

IOANNIS STRIBIS

1
no

XENOPHON PAPER

DECISION-MAKING IN THE BSEC

A CREATIVE CARTOGRAPHY OF GOVERNANCE



JULY 2006

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PREFACE

The Organisation of the Black Sea Economic Cooperation (BSEC) finds itself in the midst of reforming its institutional framework. The reasons for reform are many: They range from the periodic need to recalibrate existing mechanisms to the necessity of adapting to changes in the international environment which impact on the BSEC's role and position in the wider Black Sea region and beyond. The heteroclit membership of the BSEC with its varying perspectives and approaches to regional cooperation makes this exercise all the more challenging and pressing. How much consensus exists among the member states for substantive reform of the Organisation? Is the BSEC able to reform in order to become a more effective organisation? What will be the consequences if the reform process stalls or falls short of expectations?

The aforementioned questions are relevant at a time when the wider Black Sea region acquires greater prominence for the European Union which is currently debating its future policy towards the region. The same applies to the United States whose geopolitical considerations imply the search for partners in the region. Other regional 'heavyweights' such as the Russian Federation and Turkey attempt to balance the need for reform of the BSEC in the interest of furthering regional cooperation with a careful assessment of future interaction with external actors. Yet again countries like Greece and Romania aim to balance their EU commitments with their BSEC obligations. In addition, cross-cutting horizontal concerns such as energy, transport, the environment, and combating organised crime among others need to be factored in and carefully assessed both from a national and regional point of view.

In this context, Ioannis Stribis endeavours in this Xenophon Paper to explain, define, and more importantly suggest possible revisions to the BSEC's work methods. The author adopts a legal perspective and presents some of the aspects of the reform process for consideration. In this sense, this study is by no means exhaustive but it is a valuable contribution to the ongoing discussion built on the author's insight of the BSEC.

This Xenophon Paper represents a novelty in the ICBSS' work methods as the Center itself is currently undergoing a restructuring process with a view to contribute more efficiently to the BSEC's work and to enhance its status as an independent policy-oriented expert on the wider Black Sea region while also contributing more efficiently to the BSEC's work. Therefore, this Xenophon Paper is the first of hopefully a long series of analyses with a prescriptive orientation which aim to contribute to a better understanding of the region and its institutions and thus to the debate regarding the major issues on the region's agenda. The reform of the BSEC if it is to be successful can only be seen within this wider context.

Dimitrios Triantaphyllou

Athens, July 2006

PRELIMINARY NOTE

Every international organisation, and for that matter any institution desiring to be efficient and relevant to its stakeholders has to take into account the time factor and the changes occurring in the environment in which it is called to operate. It is therefore essential to give some thought to how an international organisation such as the BSEC can best anticipate and address likely future challenges.

The present work is part of this forward-oriented cogitation on the development and improvement of the BSEC with the aim of empowering it to better respond to the evolving needs of the region, the member states and their people and to attain the objectives for which the Organisation has been established. This goal directly relates to a research on the institutional aspects of cooperation, that is on the governance system, in accordance with which the decisions of the Organisation are prepared and adopted. Whoever engages in such endeavour, has first to address the question asked time-and-again in the BSEC *fora*: should we examine the issue of institutional consolidation and development when BSEC lags behind in several substantial issues, in promoting cooperation in some of the agreed areas of cooperation (article 4 of the Charter and subsequent resolutions of the Council of Ministers of Foreign Affairs of the BSEC member states)?

Upon examination of the facts one realises that there is little room for legitimate argument in this direction. The question puts the horse before the cart: if BSEC lacks the agility and the capacity to take appropriate normative action, due to an inflexible decision-making mechanism – possibly appropriate at the time of its inception but outdated at the present stage of its development, because it stifles the dynamism of the most active instances of the Organisation – the substance will unavoidably suffer from delays and inefficiency. It is therefore patent that thought given to the necessary reform of the Organisation in order to meet the current needs and challenges should be developed along two parallel tracks, of the institutions on the one hand and on the other of the concrete fields of cooperation. In both directions there are improvements that can and should be envisaged. This dual approach can yield the expected results, because any progress in one aspect will have repercussions to the other. Efficient and credible decision-making will empower the Organisation to boost cooperation in concrete fields, where the action of the Organisation is still anaemic. For, only if the BSEC is not blocked by procedural disputes and applies the principles of good governance in its internal functioning, can it be a reliable actor in promoting prosperity and stability in the region. On the other hand, progress in a given area of cooperation will afford BSEC the success story that is necessary in order to rouse the awareness of the stakeholders that, provided the necessary means are made available to the BSEC, the latter can fulfil the aims assigned to it and promote regional cooperation in concrete ways. Governance and progress are interconnected and complementary. Flaws and inefficiencies in one can undermine the other far afield. But the same logic applies also when it comes to the benefits of governance that are felt in all areas of cooperation.

The establishment of the necessity and the timeliness of addressing the issue of decision-making in the BSEC place a burden upon all actors involved in the process. A successful

regulation of this issue requires the contribution of the organs and related bodies of the BSEC, ministries and other state agencies, scholars, civil society actors, business interests, etc. Each and every one, within the scope of their interests and expertise, has a substantial role to play in this endeavour; and the mobilisation of the good will of all is a necessary requisite for the desired success.

This synergetic approach has gained ground in the BSEC. The item regarding updating the BSEC normative documents is already on the agenda of the Organisation, in particular of its Committee of Senior Officials. PERMIS has already submitted its considerations, general guidelines and several concrete proposals for the desired normative reform since the end of 2002, in a paper submitted to the Committee of Senior Officials and consequently to the Council which

"decided to launch a general discussion on the issue of strengthening the institutional capacity of the BSEC in line with the provisions of the BSEC Decennial Summit and the BSEC Economic Agenda"

and

"instructed the Working Group on Organisational Matters to elaborate on the issue and submit its proposals to the Committee of Senior Officials."¹

The successive Chairmen-in-Office have taken up the issue or some aspects of it, that I propose to scrutinise here below, (a paper has been submitted by the Republic of Azerbaijan during its second term² as Chairman-in-Office of the BSEC³ and Georgia organised a two-day brainstorming session of the Committee of Senior Officials (Batumi, 3-4 September 2004) devoted to this issue) in an attempt to keep the issue on the frontline of the interest of the member states.

During its term as Chairman-in-Office, the Romanian Ministry of Foreign Affairs also convened a meeting of the Committee of Senior Officials (Sinaia, 3-5 February 2006), which *inter alia* addressed the issue of reform and restructuring of the BSEC in order to increase the effectiveness of the Organisation. The meeting permitted restricted participation (only the BSEC member states), departing, without any explanation, from the traditional synergetic approach and its benefits. Therefore the contents of the deliberations are not in the public domain; nevertheless one can legitimately assume that the points that have been agreed upon were reflected in the Statement of the Ministers of Foreign Affairs entitled *BSEC towards its 15th Anniversary*, adopted at the meeting of the Council that concluded the Romanian Chairmanship (Bucharest, 26 April 2006).⁴ The contents (and structure) of the

1. Council of Ministers of Foreign Affairs, 9th Meeting, Baky, 31 October 2003, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(2003)2, paragraph 6.

2. The Republic of Azerbaijan has served two consecutive terms as Chairman-in-Office of the BSEC (2003 – 2004), filling the gap from the denial of the Republic of Bulgaria to assume this function in the BSEC.

3. "Working Paper by the Chairman-in-Office (Republic of Azerbaijan) for the participants of the WG on Organisational Matters (to be held in Istanbul, on 26-27 January 2004)".

4. Doc. Annex VI to BS/FM/R(2006)1.

Bucharest Statement exactly reflect the items discussed at the Sinaia meeting of the Committee of Senior of Senior Officials (though the meeting was restricted to the member states, its agenda was posted at the website of the Romanian Ministry of Foreign Affairs, see *infra* pp. 58, 60). Though not legally binding (the Ministers opted for a political statement rather than for a resolution of the Council, by which all member states "shall abide" in accordance with article 17, paragraph 3 RP), the Statement is an indication of the political will of the member states to work towards the direction agreed upon. The part of the Statement referring to the reform of the BSEC, aimed at increasing its effectiveness, contains a series of recommendations, the implementation of which the Ministers of Foreign Affairs of the BSEC member states decided to support. Some recommendations figure among them with direct or indirect relevance to the decision making in the BSEC: strengthening of the competencies of the Committee of Senior Officials, in the first instance but also pledges for better coordination among the different structures (successive Chairmen-in-Office, countries-coordinators and PERMIS) as well as an undertaking to consider "the establishment of a fast-track model in BSEC, which would enhance further cooperation in specific sectors".⁵

These efforts have been so far without concrete results. The meetings of the Working Group on Organisational Matters, sometimes coupled with parallel sessions of Legal Experts have been rather disappointing in this respect, as it was impossible to determine the necessary minimum common denominator.⁶ As to the Committee of Senior Officials, the discussion on this important issue has been overshadowed by a host matters, trivial or less so, to which it is genuinely or artificially related. The Bucharest Statement is a concrete step forward, in terms of political commitment. It remains however fragmentary and lacks the precision necessary for the concrete implementation of the vast programme announced.⁷

The very slow pace over the last three years of the inclusion of the issue in the agenda of the Organisation may be seen as a testing period – necessary for every institution – devoted to self-examination and intellectual maturation. Yet in complex and challenging times the road of inertia may seem broad and inviting, but it ends in uncertainty and decline. I believe that the time is ripe for an analytic proposal on this issue, as ever more frequent confidential mentions and encouragement by senior officials to the author suggest that, despite a superficial impression of fatigue due to the fruitless discussions on the topic, there is a considerable acceptance of the real need to transform the Organisation, even

5. *Ibid.*, pp. 2-3.

6. The level of the discussions was also discouraging for the ability of the Working Group to advance the issue assigned to it by the Committee of Senior Officials. This is one of the major reasons for the request of the PERMIS to postpone sine die the meeting of the Working Group on Organisational Matters, initially scheduled for 25 and 26 January 2006.

7. Cf. e.g. the reference to the desired role of the Committee of Senior Officials: "Strengthening the competencies of the Committee of Senior Officials in the BSEC system, in its capacity as a body elaborating all drafts of Resolutions, Decisions and Recommendations to be adopted by the Council of Ministers of Foreign Affairs". As stated, this paragraph is a *mere reiteration of the present situation* lacking a real vision of reform, which would be to go beyond the present "capacity as a body elaborating all drafts of Resolutions, Decisions and Recommendations to be adopted by the Council of Ministers of Foreign Affairs."

though a few member states would not trumpet their position. The present inquiry and proposal is therefore a modest contribution to the run-up for the Summit meeting scheduled for June 2007, to mark the fifteenth anniversary of the BSEC. This Summit offers a possibility that ought not to be missed, to take stock of the strengths and weaknesses of the BSEC process but also to adopt decisions for overcoming the existing weaknesses and develop its strengths.

