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The relations between the EU and Andorra, San Marino and Monaco

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10.1 Introduction

Writing on the relations between the EU and Andorra, San Marino and Monaco is not an easy exercise.[1] Various aspects make these relationships very complex. An important one has to do with history, whether or not in combination with geography. It is simply impossible to examine the relationships between the EU and, for example, Andorra, without explaining why Andorra is where it is and how it comes that this piece of land in the heart of the Pyrenees is neither France nor Spain and not part of the EU. But entering into the unique and often fascinating history of micro-States in a contribution like this is an almost impossible venture. Constraints of various natures impose all kinds of limitations and the reality is such that only a very fragmented picture of the relevant historical facts can be provided. Nevertheless, the very short historical background to each of the three micro-States should help to elucidate their specificity in their present relations with the EU.

One of the characteristics common to all of the European micro-States is the very special relationship with their immediate neighbour or neighbours; this very often also explains why their neighbours did not absorb them. But this common feature is at the same time the characteristic which makes

The author had the opportunity to discuss with H.E. the Ambassador of Andorra, Mrs Carme Sala; H.E. the Ambassador of San Marino, Mr Gian Nicola Fillipi Balestra; and H.E. the Ambassador of Monaco, Mr Jean Pastorelli, various aspects covered in this paper. He would like to express his gratitude for these very useful discussions. All views and opinions expressed in the paper are the responsibility of the author alone.

[1] A first attempt was 'Les micro-états européens et l'Union européenne: une relation de proximité sous tension?', in *Les dynamiques du droit européen en début du siècle. Etudes en l'honneur de Jean-Claude Gautron* (Paris: Pédone, 2004), pp. 751–75. The present contribution is a more elaborated and updated study.

it very difficult to make generalisations. While it seems to a large extent correct to say that 'the level of independence of a micro-State depends on the will of the larger neighbouring State',[2] it is also a fact that the history of each micro-State is quite different and very closely intertwined with the political, economic and legal background of the region in which it is located. Consequently, the overall picture of each of the micro-States' relationships with the EU is a diversified one. Each has gradually developed its own bilateral framework with the EU, sometimes at the initiative of the EU, sometimes at its own initiative. There seems to have been little or no concertation among the micro-States themselves on their possible relations with the EU, except perhaps regarding some developments related to the Treaty establishing a Constitution for Europe. But a lack of concerted action by Andorra, San Marino and Monaco (and also Liechtenstein) in developing their own relations with the EU does not prevent these countries from having formal or/and informal contacts with each other, for example, through their official representations accredited to the EU in Brussels.

The EU too, for its part, has never had a well-defined global policy approach towards these small grey spots which have remained outside the enlarged EU. The EU has other priorities, and most of its initiatives towards micro-States have been developed on a purely ad hoc basis. This is, of course, in the light of what has just been mentioned, perfectly understandable. However, one important exception to this state of affairs is the EU initiative in the field of taxation of savings income which will be examined in more detail later in this contribution. All micro-States, in one way or another, are known for their low level of taxation and/or accommodating fiscal laws. For the first time in the history of the external relations of the EU, the micro-States were subjected equally to a well-conceived EU political strategy in this respect.

This contribution first examines each of the three European micro-States' specific relationships with the EU. As was already mentioned, because of their different histories, the individual legal frameworks show a great diversity. Therefore, the analysis of the relationships of each micro-State with the EU starts with a short introduction to the historical and political background of the micro-State in question in which the relations

[2] See J. Duursma, *Fragmentation and the International Relations of Micro-States. Self-determination and Statehood* (Cambridge: Cambridge University Press, 1996), p. 433.

with the neighbouring State or States, in all cases EU Member States, occupy a prominent place. Not all legal instruments governing the relations between the EU and the micro-States are included in this part. Sections 10.3 and 10.4 deal with a number of important bilateral agreements with the micro-States or other initiatives, involving the EU and/or its Member States and affecting the micro-States. Section 10.3 concerns, more specifically, the monetary dimension of the relationships and the various initiatives taken in this respect, while in Section 10.4 the position of the micro-States in the EU's fiscal policy is briefly examined. However, the separation between the different parts in this contribution should not be taken too strictly. The 'micro-States' specificity' remains very much a determining factor for what is covered in all the different parts, but in Section 10.3 and Section 10.4 the focus is more on global EU policies. For example, when the EU approached Andorra for the conclusion of an agreement on taxation of savings income, Andorra insisted on a 'package'-strategy allowing also for negotiations on other subjects of interest for the Principality. In other words, negotiation and acceptance of certain specific arrangements falling under the global EU approach, including also their timing, are not always disconnected from other initiatives.

10.2 The micro-States' specificity as a determining factor in their relations with the EU

Among the European micro-States, one in particular occupies a substantially different position to the others. While the three micro-States examined in this contribution have gradually developed or are developing their own bilateral relations with the EU, Liechtenstein, for its part, is a participant in the European Free Trade Association (EFTA) framework and is the only micro-State which is a full member of the European Economic Area (EEA). Certainly, this does not necessarily exclude the conclusion of specific bilateral arrangements, but on the whole the picture of Liechtenstein's relations with the EU is considerably different from that of the other micro-States. This, together with reasons related to available space in this volume, explains why the relations with Liechtenstein are not included in this contribution. They form part of a separate study which will be published elsewhere. The relations between Andorra and San Marino and the EU probably have the most in common but nevertheless vary in various important aspects. Monaco,

because of its extremely small size and above all because of its very close relationship to France, is in itself a special case in the peculiar world of micro-States.

10.2.1 Andorra

Background

The principality of Andorra with a territory of 468 km^2 is no doubt the giant of the European micro-States. In terms of geographical extent, it is more than 200 times the size of Monaco, and it is greater than Malta,[3] which is now an EU Member State.[4] Also, as far as population is concerned, Andorra is the largest European micro-State with more than 70,000 inhabitants[5] but it remains far behind Malta, which has around 400,000 inhabitants.

Andorra's history is particularly complex and goes back well into the Middle Ages. Its existence, as independent territory, finds its origin in the continuous struggle between the Count of Foix (South of France) and the Bishop of Urgell (a city in the North of Catalonia). In 1278 and 1288 arbitrations led to a compromise between the civil and religious powers involved in the dispute and the system of *Pareatges* ('Paréages') was introduced. The *Pareatges* established co-sovereignty by the Bishop and the Count and granted certain rights to the co-sovereigns in a number of areas, including the military and the administration of justice. Andorrans paid tribute – the *quèstia* – to the Count and the Bishop, although the most important thing was that the two powers renounced to conquer or incorporate in their own respective territories, the territory that is now Andorra. It is this arrangement which constitutes, to use the expression of Mateu and Luchaire, Andorra's birth certificate.[6] The fact that there was not a single prince but *two* co-princes is the main explanation for Andorra's unique status in international law. Often through a very subtle play of diplomacy, including sometimes playing off the one against the

[3] The surface of Malta is 316 km^2. [4] Since 1 May 2004.

[5] The majority of the population in Andorra is of Spanish nationality (38 per cent); the Andorrans represent 36 per cent of the inhabitants. Other nationalities are Portuguese (11 per cent), French and others (15 per cent), see *L'Andorre en chiffres 2005*, Ambassade de la Principauté d'Andorre en France, Govern d'Andorra, Ministeri de Finances, Servei d'Estudis, n.d., p. 21.

[6] M. Mateu and F. Luchaire, *La Principauté d'Andorre. Hier et aujourd'hui* (Paris: Economica, 1999), p. 19.

other, Andorra has survived for more than seven centuries.[7] In 1993 Andorra adopted a modern constitution offering all the characteristics of a parliamentary democracy with the application of the rule of law and fundamental rights and freedoms, while preserving a number of its historical specificities. Some basic elements of the *Pareatges* are maintained, the most important being the confirmation that the Co-Princes, that is to say the Bishop of Urgell and the President of the French Republic,[8] are jointly and indivisibly, the *Cap de l'Estat* (Head of State) in their personal and exclusive right (Art. 43). Their powers are identical and they are the symbol and guarantee of the permanence and continuity of Andorra as well as of Andorra's independence. The *Coprínceps* (Co-Princes) sanction and enact the laws and they express the consent of the State to honour its international obligations.[9] The *Consell General* (General Council), composed of directly elected members, represents the Andorran people[10] and the Government is politically responsible to the *Consell General*.

[7] See, for example, M. Mateu and F. Luchaire, previous note, pp. 21–45. It is interesting to note how this 'Andorran specificity' was perceived in the (rare) accounts of Andorra by foreign observers particularly in the nineteenth century. For a curious but interesting account by an American traveller, see B. Taylor, *The Republic of the Pyrenees. Andorra 1867*, re-edited in *L'Andorra dels viatgers. Els Americans, 1*, Ministeri d'Afers Exteriors, Andorra, 2002. For another comment, see 'La République d'Andorre', *L'Illustration européenne*, 1870–1871, pp. 123–4, which notes that Andorra, notwithstanding its very small size, 'a toujours fait preuve [of the necessary energy] pour conserver intacte son indépendance, au milieu des crises nombreuses qu'ont traversées ses puissants voisins, la France et l'Espagne'.

[8] Sometimes political events taking place with Andorra's neighbours, in particular France, affected certain aspects of the implementation of the *Pareatges*. For example, in the seventeenth century the rights of the Count of Foix were transferred to the King of France. After the French Revolution and after a period of great uncertainty, Napoleon re-established the *quèstia* and agreed to restore the former administrative, commercial and police framework. After 1815, King Louis XVIII became Co-Prince of Andorra and later the President of the French Republic assumed the function of Co-Prince. This is still the situation today.

[9] If one of the Co-Princes is impaired to do so, the signature of the other Co-Prince together with the countersignature of the Head of Government, is sufficient (Art. 45(3)). On the specific position of the Co-Princes when Andorra negotiates agreements in areas indicated in Article 64(1) of the Constitution affecting the relations with the neighbouring States, see J.-C. Colliard, 'L'État d'Andorre', *Annuaire français de droit international* (1993), p. 387, who qualifies the power of the Co-Princes, for the category of agreements mentioned, as 'un véritable droit de *véto*'; on the position of the French Co-Prince in general, see also F. de Saint-Sernin, 'Le Président de la République française, coprince d'Andorre', *Revue des deux mondes, Numéro spécial* '*Visages de l'Andorre*' (2001), pp. 18–25.

[10] Half of the representatives are elected on the basis of a national single constituency, half are elected by the seven *Parròquies* ('parishes' in the sense of 'municipalities').

