THE FUTURE OF THE EUROPEAN UNION: THE POST-NICE AGENDA

I. Introduction

First let me express my great honor and pleasure to be able to act as a Visiting Professor in this distinguished Tamkang University. It was in 1988 when I was last time in your beautiful country; I was attending a Sino/European Conference in the course of which I gave a speech on European Investment in the RoC. Since then, things in Europe have drastically been changed. The communist system has collapsed, Germany has been reunified, the European Union was founded and my country, Austria, has become one of its members, along with Sweden and Finland. This would have been inconceivable a few years ago because Austria's neutrality was regarded as being irreconcilable with membership in a highly integrated organization, a supranational organization, which in the eyes of the Soviet Union was seen as the economic backbone of NATO. Previously, much pressure has been exercised from this side on Austria against any too close approach towards the Communities.

But fortunately, all this is history now. As a have said before, the radical changes in Europe, in particular the establishment of the European Union by the Treaty of Maastricht in 1992, happened within only a few years. It was the first project of this kind, which has been performed in history. It is both from the point of view of its structure as well as from its aims and objectives unique because it differs fundamentally from all other traditional organizations, as, of course, also the Communities did before. They are the foundation of the Union. This first project of the formation of a political Union proved, however, to be incomplete, if not defective. Improvements had to be made by the Treaty of Amsterdam of 1997, which, however, could not finish its agenda. Another revision of the Maastricht Treaty was necessary which came about in the form of the Treaty of Nice of 2001. My today's topic is the Future of the EU. Since the ToN has not yet entered into force but will hopefully become law in the future, I shall concentrate on its substance, in particular because of its crucial importance for the enlargement. This Treaty will, however, not be the last word: the summit meeting of Nice in December 2000 has also pointed in the direction of a new European Union, outlined in the so-called Declaration on the Future of the EU which was re-iterated with a greater precision in the Laeken Declaration of last December. I shall deal with that in my second part of the present speech.

In view of the complex substantive but perhaps also linguistic problems I would like to appeal to you not to hesitate to interrupt me, if you have any questions. I then should be very happy to answer them.

II. The Treaty of Nice of 26 February 2002

In December 1999 the European Council at Helsinki decided to summon another intergovernmental conference (IGC) in order to cope with the numerous applications hitherto unknown in the history of the European integration. It was its aim to decide upon the institutional reforms necessary to bring the fifth or, if you will, the sixth enlargement (with Eastern Germany) to a successful end. The IGC began its work on 14 February 2000 and finished it on the 11th December of the same year. An agreement on the amendments to the Treaty on European Union could be reached. After Amsterdam in 1997, it was the second amendment to the Treaty of Maastricht of 1992, which, in turn, revised the first revision of the basic Treaties in 1986 by way of the Single European Act. In totality it was therefore, the fourth revision of the Treaties of Rome of 1957, which made, of course, their comprehensibility not easier. Thus the simplification of the Treaties became, as we shall see, one of the main tasks for the next IGC to be held in 2004

This IGC 2000 had primarily to deal with the so-called Amsterdam left-overs. These were politically very controversial issue upon which not agreement could be reached in Amsterdam 1997. They were mainly focusing on the institutional reforms. One has to bear in mind, that the basically quadruple structure of the Communities – Council, Commission, Parliament and the Courts, was designed for an organization of six Member States, which had now reached the number of fifteen. The institutions available were in no position to function properly in a Community of, say, twenty-seven Member States. If the same system would be applied to the Commission, this body would be composed of some 35 Commissioners, most of which would be without portefeulle. The Parliament would consist of over 1000 Members of Parliament (so-called MEPs), reaching the sizes of the "Supreme Soviet" of the former Soviet Union und would become entirely inoperative.

A reform of this delicate issue would mean reaching compromises between the larger States and the smaller States of the Union. While the former were reluctant to give up their predominant position in the Commission, the latter feared to lose their influence and would be pushed to the perimeter of the Union. In addition, the establishment of a so-called Directorate of the Big Five, composed of Germany, France, Britain, Spain and Italy was the horror vision of countries like the Benelux, Denmark and also Austria.