Bearing in mind that in governance issues no universally applicable recipes (one-size-fits-all approach) exist, specific strategies or programmes should be drawn up and implemented in the BSEC framework. These strategies should be subject to broad consultation at all levels inside the Organisation and also take into account lessons learned in other international institutions, the European in particular. Europe is the geographic and political area where BSEC and its member states belong and the European orientation of the BSEC process has been a key element since the inception and early years of the initiative,⁸ confirmed in the BSEC Charter⁹ and reinforced ever since.¹⁰

This is the course of action chosen for the elaboration of the present study and of the proposals submitted therein. The author does not claim that these are the only suggestions that can address the deficiencies or malfunctions of the Organisation of the BSEC in the field of decision-making and governance in general. The suggestions presented here below are the fruit of personal practice and experience in the BSEC and long and thorough reflection on its progress since early 1999 (when the author entered upon his professional relationship with the BSEC) from the vantage points that are the Permanent International Secretariat of the Organisation of the BSEC (BSEC PERMIS) and the International Centre for Black Sea Studies (ICBSS), the acknowledged BSEC think tank. Naturally, they exclusively represent the views of the author and not of the two institutions mentioned above or any other organisation.

8. See Summit Declaration on Black Sea Economic Cooperation, Istanbul, 25 June 1992, paragraphs 1, 2, 5 and 9, in *BSEC Handbook of Documents*, vol. I (1995), pp. 3, 4; Moscow Declaration of the Heads of State or Government of the Participating States of the Black Sea Economic Cooperation, 25 October 1996, Preamble and Part 1 (Cooperation and partnership, stability and economic prosperity), in *BSEC Handbook of Documents*, vol. II (1996), pp. IX-X.

9. Cf. the eighth preambular paragraph of the Charter:

"SHARING the common vision of their regional cooperation as a part of the integration process in Europe, based on human rights and fundamental freedoms, prosperity through economic liberty, social justice, and equal security and stability which is open for interaction with other countries, regional initiatives and international organisations and financial institutions".

10. See the Extraordinary Meeting of the Committee of Senior Officials with the participation of the EU institutions and member states (Brussels, 11 April 2005), the relevant resolutions of the Council of Ministers of Foreign Affairs, 12th Meeting, Komotini, 23 April 2005, Resolutions, Decisions and Recommendations, Doc. Annex VII to BS/FM/R(2005)1, paragraphs 1-3, and 13th Meeting, Chisinau, 28 October 2005, Resolutions, Decisions and Recommendations, Doc. Annex VII to BS/FM/R(2005)2, paragraph 18 and Declaration of the Ministers of Foreign Affairs of the Member States of the Organisation of the Black Sea Economic Cooperation on the enhancement of cooperation with the European Union, Doc. Annex VI to BS/FM/R(2005)2, as well as the ongoing *Mati Process* on BSEC – EU interaction, launched in accordance with the afore mentioned resolution of the 12th Meeting of the Council in September 2005.

Within the framework sketched in the previous paragraphs, the present study does not aim exclusively at drawing the exact map of the decision-making process in the BSEC and revealing its shortcomings. This is the necessary first step in order to seek the normative remedies to the existing weaknesses and inefficiencies. The ambition of this study is thus not only to report on the situation as it is (status quo), but to contribute to the improvement of the situation itself. The considerations developed below also revolve round this second axis of applied research. In this perspective a prominent place has been given to the practical orientation of law-making, of adopting normative solutions appropriate to the problems. Therefore, the reader will notice the effort to package all proposals submitted herein in the idioms of legal discourse and to propose for each section discussed, a complete formulation to be inserted in the relevant, each time, BSEC normative document. These concrete proposals are compiled at the end of the study, for easy reference, without the discussion that introduces them and accompanies them in the main part of the volume.

This method exposes the author to some risks, as the formulations proposed may more easily become the object of criticism. This is a most welcome consequence in applied research work. I persist however in my efforts to submit concrete wordings because the objectives of the study are thus more efficiently served. The first reason for the proposal of precise provisions is the premise that any proposed reform cannot be realised on the basis of general and abstract principles alone. In order to maximise the chances for successful implementation, the principles should be accompanied by programmatic details, political support and consistent execution. This assumption brings about the second basis of the methodology of this work. Programmatic details that entail actual political support and commitment for execution require to square principle positions with practical aspirations of the decision makers and all other interested actors. In fact, many may espouse the spirit and underlying assumptions of a proposed reform but be concerned about the practical modalities of its implementation, they may feel uncomfortable with the question of how the principles are to be concretely translated into normative language, which consequences the specific decisions may result in, etc. It is therefore always of great assistance to match the policy considerations with practical solutions. The discussion in the BSEC *fora* is definitely much more productive when a draft text is proposed and debates do not endlessly revolve around principles, on which almost everyone agrees, but fail to yield tangible proposals, where a basis for compromise can be found.

The Charter and later on the BSEC Economic Agenda for the Future (see *infra* p. 13, fn. 14) have ushered BSEC into the eagerly awaited stage of concrete project implementation, valid for "all its activities". The present work made a choice along the same lines: the modernisation of the decision-making in the BSEC is viewed as a concrete project, whose implementation requires both an inspiring and legitimising theoretical underpinning as well as concrete measures for its implementation.

11. Declaration of the Ministers of Foreign Affairs of the Member States of the Organisation of the BSEC on the relations with the European Union, Council of Ministers of Foreign Affairs, 13th Meeting, Chisinau, 28 October 2005, Doc. Annex VI to BS/FM/R(2005)2, paragraph 3: "Emphasize that BSEC, as a regional organisation, committed to the principle of project based approach to all its activities...".

GOVERNANCE IN THE BSEC

The general model of development throughout the world is triple-based: sustainability of the economy, security and good governance. These major values impose themselves as instruments for the realisation of the lofty aims of stability, prosperity and well-being, which are pursued by international organisations and national governments alike. They are inter-linked and mutually reinforcing; they complement one another on the way towards the formation of a better international framework. In this respect efficient governance and modernisation take a central role in contemporary international affairs. The more than 150 world leaders, heads of state or government and representatives of the other United Nations members at the 2005 World Summit (on the occasion of the sixty years of the UN) solemnly "acknowledge[d] that good governance and the rule of law at national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."¹² Therefore, the aim of efficient governance is not merely a complement to human development; it is a core goal in its own right, whose attainment constitutes a necessary requirement for the progress of the society concerned.

In the framework of regional problems regarding governance, modernisation and capacity building, and of the contribution of regional institutions to this process, the focus is too often put on the individual countries.¹³ The many and serious problems that countries are facing in the transition period from central planning to market economy and from authoritarian political organisation to liberal democracy, force the societies and decision-makers, to cope with the question of how the states can break with patterns of ineffectiveness and corruption and promote good governance in decision-making, as well as in the executive and the judiciary functions of the state and its agencies.

Consideration of the issue was initiated by the Organisation of the Black Sea Economic Cooperation (BSEC) through the Economic Agenda for the Future, adopted in 2001.¹⁴ This strategic document contains a section (II) entitled "Cooperation in the field of institutional renewal and governance". The introductory remark of this section reiterates what has been already said in many international *fora* on the interdependency and complementarity of the economic development and governance: "An economic agenda cannot be addressed in today's circumstances without the essential public institutions, as has been widely recognised by the major international organisations and many national governments."¹⁵ The drafters of the document did not overlook the challenges of achieving effective gover-

12. High-level Plenary Meeting of the UN General Assembly, World Summit Outcome Document, UN Doc. A/60/L.1, 16 September 2005, paragraph 11, p. 2.

13. See for example, Thomas Waelde, "International Good Governance and Civilised Conduct among the States of the Caspian Region: Oil and Gas as Lever for Prosperity or Conflict", *CEPMLP*, 1999 (vol. 4), <http://www.dundee.ac.uk/cepmlp/journal/html/vol4/vol4-16.html> (visited on 28 January 2006).

14. BSEC Economic Agenda for the Future. Towards a More Consolidated, Effective and Viable BSEC Partnership, Chapter II: Cooperation in the Field of Institutional Renewal and Governance, Doc. Attachment 1 to Annex VI to BS/FM/R(2001)1, 27 April 2001, in *BSEC Handbook of Documents*, vol. V (2002), pp. 124, 141-144.

15. *Ibid*, p. 141.

nance at the national level¹⁶ and noted that "member states w[ould] need to give priority attention to the quality of governance" if the dynamic forces of the 21st century are to be met.¹⁷ The Economic Agenda goes on to specify essential qualities of governance where cooperative activities can be developed in the BSEC framework: legality, legitimacy and confidence in laws and institutions, effective partnerships, policy integration, responsible budgeting, investing in government capacity, anticipating crisis management and building key networks.¹⁸ The significance of this section cannot be underestimated: it actually introduced into the BSEC agenda the issues of governance and institutional renewal, which were included neither in the BSEC Charter nor in the 1992 Declaration Establishing the Black Sea Economic Cooperation. In this manner it brought BSEC in line with the other international (universal or regional) organisations, which devote a large proportion of their deliberations and activities to governance, and paved the way for the launch of specific activities in this new area of cooperation in the BSEC.

Following the adoption of the BSEC Economic Agenda, the International Centre for Black Sea Studies organised the first BSEC workshop on institutional renewal and good governance with the assistance of the Organisation for Economic Co-operation and Development (OECD) and Transparency International (Taganrog, 29-31 May 2002) and the participation of representatives of local authorities from the BSEC member states.¹⁹ The concrete implementation of the section of the BSEC Economic Agenda devoted to governance started out with the project "Getting the Act Together. Strengthening International Relations Capacities in BSEC Countries",²⁰ jointly undertaken by the BSEC Permanent International Secretariat, the International Centre for Black Sea Studies and the Friedrich Ebert Foundation (Germany). The said project has been the first attempt in the BSEC to include the issue of good governance and necessary institutional reform in the Organisation's agenda, by mobilising financial and human resources from broad and diverse horizons, including the BSEC region, the European Union, OECD, Council of Europe and the USA. The point of departure for the launch of the project was the observation that, because in the globalised world environment countries depend on each other in many respects and are called on to negotiate and cooperate, on a regular basis, in virtually all areas of government activity, the countries' ability to perform such functions effectively has taken on vital significance for the countries individually as well as for their partners on the international level. Therefore, the overall aim of the project was to enhance the capacity of the BSEC member states to contribute to international governance and to influence the process of global regulation, by developing specialised expertise and organisational structures to these ends.