Even if Andorra was never occupied by one of its neighbours or 'integrated' into the territory of one of its neighbours, its international legal capacity remained uncertain. For a very long time, the only international instruments worth mentioning in which Andorra was involved were the commercial agreements, concluded in 1867 through an Exchange of Letters with Spain and France.[11] It was only far into the twentieth century that the question of Andorra's international legal status became a highly debated matter. This was particularly the case after 1980, when the calls of the Andorran people for domestic reform and modernisation of the Andorran institutions and political structures also became more and more outspoken.[12] Interestingly enough, this went together with a strong economic development of the Principality,[13] mainly as a result of a rapidly growing tourist sector bringing millions of visitors to Andorra every year.[14] One of the Principality's many attractions for these visitors is its low indirect taxation.

One serious difficulty facing Andorra in its attempt to acquire international legal personality has been the position of the French Government which refuted such personality on the grounds that Andorra was only 'a territory' and not a sovereign State. In 1971, the French Cour de Cassation, while recognising that 'les vallées d'Andorre' did benefit from certain privileges, still stated that they neither constituted a State nor a subject of international law ('les vallées d'Andorre . . . ne constituent ni un Etat, ni une personne de droit international'[15]). Clearly, in this view, it was only the French President, as Co-Prince of Andorra, who could decide whether an international agreement had to be applied in the territory.[16] Consequently, any international activity or representation of Andorra needed to be organised through the French Co-Prince.

[11] See P. Raton, *Le statut international de la Principauté d'Andorre*, Andorra, Govern d'Andorra, n.d., 2nd ed., pp. 21–2.

[12] See Mateu and Luchaire, *La Principauté d'Andorre*, n. 6, pp. 58–60.

[13] See A. Pintat, 'L'engagement international de l'Andorre', *Revue des deux mondes*, n. 9, pp. 27–34.

[14] In 2004 Andorra received 11.6 million tourists, see *L'Andorre en chiffres*, n. 5, p. 37.

[15] Judgment of 6 January 1971, *Recueil Dalloz-Sirey*, 1971, p. 338, with annotation by J.-C. Sacotte. Further in the judgment the Cour de Cassation seems to confuse the specific role of the French President as Co-Prince of Andorra with that of the French State.

[16] For a detailed and critical analysis of the classic French position, see N. Marquès, *La reforma de les institucions d'Andorra (1975–1981). Aspectes Interns i Internacionals* (Lleida: Virgili & Pagès, 1989), pp. 252–71.

Gradually, this monolithic interpretation was challenged by leading international law experts.[17] But, perhaps even more importantly, the other Co-Prince, the Bishop of Urgell, was no longer prepared to follow the French interpretation and pleaded more and more openly for the recognition of the Principality's international personality in its own right.[18]

In analysing the bilateral relations between the EU and Andorra, the commercial Agreement of 1990 constitutes a historical point of departure. Its origin, context and contents, as well as its domestic constitutional and international repercussions, are hereunder briefly examined. This is followed by an analysis of the 2004 Cooperation Agreement concluded with the EC. Other agreements or negotiations on agreements with the EC are included in Sections 10.3 and 10.4 of this contribution.

The 1990 Agreement with the EEC

Origin and context The decisive and international breakthrough of Andorra came in 1990, when it succeeded in signing a bilateral agreement with the EEC, the first bilateral agreement since the 1867 Exchange of Letters with its neighbours. Today, this international legal instrument remains the main but not sole bilateral legal framework with the EC. The establishment of the EEC, of which Andorra's neighbour, France, was a founding member, had already resulted in a number of anomalies with regard to the legal regime of the trade relations between the EEC and Andorra.[19] While these anomalies might still be tolerated as long as France remained the only neighbour of Andorra in the EC, the situation changed dramatically with the prospect of accession of Spain to the EC. Spain was by far Andorra's largest trading partner and the 1867 bilateral Exchange of Letters could no longer continue to govern their bilateral trade relations. In a Joint Declaration on future trade arrangements with Andorra,

[17] See, for example, K. Zemanek, *Le statut international d'Andorra. Situation actuelle et perspectives de réforme* (Andorra: Casa de la Vall, 1981), p. 187.

[18] For the position of the Bishop rejecting the monopoly of the French Co-Prince in external matters, see N. Marquès, *La Reforma*, n. 16, pp. 270–1.

[19] An interesting but unpublished PhD thesis on the relations between the EEC and Andorra before the conclusion of the 1990 Agreement, is that of P. Klaoussen, *Les effets de l'intégration communautaire sur le régime juridique des échanges commerciaux de l'Andorre*, Université de Toulouse I, 1989, p. 230. For the author's analysis of these anomalies, see in particular pp. 66–87.

included in one of the Annexes to the Accession Treaty for Spain and Portugal, it was explicitly stipulated that 'an arrangement governing trade relations between the Community and Andorra will be finalised within a period of two years of the date of entry into force of the Act of Accession and will be intended to replace the national arrangements at present in force'. The existing national arrangements were supposed to continue to be applied until the new bilateral arrangement came into force. Needless to say, this Declaration offered on a golden plate a unique opportunity for Andorra to affirm itself internationally. Since a bilateral agreement with the EEC was envisaged, this would mean recognition of Andorra's international legal personality by the EEC. Moreover, indirectly, such a move would undoubtedly substantially contribute to the recognition of Andorra's legal personality worldwide.

Before Spain's signature of the Accession Treaty, the Andorran Government had already taken the initiative in 1982 urging the Co-Princes to support direct exploratory contacts between the Government and the European Community in order to assess the economic consequences of a possible accession of Spain to the EC.[20] In the light of what has been explained above, it is clear that a serious obstacle for any move forward remained the French position on direct bilateral negotiations between Andorra and the EC. But another major hurdle was the question who was to represent Andorra, if such bilateral contacts were to be established. There were no constitutional provisions on the conclusion of agreements and practice was lacking. Fortunately for the Principality, when solutions for these questions became unavoidable, that is to say in the second half of the 1980s and early 1990s, the time had never been so propitious for a resolute step in the direction of the 'andorisation' of the Principality's external relations. Indeed, in France, even if at least initially, the Quai d'Orsay still preferred to continue to defend the traditional French view on the representation of Andorra internationally, it was not a secret that the then French Co-Prince, President Mitterand, was not unsympathetic to the Andorran cause.[21] This had been made clear by the President

[20] See Declaration of the Andorran *Cap de Govern* (Head of Government) M. Oscar Ribas, quoted in R. Poy, *El Repte, Records d'un cap de Govern d'Andorra* (Andorra: Fundació Julia Reig, 2001), pp. 57–8.

[21] For a very interesting account and analysis of the history of the 1993 Constitution in relation to the position of the French Co-Prince, see Colliard, 'L'État d'Andorre', n. 9, pp. 367–92, who emphasises that in general the French Co-Princes were more in favour of democratic and

himself on the occasion of the remittance of the *quèstia* in 1989, while the negotiations between Andorra and the EC were pending, when he stated that, as regards the institutional reforms in Andorra, he was open towards any solution which responded to the profound aspirations of the Andorran people domestically as well as internationally. In other words, also for President Mitterand, constitutional and international emancipation seemed to go hand in hand. With regard to the ongoing negotiations with the EC, he expected that the coming agreement would take into account Andorra's legitimate interests and such an agreement would at the same time also facilitate, to use the President's words, 'l'indispensable désenclavement d'Andorre dans l'Europe d'aujourd'hui'.[22]

It is evident that such a strong and unequivocal position by the French Co-Prince constituted an invaluable support for the Andorran delegation negotiating the agreement with the EC. It must also be said that the composition of this delegation had already been a complicated matter in itself and in the end a large delegation composed of representatives of the Government, the Co-Princes, the French Ministry of Foreign Affairs, Andorran officials and ad hoc experts, negotiated this historical agreement. Expectations were very high since the ultimate objective of the negotiations was nothing less than a customs union between Andorra and the EEC. Although the recognition of Andorra's international personality remained a difficult political and legal question, astonishingly, negotiations did not concentrate on this aspect at all. In the formal bilateral negotiations the matter was not even raised and, apparently, a political compromise had been reached on this delicate issue before the real negotiations started. The European Commission, which logically was the negotiator for and on behalf of the Community, preferred to tackle the genuine substantive issues – after all, the main objective of the agreement was to establish a customs

constitutional reforms than the Bishop. The democratic dimension of the institutional changes in Andorra constituted an essential element of President Mitterand's favourable disposition towards these changes and in this context Colliard also quotes the President who had noted, at the remittance of the *quèstia* in 1991, that the preparatory works for the constitution incorporated 'des principes aussi fondamentaux que l'instauration d'un Etat de droit démocratique et souverain', p. 385; also comments in R. Poy, *El somni. Records d'un cap de Govern d'Andorra* (Andorra: Fundació Julià Reig, 2004), p. 121–2; on this point see also Mateu and Luchaire, *La Principauté d'Andorre*, n. 6, pp. 64–5. In France, between 1986 and 1988, it was the period of the 'cohabitation'.

[22] See Présidence de la République, 'Allocution prononcée par Monsieur François Mitterand, Président de la République à l'occasion de la remise de la *quèstia* andorrane', Palais de l'Elysée, 17 novembre 1989.

union – and, apparently, it was also the Council's and Commission's idea to conclude the agreement with Andorra through a mere Exchange of Letters, instead of a 'classical' bilateral agreement. The reasons invoked for this procedure were the flexibility of the legal instrument 'Exchange of Letters' together with the specificities of Andorra's legal status. Certainly, Andorra would have preferred a more classic legal format for the Agreement, especially in the light of the importance of its substantive objective, above the not very convincing legal justification of the choice of the legal instrument used by the EC. But even if the agreement was agreed upon via the 'Exchange of Letters' procedure, it would then nevertheless constitute Andorra's biggest international achievement ever in its history. In other words, the Agreement would be a real constitutional and international 'primeur' for the Principality. Finally, in 1989 the Andorran delegation and the European Commission were able to reach agreement on the substance and the Agreement was signed in 1990.[23] The substantive legal bases used by the EC for the conclusion of this agreement were Articles 113 and 99 EEC. The reason that Article 99, on harmonisation of turnover taxes, was also deemed necessary, in addition to the basic Treaty provision on commercial policy, remains somewhat unclear, unless perhaps the arrangements on 'allowances' (see *Contents* below) justified it. An immediate consequence of this choice was that the Agreement required unanimity among the Member States for its conclusion. An interesting side effect of the conclusion of this Agreement on the basis of the unanimity rule within the Council was that *all* the Member States also, even if only indirectly, recognised Andorra's international legal personality.