This was the starting point of the IGC 2000. Without going into details, the following results were achieved after heavy and emotionally conducted discussions in which not only clashes occurred between the big five and the smaller States but also between the former arch enemies France (*Jacques Chirac*) and Germany (*Dieter Schröder).*

Nevertheless, the Treaty of Nice was adopted on 12 December 2000. After having been undergone legal and linguistic editing, it was formally singed at Nice on 26 February 2001. Its major innovations relate to the institutional reforms, as contained in the "Protocol on the Enlargement of the European Union"

III. The Council

The changes made in the Treaty constituted one of ten most difficult – both technically as well as politically – problems. It refers to the problem of redistribution of votes in the Council. The present system favors smaller States. QMV requires 62 votes out of 87. Germany, for instance, has ten votes, Austria four. Germany has 80 mio. inhabitants, Austria has only eight.. This disparity is now mitigated in favor of the larger States. From 1 January 2005 onwards the following weighting of votes in the Council shall apply:

Chart; weighting of votes inserted

Redefinition of QMV:

- ④ The present threshold of 71.31 percent (62 out of 87) will gradually be increased to 73.91 percent in a Union of 27 Member States
- ④ Acts of the Council shall require for their adoption at least 170 votes in favor cast by at least a majority of the members where this Treaty requires them to be adopted on a proposal from the Commission. If no such proposal is requires, act of the Council are to be adopted by at least two thirds of the members.
- ④ In this case any member of the Council may request verification that the qualified majority comprises at least 62 percent of the total population of the Union. If that condition is shown not to be have met, the decision in question shall not be adopted.

This is an entirely new element in the voting system in the Council that would give Member States with a larger population, such as Germany or Poland, an extra voting power in the Council. This new system is commonly called "dual" majority; but is, in fact, a triple majority, because a

- ④ a certain threshold is required. In the beginning 169 out of 237 votes (71%) which is gradually increased to approximately 73 %.
- ④ A majority of member States, and
- ④ 62 percent of the Union's total population

Another innovation refers to the inclusion of further areas in the QMV. They include: facilitation of freedom of movement of citizens of the Union, judicial cooperation in civil matters, industrial policy, cooperation with third countries, statute of the European political parties and matters relating to visa, asylum and immigration.

IV. The European Parliament

The maximum number of MEP is fixed with 732. The present number of the representatives, namely 626, is to be reduced by 91 seats, which means to 535. This rule will, however, fully take effect during the period from 2009 to 2014 because as long as the total number of representatives has not reached 732, a pro rata correction is to be applied, so that the total number of representatives is as close as possible to 732.

Insert chart EP Seats

The Parliament's role was recognized by the extension of the co-decision procedure to, for instance, matters relating to asylum, judicial cooperation in civil matters, industry, et.

V. The Commission

After having solved the problem of the weighted voted in the Council it was agreed that from 1 January 2005 onwards, only one national of a Member State might be member of the Commission. This means that the larger States were prepared to give up on Commissioner. This, in fact, constitutes a victory of the smaller States over the larger States who traditionally rejected this idea. After the 27th State has joined the Union, the number of Members of the Commission must be less than the number of Member States. The Members of the Commission shall be chosen according to a rotation system based on the principles of equality. The Council, acting unanimously, shall adopt the implementing arrangements. This is also called the *rendezvous*: clause. After the 37th State has joined the Union, the Council must meet and discuss this matter. This will be a tough discussion because hardly any country would be prepared to give up "its" Commissioner.

VI. The Courts

In view of the increase of cases submitted to the Courts, there was no debate about the necessity of a reform. This was laid down in a Protocol "on the Statute of the Court", annexed to the Treaty of Nice. According to Article 245 EC Treaty the Council acting unanimously at the request of the Court of Justice and after consulting the EP and the Commission, or at the request of the Commission and after consulting the EP and the ECJ may amend the provision of its Statute. From the constitutional point of view, this is one of the rare cases in which amendments do not require ratification by the Member States. It empowers the Council to enact such amendments but only by unanimous vote. The initiative may be taken by the Court itself or – and this is new – by the Commission.

The major reforms envisaged by the Protocol include in the first place the upgrading of the Court of First Instance. It will have the same status as the ECJ which means that it will be no longer just "attached to the Court of Justice" (Art. 225 EC Treaty) Its jurisdiction will extended to direct actions, namely actions for annulment (Art. 230), failure to act (Art. 232), for damages (Art. 235), disputes between the Community and its servants (Art. 236) and to actions arising from an arbitration clause contained in a contract concluded by or on behalf of the Community (Art. 238). It will also be empowered to give preliminary rulings in specific areas laid down by the Statute (Art. 25 para. 3)

As far as the competence of the ECJ is concerned, it will continue to act as an appellate Court to the Court of First Instance. Furthermore, it is ti decide upon actions for infringement against Member States. Thus its jurisdiction remains reserved to the basic questions of Community law. In order to be able to cope with the increased number of cases, it will be

organized in the forms of chambers of three or five judges. The Grand Chamber consists of eleven judges and shall sit when a Member State or a Community institution that is party to the proceedings so requests.