16. *Ibid.*, p. 141, "Achieving effective governance in the face of the dynamic forces of the new century may well be the biggest challenge to be met by virtually all governments."

17. *Ibid.*, p. 141.

18. *Ibid.*, pp. 142-144.

19. Council of Ministers of Foreign Affairs, 6th Meeting, Kyiv, 25 April 2002, Report, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(2002)1, paragraph 59.

20. International Centre for Black Sea Studies, *Getting the Act Together: Strengthening International Relations Capacities in BSEC Countries. A Programme of Three Linked Workshops to Explore Issues, Share Experiences and Develop Cooperative Actions*, Background Paper, Athens, March 2003.

As the BSEC did not comprise an established structure to deal with the issue of institutional renewal and good governance, the said project-proposal provided for the organisation of three workshops, where high-level participants from the BSEC member states would exchange opinions, experience and best practices with their homologues from European Union institutions as well as member states, with focus on the countries of the recent (2004) enlargement that had undergone a substantial reform process as part of their preparation for full EU membership. In this framework three workshops were held in Yerevan, on 19-20 March 2003, in Baky, on 22-23 September 2003 and in Tbilisi, on 7-8 October 2004. A fourth workshop in the same series was deemed necessary in order to prepare a ministerial conference aimed at inaugurating this new field of cooperation in the BSEC at the political level. This fourth workshop was organised by the Hellenic Ministry of Interior and Decentralisation and the ICBSS, in Athens, on 9-10 February 2005.

The remarkable interest shown in the issues of reform and governance in the BSEC in the course of the series of the four workshops, demonstrates the importance of the modernisation and governance issues in the present-day international setting. The outcome then of these four seminars under the "Getting the Act Together. Strengthening International Relations Capacities in BSEC Countries" project, was the inauguration of such an area of cooperation, on a permanent basis, in the BSEC. This watershed event occurred at the meeting of the Ministers in charge of Public Administration and the Ministers of Justice of the BSEC Member States, in Athens, on 21 February 2005, under the Hellenic Chairmanship of the BSEC. The Ministers "invite[d] the Council of Ministers of Foreign Affairs to approve the establishment of a Working Group in order to institutionalise regional cooperation in the field of institutional renewal and good governance, to implement and promote cooperation on the basis of this Declaration and *inter alia*, to submit recommendations and guidelines in creating short and mid-term action plans for specific aspects of building government capacity."²¹ Endorsing this decision of their colleagues, the Ministers of Foreign Affairs of the BSEC member states acting in the format of the BSEC Council "approved the establishment of a new Working Group on Institutional Renewal and Good Governance to deal with cooperation among BSEC Member States in this field"²² and appointed Greece as the country-coordinator of the Working Group for a two-year period starting from 1 May 2005.²³

The conspicuous mobilisation of so many actors in the issue of governance and institutional renewal in the BSEC member states (displayed during the four seminars that preceded the Ministerial Conference of February 2005 and that prepared the decision to establish a permanent BSEC structure to deal with governance and reform), gives even greater importance to the similar questions arising within the BSEC Organisation, as a distinct body

21. Joint Declaration on Institutional Renewal and Good Governance of the Ministers in charge of Public Administration and the Ministers of Justice of the Member States of the Organisation of the Black Sea Economic Cooperation, Athens, 21 February 2005, Doc. BS/PAJM/R(2005)1 Annex V, p. 3.

22. Council of the Ministers of Foreign Affairs, 12th Meeting, Komotini, 23 April 2005, Resolutions, Decisions and Recommendations, Annex VII to BS/FM/R(2005)1, paragraph 16.

23. *Ibid.*, paragraph 13, litt. (f).

where decisions are taken and implemented. As the expression has it, all good deeds start at home; the challenge of modernisation is topical not only at the external (member states') level of the BSEC but also at that of the internal functioning of the Organisation. Consequently, it does not exclusively concern the states of the region but also the institutions that these states have established as tools for enhancing the cooperation among them, as well as between the region as a whole, heterogeneous though it may be, and other actors on the international level, states or institutions. Only if the organisations concerned apply the principles of good governance in their internal functioning, can they be reliable actors in promoting peace, stability and prosperity in the region and beyond.²⁴

The present challenge is, to put it candidly, to set BSEC's house in order with respect to a major aspect of its functioning, the decision-making mechanism. The practice hitherto of the Organisation has revealed problems clamouring for attention, both academic and practical, and the process of decision-making has to be treated in a purposeful way, as any other aspect of management. This is all the more important, as some quarters question the efficiency of the BSEC, hinting at the risk that the "over-bureaucratised structure of decision-making process"²⁵ may render the Organisation irrelevant in regional (and international) affairs. This is a thinly veiled reference to some comments expressed in a different context and strategic perspective²⁶ and are surely excessive, unrepresentative of official positions.²⁷ Nevertheless, they should sound the alert and prompt creative thinking regarding reform. These external voices are added to the consideration that after almost fifteen years of existence, BSEC has yet to learn the lessons of its success stories, but also of its limitations and failures. It has first of all to improve its efficiency in selecting, implementing and managing concrete projects. The latter must clearly respond to the needs of the peoples of the region (business communities and other actors, including the civil society) and succeed in securing their adherence and support.

It is true that some international organisations have hardly changed since their foundation and face more or less serious problems, while others have managed repeatedly to reform

24. For a recent survey of the governance issues in the present changing international landscape, see the collection of essays edited by Laurence Boisson de Chazournes and Rostane Mehdi, *Une société internationale en mutation. Quels acteurs pour une nouvelle gouvernance?*, Bruxelles: Bruylant, 2005, 391 p.

25. Statement by Ambassador Tedo Japaridze, Secretary General of the BSEC PERMIS at the Thirteenth Meeting of the Council of Ministers of Foreign Affairs of the BSEC Member States, Chisinau, 28 October 2005, Doc. Annex IV to BS/FM/R(2005)2, p. 5.

26. See, for example, Bruce P. Jackson, Testimony before the Committee on Foreign Relations of the US Senate, (109th Congress, 1st Session), Hearing on "The Future of Democracy in the Black Sea Area", 8 March 2005, p. 5, "the Black Sea region remains 'institution-poor'. Regional initiatives, such as the confused GUUAM or the moribund Black Sea Economic Cooperation forum have not filled the gap. As a consequence, we should engage with regional leaders ... on the formation of new structures for a Black Sea strategy." [= *Romanian Journal of International Affairs* 2005 (v. X), p. 17 at 24].

27. Opening Remarks by US Ambassador to Romania Nicholas Taubman at the Conference on "Enhancing Security Cooperation in the Black Sea Region: Can We Build Bridges and Barriers?", Bucharest, 30 January 2006, "Another example of a regional organisation that merits support is the Black Sea Economic Cooperation Organisation (BSEC), which Romania chairs through April. Organisations like SECI and BSEC can make a real contribution to establishing the stronger regional dialogue that Romania is seeking, and which we fully support."

their institutional framework, better to be able to respond to new challenges. In the United Nations there is currently an ongoing discussion to identify the conditions that enable reform of the organisation and consider how these conditions can be encouraged²⁸. With respect to the BSEC, no one can question that there are organisational and managerial reforms that can and should be done in order to improve the quality of governance. This paper addresses only one feature of the reform, the decision-making process and, to a lesser, and necessary, extent, the structures of the Organisation. It does not deal with other aspects, such as human resources and systems across government, which could also strengthen the operational capacity of the BSEC.

The BSEC Charter is not an old document, nor an obsolete one. The political decision to transform the BSEC, which was launched in the format of a periodic diplomatic conference, into an international organisation endowed with legal personality, and, for that reason, to draw a legally binding international treaty was adopted by the Heads of state or government of the BSEC participating states at their Moscow Summit in 1996.²⁹ The elaboration of the international treaty concerning the establishment of the Organisation of the BSEC was begun the same year. The negotiations were completed in 1998 and the Charter of the Organisation of the Black Sea Economic Cooperation was signed on 5 June 1998, in Yalta.³⁰ The Charter entered into force on 1 May 1999, the date as of which the informal initiative of BSEC gave its place to the regional economic organisation of the same name. Since then the Charter has provided the normative framework for the regular functioning of the Organisation of the BSEC. In anticipation of the signature and subsequent entry into force of the Charter, the member states have adopted new Rules of Procedure in 1997,³¹ congruent with the Charter, and decided that they would be operational as of the entry into force of the Charter.³² However even the best thought-out and prepared texts cannot anticipate all the issues requiring attention in the everyday life of an institution, and the practice brought to light some points that the BSEC Charter in its present form regulates in a way that demands revision.

28. See High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN Doc. A/59/565, 2 December 2004; Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, 21 March 2005; High-level Plenary Meeting of the UN General Assembly, *World Summit Outcome Document*, UN Doc. A/60/L.1, 16 September 2005.

29. Moscow Declaration of the Heads of State or Government of the Participating States of the BSEC, 25 October 1996, in BSEC, *Handbook of Documents*, vol. II (1996), p. XI.

30. Charter of the Organisation of the Black Sea Economic Cooperation, in *BSEC Handbook of Documents*, vol. IV (2000), pp. 1-15 = in *BSEC Statutory Documents*, Istanbul: Permanent International Secretariat of the BSEC, 2001, pp. 3-16.

31. Rules of Procedure of the Organisation of the Black Sea Economic Cooperation (BSEC), approved at the Tenth Meeting of the Ministers of Foreign Affairs, Kyiv, 22 October 1997, Doc. Attachment 2 to Annex VI to BS/FM/R(97)3, in *BSEC Handbook of Documents*, vol. III (1998), pp. 84-96 = in *BSEC Statutory Documents*, Istanbul: Permanent International Secretariat of the BSEC, 2001, pp. 31-41.

32. Tenth Meeting of the Ministers of Foreign Affairs, Kyiv, 22 October 1997, Resolutions, Decisions and Recommendations, Doc. Annex VI to BS/FM/R(97)3, paragraph 3, in *BSEC Handbook of Documents*, vol. III (1998), p. 64.