Contents The Agreement establishes a customs union between the EC and Andorra covering the Chapters 25 to 97 of the Harmonised System (industrial products). There is free movement of goods covered by these Chapters, provided they are produced in the Community or in the Principality, including those obtained wholly or in part from products coming from third countries and in free circulation in the Community or in Andorra. Free movement of goods applies equally to goods which come

[23] For text, see OJ 1990 L 374/14. The Agreement entered into force on 1 July 1991. From the Andorran side the Agreement has three signatures: one for the President of the French Republic as Co-Prince of Andorra, one for the Bishop of Urgell as Co-Prince of Andorra, and one for the Government of Andorra.

from third countries and are in free circulation in the Community or in Andorra (Art. 3). Logically, the free movement principle covers the elimination of certain duties and charges having equivalent effect to customs duties as well as quantitative restrictions and measures having equivalent effect (Art. 9). Andorra had to align its laws to the EC laws on imports of goods from third countries (Art. 7). The first Joint Committee EEC–Andorra established an inventory of Community legal acts to be applied by Andorra.[24] An important consequence of this commitment was that tariff preferences granted by the EC to third countries also have to be applied by Andorra. Processed agricultural products falling within the chapters mentioned above are not subject to duties on the fixed component but to the variable component that continues to apply to products covered by the Chapters 1 to 24 of the Harmonised System (agricultural products). Agricultural products do not come within the scope of the customs union. They are not totally excluded from the Agreement, however, and if they originate in Andorra, are free from import duties on imports in the Community (Art. 11). For imports into Andorra of agricultural products originating in the Community, the Community's CAP refunds apply and Andorra is entitled to levy import duties on such products.[25]

The Agreement contains specific provisions on trade in tobacco. Article 12(2) provides that Andorra grant a preferential tariff of 60 per cent of the normal customs duty applicable to certain tobacco products manufactured in the Community from raw tobacco as compared to imports of the same products from third countries. The origin of this special treatment of certain tobacco from Community origin is to be found in the situation that existed before the signature of the 1990 Agreement when arrangements with the French SEITA and Spanish TABACALERA existed in Andorra, granting preferential tariffs to cigarettes and tobacco manufactured by these two companies.[26]

[24] See Decision 2/91, Joint Committee EEC–Andorra, OJ 1991 L 250/24 and later repealed and replaced by Decision 1/2003, Joint Committee EC–Andorra, OJ 2003 L 253/3.

[25] Andorra's import duties are very low, except for tobacco and beverages.

[26] SEITA and TABACALERA were for a very long time national legal monopolies in respectively France and Spain for the production and wholesale distribution of tobacco products. These legal monopolies are now abolished but the arrangements with Andorra on import of tobacco of Community origin which had been made while both companies still enjoyed this status continue to be applicable.

The Agreement further provided that for a period of five years the Community was authorised, acting on behalf of and for Andorra, to put into free circulation goods with destination Andorra and originating in third countries (Art. 8(1)). Since 1 July 1996 this is done by Andorra itself.[27] Not to be underestimated either is the part of the Agreement concerning the allowances ('*les franchises*') for travellers entering the Community from Andorra allowing imports of goods of a strictly non-commercial nature. Generally speaking, the total value of the goods that may be imported free of import duties, turnover tax and excise duties is three times the value granted by the Community to travellers from other third countries. There are, however, quantitative limits on certain products, such as milk products, tobacco, alcohol, coffee, tea and perfume. In addition, the Agreement provides for the application of the principle of non-discrimination in the field of indirect taxation on products (whether included in the customs union or not) of one Contracting Party compared to similar products from the other Contracting Party (Art. 15). Finally, it is worth mentioning that the Agreement contains a Joint Statement regarding the provisions in the Agreement on movement of goods, stipulating that where they are similar to the EEC Treaty, the Contracting Parties' representatives in the Joint Committee 'shall undertake to interpret the former, within the scope of this Agreement, in the same way as the latter are interpreted in trade within the European Economic Community'.

Today, the 1990 Agreement is still in force and is to the satisfaction of both parties. A few minor problems have arisen regarding the application of the rules of origin for goods not covered by the provisions on the customs union (for example, regarding madeleine cakes, bovines, the concept 'sufficient working or transformation'), but on the whole there have been few problems. There is one important exception, however. In the second half of the 1990s the so-called tobacco war broke out between the EC and Andorra. Andorra was accused of being a source of intensive smuggling of cigarettes manufactured under licence in Andorra or manufactured in non-member States of the EU, imported into Andorra, and then exported to the EU, particularly Spain. Large quantities of cigarettes were indeed confiscated, mainly by the Spanish customs authorities but also by customs authorities of some other Member States. According to the EC, the quantities of tobacco imported into or manufactured in Andorra were far exceeding what was

[27] Decision 1/96, Joint Committee EC–Andorra, OJ 1996 L 184/79.

necessary for the estimated local consumption and for duty free sales to tourists. In 1997, for example, the EC tax receipt losses as a result of cigarettes smuggling were estimated at 400 million ECU and according to the European Commission, there was 'a lack of appropriate legislative instruments in Andorra to prevent and combat fraud'.[28] One of the interesting legal questions in the dispute was whether the concerned Andorran exports in themselves constituted a violation of the 1990 Agreement. Whatever the legal interpretation of the two Parties, the strong pressure exercised by the EU, and Spain in particular, through very tight controls at the border, led the Andorran Government to take unilateral measures in 1999 in the form of legislation to combat customs fraud and penalise smuggling.[29] Since then, no serious problems with the EU seem to have arisen regarding tobacco exports from Andorra nor indeed in the bilateral trade relations as a whole. However, the Court of Auditors of the EC has criticised the provisions of the 1990 Agreement EEC–Andorra in general, emphasising that the vast majority of goods imported into Andorra were not for consumption in Andorra itself but rather for sale to tourists who in turn were largely reimporting these goods back into the Community. The Court of Auditors, therefore, suggested that 'it might be more appropriate to base the systems in Andorra [and San Marino] on the rules and levels attributable to the actual consumption of goods'. While accepting 'a formula of population ratios taking tourists into account', the Court nevertheless concluded that there appeared 'to be a need for a review of such arrangements [as in the Agreement with Andorra] in the light of the single market'.[30] It thus implied that a renegotiation of the 1990 Agreement would be required. The Commission did not specifically address this suggestion in its reply, but responded in more broad terms that certain arrangements entered into with some micro-States 'have historical and/or political origins'. The Commission '[was] therefore trying to find appropriate means of reconciling the historical and political interests in question and the financial interests of the Community's own resources'. The Commission also emphasised 'that the financial impact of these exceptional situations on the Community is

[28] European Commission, *Protection of the financial interest of the Communities. Fight against fraud. Annual Report 1997*, COM(98) 276, p. 19.

[29] See the laws on customs fraud and on control of sensitive goods of 4 March 1999 and on penal sanctioning of smuggling of July 1999.

[30] See Special Report No 2/93 on the customs territory of the Community and related trading arrangements accompanied by replies of the Commission, OJ 1993 C 347/1.

negligible'.[31] The historical, geographical and political specificities together with the negligible economic repercussions on the EU as a whole, are indeed convincing arguments in favour of maintaining a special relationship with Andorra and other European micro-States.

Before entering into some of the constitutional and international implications of the 1990 Agreement, one specific trade aspect was organised in a separate legal instrument and deserves mention here. In 1997, a Protocol with the EC on veterinary matters was signed to supplement the 1990 Agreement.[32] Its main objective is 'to maintain traditional flows of trade in live animals and animal products between Andorra and the European Community'.[33] Basically, Andorra undertakes in this Protocol to apply Community veterinary rules. The list of Community veterinary provisions to be applied is drawn up by the Joint Committee set up by the 1990 Agreement. The Protocol is of prime importance for the agricultural sector, as well as for the application of animal and food safety laws in Andorra and is interesting from a legal point of view. Various Decisions of the EC–Andorra Joint Committee have further implemented Community legislation in these areas.[34] Decision 1/2005 of the Committee is of particular relevance because it deals with the position of Andorra towards the basic Community Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and procedures in matters of food safety.[35] It also lays down the conditions of Andorra's participation in the Community's 'rapid alert system'.[36]

Constitutional and international implications The 1990 Agreement EEC–Andorra had important consequences domestically as well as externally. It was an important step towards the modernisation of Andorra's institutions and, as already mentioned, in 1993 a modern written constitution was adopted. The 1993 Constitution clearly and unambiguously formulated Andorra's independence and, most importantly, its external legal capacity. On this last aspect, the impact of the conclusion of the 1990 Agreement was simply colossal. While Andorra had been one of the

[31] See previous note, p. 27. [32] OJ 1997 L 148/16. [33] See Preamble of the Protocol.
[34] See Decision 2/1999, OJ 2000 L 31/84; Decision 1/2001, OJ 2002 L 33/35; Decision 2/2003, OJ 2003 L 269/38.
[35] For text, see OJ 2002 L 31/1, amended by Regulation 1642/2003, OJ 2003 L 245/4.
[36] OJ 2005 L 318/26.

European micro-States with the most uncertain or most fragile external legal personality, the Agreement now implied that it was treated by the EC as a full-fledged third State. With, in the past, one big neighbour claiming to have exclusivity over Andorra's international relations, the conclusion of a bilateral agreement with the EEC meant a dramatic turning point and a fact of immense historical importance for the Principality.[37] After the conclusion of this Agreement, it seems that France no longer insisted on representing Andorra internationally. The conclusion of the 1990 Agreement in combination with the 1993 Constitution were the beginning of a rapidly and universally recognised international presence of Andorra, including inter alia membership of the UN, the Council of Europe, opening of various embassies and representations abroad, among them the opening in Brussels of a mission accredited to the EU. Andorra is an observer in the WTO but not yet a member.[38]

Another very important milestone in the development of Andorra's external relations was the trilateral agreement signed with Spain and France on 1 June in 1993 on good neighbourly relations, friendship and cooperation.[39] This agreement, which ultimately consecrates Andorra's external capacity and is therefore the most important ever signed with its neighbours, has far-reaching effects indeed. First, it takes account of the specific geographic situation of Andorra and its historical traditions and recognises in Article 1 the Principality of Andorra as a sovereign State. In addition, the integrity of the Principality is guaranteed. It is important to note that the trilateral agreement refers to the importance of the 'European context' in which relations among the parties are developed. Moreover, the Parties commit themselves to settling any differences that might arise, taking into consideration the obligations undertaken within the framework of the European Community (Art. 4). Since the signature of this agreement,

[37] See also the declaration of the then Head of Government, M. Oscar Ribas, at the moment of ratification of the Agreement, in Poy, *El somni*, p. 108.