These reforms should enable the Courts to meet the requirements expected from the increase of cases brought before them after the enlargement.

VII. Enhanced Cooperation or "flexibility"

This is a concept introduced by the Treaty of Amsterdam designed to enable a limited number of Member States to take further steps towards integration without being hindered by those States, which are not (or not yet) prepared to go along with such initiatives. The best example is the EMU that only includes twelve Member States, the UK, Denmark and Sweden staying out of it and thus not belonging to "EURO-land". It began with the Schengen agreements in the nineties when Germany, France, the Benelux Countries and Italy decided to eliminate border controls. This was made by separate agreements outside the scope of the Communities. It was criticized for the lack of transparence and control by the EU/EC institutions.

The treaty of Nice laid down new detailed rules for such a "Europe at two speeds". Its principles, *inter alia*, are as follows:

- Enhanced cooperation can be established in all three pillars; the CFSP requires unanimous consent in the Council while in the Community and the PJCCM pillar QMV is sufficient;
- It must be engaged in only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties
- It must be aimed at furthering the objectives of the Union and the Community
- It must remain within the limits of the powers of the Union or the EC and does not cover areas falling within the exclusive competence of the Community
- It must involve a minimum of eight Member States
- It shall not affect the competences, rights and obligations of those Member States which do not participate therein, and, above all,
- It must be open to all the Member States.

If one looks for examples of such enhanced cooperation one could imagine such a cooperation between countries of the Eastern part of Europe to take specific measures, for instance, to combat organized crime stemming from, say, Russia, Ukraine, Belarus etc. Such an

enhanced cooperation could include the Baltic States, Poland, the Slovak Republic, Hungary, Bulgaria but also Austria and Germany. Countries like Portugal and Spain or other Member States in western Europe are probably not faced to such specific problems in the East.

VIII. Sanctions against Member States

Under the new Article 7 EU Treaty sanctions can be imposed against a Member States that has violated the principles of the Union, namely liberty, respect for human rights, the rule of law and democracy. The principal sanction envisaged is to deprive the disobedient Member State of its voting rights. This new provision was in the back of the minds of some European politicians belonging to the left spectrum of the political landscape. The following case against Austria occurred:

When in early 2000 it became clear that Austria would integrate the rightwing freedom party in its new government, the so-called EU XIV, the other Member States, imposed diplomatic sanctions against Austria in the form of the „Statement of the XIV Member States“ of 31 January 2000. In substance it meant the downgrading of bilateral diplomatic relations. No reasons were given therein and Austria was refused any opportunity to be heard on that case. This diplomatic isolation resulted *inter alia* in the cutting off from information preceding Council meetings and other gatherings within the EU. Also the tourist industry suffered losses because other EU citizens did not spend their holidays in Austria, as they used to do.

The idea behind these diplomatic sanctions was an alleged threat to the above-mentioned principles of the Union that, of course, did not occur. The EU XIV expected that Austria's government would ultimately resign and banish the freedom party from the next government, which, of course, did not happen. But there was no exit strategy for the other XIV Member States. Ultimately, the President of the European Court for Human Rights in Strasbourg, *Lucius Wildhaber*, was requested to appoint a group of „Three Wise Men“ to investigate the human rights situation in Austria. The position of the freedom party as regards xenophobia and racism was also checked. After this group had issued a report which showed that the allegations - namely threat to the EU principles - were completely ill founded, the EU XIV lifted their sanctions in September 2000.

This case is interesting in may ways: if the diplomatic sanctions are looked at from the point of view of traditional international law, they must be considered as being an extremely unfriendly but nevertheless legal act. A diagnosis under European Union law leads, however, to a different result. Conflicts among Member States should never be resolved by unilateral actions, as

the Court has stated in many cases. Any act of the Community must be reasoned. The Union must respect the national identity. Therefore, this act of the EU XIV must be considered as an illegal intervention. Finally, however, that fact that Austria was given no opportunity to state its case, namely that coalition negotiation with the social democrats failed and, after all, the freedom party was democratically elected by some 30 percent of the Austria peoples who went to the polls, constitutes the breach of basic principles of Community law. In summary, these sanctions, although disguised as bilateral measures under traditional international law, were in reality a serious infringement of basic principles of European Union law.