The first and foremost issue of major importance for the desired future process of amendment of the BSEC Charter in the direction of modernisation of the Organisation concerns the decision-making. The objective to be achieved in this respect is to strengthen the efficient and effective functioning of the BSEC.

In this spirit, the aim of this paper is not to call for a global overhaul of the decision-making rules provided for in the BSEC Charter. No doubt, bolder proposals could be advanced in this direction, however the methodology of elaborating the proposals here below is to be moderate in order to stay with realistic chances for short-term adoption, which is a fundamental necessity. This is valid both for the proposals that do not involve major modifications of the present normative framework, but rather full exploitation of the resources contained therein, and for the suggestions the implementation of which would require the amendment of the BSEC Charter; even in this case, a modest approach is adopted, due to the belief that the Charter is not in need of wide-ranging alteration, at least with respect to the topic of the present inquiry, decision-making. The author hopes that the present paper will help launch a more general and far-reaching discussion on the necessary, constructive and practical reforms, and is confident that during this discussion, other, more interesting proposals and suggestions will surface and, hopefully, gain wide adherence in the longer run in several quarters and also significant persuasiveness among the decision-makers, in order to pave the way for a more comprehensive reform of the BSEC.

The time is ripe for a reform with the limited scope of increasing the efficiency of the decision-making mechanism in the Organisation of the BSEC and the present discussion is also topical due to the fact that the amendment process of the BSEC statutory documents, and in particular of the Charter, has been tested with the decision to insert a new article, numbered 24 in the Charter, concerning the status of the ICBS.³³ Thus the member states and the institutions of the BSEC have acquired the expertise for deciding and implementing reforms of the Organisation.

In developing the subject matter of the present paper, I shall not dwell on the structure of the Organisation. Suffice it to say here that BSEC has principal and subsidiary organs. Its highest instance is the Summit of Heads of state or government, which is convened on extraordinary occasions, mainly on the occasion of anniversaries of the BSEC or whenever the need appears to take a major decision on the future course of the Organisation.³⁴ The principal decision-making organ of the BSEC is the Council of Ministers of Foreign Affairs of the BSEC Member States (hereinafter: Council or CMFA), which is entrusted with deciding on all issues pertaining to the functioning of the Organisation. In so doing, the Council adopts legally binding resolutions and decisions as well as recommendations. The Council meets in regular session twice a year. The sessions of the Council of Ministers of Foreign Affairs are

33. Council of Ministers of Foreign Affairs, Special Meeting, Istanbul, 25 June 2004, Report, Doc. BS/SFM/R(2004)1, paragraph 6.

34. See the decisions to transform BSEC into an international organisation, Moscow, 25 October 1996; signature of the BSEC Charter, Yalta, 5 June 1998; expansion of the BSEC activities to security and stability, Istanbul, 25 June 2002.

prepared by the Committee of Senior Officials, which is composed of high-ranking personnel from the Ministries of Foreign Affairs of the BSEC member states. The BSEC Charter and other statutory documents do not specify the periodicity of the Committee's meetings. It convenes upon convocation of the Chairman-in-Office on average five to six times a year. The top structure of the Organisation is completed by the Chairman-in-Office, rotating every six months and entrusted with the coordination of all activities carried out within the framework of the BSEC, the proper conduct of the BSEC proceedings as well as the implementation of the resolutions and decisions adopted by the Council. The Charter provides also for the Troika, composed of representatives of the Chairman-in-Office, its predecessor and its successor to this function. The Troika is convened upon request of the Chairman-in-Office in order to exchange views on current and prospective activities of the BSEC and on its relations with other international organisations and institutions. The bulk of the ground-work of the BSEC is laid by the subsidiary organs, mainly Working Groups and Groups of Experts. There are Working Groups for most areas of cooperation provided for in the BSEC Charter or agreed thereafter. Expert Groups are constituted on an ad hoc basis whenever the need arises for studying specific issues. The activities of the Working Groups are coordinated by a Country-Coordinator appointed for a two-year term in office. Secretarial services are provided for by the Permanent International Secretariat, which is the coordinating centre in the flow of information and for the work pursued in the BSEC process.

The brief insight into BSEC enables us to address the first major issue of governance in the BSEC, namely the decision-making process, its deficiencies and limits, and, in due course, the way forward, with the aim of rendering the Organisation of the BSEC more efficient and responsive to the needs of the people of the region (Part A). Good governance is not however confined to mechanisms and technicalities that ensure the highest possible quality of deliberations and decisions. The latter have to be accepted by their addressees and users, and this is a major concern of various international and regional institutions, in particular in the European space. BSEC does not score very well in this respect, and the situation has lately shown signs of regression, which are all the more disconcerting, taking into account the net progress witnessed in other regional European organisations. It is therefore high time to apply and expand the existing rules and practices designed to make BSEC transparent and understandable to its stakeholders with the ultimate goal to gain their trust (Part B).

PART A

DECISION-MAKING PROCESS

The application of the teachings of governance in the elaboration of proposals on enhancing the effectiveness of the decision-making process in the BSEC leads to two different but complementary approaches. The first consists in the full use of the potential of the BSEC Charter, while the other requires changes in the normative framework, that is in the Charter and when necessary, other statutory documents. Consequently, the first chapter will develop proposals that can be implemented across the board of the BSEC Charter as it currently stands, with some minor adjustments in the by-laws, while the second chapter will contain proposals necessitating new rules in the Charter, and subsequently substantial modifications also in the Rules of Procedure.

CHAPTER 1

MAKING THE MOST OF THE EXISTING NORMATIVE FRAMEWORK

The BSEC was launched, at its inception, as an initiative of collaboration of a rather informal shape among the participating states. The culminating event of this forum instituting collaboration was the semi-annual meeting of the Ministers of Foreign Affairs of the participating states, where political guidelines were discussed and adopted. Since the entry into force of the Charter the BSEC has progressed from the early stage of the diplomatic conference model; it has matured into an international organisation, an international legal person formally distinct from its member states. The main feature of this evolution is the existence of permanent structures. Standing organs necessarily imply different levels of decision-shaping and decision-making in the Organisation.

A closer look at the Charter shows however that such a characteristic is provided for in an inchoate form; the subsequent practice has even sidelined this element and concentrated all the decision-making, even on trivial issues, in the Council of Ministers of Foreign Affairs, thus overburdening the most important BSEC organ and preventing it from dealing with the most serious issues, where ministerial guidance is necessary. The implementation of the announced objective of rendering the work of the Organisation more efficient and effective can be achieved through instilling a greater degree of flexibility in the decision-making process, thus enabling the BSEC to respond with timeliness and efficiency to the challenges, internal or external, it is called upon to cope with.

A. THE RULES OF THE CHARTER

Let us first take a brief glance at the decision-making scheme as provided by the Charter and as it has been applied for the last six years, since the Charter came into force.

The key provision in this respect lies in article 11 of the Charter, stipulating that
"The Council is the principal regular decision-making organ of the BSEC."

The same article goes on to enumerate a series of matters, which shall be decided by the Council (see *infra* p. 23).

The use of the word "regular" with respect to the "decision-making organ" clearly means that the Council has no exclusivity of decision-making power. The Charter admits three directions in which the decision-making capacity in the BSEC may evolve. The first is implied in article 10 of the Charter providing for summit meetings:

"The Heads of State or Government of the Member States may meet, when the need arises."

This provision is complemented by article 1, paragraph 3 of the Rules of Procedure (hereinafter: RP) providing that

"The decision-making within the BSEC is, *apart from the Summit*,³⁵ bestowed upon the Council ..."

The other provision breaking the monopoly of the Council's decision-making capacity points to a lower-ranking organ, the Committee of Senior Officials. The subordinate status of this organ to the Council, led to an explicit provision of the Charter (article 15), which reads

"The Committee of Senior Officials, representing the Ministers of Foreign Affairs of the Member States and acting on their behalf, is entrusted with the following competencies:

(...)

c) studies organisational aspects of the BSEC activities, participates in the elaboration of preliminary calendar of events, *takes decisions on relevant matters* except the issues under the competence of the Council and the Chairman-in-office."

Finally, the Charter contains in its article 2 ("Definitions") the proviso under *litt.* (f), according to which

"'Subsidiary Organs' means any Working Group, Group of Experts, Task Force, Committee or service established by the Council of Ministers of Foreign Affairs *or under its authority*."

The phrase in italics clearly acknowledges that the direct involvement of the Council is not, legally and politically, the only possibility for the establishment of BSEC subsidiary organs. The latter can be also set up by other BSEC organs acting under the authority of the Council, that is being empowered by it to that effect. The provision does not specify the beneficiary of this authorisation by the Council, thus allowing a wide construction in favour of each BSEC organ acting within the scope of its competency and attributions. We will return to the modalities of the application of this provision of the Charter (*infra* pp. 31-34).

35. Unless otherwise indicated, emphasis is added.

The afore-mentioned provisions certainly constitute exceptions to the general principle of the Council being the decision-making BSEC organ; this is also the meaning of the term "regular" in article 11 of the Charter. It follows that the instances where the Council does not adopt decisions are extraordinary in terms both of frequency as well as of substance and impact. In fact, the Heads of state or government do not meet periodically and even when the Summit is convened, it does not, as a rule, adopt specific decisions but sets the overall, political frame for the future action of the BSEC. The Committee of Senior Officials, on the other hand, is entitled by the Charter to adopt decisions only with respect to organisational aspects of the BSEC activities, which are essentially procedural in nature, and, even in this limited scope of matters, the relevant article explicitly reserves the primacy of the Council and the Chairman-in Office. Undoubtedly, the possibility of establishment of BSEC subsidiary organs following the authorisation of the Council, under article 2, *litt. (f)*, is more general in its normative scope. However, this opportunity has not hitherto been taken. Be that as it may, the above exceptions to the Council's decision-making exclusivity deconstruct the often sacralised view – still vitiating, and to no negligible degree, the deliberations in the BSEC organs – that the Council and none other than the Council is entitled to decide on every issue pertaining to the organisation and activities of the BSEC.

It becomes obvious from the above presentation that according to the Charter system, the Council of Ministers of Foreign Affairs dominates the decision-making in the Organisation. This state of affairs is reflected in article 11 of the Charter, which, after stating the principle (already presented) that

"The Council is the principal regular decision-making organ of the BSEC"

goes on to enumerate a series of matters, which shall be decided by the Council:

"The Council, in the framework of the BSEC objectives, shall:

- a) decide on all issues pertaining to the functioning of the BSEC;
- b) consider all matters submitted by the Subsidiary Organs and to take accordingly appropriate decisions;
- c) take decisions on membership and observer status;
- d) adopt and modify the Rules of Procedure;
- e) establish Subsidiary Organs within the BSEC, to assign tasks to them, to define, modify or terminate their mandates;
- f) consider any other related matters it may deem appropriate."