[38] Andorra applied for WTO membership in 1997 and there have been several meetings of the Working Party on the Accession of Andorra. Bilateral contacts on market access have taken place and Andorra has made offers in goods and services. The dialogue continues but there seems to be no hurry for a quick decision on accession. Questions have been asked in the meetings of the Working Party on the compatibility of WTO rules with the 1990 Agreement which, as was already mentioned, excludes from the customs union agricultural products, see, e.g. Working Party on the Accession of Andorra, Meeting of 7 August 2000, WT/ACC/AND/8, pp. 59–60.

[39] For text, see *Journal Officiel de la République Française*, 1995, no. 35.

various other bilateral and trilateral agreements have been signed by Andorra with one or both of its neighbours.[40]

The 2004 Cooperation Agreement

The 2004 Cooperation Agreement signed between the EC and Andorra[41] is the result of two phases of negotiations.[42] The first began in 1997 and although negotiations had been smooth, the agreement could not be finalised mainly because of the tobacco war, mentioned above. In 2002, negotiations resumed.[43] This move was not disconnected from complex bilateral negotiations on other matters, in particular on the taxation of savings income (see Section 10.4). The main objective of the 2004 Agreement is to strengthen and deepen the existing bilateral relations. The Agreement, which in no way amends or affects the 1990 Agreement, covers a wide variety of specific areas for cooperation, including environment, communications, information, culture, education, training and youth, social aspects, health, trans-European networks, transport and regional policy. The Agreement contains a non-discrimination clause for workers with Andorran nationality legally resident in an EU Member State and for workers having the nationality of a Member State legally resident in Andorra as regards working conditions, pay and redundancy (Art. 5), but there are no provisions on movement of persons or right of establishment. It is too early to make an assessment of the real impact of the Agreement on the bilateral relations and, so far, few initiatives for concrete implementation have been taken.[44] One of its advantages is that it offers a broad legal basis for cooperation, which, moreover, the parties may extend by mutual consent through the conclusion of agreements on specific matters (Art. 8).

[40] See, for example, the trilateral 2000 Convention on entry, movement, stay and establishment of nationals of the Contracting Parties; for text, see *Journal Officiel de la République Française*, 6 August 2003, no. 180.

[41] For text, see OJ 2005 L 138/23. The Agreement entered into force in 2005.

[42] See M. Maresceau, 'Informe sobre el projecte d'Acord de cooperació entre la Comunitat Europea i Andorra', in *Els acords polítics amb Europa 2001–2005* (Andorra: Govern d'Andorra, Ministeri d'Afers Exteriors, 2005), pp. 47–51.

[43] For an overview of the negotiations in both phases, see V. Pou i Serradell, *Els nous acords Andorra – Unió Europea* (Andorra: Crèdit Andorrà, 2006), pp. 98–105.

[44] The first meeting of the Cooperation Committees, set up by the Agreement, took place on 25 November 2005.

From an EC law point of view, the 2004 Cooperation Agreement is of a non-mixed character and this may seem astonishing at first sight in the light of the social provisions which it contains and which previously implied the need for the co-signature of the EU Member States. Although there is no formal explanation provided by the EU why the Agreement is not also signed by the EU Member States, it is probably because Article 137 EC, as amended by the Nice Treaty, allows the Community to support and complement the activities of the Member States in the field of social policy, including 'conditions of employment for third country nationals legally residing in Community territory'. The Cooperation Agreement is based on multiple legal sources, of which the Council Decision of 10 May 2005 on the conclusion of the Agreement mentions no less than ten substantive provisions of the EC Treaty. The Commission had also suggested that the Agreement be based on Article 300(2)(1) EC and Article 300(3)(2) EC as procedural sources, which meant that the European Parliament was supposed to give its opinion. However, Parliament modified the proposed legal bases and replaced those proposed by the Commission by Article 310 EC, which is the EC Treaty provision on 'association'. Parliament invoked the far-reaching competences of the cooperation committee which had been set up by the Agreement and, as such, in the view of the Parliament, should be seen as 'a specific institutional framework' requiring the *assent* of the Parliament in accordance with Article 300(3) EC. Parliament's approach, however, appeared to be somewhat overdone. For the sole sake of guaranteeing its own prerogatives and in a unilateral gesture, the imposition by Parliament of Article 310 EC as a legal basis for a cooperation agreement, albeit a broad one, seemed neither appropriate nor desirable given that at various levels in Andorra itself, it had been a matter of discussion whether the Principality should seek associate status with the EC or not, but this had not been settled and nor was this decision linked with this particular cooperation agreement.[45] Certainly, the Cooperation Agreement is not necessarily an end in itself and broader and deeper cooperation and perhaps association or another form of close relationship are not to be excluded in the future. But before such a step

[45] Although it must be said that a similar practice has occurred in some other instances, for example, regarding the *Bilaterals I* with Switzerland (see contribution by C. Kaddous in this volume), which were also based on Article 310 EC, while the agreements, individually or as a whole, were not association agreements and while the issue of possible 'association' of Switzerland with the EC had never been part of any bilateral discussion between Switzerland and the EC.

could seriously be contemplated by Andorra, a broad political debate and large political consensus on the relationship with the EU as a whole and, in particular, on the place of Andorra in Europe, would appear indispensable.

10.2.2 San Marino

Background

The Republic of San Marino, with a territory of 61 km^2 and approximately 30,000 inhabitants, located in the North of Central Italy, is probably one of the oldest independent European republics. The fourth century, when Marino – later San Marino – founded a Christian community in what is now San Marino, is often mentioned as the beginning of the history of San Marino. Whether this is legend or reality will not be answered here, but it can be said that it has indeed been something of a miracle that San Marino has remained standing throughout its history as an independent State[46] while the mighty and less mighty city-States and republics in its neighbourhood disappeared as independent entities one after the other. San Marino even survived the process of unification of Italy.[47] Today, San Marino is a sovereign State but it has no formal written constitution. The Republic has a unique institutional structure and since 1974 a 'modern' Declaration of the citizens' rights and fundamental principles on the organisation of the Republic has been applicable.[48] This Declaration also

[46] On the history of the Republic and how it survived the big and small turbulences around it, see inter alia, A. Garosci, *San Marino. Mito e storiografia tra i libertini e il Carducci* (Milano: Edizioni di Comunità, 1967), p. 387. An old but still readable work on the general history of San Marino is that by H. Hauttecoeur, *La République de San Marino* (Brussels: Havermans, 1894), see in particular the pages on 'the conquest' of the Republic by Cardinal Cesare Borgia, the son of Pope Alexander VI, in the beginning of the sixteenth century (pp. 95–102) and on Cardinal Alberoni's occupation of San Marino in 1739–1740, which lasted a few months (pp. 135–54). Both occupations were particularly dangerous episodes for San Marino's existence as an independent State.

[47] In the period of the *Risorgimento*, Garibaldi, who in 1849 had found refuge in San Marino when in great difficulty against the Austrians, later, when he successfully united Italy, left San Marino untouched as an independent State, see P. Franciosi, 'Garibaldi e la Repubblica di San Marino', in *Scritti Garibaldini* (San Marino: Biblioteca di San Marino, 1982), pp. 85–146.

[48] Just to give an illustration, the Head of State is double-headed with two *Capitani Reggenti*, appointed by the *Consiglio Grande e Generale* (Great General Council) which is composed of members elected by general suffrage, who take their decisions based on collegiality, see Article 3 of the 'Dichiarazione dei diritti dei cittadini e dei principi fondamentali dell'ordinamento sanmarinese'. On the constitutional system, see G. Guidi (ed.), *Piccolo Stato, costituzione e connessioni internazionali. Atti del convegno dell'Associazione di diritto pubblico comparato ed europeo. San Marino. Collegio Santa Chiara, 21–22 giugno 2002* (Turin: Giappichelli, 2003), pp. 121–75. The text of the 1974 Dichiarazione (with amendments) is reproduced at pp. 299–303.

stipulates that 'constitutional laws' ('*leggi costituzionali*') can be enacted (Art. 3 bis). The international legal personality of San Marino is well-established and unchallenged. San Marino has developed a wide range of official bilateral relations with third countries and is also a member of many international organisations, such as the Council of Europe since 1988 and the UN since 1992. San Marino is not a member of WTO. Probably, the size of its territory, its fully enclaved status, its participation in a customs union first with Italy and later with the EC, make WTO membership if not superfluous, at least burdensome, while the practical effects of such membership for the Republic remain negligible. San Marino already had a diplomatic mission accredited to the EC in 1983 and has the longest European diplomatic practice in Brussels of the four European micro-States.

An important point of reference, from the point of view of this contribution, is the 1939 Agreement between San Marino and Italy on friendship and good neighbourly relations.[49] As a result of this Agreement, San Marino became part of the Italian customs territory. The Italian authorities collected the duties on imports of goods destined for consumption in San Marino and on an annual basis sent a flat-rate compensatory amount to the authorities in San Marino. The 1939 Agreement remained applicable after the fall of Mussolini. After the entry into force of the EEC Treaty it came within the scope of the then Article 234 EEC (now Art. 307 EC),[50] which stipulates that the rights and obligations arising from agreements concluded *before* the entry into force of the EEC Treaty between one or more Member States on the one hand, and one or more third countries on the other hand, are not affected by the provisions of the EEC Treaty.

The 1991 Agreement on Cooperation and Customs Union The customs regime resulting from the 1939 Agreement lasted until 1 December 1992, the date of entry into force of the Interim Agreement on trade and

[49] In the period between the two World Wars, San Marino, while remaining an independent State, had also adopted fascism. It was with the fascist government of San Marino that the Italy of Mussolini concluded the 1939 Agreement. Mussolini, during his reign, left San Marino untouched. On San Marino's fascist period, see P. Sabbatucci Severini, 'Un microstato e il suo tutore: San Marino e l'Italia. 1861–1960', in *Il piccolo Stato. Politica storia diplomazia. Atti del convegno di studi. 11–13 ottobre 2001* (San Marino: AIEP, 2004), pp. 261–9.