During the IGC 2000 Austria proposed an amendment to Article 7 EU Treaty in the sense that in case of a clear danger of a serious violation of the Union principles by a Member State the Council may by a four fifth majority render a decision to that extent. This decision, however, requires a reasoned proposal either by other Member States, by the European Parliament or by the Commission after the State concerned had been given the opportunity to be heard. In addition, the European Court is given control over the procedural aspects. This new procedure is widely regarded as an early warning system.

The uncontroversial acceptance of the Austrian amendment by the other XIV Member States at the IGC 2000 is a clear evidence that their sanctions against Austria were unlawful.

IX. The Declaration on the Future of the European Union

The Treaty of Nice has paved the way for the enlargement. This project exceeds all dimensions the Unions has hitherto been faced to. Out of the thirteen States which are at present knocking at its doors there are ten former socialist States - or part of socialist States -which soon will become members of the Union. One of the darkest chapters in European history will thereby finally be closed: the second World War and the ensuing artificial division of Europe[1]. On the other hand, the Union has achieved its highest level of integration: it has completed the EMU with the EURO as the sole legal tender for twelve States, it has improved the mechanisms to combat organized crime and problems relating to asylum and immigration are on its way to be better coped with. The instrument of enhanced cooperation may serve as a further motor of integration, as the EMU has demonstrated.

This does not mean that this is the beginning of the end of this unique process of European integration. On the contrary: it is just the end of the beginning for building an improved, if not a new, European architecture.

[1] See Presidency Conclusions European Council Meeting in Laeken. 14 and 15 December 2001. SN 300/1/01 REC 1.Laeken Declaration , 19.

The European Council meetings at Nice and subsequently at Laeken in Belgium in December 2001 made it quite clear that the European Union stands at a crossroads. It faces twin challenges, one within and the other beyond its borders. Within the Union, the European institutions must be brought closer to its citizens. Beyond its borders the European Union is confronted with a fast-changing, globalized world. It has to play the role of a power not only resolutely doing battle against all violence, all terror and all fanaticism but also to seeking to set globalization within a moral framework and to anchor it in solidarity and sustainable development.

Before the background of these broad aims as proclaimed in the Laeken Declaration, the reforms of the Union should concentrate on the following four items:

1. A better division and definition of competence in the European Union on the basis of the principle of subsidiarity
2. the simplification of the Union's instruments
3. More democracy, transparency and efficiency in the European Union, and
4. Towards a Constitution for European citizens.

These items are now before the Convention that began its work in last March under the chairmanship of the former French President *Giscard d'Estaing*

Besides the two Vice-Chairmen Mr. G. Amato and Mr J.L.Dehaene this Convention is composed of 15 representatives of the Head of State or Government of the Member States, 30 members of national parliaments, 16 members of the European Parliament and two Commission representatives. The accession candidate countries are fully involved in the Convention's proceedings. One government representative and two national parliament members represent them in the same way as the current Member States. They are, however, not able to prevent any consensus which may emerge among the Member States.

The above-mentioned issues are now under deliberation. The results will form the basis for the IGC 2004 that, in turn, will formulate a new Treaty.

Finally, I would like briefly to comment on these four items.

A. A better division and definition of competence in the European Union on the basis of the principle of subsidiarity

The Union/Communities are based on the principle of conferred powers. This principle, in theory, is very simple but when it comes to its application in practice, it becomes difficult.

A prominent example is furnished by the conclusion of the WTO Agreement of 1994. The Communities possess internal competences on all matters relating to the internal market as an area without internal frontiers in which the free flow of goods, persons, services and capital is ensured (Art. 14/2).. According to the so-called ERTA-doctrine, internal powers are parallel to external powers. In other words, if a specific power is internally conferred upon the Communities they may act also to that extent on the external scene, namely with third States. This results in the pre-emption of the Member States to that extent. They are no longer empowered to conclude agreements with third States on those matters. The difficult question is as to the delimitation of powers. In the *WTO*-Case (Opinion 1994) the question arose as to whether the Communities or the Member States or both are entitled to conclude that agreement. The Commission maintained the opinion that all powers relating to WTO subjects are conferred exclusively upon the Communities. Consequently, only the Communities were entitled to sign the agreement on behalf of all the Member States. The ECJ rejected that idea. After lengthy deliberations it came to the conclusion that the GATT - trade in goods - does no longer belong to the Member States' powers. As far as the trade in services (GATS) is concerned, Community powers only extend to those services which do not require the crossing of borders by persons; and TRIPS - trade related intellectual property rights - continue to fall into the shared - Member States' and Communities' – competence. The result of this ECJ opinion was that the WTO Agreement was defined as a „mixed agreement" requiring the adoption or ratification both of the Communities as well as of the Member States.