Taking a closer look at this provision, seminal for the present inquiry, we notice that the enumeration contained in article 11 is couched, from the legal-technical, as well as logical point of view, in rather imperfect terms and presents significant incoherencies that need to be remedied. In the first place the authority granted by *litt. (a)* (to "decide on all issues pertaining to the functioning of the BSEC") is so general and all-encompassing that it in fact renders the rest of the enumeration nugatory. Is it possible, for example, to think of issues that pertain more directly to the functioning of the BSEC than the Rules of Procedure (*litt. d*) or the establishment and functioning of subsidiary organs (*litt. e*)? Are not the recommendations of the BSEC subsidiary organs related precisely to the functioning of the BSEC (*litt. b*)? On this exact point, the internal structure of the list under article 11, placing

the recommendations of the subsidiary organs before the establishment of these very organs is quite confusing. In addition, it is worth wondering how article 11, *litt.* (e), reserving the establishment of BSEC subsidiary bodies to the Council, can be reconciled with article 2, *litt.* (f) of the Charter, which stipulates that the BSEC subsidiary organs are "established by the Council of Ministers of Foreign Affairs *or under its authority*"; the organs and persons who have to interpret and apply these two provisions of the BSEC Charter find themselves before a quagmire, that requires a certain amount of creativity and intellectual audacity on the part of the interpreter.³⁶ These imperfections in the article regulating the role and attributions of the pivotal BSEC organ are serious and may generate disagreements or other problems for the overall function of BSEC, thus making a priority task of the improvement of this provision, in line with the governance principles.

The afore mentioned deficiencies of the normative framework relating to the decision-making process in the BSEC, which in any case call for adjustment, become more important when the domination already hinted at of the said process to by the Council is taken into account. This state of affairs is further aggravated by the fact that the slight exception in favour of the Committee of Senior Officials (article 15, *litt.* (c) of the Charter), although insignificant from the material point of view, has never been utilised. The same applies to the conceptually more substantial possibility of establishing subsidiary organs by an authority other than the Council (article 2, *litt.* (f) of the Charter). It is however manifest that such a system is neither rational nor sustainable in the long run. I would like to recall the unpleasant situation experienced by the BSEC in the years 2002 and 2003 due to the impasse reached in the Committee of Senior Officials (and subsequently in the Council) in regard to the appointment of a deputy secretary general of the BSEC PERMIS. This is an issue that, by any standard, hardly affects the vital interests of the states, nor influences the stability and prosperity in the region, its economic development or the well-being of its people.

Therefore, the hierarchy of the BSEC organs provided for in the Charter should be reflected in the nature of decisions that they are called upon to adopt in the cooperation process. Encumbering the Council of Ministers of Foreign Affairs with petty issues has the negative effect of distracting this organ from its main mission: to consider the most important issues of general orientation of BSEC affairs and come to the appropriate decisions. Decisions of minor, not to mention trivial importance should be adopted at a lower level.

The legal deficiencies of the normative framework regulating the decision-making process in the BSEC do not constitute the sole reason for the desired adjustment and revision of the existing rules and practice. An additional, practical, argument in favour of the proposed fine-tuning of the decision-making mechanism is that of the requirement for a timely response on the part of the BSEC to the rapid changes occurring in our times as well as in the geo-political environment in which BSEC operates. Such appropriate and well-timed decisions cannot always be feasible for the Council, because its members (the Ministers of Foreign Affairs) too often have a full agenda of engagements, that make an extraordinary meeting of the Council

36. See also article 12 of the Charter: "The Council may establish Subsidiary Organs" (first paragraph) and "The Subsidiary Organs shall carry out their mandate defined by the Council" (second paragraph).

impracticable. Suffice it here to say that the BSEC adopted a Joint Statement condemning the terrorist attacks of 11 September 2001, in New York and Washington, more than one month after the event, at the meeting of the Council of Ministers of Foreign Affairs held on 26 October 2001.³⁷ In contrast, organisations like the EU or NATO, which have a flexible stratified decision-making disposition, reacted without delay. Another more recent example (2006) may also illustrate the need for a flexible decision-making system: the inability of the BSEC to become a partner of the International Organisation of Migration (IOM) in the implementation of a project on migration management owing to the inability of the former to respond in due time to a proposal of the latter; in fact the deadline expired long before the scheduled biannual meeting of the BSEC Council, and the consent of the Organisation could not be expressed in due time. This instance is politically much less sensational than the terrorist attacks of 11 September 2001, it however also rings the alarm, as an Organisation that claims to be project-oriented needs a decision-making pattern that would not impede the implementation of concrete projects, due to slow and ineffective decision-making procedures. Such procedures could discourage potential project partners and thus undermine the image of BSEC as a reliable mechanism for project implementation in the region.

In this part of the present scrutiny, stress is placed on the possibilities afforded by the existing rules in order to instil good governance principles in the BSEC proceedings. And these possibilities, as provided for in the BSEC Charter and the Rules of Procedure, albeit insufficient to address all the issues requiring amelioration, are not negligible. Pending the adoption of wider amendments (see *infra* pp. 40 ff), BSEC is not justified in disregarding the concerns in respect of governance: it has to make the best use of the potential already enshrined in the Charter and the RP, revised in order to be in accordance with the Charter of the BSEC, as it was finalised at the time, and adopted with the express "understanding that they will become operational after the entering into force of the Charter."³⁸ Consequently the principles enunciated in the Charter also inspired the RP in their 1997 version, which is presently in force. As said before, the ideas proposed herein are solidly anchored within the Charter's framework and its agreed principles.

B. THE PROCEDURES

i) The delegation of decision-making authority

The first legal possibility of sharing the decision-making in the BSEC is provided for in the article 1, paragraph 3 RP:

"The decision-making within the BSEC is, apart from the Summit, bestowed upon the Council *which may charge subsidiary organs to make a decision on a particular question and inform the Council on it.*"

37. Statement of the Council of Ministers of Foreign Affairs of the Organisation of the BSEC on Joint Measures in Combating International Terrorism, 26 October 2001, Attachment 2 to Annex V to BS/FM/R(2001)2, in *BSEC Handbook of Documents*, vol. V (2002), p. 223.

38. Tenth Meeting of the Ministers of Foreign Affairs, Kyiv, 22 October 1997, Resolutions, Decisions and Recommendations, Doc. Annex VI to BS/FM/R(97)3, paragraph 3, in *BSEC Handbook of Documents*, vol. III (1998), p. 64.

The legal technique employed for implementing this scheme for sharing decision-making is the principle of *delegation of powers*. This method is known to every legal system and widely resorted to in every branch of the law. As a matter of fact, *even if, contrary to the-reality, the delegation of the decision-making power was not provided for, it would be allowed*; the essence of being entrusted with a power implies the legal possibility of the holder to delegate its exercise. Only in the case of an explicit prohibition would such option have been excluded. Yet, there is no prohibitory rule to that effect in the Charter and the other BSEC statutory documents. The advantage of the explicit above-mentioned provision is that it sets the framework for the application of the scheme in concrete cases.

As provided for in the BSEC RP it rests upon the *authorisation of the Council*. The latter is the sole BSEC organ that can delegate the adoption of a decision; further delegation from an organ without *ab initio* decision-making authority, but has received such power by the Council, although logically possible, seems excluded by the RP. The scope of the delegation system, following article 1, paragraph 3 RP, although relatively narrow, can undoubtedly contribute to better governance in the BSEC, provided that the possibility contained therein is given full effect, as should be the case for each provision in force. Reasonable use of it in accordance with the will of the drafters and the letter and spirit of its wording will facilitate the unshackling of the rigid and in effect unyielding decision-making doctrine of the BSEC.

The application of article 1, paragraph 3 RP requires previous authorisation by the Council enabling a specific BSEC organ to adopt a decision. The decision to be adopted following the instruction of the Council should concern "particular" questions. This member of the phrase cannot be construed as limiting the delegated decision-making power to minor issues or issues of detail. Such a restrictive interpretation overlooks the fact that "particular question" does not mean it is insignificant but that is instead specific, limited to a specific field. Consequently, even a decision on essential issues can be delegated, for example the adoption of the budget of a given financial year. The wording of article 1, paragraph 3 RP warrants being comprehended in this sense and there is no indication to the contrary in the Charter. What cannot be delegated is, for example, the adoption of every decision concerning financial matters. For the same reason, the Council cannot delegate its power to adopt decisions on issues of minor importance, which are not individually specified, for example, the filling of every post in the BSEC PERMIS. The validity of delegation in the existing system of the RP, does not depend on the gravity of the decision to be adopted (permitted for minor issues, prohibited for important ones) but on its concrete character, so that the delegation is compatible with the legal order of the Organisation when it concerns a question individually, and not generally, designated by the Council.

For practical reasons, it is submitted that, when delegating its decision-making power on a particular question, the Council may, whenever possible, adopt the general framework of an action to be implemented by the Organisation of the BSEC and authorise a designated BSEC organ to take the relevant concrete decisions for the implementation of the concerned action. This aspect is also covered by the provision of article 1, paragraph 3 RP.

Another issue it is expedient to clarify in order to avoid misunderstandings that can hamper recourse to the delegation principle for the decision-making power, is the use, in article 1, paragraph 3 of the term "decision" ("to make a *decision* on a particular question"). In accordance with the RP (to which article 18 of the Charter on the decision-making in the BSEC refers) there are two types of binding acts that can be adopted in the framework of the Organisation:³⁹ resolutions, which concern substantive issues of the BSEC (structure and functioning of the Organisation) and are adopted by consensus (article 17, paragraphs 1, 2 RP), and decisions adopted on specific issues pertaining to technical matters and/or functioning of the BSEC and require a two-third majority (article 18, paragraphs 1, 2 RP). However the term "decision" in the provision regulating the delegation of the decision-making power by the Council is not the technical term employed in article 18 RP, but a generic term indicating a binding legal act. This is clear from the text of article 1, paragraph 3 and its context. In many provisions of both the Charter and the RP the word decision is used in a nonspecific sense, as in the expression "decision-making" (articles 18 Charter and 1, paragraphs 1, 3 RP), and, in particular, in order to indicate a resolution (in the sense of a legally binding act adopted by consensus): the most potent affirmation of this argument is to be found in the use of the term "decision" in the article 11, *litt.* (c) of the Charter, with respect to "membership and observer status" in the BSEC, issues that undoubtedly require a resolution in the technical sense, in the last phrase of article 4 of the Charter and also in article 11, paragraph 1 RP, which is the very article regulating the issues in which a resolution is mandatory. The same general meaning also pertains to the term "decision" in the provision under consideration, so that an argument that the delegation of the decision-making power would concern only decisions, in the technical sense of article 18 RP, cannot be validly invoked. Therefore, the Council is entitled to delegate its decision-making power on a specific issue, irrespective of the technical nature of the decision to be adopted by the authorised BSEC organ and the required majorities for its adoption (see *infra* pp. 30-31).

