatives in the Assembly of the Council of Europe among the representatives of associate members who sit in that body. If the identity of representation in the two Assemblies risks not being observed, the identical number of representatives of associate members may also be set aside. However, this numerical differentiation could not be deemed to be discrimination between associate members or between the latter and full members. This might be the case in the event of significant differences in relation to the representations in the Assembly of the Council of Europe.

Conversely, no juridical basis can be seen for refusing the participation of parliamentarians of associate members in voting on opinions and recommendations of the Assembly.

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