[50] Since San Marino is not a Member State of the EU, the duties levied by Italy on imports with destination San Marino cannot be considered as Community own resources. A complex legal dispute has arisen on the status of the customs duties collected by Italy, on behalf of San Marino, before the entry into force of the Interim Agreement in 1992, see Case C-10/00 *Commission* v. *Italy* 2002 ECR I-2357.

trade-related matters between the EC and San Marino.[51] This Agreement incorporated the trade and trade-related provisions of the 1992 Agreement on cooperation and customs union signed between San Marino and the EEC and its Member States.[52] The mixed nature of this last Agreement, with its lengthy ratification procedures in the EU Member States, explained the need for a separate Interim Agreement which could be concluded rapidly since for 'trade and trade-related matters' the Community has exclusive competence. When the 1992 Cooperation Agreement entered into force in 2002, it replaced the Interim Agreement.

Apart from the agreements with San Marino on the use of the euro and on taxation of savings income which are further examined, the 1992 Agreement on Cooperation and Customs Union is the only important bilateral legal framework that should be mentioned. It consists of three substantive parts. The most important is that on the establishment of the customs union (Arts. 2–13). A few comments on this part are provided further below. A second part concerns the promotion of cooperation in a number of sectors including industry, environment, tourism, communication, information and culture (Arts. 14–18). The scope of cooperation can be extended by mutual consent (Art. 19). A third part is devoted to social provisions, including cooperation in the field of social policy (Arts. 20–22). Workers having San Marino nationality employed in a Member State shall be free from discrimination based on nationality in relation to its own nationals as regards working conditions or remuneration. This non-discrimination principle also applies in the field of social security. San Marino, for its part, applies the non-discrimination principle to workers from the EU Member States employed in its territory. It is the inclusion of these provisions in the Agreement which explains why, when the Agreement was signed, the mixed procedure for its conclusion was followed. But this procedure would also lead to an exceptionally long and difficult road for approval in all the Member States, complicated by the fact that the EU further enlarged in the course of this process and additional ratifications were necessary. In the end, the ratification procedure would last no less than eleven years, which is the longest ever for a mixed

[51] For text, see OJ 1992 L 359/13.

[52] For text, see OJ 2002 L 84/43. Strangely enough, the official title of the Agreement omits 'the Member States' while they were formally 'Contracting Parties' to the Agreement.

agreement. The provisions on cooperation, though in force since 2002, seem to have had only limited effect in practice and not a single implementing decision seems to have been taken by the Cooperation Council in any of the areas for cooperation.

The provisions on the customs union are of considerable importance, of course. All products covered by Chapters 1 to 97 of the Common Customs Tariff, that is to say also agricultural products (unlike the customs union with Andorra), fall within the scope of the provisions of the customs union (Art. 2). The provisions on the establishment of the customs union are identical or very similar to those of the customs union with Andorra, and it is obvious that this Agreement inspired the Agreement with San Marino.

Similarly to what was laid down in the Agreement with Andorra, San Marino authorised the Community, for a period of five years and even beyond, if no agreement could be reached, 'acting on behalf of, and for, San Marino, to carry out customs clearance formalities, in particular release for free circulation of products sent from third countries to San Marino'. Thus far, and in contrast with what happened in the case of Andorra, the transfer of these competences to the authorities of San Marino has not taken place, which means that all third-country goods destined for San Marino are first customs-cleared by Italian or other Member States' customs authorities. Consequently, goods originating in non-EC countries with the destination of San Marino cannot cross the Community without first being put into free circulation. In other words, San Marino itself does not collect duties or charges on its imports. For the Republic to assume this responsibility would have meant a sufficiently large and well-trained customs staff. This is probably the main explanation why the San Marino authorities have not insisted on the implementation of this provision of the Agreement. It should be added that goods originating in San Marino are automatically considered as being in free circulation.

In 2002, the Government of San Marino published a policy paper on its relations with the EU.[53] While acknowledging that the 1992 Cooperation and customs union Agreement had contributed to facilitating its participation in the Internal Market, difficulties remained and, on the whole, as was already mentioned, the results of the Agreement have been limited. The Agreement may, therefore, have to be extended and new forms of bilateral cooperation may be necessary. It is interesting to note that the

[53] http://ec.europa.eu/comm/external_relations/sanmarino/doc/aidememoire.pdf.

Memorandum signals that it is 'important to thoroughly consider all implications – which the Republic cannot and does not intend to circumvent – of a possible membership in the European Union for a country which, in terms of territorial extension and population, is a microstate and wants to preserve its own identity. Such implications would not only affect the Republic of San Marino, but also the European Union.' With this statement, San Marino was the first European micro-State not to formally exclude a possible EU membership option and this view has very recently gained momentum. On 27 August 2007, San Marino informed the EU Presidency that it wants to achieve increasing integration with the EU in the light of a possible application for EU membership. This initiative is not (yet) a formal application for membership. It remains to be seen how the EU intends to respond to this move and in the conclusions of this study we come back to this point.

10.2.3 Monaco

Background

Monaco with its 2 km^2 is the second smallest micro-State in the world (Vatican City is the smallest) and has a population of around 33,000 of which only 16 per cent have Monegasque nationality (47 per cent French, 16 per cent Italian and 21 per cent other nationalities). Monaco is a hereditary and constitutional monarchy. The 1962 Monegasque Constitution, reviewed in 2002, stipulates that Monaco is a sovereign and independent State. However, Monaco has exceptionally close relations with its neighbour, France, which implies inter alia the inclusion of French officials in very high official posts in Monaco. For example, the *Ministre d'Etat* (Minister of State), presiding the *Conseil de Gouvernement* (Governmental Council), is a French national (but since 2002 it might have been a Monegasque national). This and other links with France could have been an obstacle to its acceptance as a truly independent State but the Principality has nevertheless gradually been able to receive international recognition of its independent status. Monaco has been a member of the United Nations since 1993 and became, after thorough screening,[54] a member of the Council of Europe in 2004. Monaco is not a member of the WTO.

[54] See G. Grinda, 'Le processus d'adhésion de Monaco au Conseil de l'Europe: incidences sur l'ordre juridique de la Principauté', *Revue de Droit Monégasque* (2005), pp. 25–58.

The history of Monaco is closely connected with that of the Grimaldi dynasty. Already by the end of the thirteenth century the Grimaldi family was in possession of Monaco. In the second half of the fifteenth century, Monaco's independence was recognised, but in order to survive as an independent entity it needed to sign various agreements accepting protection from foreign powers (Spain, France and Sardinia). In 1793, Monaco was annexed by France but in 1814 was granted independence, with the King of Sardinia exercising his protection, and this was confirmed and reinforced in 1815 by the Congress of Vienna.[55] In 1861, after the County of Nice had become part of France, a considerable portion of the territory of Monaco (the cities of Roquebrune and Menton) became part of France.[56] Monaco signed an agreement with France in the same year and the latter became not only its sole neighbour, but also its supervisor. In 1865, a customs union was established. In 1918, still during World War I, an Agreement between France and Monaco was signed under strong pressure from France. France agreed to guarantee the independence, sovereignty and integrity of Monaco. However, the 1918 Agreement also considerably affected Monaco's external capacities, was close to establishing a French 'protectorate' and offered a legal basis for a possible 'permanent intervention' in the affairs of the Principality.[57] While Article 1 stipulated that Monaco exercises its sovereign rights 'in perfect conformity' with the political, military, maritime and economic interests of France, Article 2 unequivocally linked Monaco's external relations to those of the French Republic, since Monaco needed for the development of its international relations prior approval ('*entente préalable*') from the French Government. France agreed to 'facilitate' Monaco's participation at its side ('*à ses côtés*') at international conferences and institutions. The 1930 Treaty[58] provided a legal basis allowing French officials to occupy various high posts in the Monegasque civil service, including that of Head of Government. In 1963, after a bitter dispute between the two Parties over the fiscal laws in Monaco, a series of

[55] On the 'protection' of Monaco after the French Revolution and First Empire, see L.H. Labande, *Histoire de la Principauté de Monaco* (Monaco: Editions de l'Imprimerie Nationale de Monaco, 1934), pp. 383–476.

[56] On this episode, see J.-J. Antier, *Le Comté de Nice* (Paris: Editions France-Empire, 1972), pp. 303–20.

[57] See J.-B. Robert, *Histoire de Monaco* (Paris: PUF, 1997, 2nd ed.), pp. 91–2 and p. 101.

[58] For text, see *Journal Officiel de la République Française*, 1935, p. 1931.

agreements were signed, among them an agreement on neighbourhood relations and mutual administrative assistance.[59]

On 24 October 2002, a new bilateral cooperation agreement between France and Monaco was signed.[60] Its main aim was 'to modernise' the existing bilateral relationships, especially the 1918 Agreement.[61] As far as the external relations of the Principality are concerned, France commits itself to take Monaco's fundamental interests into consideration, while Monaco undertakes to conduct its international relations regarding fundamental issues in convergence with those of the French Republic through appropriate concertation (Art. 2).[62] Certainly, the new agreement no longer uses the 1918 expressions '*parfaite conformité*' and '*entente préalable*', although there is still strong emphasis on 'concertation' and 'convergence' with France. Torelli interprets these references as '*la contrepartie de l'abandon de la France de ses privilèges*'.[63] Moreover, Article 1(2) of the 2002 Treaty stipulates, in general terms, that in the exercise of its sovereign rights Monaco will align its policies with the fundamental interests of France in the fields of politics, economics, security and defence. Notwithstanding the fact that for Monaco

[59] For text, see *Journal Officiel de la République Française*, 1963, p. 412. For an in-depth legal analysis of the crisis between Monaco and France in 1962 and 1963 and the agreements signed between the two Parties in 1963, see J.-P. Gallois, *Le régime international de la Principauté de Monaco* (Paris: Pédone, 1964), pp. 150–215.

[60] For text, see *Journal Officiel de la République Française*, 7 January 2006, p. 309.