Although not expressly referring to the delegation system of article 1, paragraph 3 RP, an example of application of this possibility may be found in the resolution of the Council, adopted at its first meeting (Thessaloniki, 27 October 1999), with respect to the issue of concluding the Headquarters Agreement between the BSEC and the host country. By this resolution

"The Council of Ministers entrusted the Troika to negotiate the draft [Headquarters] Agreement in the light of these [member states'] comments with the Government of Turkey and the Chairman-in-Office to sign the final text with the Turkish Government upon approval by the Member States in accordance with the silence procedure by the end of the year."⁴¹

39, The third category of acts that may be adopted, the recommendations, do not have binding effects on the member states (article 19, paragraph 1 RP).

40. See article 11, paragraph 2, *litt.* (a) and (b) RP.

41, Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 27 October 1999, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(99)2, paragraph 24, in *BSEC Handbook of Documents*, vol. IV (2000), p. 134.

In this instance, technically the final decision belonged to the member states that had to concur individually with the approval of the Headquarters Agreement. However, the finalisation of the Agreement at the level of the Organisation, which normally, in accordance with the general rules, belonged to the Council, was delegated to the Troika. This approach succeeded and, after finalisation of the Agreement by the Troika and Turkey (the co-contracting party of the BSEC)⁴², the Agreement was signed, in Chisinau, on 27 April 2000,⁴³ without further involvement of the Council.

An instance where the possibility of delegation of decision-making power was proposed explicitly invoking article 1, paragraph 3 RP occurred during the consideration of the draft Convention for Fisheries and Conservation of Living Resources of the Black Sea. The Group of Experts considered the draft Convention which was negotiated outside the BSEC framework and initialed on 25 June 1997 by the six coastal Black Sea countries. They agreed that the said draft text "should be updated in conformity with the new realities".⁴⁴ As it was made plain during the deliberations at the Expert Group, this phrase refers to the deadlock concerning the conclusion of the 1997 draft Convention with respect to the financing and sustainability of the organisational structure envisaged (the draft provided for the establishment of a fully-fledged new organisation, the Black Sea Fisheries Commission having legal personality, organs and budget). Therefore, it was suggested that a new course of action could be considered in order to conclude the convention, that is to adapt the 1997 draft to the BSEC rules and regulations, by assigning the tasks envisaged for the Black Sea Fisheries Commission to a specific BSEC subsidiary organ, to be established, and to the BSEC PERMIS, thus sparing any additional financial burden on the states parties to the Convention to be concluded.

The Group of Experts could not agree on the appropriate course for finalising the draft Convention for Fisheries and Conservation of Living Resources of the Black Sea and elaborated two versions of the text: the first presumed the continuation of the drafting process on the basis of the structure, participation, key provisions and financial provisions contained in the 1997 draft, while the second encompassed the substantial provisions of the 1997 text, with agreed amendments, and at the same time introduced changes into the organisational aspects of the draft Convention in order to render it compatible with the BSEC norms and practice. It was with respect to the second option that the delegation of the decision-making power was submitted by the representatives of the Republic of Turkey, during the meeting of the experts, as a rule concerning the decisions necessary to carry out the objectives of the Convention to be concluded. The proposal, entitled "Draft Resolution to be adopted by

42. The Troika met with Turkey twice in order to finalise the draft Headquarters Agreement: Meeting of the Troika with the participation of the Republic of Turkey for Negotiation of the Headquarters Agreement, Istanbul 17 December 1999, Report, Doc. BS/TRM/R(99)1, in *BSEC Handbook of Documents*, vol. IV (2000), p. 190; and Istanbul, 25 February 2000, Report, Doc. BS/TRM/R(2000)1, in *BSEC Handbook of Documents*, vol. V (2002), p. 253.

43. See Council of Ministers of Foreign Affairs, 2nd Meeting, Chisinau, 27 April 2000, Report, Doc. BS/FM/R(2000)1, paragraph 11, in *BSEC Handbook of Documents*, vol. V (2002), p. 4.

44. Expert Group Meeting on "draft Convention for Fisheries and Conservation of Living Resources of the Black Sea", Istanbul, 5-7 September 2000, Report, (the document was not given reference number), paragraph 7, in *BSEC Handbook of Documents*, vol. V, p. 444.

the Council of Ministers in Bucharest in October 2000" contained a second paragraph stipulating that

"The Council agreed to establish the Working Group on Fisheries and Conservation of Living Resources of the Black Sea provided for in the Article 5 of the afore-mentioned Convention and in accordance with the Article 1, paragraph 3 of the BSEC Rules of Procedure to bestow upon the said WG the authority of taking decisions related to the scope of the Convention and to inform the Council of Ministers on them."

The said proposal was not included in the Report of the meeting of the Group of Experts on "draft Convention for Fisheries and Conservation of Living Resources of the Black Sea" or in the draft Convention itself. Its compatibility with article 1, paragraph 3 appears doubtful in view of the requirement that the delegated authority should concern "a particular question". Here, the delegation of power does not concern a concrete, identifiable question but all matters relating to the implementation of the draft Convention (article 8 Second Option of the draft Convention); it is hardly possible to consider the wide range of issues⁴⁵ that needed to be decided by the BSEC Working Group on Fisheries and Conservation of Living Resources of the Black Sea as "a particular question". The subsequent elaboration of the proposal may have remedied this incompatibility, however such elaboration never took place as the majority of the Black Sea coastal states favoured the first option and the finalisation of the draft Convention was handed over, by joint decision of the two institutions, by the BSEC to the Commission on the Protection of the Black Sea Against Pollution.⁴⁶ As a consequence of the preference to negotiate the draft Convention for Fisheries and Conservation of Living Resources of the Black Sea outside the BSEC framework there has been no opportunity to elaborate the initial proposal and to test in practice the application of the provision of the article 1, paragraph 3 RP.

The Headquarters Agreement gave recently another⁴⁷ opportunity to resort to delegation of powers, albeit without referring to the relevant article 1, paragraph 3 RP. At its fourteenth meeting (Bucharest, 26 April 2006), the Council

"mandated the Secretary General of BSEC PERMIS to continue consultations with the Host Country and *agree on behalf of BSEC* on the relevant amendments to the Headquarters Agreement between the Organization of the Black Sea Economic Cooperation and the Government of the Republic of Turkey."⁴⁸

45. See *inter alia* decision on the species requiring regulation, the protected species and habitats, means and modalities for the limitation of fishing effort, the allowable catches for species harvested, on the basis of the scientific advice, quotas for each regulated species to be allocated to the Black Sea coastal States, open and closed fishing seasons, open and closed fishing areas, the types of vessels used, the types of gear used, including the use of drift-nets, fishing methods, methods and format of keeping catch records, minimum sizes of fish which may be caught and retained on board, modalities for cooperation in effective monitoring, compliance, surveillance and enforcement of the above measures, other measures determined by the Working Group as the Committee to be necessary for the conservation and sustainable utilisation of the Black Sea living resources, etc., article 8, paragraph 3 Second Option draft Convention.

46. Joint Meeting of the BSEC Working Group on Organisational Matters and the Commission on the Protection of the Black Sea Against Pollution, Istanbul, 20 February 2002, Report, Doc. BS/OM-BSC/WG/R(2002)1, paragraph 8.

47. On the negotiation of the agreement, see *infra* pp. 44-45.

48. Council of Ministers of Foreign Affairs, 14th Meeting, Bucharest, 26 April 2006, Resolutions, Decisions and recommendations, Doc. Annex VII to BS/FM/R(2006)1, paragraph 28.

In this way the PERMIS Secretary General was assigned with the final decision on the part of the BSEC regarding the amendments to the said Agreement. The approach proved quite successful, as it allowed the speedy (in less than two months) finalisation of amendments to the Agreement,⁴⁹ thus providing an additional proof on the benefits from the wider use of the delegation of decision-making.

At the same meeting (Bucharest, 26 April 2006), the Council adopted another act delegating decision-making to the Secretary General of the BSEC PERMIS, again without express reference to article 1, paragraph 3 RP. In this instance

"The Council ... empowered the Secretary General of the BSEC PERMIS to support BSEC-related publications including to allow them to use the BSEC logo up to a renewable period of two years, as of 1 May 2006 on a case-by-case basis providing the relevant information to the Committee of Senior Officials."⁵⁰

Here again we have the main elements of the delegation of powers, though without strictly adhering to the terms of article 1, paragraph 3 RP, which may justify the non-reference to that provision.⁵¹

In view of the renewed interest of the decision-makers of the BSEC to use the delegation of decision-making power, as evidenced by the two above instances, it is necessary to clarify the procedural aspects of this perfectly legitimate alternative to the rigid practice of adopting decisions in the BSEC.

The first major issue which appears in the process of the decision-making delegation is the question of the required majority for the adoption by the Council of the authorisation to other BSEC organs "to make a decision on a particular question and inform the Council on it." The answer to this question is to be found in the existing provisions that regulate the decision-making, to be found in the Rules of Procedure, to which refers the article 18 of the Charter:

"The decision-making mechanism is set forth in the Rules of Procedure. The Council shall endeavour to achieve consensus on all issues. On some issues, as defined in the Rules of Procedure, consensus is mandatory."

In accordance with the mandate of the Charter, the Rules of Procedure contain detailed regulations as to decision-making in the BSEC (articles 10 to 19). Of direct relevance to the present study are articles 17 and 18, referring to the two types of legally binding acts that can be adopted in the BSEC (resolutions and decisions, adopted respectively by consensus and two-third majority), and article 11, enumerating the issues where consensus is manda-

49. See Note of the BSEC PERMIS, BS/INFO.2006.445 dated 13 June 2006.

50. Council of Ministers of Foreign Affairs, 14th Meeting, Bucharest, 26 April 2006, Resolutions, Decisions and recommendations, Doc. Annex VII to BS/FM/R(2006)1, paragraph 76.