From the point of view of a European identity this legal situation is deplorable. In my view, one of the tasks of the Convention and of the new Treaty should be to clearly define what are „European Responsibilities". There should be a catalogue of exclusive competences allocated to the European Union which would contain all WTO-matters allowing Europe to speak with one voice in that organization. It could also include EMU matters, transport and fisheries.

But this would be a difficult task. One of the founding fathers of the American Constitution, James Madison, delegate from Virginia and the man who contributed more than any of his colleagues to the form of the Constitution[2], said in the context with the difficulty to keep those in dependence of the people who are entrusted with powers:

"Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments[3]".

---

[2] Ralph H.Gabriel, Hamilton, Madison and Jay on the Constitution. Selection from the Federalist Papers, New York 1954, xii

[3] Ibid. 38.

But the solution found in Section 8 of the US Constitution might perhaps serve as a model. It lists the several powers conferred on the government ranging from security against foreign danger, as Madison has called it, over the power to coin money to the regulation of Commerce with foreign nations. It also empowers the Congress "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

There is no further "positive enumeration", as Madison[4] has called it, of the powers necessary and proper for carrying their other powers into effect. Such an attempt "would have involved a complete digest of laws on every subject to which the Constitution relates", he said.

The same seems to be true for the European Union. A catalogue of shared powers, at contained in the German Grundgesetz, would be politically difficult to achieve. Gaps could be filled by way of Article 308 EC Treaty which could be formulated more precisely by , for instance the addition of a rule to the extent that the principle that all powers other than those conferred upon or delegated to the Union are reserved to the Member States should be expressly stated in the new Treaty or Constitution.

B. The simplification of the Union's instruments

Just only a brief glance at the diagram that I have prepared for this course reveal the complexity of the structure of the Union. Supranational elements are mixed with intergovernmental areas, which make it very difficult for the ordinary citizen to understand their inter-relationship. Admittedly the Maastricht Treaty constitutes, as was said before, the great leap forwards its system, but many of its Articles are only comprehensible for experts. This applies particularly to Article 46 TEU, which defines the compulsory jurisdiction of the European Courts. The subsequent revisions by the Amsterdam and Nice Treaties dis not make things easier. On the contrary: The use of different acts of legislation in the different pillars is confusing for the bodies, both Community institutions and Member States' authorities, that have to apply the law. Why should a framework decision in the third pillar not have direct effect as, under certain circumstances the directive in the first pillar?

A solution is offered by the Basic Treaty, which was drafted by the European University Institute in Florence, Italy. It only contains 95 clauses and includes the CFSP and PJCCM and thus does away with the pillars.

---

[4] Ibid. 62.

C. More democracy, transparency and efficiency in the European Union

This postulate relates to the role of the national parliaments which could contribute toward the legitimacy of the, what might be called, European project. More democracy refers also to the three institutions Council, Commission and Parliament. The Council is composed of members of national governments, which, in turn, derive their legitimacy from national elections. This does not apply to the Commission that is often criticized for its lack of democratic background. The President plays the crucial role. One could discuss the question of whether it should be elected by the European Parliament or even by the citizens of the Union. This , in turn, raises the question of a European electoral constituency which hitherto does not exist. The national rules on elections still prevail. Transparency also relates to the openness of the meetings of the Council which, in fact, does not yet exits Effectiveness relates to the abolition of the unanimity rule which no longer should have its place in a Union of 27 or so Member States. Finally, the Laeken Declaration envisages a

D. Constitution for European citizens.

The four treaties may already be considered as a European constitution, which, however, is not contained, in a single instrument. As to what had already been said about simplification of the Union's instruments, there should be one single instrument to contain the basic provisions governing the European Union. The Florence draft of a Basic Treaty might be the beginning of such a project, which ultimately might lead to what is called the United States of Europe (USE), as envisaged by numerous writers in the past. A crucial question is as to whether to include the EU Charta of Fundamental Rights in the new "Constitution" or "Constitutional Treaty". The answer is yes because in any democratic system all governmental or administrative acts should be able to be challenged before an independent Court.

These are the main question for the future of the European Union. Should there no serious objection against this idea be raised, and then there is some hope that arbitrary treatment of political opponents will be reduced to a minimum

If this comes true, then the visions of numerous writers, diplomats, Sovereigns, etc. will become true in the Europe of the 2001st century.

Thank you for your attention.