[61] A review of the 1918 Agreement had also been strongly suggested in the Report of two judges at the European Court of Human Rights, Mr A. Pastor Ridruejo and Mr G. Ress, on the conformity of the Monegasque legal order with the Council of Europe fundamental principles and prepared at the request of the Bureau of the Assembly of the Council of Europe. The Report, rather rapidly, concluded that Monaco was 'irrefutably an independent sovereign State with regard to international relations'. Monaco was a member of the UN, and was therefore 'being recognised as an independent sovereign State by the organised international community as a whole'. However, the Report also observed that the exercise of this sovereignty was subject to significant limitations as a result of bilateral treaties with France and considered as highly desirable, that the Treaties of 1918 and 1930 be amended, see AS/Bur/Monaco (1999) 1 rev. 2, 25 July 1999. The Opinion of the Parliamentary Assembly of the Council of Europe reiterated many of the suggestions contained in the Report and insisted also strongly on the introduction of changes in the established practice, based on the Franco-Monegasque Treaty of 1930, which resulted in reserving senior Monegasque Government and civil servants posts to French officials. Depriving Monegasque citizens from such posts 'runs counter to the principle of non-discrimination', see Opinion No. 250 (2004).

[62] Article 2(1) of the 2002 Agreement reads as follows: 'la Principauté de Monaco s'assure par une concertation appropriée et regulière que ses relations internationales sont conduites sur les questions fondamentales en convergence avec celles de la République Française'.

[63] M. Torelli, 'Un nouveau cadre conventionnel entre la France et Monaco: le traité du 24 octobre 2002', *RGDIP* (2003), pp. 7–30, in particular p. 23.

the 2002 Agreement constitutes a considerable qualitative improvement compared with the 1918 Agreement,[64] the impression remains that the bilateral relations France–Monaco continue to have primacy over Monaco's external relations as a whole.[65]

The continuing 'patronage' of Monaco by France, under the 2002 Agreement in an intensity which is undoubtedly different from that established by the 1918 Agreement, cannot be denied. Even if the 2002 Agreement has been qualified as '*un traité respectueux de la souveraineté monégasque*'[66] aiming at enhancing bilateral cooperation – and Monaco's membership of the Council of Europe may help to consolidate the acquired greater liberty of action – at the same time the very close relationship France–Monaco – no other European micro-State is so closely linked with its neighbour – remains probably the explanation, or at least one of the explanations, why, up until now, no bilateral agreement of a general nature between Monaco and the EC has been signed. Monaco is already part of the Community customs territory and applies the customs code as applied in France, while French customs officials are in charge of the customs controls of the territory of Monaco.[67] The unilateral integration of Monaco in the customs territory of the Community had already materialised in 1968 with Regulation 1496/68 of 27 September 1968,[68] and this was recalled in subsequent Regulations, the latest one being Regulation 2913/92 of 12 October 1992 establishing the Community Customs Code.[69] In addition, it should also be mentioned that Monaco follows the French VAT regime.

The 2003 Agreement on the application of certain Community acts

Being included in the Community customs territory of the EC means that Monaco applies EC law regarding the customs union. Consequently,

[64] See G. Grinda, *La Principauté de Monaco, L'Etat, son statut international, ses institutions* (Paris: Pédone, 2005), pp. 34–5, who emphasises that the 2002 Agreement more strongly relies on the principle of equality among States in comparison to the 1918 Agreement.

[65] Professor Torelli's remark is in this context eloquent where he compares the 2002 Agreement with the 1993 trilateral Agreement between Andorra and its two neighbours which explicitly refers to the European context of the trilateral relations (see n. 39). In the lack of such a reference in the 2002 Agreement 'on pourrait y voir le maintient du bilatéralisme le plus strict', n. 63, p. 16.

[66] Expression is from Grinda, *La Principauté de Monaco*, n. 64, p. 34.

[67] Customs Convention of 18 May 1963, *Journal Officiel de la République Française*, 27 September 1963, no. 8679.

[68] OJ 1968 L 238/1. [69] OJ 1992 L 302/1, Article 3(2)(b).

Monaco applies the EC rules regarding free movement of goods.[70] The same holds true for the common customs tariff on imports from non-EC Member States, but preferential agreements concluded by the EC with third countries do not apply to goods originating in Monaco. The Community customs territory does not cover external trade. In other words, goods originating in Monaco do not have Community origin but as a result of Monaco being in the Community customs territory, they benefit from free movement inside the EU. However, even in the EU they may nevertheless encounter obstacles, in particular where the Community has established specific rules for the harmonisation of the laws of the Member States. Such rules go beyond the rules that Monaco applies as being part of Community customs territory. This explains why the Principality signed a bilateral agreement with the EC in 2003 – the first in the history of its relations with the EU – 'on the application of certain Community acts on the territory of the Principality of Monaco'.[71]

The Agreement aims at facilitating economic activities and trade in the field of medicine for human and veterinary use, cosmetic products and listed medical devices. It makes the Community acts covering these fields and incorporated in the Annex of the Agreement applicable on the territory of Monaco. The acts in question are applicable in the legal order of Monaco without further legislative or administrative intervention. Moreover, it is also stipulated in Article 1 of the Agreement that 'such rules must be interpreted in accordance with the case law of the Court of Justice of the European Communities'. The main significance of this Agreement is that it gives manufacturers in Monaco greater legal certainty regarding the access of their products to the EU market. In the light of the special relationship between Monaco and France, the Monegasque authorities, in order to preserve uniform interpretation in accordance with the case law of the ECJ, 'may have recourse to their special administrative relationship with the French Republic' (Art. 2(2)). This may be helpful where Monaco itself does not possess the required infrastructure, laboratories, know-how, etc. for the required tests and verifications. A Joint Committee EC–Monaco – also the first established in the relations EU–Monaco – is responsible for the management and proper implementation

[70] See G. Vandersanden, 'L'application du droit communautaire sur le territoire de la Principauté de Monaco', *Revue de Droit Monégasque* (2000), pp. 176–9.

[71] OJ 2003 L 332/42.

of the Agreement. This Committee also acts as a dispute settlement body and its jurisdiction has a draconian dimension: if a dispute is brought before it, it is forced to find a solution within the foreseen procedure and time limits since failing to do so signifies the end of the Agreement (Art. 4(3)). Clearly, the assumption is that neither the spirit nor the text of the Agreement lends to flexibility in application and it is in the interests of both parties that the provisions of the Agreement are strictly applied.

Monaco and the Schengen Agreement Monaco concluded a bilateral agreement with France in 1963 on entry, stay and establishment of foreigners.[72] With this agreement, Monaco, as a third State, occupies a very special position regarding the movement of persons with a Member State of the EU. Basically, Monaco allows the French authorities to decide about immigration into Monaco, the reason being that there is no control of persons at the French-Monegasque border. Monaco only has a common border with France and France is therefore its only neighbour. However, Monaco has direct access to the Mediterranean sea and, moreover, has a heliport. While overland visitors to Monaco must proceed via France and satisfy the French immigration laws, the possibility of direct access to Monaco by air or sea has necessitated some specific measures.

As far as travel through France is concerned, an important landmark was the 1985 Schengen Agreement. The border between France and Monaco would, in principle, have become the Schengen external border. This, however, would have meant that the 1963 bilateral agreement between France and Monaco on free movement of persons was rendered inapplicable. A pragmatic and legally workable solution has been found in order to maintain the free movement regime. In its Decision of 23 June 1998 on Monegasque residence permits, the Schengen Executive Committee recalled in the preamble that 'freedom of movement between France and Monaco was instituted prior to the entry into force of the Convention implementing the Schengen Agreement' and '[that] the Contracting Parties to the Convention implementing the Schengen Agreement have not called into question these rules on freedom of movement'. Moreover, 'on the basis of the Agreement on Good Neighbourly Relations between France and Monaco of 18 May 1963, as revised and supplemented by an Exchange of Letters between France and Monaco

[72] See reference, n. 59.

of 15 December 1997, the French authorities apply the rules and checks laid down in the Convention implementing the Schengen Agreement when carrying out checks on the entry, stay and establishment of foreign nationals in the Principality of Monaco'. As a result of this specific situation the Schengen Executive Committee decided inter alia to incorporate Monegasque residence permits in the French section of Annex IV to the Common Consular Instructions. Moreover, Monaco-Heliport and Monaco Port de la Condamine were added to the authorised external border crossing points of the Schengen Common Manual.[73]

10.3 The use of the euro in San Marino, Monaco and Andorra

None of the European micro-States has its own official national currency and they all used on their territory one of the neighbours' currency.[74] San Marino used the Italian lira and Monaco the French franc, while Andorra used both the Spanish peseta and the French franc (Liechtenstein uses the Swiss franc). The legal base for the use of the neighbour's currency was in each case the monetary convention which each had concluded with its respective neighbours. However, the use of the peseta and French franc in Andorra was not based on conventions concluded by Andorra with its neighbours; Andorra was using these currencies on a purely de facto basis. The introduction of the euro in EU Member States necessarily affected the use of the currency in the three micro-States.

A Declaration attached to the Final Act to the Treaty of Maastricht provided that the existing monetary conventions between Italy and San Marino and Vatican City, and between France and Monaco remained unaffected by the EC Treaty 'until the introduction of the ECU as the single currency of the Community'. In the meantime, the Community undertook the commitment 'to facilitate such renegotiations of existing arrangements as might become necessary as a result of the introduction of the ECU as a single currency'. On 31 December 1998, the Council took the necessary decisions on the position to be adopted by the Community regarding the monetary relations with San Marino and Monaco.[75] Interestingly, in the negotiation of a monetary convention on the use of

[73] For text, OJ 2000 L 239/11.

[74] This part of the contribution is largely based on the study mentioned at n. 1, pp. 766–8.

[75] Decisions 1999/36 and 1999/97, OJ 1999 L 30/31 and L 30/33. Also for the Vatican City a decision was adopted, OJ 1999 L 30/35.

the euro, it was France that was asked to negotiate with Monaco and Italy with San Marino, both on behalf of the Community. The reasons for this unusual step were, as far as Monaco is concerned, the fact that France had 'particular monetary links with the Principality of Monaco which are based on various legal instruments'. Moreover, financial institutions located in Monaco had the potential right to access the refinancing facilities of the Banque de France and they also participated in some French payment systems under the same conditions as French banks. Given the historical links between France and the Principality, it was therefore considered 'appropriate that France negotiates and may conclude the new agreement on behalf of the Community'.[76] For San Marino a largely similar reasoning was followed, also invoking inter alia, 'the historical links' between Italy and San Marino in order to have the convention negotiated and concluded by Italy on behalf of the Community. Each within their sphere of competence, the European Commission and the European Central Bank were associated with these negotiations. The derogation from the classical negotiation procedure of Article 300 EC did not constitute a problem from a legal point of view since Article 111(3) EC explicitly makes such derogation possible. The negotiations with the two small States were successfully concluded in 2001.[77]

As a result of these conventions, San Marino and Monaco are entitled to use the euro as their official currency and they granted legal tender status to euro banknotes and coins as from 1 January 2002.[78] Both countries abstain from issuing national banknotes or coins unless on the basis of an agreement with the Community. They are allowed to issue a specific amount of euro coins every year as determined in the respective conventions.[79] San Marino is allowed to continue to issue gold coins denominated in scudi, while Monaco may issue euro collector coins under certain conditions. These coins for

[76] See preamble Council Decision of 31 December 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Principality of Monaco, OJ 1999 L 30/31.