51. Article 1, paragraph 3 provides for an authorisation to BSEC organs, and the Secretary General of the BSEC PERMIS is not a BSEC organ but an officer (the highest) of that organ; the same provision requires that relevant to the delegated power information should be given to the Council and no to the Committee of Senior Officials. These are however legal-technical imperfections, that do not affect the validity of the delegation of power.

tory (a resolution is required). In the first place the delegation of the decision-making by the Council can only be given by a legally binding act. This is obvious from the fact that the delegated power concerns the adoption by another BSEC organ of a legally binding act; consequently the delegated power has to be assigned equally by a legally binding act (no one can transfer more power than he/she actually holds). The use of a recommendation is therefore excluded from the application of article 1, paragraph 3 RP.

With regard to the required number of BSEC members needed to concur in the Council for a valid delegation of decision-making, the critical aspect is the nature of the decision, whose adoption is entrusted to the lower-ranking BSEC organ: if the question that is the object of the delegation is one of these covered by the enumeration of article 11, paragraph 2 RP, where consensus is mandatory, the authorising act of the Council should be also taken by consensus. When conversely a BSEC organ is entrusted with the adoption of a decision, that in accordance with the general rules does not require consensus, it is equally sufficient for the Council to adopt the empowering act by a two-third majority. There is a legal symmetry between the substantial decision to be taken by the BSEC subsidiary organ and the authorising act of the Council.

Turning now to the modalities of the adoption of the decision by the subordinate organ assigned with this task by the Council, the delegation does not in principle alter the applicable rules. Therefore, if the organ empowered to make a specific decision is multilateral (e.g. the Committee of Senior Officials, a Working Group), it has to follow the rules that are applicable to the Council with respect to the quorum and the required majority for the adoption of the decision concerned. If the delegation is directed to a BSEC organ of restricted participation (e.g. the Troika, an *ad hoc* task force, etc.), the decision-making should follow the rules that apply to the organ concerned, unless the Council in its authorising decision has prescribed otherwise with respect to the procedure, quorum or majority. The Council may also attach specific conditions for the adoption of a decision by a unitary organ, such as the Chairman-in-Office, the Country-Coordinator, the PERMIS or other.

ii) Establishment of subsidiary organs "under the authority" of the Council

The presentation and analysis so far, has focused on the general aspects of the decision-making sharing system through the principle of the delegation of powers, irrespective of the subject matter of the decision to be adopted. There is nevertheless an issue, with respect to which the Charter itself acknowledges the latitude of the Council to authorise another organ to adopt a decision. This is the possibility of the establishment of BSEC subsidiary organs not directly by the Council of Ministers, but "under its authority" (article 2, *litt.* (f), see *supra* p. 22). This further possibility afforded by the Charter for allocating a specific segment of decision-making power to other BSEC organs has not been resorted to hitherto. It is certainly of rather limited scope, as it concerns only one particular aspect of decision-making, the establishment of the BSEC subsidiary organs. This specific issue is however of major importance for the BSEC process: in fact the greater part of the groundwork in the BSEC is carried out by the subsidiary organs, mainly Working Groups and Group of Experts. The Work-

ing Groups in particular constitute the backbone of the Organisation of the BSEC. These organs develop joint programmes and projects, submit recommendations and pursue their implementation following approval by the Council. They accomplish the most important work by establishing their agenda, and consequently the agenda of the BSEC in the respective areas of cooperation and, following the establishment of the BSEC Project Development Fund, they elaborate the project proposals to be funded by the Fund.

In a nutshell, the successful development of the BSEC cooperation process depends substantially on the efficiency of the work of the Working Groups and other subsidiary organs. Article 2, *litt.* (f) of the Charter can be proven useful, in particular with respect to the establishment of subsidiary organs that the Working Groups may need to set up in order to facilitate their activities. An example can be the swift establishment, in the framework of a Working Group, of a task force (with limited participation) in order to discuss or study a specific issue and report to the Working Group. The possibility of every organ to establish subsidiary organs is an inherent power in the law of international organizations,⁵² even when the constitutive charter of the international organisation concerned does not contain any provision to that effect.

The BSEC Charter provides for an instance where the composition of a subsidiary organ is entrusted to the Committee of Senior Officials (and not the Council): article 15, *litt.* (e) of the Charter provides that the Committee of Senior Officials

"nominates experts to a specialised sub-group for carrying out the budget auditing."

Though of constitutional character, this provision has not been acted upon by the *Financial Regulations and Procedures of the BSEC PERMIS* (FRP).⁵³ The rule 23 FRP provides that the auditing of the budget of the PERMIS⁵⁴ is conducted by a Group of Auditors specialised in budgetary matters and composed of three representatives, one from each member states that form the Troika of the Organisation (sessional Chairman-in-Office, its successor and its predecessor) (rule 23, paragraph 2).⁵⁵ In a further paragraph, rule 23 regulates the nomination of the members of the Group of Auditors, without reference to the statutory right of the Committee of Senior Officials (article 15, *litt.* (e) of the Charter):

"The Member States to participate in the Group of Auditors shall nominate their representatives by the second half of October of each year..." (rule 23, paragraph 5 FRP).⁵⁶

The inconsistency between the relevant provisions of the Charter and the FRP regulating the nomination of the members of the Group of Auditors of the budget is conspicuous. With

52. Cf. International Court of Justice, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports 1954, p. 57.

53. Approved by the Council of Ministers of Foreign Affairs, 4th Meeting, Moscow, 27 April 2001, Doc. Attachment 4 to Annex VI to BS/FM/R(2001)1, in *BSEC Handbook of Documents*, vol. V (2002), pp. 160-175.

54. The *Financial Regulations and Procedures of the BSEC PERMIS* concern the budget of the PERMIS, which is a concept narrower from and encompassed in the "Budget of the Organisation", provided for in article 25 of the Charter.

55. FRP, Doc. Attachment 4 to Annex VI to BS/FM/R(2001)1, in *BSEC Handbook of Documents*, vol. V (2002), p. 174.

56. *Ibid.*

a view to remedying this discrepancy, paragraph 5 of the rule 23 FRP should be replaced by the Council at its earliest convenience in order to bring the FRP in line with the Charter. The revised version of rule 23, paragraph 5 may combine the competencies of the Troika member states with the constitutional prerogative of the Committee of Senior Officials:

"23.5) The member states of the Troika shall announce their representatives to the Group of Auditors by the second half of October of each year and request from the Committee of Senior Officials to agree the composition of the Group of Auditors accordingly."

The above mentioned example demonstrates, at the same time, the openness of the BSEC Charter to the decisive role of another BSEC organ in the functioning of a subsidiary organ and the limits of this openness, that concerns the composition and not the establishment of the organ. In fact, article 15, *litt.* (e) of the Charter operates a sharing scheme of the decision-making capacity between the Committee of Senior Officials (a BSEC organ) and the member states of the Organisation. The application of article 2, *litt.* (f) of the Charter (establishment of BSEC subsidiary organs, not directly by the Council but under its authority) will give broader autonomy to the BSEC organs and allow them to function more effectively. By the same token it will contribute to increasing their responsibility in the BSEC affairs. The philosophy of this provision is founded on the delegation principle. It goes however beyond the article 1, paragraph 3 RP, that was examined earlier in this study. The distinctive feature of article 2, *litt.* (f) is that this provision of the Charter does not require for its application a decision "on a particular question". While article 1, paragraph 3 RP would warrant the setting up of subsidiary organs only on *ad hoc* basis, the provision under consideration allows the possibility of a "*permanent*" *authorisation to establish subsidiary organs*.

With respect to the modalities of its application, article 2, *litt.* (f) of the Charter does not specify the beneficiary of the authorisation by the Council, allowing thus a wide construction in favour of each BSEC organ acting within the scope of its competency and attributions. By and large the Committee of Senior Officials and the Working Groups already established would be the organs entrusted with the establishment of subsidiary bodies. This affirmation does not exclude the available option of charging BSEC organs of limited participation with setting up further subsidiary organs. The empowerment can be on a case-by-case basis, through specific resolutions of the Council. Nevertheless, it would be more useful and in accordance with the concept of good governance to adopt general clauses to that effect. For the Working Groups, which may be the structures that could benefit the most from the institution of such practice, in terms of efficiency and rapidity of their endeavours, the general clause may be inserted in the Terms of Reference adopted by the Council (by consensus) for each Working Group. Such a general clause can be couched in the following terms:

"The Working Group on ... has the authority to establish Group of Experts, Task Forces, Committees or services that are necessary for the effective and efficient accomplishment of its tasks, as provided for in the present Terms of Reference."

With respect to the Committee of Senior Officials, the general clause can be formulated either in a resolution of the Council, explicitly enabling the Committee to establish the required subsidiary organs for the effective and successful accomplishment of its mandate. A provision along these lines may alternatively be incorporated as a separate article in the RP.

Finally, the authority to establish subordinate subsidiary organs should be recognised also for the PERMIS, in order to allow the administrative organ of the BSEC to establish facilities that are helpful for the success of its mission and also to enhance the coordination of the various BSEC structures. In practical terms this authorisation can be granted to the PERMIS by addition of a relevant item to rule II ("Functions" of the PERMIS) of the Regulations for the Staff of the BSEC PERMIS.⁵⁷ The insertion of this new item requires a resolution by the Council, whose concrete formulation may read as follows:

"The PERMIS shall be entrusted with the following functions:

(...)

- to establish task forces or services, as may be necessary for the accomplishment of its functions"

This function of the PERMIS will be under the authority of the Chairman-in-Office, in accordance with the general provision of article 16, paragraph 3 of the Charter. Consequently, under the system of the Charter as it stands,⁵⁸ the PERMIS should in any case seek the approval of the Chairman-in-Office in order to proceed to the establishment of a subsidiary facility with validity.

iii) The provisional application

The provisional application of decisions, before the fulfilment of all the conditions required for their application is another procedural possibility for allowing a legal system the ability, on the one hand, to acquire flexibility for decisions that need to be implemented without delay, and, on the other, to safeguard the final saying to an organ or authority of higher degree. This is a general principle known in every legal order and in most branches of the law. It is designed to cope with urgent situations requiring immediate reaction and swift decision-making. In international affairs, as everywhere else, there are unforeseeable situations that cannot be expected to be addressed by periodical decision-making or previous delegation thereof. In the BSEC normative framework there is the possibility of convening a special meeting of the Council (article 3 RP) which might be of use in case of unexpected situations. However the conditions for convening such a special meeting of the Council may often be proven unsuitable for urgent situations: the proposal to convene a special meeting need to be forwarded to the Chairman-in-Office at least twenty days before the

57. Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 27 October 1999, Doc. Attachment 2 to Annex V to BS/FM/R(99)2, in *BSEC Handbook of Documents*, vol. IV (2000), p. 145.