[77] For text of the Convention with San Marino, see OJ 2001, C 209/1 and with Monaco, OJ 2002 L 142/59.

[78] On these agreements, see also 'Monetary and exchange rate arrangements of the Euro Area with selected third countries and territories', European Central Bank, *Monthly Bulletin*, 2006, pp. 90–3.

[79] For San Marino the amount is €1,944,000 a year; while for Monaco this is 1/500th of the amount of coins minted in the same year by France. This difference is a consequence of the previous bilateral agreements with Italy and France.

collection purposes do not have legal tender status in the Community. It is to be noted that the monetary convention with Monaco is more detailed and in some ways also more rigid than that with San Marino, one of the reasons being that credit institutions and other financial institutions established in Monaco are subject to the same rules as those established in France for the purposes of prudential supervision of credit institutions and the prevention of systemic risks to payment and securities settlement systems.[80] Monaco must cooperate in good faith with France 'in order to ensure that the law applicable in Monaco in the areas covered by this Agreement will at all times be identical, or where appropriate, equivalent to the law applicable in France'. The Agreement with San Marino provides for the possibility that credit institutions in San Marino will also have access to the Euro Payments Area system although to date no such access has been established.

As was already mentioned, Andorra has used the euro as its currency since 1 January 2002 on the basis of a unilateral decision. The reason why Andorra has never concluded a monetary convention with its neighbours is probably that it would have been a delicate matter to choose a particular neighbour because of the constitutional structure of co-principality. However, the reason suggested by the European Central Bank that 'Andorra did not become a sovereign State till 1993'[81] is a somewhat simplistic interpretation of Andorra's complex constitutional status. This said, in 2003 the Andorran authorities proposed to the Community to conclude a monetary convention. This request was linked with the 'taxation of savings income' package (see Section 10.4). The EC's acceptance to open negotiations was made dependent on the initialling by Andorra of the 'taxation of savings income' Agreement and on Andorra's undertaking to ratify that Agreement.[82]

[80] See Article 11(2) of the Agreement. The Agreement contains in Annexes references to the EC legislation which must be applied by Monaco. These Annexes can later be updated; for an application, see Commission Decision 2 August 2006, OJ 2006 L 219/23.

[81] See Opinion of the ECB of 1 April 2004 on the position to be taken by the Community as regards an agreement concerning the monetary relations with Andorra, Council, 2 April 2004, ECOFIN 122 UEM 56.

[82] This condition imposed on Andorra is somewhat astonishing, since, regardless of the conclusion of the taxation of savings income Agreement (see n. 90), it would appear also to be in the interest of the Community that when third countries use the euro, there is an agreement laying down the terms of such use, see also Opinion of the ECB of 1 April 2004 on the position to be taken by the Community as regards an agreement concerning the monetary relations with Andorra, Council, 2 April 2004, ECOFIN 122 UEM 56. The ECB noted 'that it would be in the Community's interest to open negotiations on a monetary agreement with Andorra' and considered 'that a third country should only introduce the euro following agreement with the Community'.

Absence of ratification would have meant suspension of the negotiations on the monetary agreement. Ratification by Andorra took place on time and the negotiations for a monetary convention were opened at the end of 2004. This time it is the European Commission acting for the Community that negotiates this agreement, in association with Spain and France as well as with the European Central Bank for matters falling within its competence.[83] At the time of writing, no monetary convention on the use of the euro has yet been signed and the Principality is adopting appropriate legislative measures for the application of the relevant Community legislation.

10.4 Bilateral agreements on taxation of savings income

Within the EU it has been particularly difficult to tackle taxation policies of the Member States from the point of view of fair competition. The reason for this difficulty has to do with the need for unanimity. However, an important political landmark was the 2000 Santa Maria da Feira European Council which agreed on a global package of measures regarding taxation.[84] While the main objective of the EU initiative was in the first place to reach a commitment on automatic exchange of information among the EU Member States, it soon appeared necessary, at least for a transitional period, to apply different measures to three of the EU's own Member States, but considered to be equivalent as providing automatic information. Belgium, Luxembourg and Austria were indeed allowed to apply a withholding tax on interest income that is paid to nationals resident in other EU Member States. The rate was determined as 15 per cent for the period 1 July 2005 to 30 June 2008 and 20 per cent for the period 1 July 2008 to 30 June 2011. From 1 July 2011 onwards 35 per cent tax will be levied. A difficulty in this respect was that not only EU Member States had to be taken into consideration but also non-EU States qualified as 'key third countries'. These countries were identified as Switzerland and also the four European micro-States (Andorra, San Marino, Monaco and Liechtenstein), which for the first time in their history received the honour of being called 'key third countries' by

[83] See Council Decision of 11 May 2004 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Principality of Andorra, OJ 2004 L 244/47.

[84] See Annex IV to the Santa Maria da Feira European Council Conclusions.

the EU.[85] Thus, in parallel with the discussion within the EU on the proposal for a taxation of savings income directive, agreements with the key third countries were negotiated to establish equivalent measures. As a matter of fact, a political compromise with Switzerland was already reached in March 2003 in the context of a negotiation-package, called *Bilaterals II*.[86] This made it possible to go ahead with the Council Directive 2003/48/EC on taxation of savings income in the form of interest payments which was formally adopted on 3 June 2003,[87] before any of the four micro-States had signed an agreement with the EC. The preamble to the Directive stated that as long as the United States, Switzerland and the four European micro-States did not apply measures equivalent to or the same as those provided for in the Directive, capital flight towards these countries 'could imperil the attainment of the objectives of the Directive'. Consequently, there ought to be synchronisation of application of the measures by the EU Member States with those equivalent measures applied by the third countries concerned. Article 17(2) of the Directive explicitly stipulated that Member States shall apply the provisions of the Directive from 1 January 2005, later extended to 1 July 2005, provided that 'the Swiss Confederation, the Principality of Liechtenstein, the Republic of San Marino, the Principality of Monaco and the Principality of Andorra apply from that same date measures equivalent to those contained in this Directive in accordance with agreements entered into by them with the European Community, following unanimous decisions of the Council'.[88]

Needless to say, the Swiss decision to agree to sign an agreement with the EC on taxation of savings income (hereafter Taxation Agreement) unleashed enormous pressure on the European micro-States and they had no option other than also to sign similar agreements. When the EU demanded the signature of such an Agreement, some micro-States, however, proposed other subjects for negotiation. Initially, the idea of forming negotiation-packages was not very much appreciated and certainly not favoured by the

[85] Similar measures had to be applied by territories or dependencies of the Member States.

[86] On these Agreements, see contribution by C. Kaddous in this volume.

[87] For text, OJ 2003 L 157/38. For an analysis, see D. Berlin, 'La fiscalité de l'épargne dans l'Union européenne. Histoire d'une harmonisation en voie de disparition', *Journal des Tribunaux, Droit européen* (2003), pp. 162–8.

[88] The application of the Directive was not made dependent on an agreement on equivalent measures with the US, which had declined to sign an agreement with the EC.

EU, but it was also difficult for the EU to categorically ignore or simply reject any request of the micro-States for other negotiations to be opened or existing ones widened. Andorra, for example, insisted on a true package-strategy, in particular to push forward with the Cooperation Agreement, to initiate negotiations on a monetary convention on the use of the euro and to facilitate the movement of Andorran citizens across EU external borders.[89] Other micro-States emphasised the need for further cooperation in specific areas such as, for example, in the field of services. The package-approach received a degree of formal recognition through acknowledgements made in the Memorandums of Understanding, signed on the occasion of the signature of the Taxation Agreements themselves. But even if no mention of certain requests were made in these Memorandums, they could still de facto be handled in separate negotiations. In the end, the Taxation Agreements with the four micro-States were all signed in 2004 and are virtually all identical.[90] They lay down the principle that the paying agent (bank/financial institution) in the States concerned will withhold a tax on interest payments similar to the one mentioned regarding the three EU Member States derogating from the principle of automatic exchange of information. The retention tax will not be applied to EU resident taxpayers authorising

[89] At a meeting of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA, 6 October 2004, Doc. 13020/1/04), a favourable and pragmatic response was given to the Andorran request – a similar request had later also been formulated by San Marino – to facilitate the crossing of external EU borders by Andorrans and nationals of San Marino. The Presidency invited the Member States to inform their border guards that citizens of Andorra and San Marino are allowed to use 'EU corridors' at the external borders, except when such use could give rise to delays for EU citizens. However, neither Andorra nor San Marino have concluded an agreement with the EC on free movement of persons and consequently nationals of the two countries are not 'persons enjoying the Community right of free movement' within the meaning of Regulation 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code, OJ 2006 L 105/1), in particular Article 9(2). Liechtenstein nationals, via the EEA, clearly fall within the category of Article 9(2) and are allowed to use the 'EU corridors'. However, it should be noted that Regulation 562/2006 also explicitly deals with the question of stamping travel documents of third-country nationals and that it stipulates that no entry or exit stamp shall be affixed 'to documents enabling nationals of Andorra, Monaco and San Marino to cross the border' (Art. 10(3)(e)). It is not clear from the wording of the Regulation whether and to what extent the SCIFA initiative has had an impact on the formulation of Article 10(3)(c). It is too early to assess to what extent nationals of Andorra and San Marino are allowed to make use of the 'EU corridor'.

[90] For the text of these Agreements, see with Andorra, OJ 2004 L 359/32 and OJ 2005 L 114/9; San Marino, OJ 2004 L 381/34 and OJ 2005 L 114/11; Monaco, OJ 2005 L 19/53 and OJ 2005 L 110/40. All these agreements have entered into force.

the paying agent in Andorra, Monaco, San Marino (and also Liechtenstein) to disclose information on the interest payment to his tax authorities. There is no automatic exchange of information and in this way the principle of bank secrecy is largely maintained. However, the agreements concluded do allow for exchange of information upon request. The EU's neighbours have agreed to grant exchange of information on request concerning the income covered by the Agreements on conduct constituting 'tax fraud under the laws of the *requested State* or the like'.[91] It is the laws of each of the contracting States that determine the meaning of 'tax fraud' and a number of micro-States even had to introduce this notion into their domestic legislation. 'The like' only includes 'offences with the same level of wrongfulness as is the case for tax fraud under the laws of the requested State'.

As just mentioned, the Taxation Agreements are all accompanied by a Memorandum of Understanding (MoU) signed by the EC, the Member States[92] and each of the four micro-States.[93] In the MoUs, it is stated that the Taxation Agreement *and* the MoU constitute 'an acceptable agreement', while three of them (with Monaco, San Marino and also Liechtenstein) even use the expression '*balanced* and acceptable agreement',[94] protecting the interests of the contracting parties. All MoUs further stipulate that the contracting parties shall apply the arrangements in good faith and shall refrain from unilateral action which might jeopardise them without due cause. At first sight, the 'balanced' nature of the Taxation Agreement is not evident to everybody and it looks very much like a dictated and imposed text by the EC. Elements of a 'balanced' nature and/or elements making the arrangements 'acceptable' can only be seen in conjunction with the broader political negotiation-packages that some micro-States have managed to negotiate in parallel or at least to a large degree alongside the negotiations of the Taxation Agreement itself. Andorra, for example, as was already mentioned, insisted on the opening of negotiations for a monetary agreement on the use of the euro and this, together with the signing of the Taxation Agreement, was seen, as is stated

[91] Emphasis added.

[92] The MoUs refer, among other things, to the possible conclusion of bilateral agreements between the micro-States and EU Member States or to certain undertakings by the Member States, except the one with Monaco, which does not contain such references to Member States and which is only signed by the EC.

[93] Also the Taxation Agreement with Switzerland was accompanied by a MoU.

[94] Emphasis added.

in the MoU with Andorra, '[to] constitute a significant step in the deepening of cooperation between the Principality and the European Union'. Some of Andorra's other requests were not formalised in the MoU but nevertheless largely agreed on a case-by-case basis.

The MoU with Andorra also mentions a specific obligation for Andorra. Andorra undertook to introduce into its domestic legislation the concept of 'crime of tax fraud, consisting at least of the use of documents which are false, falsified, or recognised as being incorrect in terms of their content, which intend to deceive the tax authorities in the field of taxation of savings income'. Clearly, the definition of tax fraud is only relevant for the purposes of the application of the Taxation Agreement. This limitation of the scope of the concept 'tax fraud' is also to be found in the MoUs with the other micro-States. In some MoUs, references were further made to enlarging cooperation in the field of financial and insurance services (San Marino, Monaco) or to increase with the EU Member States further economic or fiscal cooperation (Andorra).

For the EU, it is certainly a success to have been able to establish a network of Taxation Agreements with Switzerland, the four micro-States and to obtain similar commitments from the many dependencies and territories. However, it is too early to make an assessment of the concrete results obtained. One of the problems is that not all off-shore centres in the world have signed similar agreements with the EC and escape routes continue to exist. In particular, the EU has so far been unable to include in its scheme a number of important centres such as Hong Kong and Singapore, two dangerous places from the point of view of tax avoidance because of their potential capacity to undermine the EU's fiscal objectives.[95]

10.5 Conclusion

As was made clear throughout this study, the relations between the EU and the European micro-States will always be of a great complexity because of the specificity of these States. In one way or another, all the European micro-States share the same existential concern about their place and role as very small entities on a European continent, that is today so largely interdependent and integrated in the EU. But having the enlarged EU on their doorstep, makes the relations with this vast

[95] See *Financial Times*, 13 October 2006, 'Hong Kong ready to reject EU call on tax avoidance'.

neighbour a permanent but at the same time also more 'anonymous' challenge than previously experienced in their relationships with their close historical neighbour or neighbours. One of the possible future scenarios is that the micro-States could face more indirect and sometimes more direct pressure from this omnipotent neighbour. Was the EU's taxation of savings income initiative a sign of the first and clear writing on the wall for such a new EU orientation towards micro-States? Or was it rather a coincidental combination of different factors in domestic and external EU policy?

From the point of view of the micro-States, the fact that the Treaty establishing a Constitution for Europe has been rejected was not a good thing. As is well known, Article I-57 foresaw a specific provision on the relations between the EU and its neighbours, stipulating that 'the Union shall develop a special relationship with neighbouring countries', founded on the values of the EU and characterised by close and peaceful relations based on cooperation. Article I-57 did not specifically address the relations with the neighbouring micro-States but a Declaration on Article I-57 made it clear that the EU was willing to take into account 'the particular situation of the small-sized countries which maintain specific relations of proximity with it'. Fortunately, the TL has kept these references intact in the new Article 8 EU Treaty and in a Declaration on this provision. Once the revised Treaty has been ratified, Article 8, combined with the Declaration, will provide for the possibility of a specific legal basis to develop the relations between the EU and the micro-States as EU neighbours. So far, various existing channels that have been set up with the EU have already allowed a degree of specificity for the micro-States. But can the existing bilateral networks, whether upgraded or not, continue to be adequate or do they need to be replaced by more global, and perhaps more institutionalised, legal and political frameworks? Is accession to the EU in the long run a realistic alternative for the micro-States?

Until now, accession of micro-States to the EU has never seriously been contemplated by the EU nor the micro-States, with the possible exception of San Marino. However, if the EU were increasingly to be tempted to exert pressure on its very small neighbours, this might provoke possible applications for EU membership from them. Fully fledged accession would, next to the fact that at present the EU is not in the mood for further enlargements, almost certainly create immense institutional and legal complications for the EU, unless a specific format of membership

status could be found for these small States. Past EU accession practice leaves little space for special forms or types of accession adapted to the specific needs of very small States. While it is true that not much is eternal in EU policy, it is also true that attitudes among micro-States themselves towards EU accession are not very precise and vary considerably. For example, as already mentioned, San Marino now seems to be moving towards fuller integration in the EU, not excluding membership. The interesting thing of San Marino's move is that it might force the EU to reflect in depth on its relations with the micro-States as a whole. Moreover, San Marino's initiative may well also affect the other micro-States' position towards the EU. In the hypothesis that San Marino were to apply formally for EU membership, it might be a complicated matter for the EU to reject this application. Indeed, at first sight, very little can be invoked against this application, except that San Marino is so small that it may perhaps never have the capacity to apply the *acquis communautaire* fully. Be this as it may, other micro-States that have not (yet) considered EU membership will certainly follow the EU–San Marino relations closely, even if membership is still something difficult for them to imagine. But whatever the micro-States' views on EU accession, as the closest neighbours of the EU, micro-States are all well aware that they cannot isolate themselves from the world around them and that they have necessarily to align their laws and regulations to (very) large parts of the EU substantive *acquis*. Certainly, they are themselves best placed to make an assessment as to the degree and intensity of this alignment, while preserving those fundamental elements which characterise their own identity and specificity. In this context, it should also be observed that aligning laws and regulations to those of the EU is not only limited to micro-States alone. Also, larger EU neighbours such as Norway or Switzerland, whether they like it or not, are even much more exposed in the very same exercise.

One thing remains frustrating for those involved in only 'aligning', whether it concerns small or larger neighbours of the EU: none may participate in the EU legislative process itself and, consequently, their impact on EU decision-making is non-existent, or virtually so. In these circumstances, the best option for the micro-States at present, and most likely also for the EU, is to establish well-conceived and well-structured networks of agreements or a comprehensive agreement because this seems to offer both parties the best armour for protecting their respective interests. In this respect, the former Head of Government of Andorra,

M. Oscar Ribas, has observed that the micro-States may lack the capacity to adopt the whole *acquis communautaire*, and even compliance with the full Internal Market *acquis* might already be a difficult matter, in particular with regard to the right of establishment.[96] In this view, a *preferential association agreement* or an *ad hoc accession* would be the best options for the recognition of the micro-States' specificity. In terms of substance, the two concepts are perhaps not fundamentally different but EU membership, be it on an ad hoc basis, would necessarily imply greater involvement for the micro-States in the operation of the EU than would any form of association. Whatever possible future scenarios, it should not be forgotten that already today, sophisticated political and legal frameworks are in place. This is certainly the case for Liechtenstein which was not examined in this contribution. But also Andorra and San Marino have a special relationship with the EU. Both form a customs union, only for industrial products in the case of Andorra but for all products in the case of San Marino, while Monaco is included in the customs territory of the Community and applies the EC law regarding the customs union. These arrangements constitute very far-reaching forms of trade integration and on the whole have been working very well. With Andorra and San Marino there is also a legal framework for establishing advanced cooperation in various areas. However, on the ground, concrete implementation proves difficult and the EU's partners have voiced disappointment about this. Important cooperation initiatives do not come from the EU other than when the EU absolutely wants something for itself. The message is clear: if the micro-States want enhanced cooperation they have to take the initiative themselves and thoroughly prepare cooperation dossiers. But even then it might still be difficult to predict whether the EU is willing to respond effectively to these expectations. Framing those expectations in an ultimate objective of accession, as San Marino seems to be doing now, may perhaps lead to enhanced consideration of the micro-States specificity by the EU whether in an (adapted) accession or cooperation/association module.

A last word on the impact of the EU on the micro-States' status internationally. It has been mentioned how important in this respect the

[96] O. Ribas Reig, *La integración en la UE de los microestados históricos europeos en un contexto de globalización* (Barcelona: Real Academia de Ciencias Económicas y Financieras, 2005), pp. 89–90.

emerging relationship with the EU/EC has been for some micro-States. Probably Andorra was the greatest beneficiary since, as was explained before, as a result of the 1990 Agreement with the EEC, the lasting uncertainty concerning its international legal personality was definitively removed. Agreements between the EC and other micro-States did not necessarily have the same effect. For San Marino (and also for Liechtenstein) there was no issue of international legal personality to be settled. In addition, it should be stressed that the relations EU–micro-States are not simply complementary to the bilateral relations between the micro-States and their historical neighbour(s) but that the relations with the EU also contribute to achieve a better equilibrium in the structure of the micro-States' external relations. The relations with the EU indeed help to readjust the previously often monolithic nature of the relations with the historical neighbours. But, whatever the EU's actual or potential contribution to a more effective and more balanced external policy of the micro-States, this should not be interpreted or perceived as being in conflict with the relations with the historical neighbour(s). Good relations with the 'old' neighbour(s) will always remain a *conditio sine qua non* for stability and prosperity of the micro-States.