58. The issue of the emancipation of the PERMIS from the authority of the Chairman-in-Office, which, will bring the BSEC in line with the mainstream of intergovernmental organisations endowed with an self-standing administrative organ, and increase the responsibility of the PERMIS, is not dealt with in the framework of the present paper, as it does not bear directly upon the decision-making process. Yet, it is a capital matter of governance for the BSEC and it has to be given the appropriate consideration, in a short-term perspective, by scholars and decision-makers.

proposed date of the meeting (article 3, paragraph 1 RP). Moreover, a special meeting of the Council presupposes the absence of objections by the member states (article 3, paragraph 3 RP). Adding the hectic schedule of ministers to these normative requirements, it becomes clear that a special meeting of the Council cannot easily be convened.⁵⁹

This observation obliges us to reflect on alternative ways to ensure responsive and responsible decision-making in case of undisputed urgency. This possibility can be provided for through the *provisional application of the decisions of the Committee of Senior Officials pending their approval by the Council*. This option is founded, in the BSEC institutional framework, on article 15 of the Charter according to which the Committee of Senior Officials represents the Ministers of Foreign Affairs of the Member States and acts on their behalf. There is here an inaccuracy which is an evident *lapsus calami*: in fact the Committee of Senior Officials does not represent the Ministers of Foreign Affairs but the Council of the Ministers; an organ of intergovernmental organisation does not represent national authorities, but express the distinct volition of the organisation as such. The opposite view is in stark contrast with the nature of the BSEC after the entry into force of the Charter as an international organisation, endowed with own legal personality, distinct from its member states, individually or collectively. The literal application of article 15 is incompatible with the character of an intergovernmental organisation, in fact it negates the very essence of the Charter and its political design to establish a fully-fledged international organisation. The explanation of this contradiction between the letter and the spirit of the provision under examination is due to the fact that the expression "Ministers of Foreign Affairs" survived in article 15 of the Charter, obviously inadvertently from the period when BSEC was an informal diplomatic initiative before the Charter, when the term was used in the expression "Meeting of the Ministers of Foreign Affairs."⁶¹ The senior officials, in their individual capacity as delegates of the governments of the BSEC member states, may represent their respective Ministers, in accordance with their appointment, mandate and/or position in the functioning and hierarchy of the internal organisation of the civil service in each BSEC member state. Nevertheless, in their capacity as members of a collective organ of the Organisation of the BSEC, they form the Committee of Senior Officials (*dédoublement fonctionnel*).⁶² Though

59. The practice of the Organisation of the BSEC so far offers one example of special meeting of the Council, the one held in Istanbul, on 25 June 2004, in the sidelines of a NATO Summit, before the entry into force of the Charter, a special meeting of the Ministers of Foreign Affairs with the participation of the Ministers responsible for Economic Affairs was held (Istanbul, 7 February 1997).

60. For the specific relationship between intergovernmental organisations and their member states see, International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt*, Advisory Opinion, 20 December 1980, Separate Opinion, Judge Manfred Lachs, ICJ Reports, 1980, p. 110: "It is a truism that an intergovernmental organisation, as a new subject of international law created by states, acquires a special status vis-à-vis those states. While it remains under their control, inasmuch as it both represents and is subject to their collective will, its decisions may, and frequently do, conflict with the will of its individual members."

61. See article 3 RP adopted in 1993, in *BSEC Handbook of Documents*, vol. I (1995), p. 518.

62. We owe to the visionary teacher of international law Georges Scelle the conceptualisation of this phenomenon and the successful term coined to describe it, see his *Manuel de droit international public*, Paris: Domat-Montchrestien, 1948, pp. 15-24 and "Le phénomène juridique du dédoublement fonctionnel" in Walter Schätzel & Hans-Jürgen Schlochauer (eds.) *Rechtsfragen der Internationalen Organisation*. Festschrift für Hans Wehberg zu seinem 70. Geburtstag, Frankfurt a.M.: Klosterman, 1956, pp. 324-342.

it is "easier to forget" the reality of this double capacity⁶³ in plenary organs, where each member state has its delegates,⁶⁴ as is the case for the Committee of Senior Officials, the latter can represent only another organ of the Organisation, in the present instance its higher echelon, the Council of Ministers of Foreign Affairs.

For the reasons given above, at a future opportunity for amendment of the Charter, the wording of the beginning of article 15 should be corrected in line with the general ideology of the Charter and read:

"The Committee of Senior Officials, representing the Council of Ministers and acting on its behalf, is entrusted with the following competencies:"

An alternative version, which would also be consistent with the Charter, could read:

"The Committee of Senior Officials, composed of delegates of the Member States representing their respective Ministers and acting on their behalf, is entrusted with the following competencies:"

The second option, although not contrary to the Charter, should however not be adopted as it stresses the subordination of civil servants internal to the member states, thus neglecting the nature of BSEC as an international organisation under international public law and failing to manifest the organic relationship between two structures of the Organisation.

In the meantime, the Council should, by resolution, correct paragraph 2 of article 1 RP, as it stands contrary to the Charter and incomprehensible, namely: "The Council may be preceded by a meeting of the Committee of the Senior Officials of the Ministers of Foreign Affairs of the Member States". The second version, which is inappropriate for the Charter, may be of help in order to render this confusing provision intelligible:

"The Council may be preceded by a meeting of the Committee of the Senior Officials, composed of delegates of the Ministries of Foreign Affairs of the Member States."

With the previous necessary clarifications on the exact nature of the representation existing between the two BSEC organs, the acknowledgment in the most formal way of this relationship between the Council and the Committee of Senior Officials constitutes the legal basis for the acceptance of the option of provisional application of acts adopted by the Committee of Senior Officials.

The characteristic of the Committee of Senior Officials as a surrogate of the Council imposes the modalities of the adoption of acts that are to be provisionally applied. Representing the Council and acting on their behalf, the Committee has to respect the decision-making modalities of the Council, with respect to the required quorum and majorities in order to adopt the act that shall be applicable on a provisional basis. For issues that require

63. Antonio Cassese proposed the term "role splitting" to render the French "*dédoublement fonctionnel*", see "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", *European Journal of International Law* 1990 (vol. 1), pp. 210-231.

64. Cf. Henry G. Schermers and Niels M. Blokker, *International Institutional Law. Unity within diversity*, The Hague/London/ Boston: M. Nijhoff Publishers, 1999 (third revised edition), § 1886, p. 1187, "In non-plenary organs in which a limited number of members represent the interests of the membership as a whole, this distinction can clearly be discerned (...) However, in plenary organs this *dédoublement fonctionnel* is easier to forget."

consensus (resolution of the Council), the relevant act of the Committee of Senior Officials has to be adopted also by consensus; for other matters, where a decision of the Council (adopted by a two-thirds majority) is sufficient, the same majority should be required at the level of the Committee of Senior Officials. The decisions of the Committee in this framework can be called by the technical term "act" in order to mark the difference with the resolutions and decisions (as technical terms) of the Council. The exact analogy between the rules applicable to the decision-making by the Council (quorum and majorities) and these to be followed by the Committee of Senior Officials, when adopting its acts of provisional application, shall apply both to the issue of establishing the urgency of the subject matter to be regulated, warranting the provisional application of the decision, as well as to the contents of the act to be adopted. The explicit recognition of the possibility of provisional application of acts of the Committee of Senior Officials, pending their approval by the Council, should be introduced as a new provision in the RP, with the heading "Provisional Application", after the existing article 16. To this effect the following formulation is submitted:

"Article *

Provisional Application

In case of ascertained urgency, the Committee of Senior Officials is entitled to adopt acts that are provisionally applicable. In such case, the Committee of Senior Officials shall respect the rules pertaining to the decision-making applicable to the Council. Acts provisionally applicable shall cease to exist, unless the Council of Ministers of Foreign Affairs of the BSEC Member States explicitly approves them at its earliest meeting after their adoption by the Committee of Senior Officials."

C. A CASE-STUDY: THE RULES AND REGULATIONS OF THE BSEC PROJECT DEVELOPMENT FUND

The feasibility of the proposed normative responses to the rigid decision-making system (as it has developed in practice, restricting even the few exceptions allowed by the existing form of the Charter) can be proved by a case study, where autonomous decision-making authority was transferred from the Council to the Committee of Senior Officials. This shift happened with respect to decision-making in the BSEC Project Development Fund. At its ninth meeting (Baky, 30 April 2004), the Council of Ministers of Foreign Affairs entrusted the Committee of Senior Officials with the responsibility for the final endorsement of applications for funding regional BSEC projects,⁶⁵ relinquishing the previous position that assigned such tasks to the exclusive competency of the Council.⁶⁶

65. Council of Ministers of Foreign Affairs, 9th Meeting, Baky, 30 April 2004, Report, Doc. Attachment 1 to Annex VI to BS/FM/R(2002)2, *Manual of Operations of the BSEC Project Development Fund*, Part Two: Role and Basic Functions of BSEC Organs in Project Development, paragraph 2: "The Committee of Senior Officials endorses projects for further consideration by the Steering Committee. The endorsement of projects by the Committee of Senior Officials is necessary for the Steering Committee of the Fund to consider the financing of a project."

66. Council of Ministers of Foreign Affairs, 7th Meeting, Tirana, 25 October 2002, Report, Doc. Annex VI to BS/FM/R(2002)2, Resolutions, paragraph 3.

In this test case the approach by stages may be observed to sharing powers of decision-making in the BSEC. When the BSEC Project Development Fund was launched in 2002, the attempts to assign the final endorsement of the applications for funding BSEC projects to the Committee of Senior Officials were fiercely contended and in fact defeated as, admittedly, being contrary to the general philosophy of the Charter. In this first stage the issue of overall importance was to establish the Project Development Fund as the main instrument for transforming the BSEC into a project-oriented endeavour, the original political goal of the BSEC process.⁶⁷ The emphasis was therefore placed on the effective establishment of the Project Development Fund, albeit providing for cumbersome procedures that would have impeded its efficient functioning, with the expected results. These deficiencies were "corrected" by amending the decision-making process in line with good governance principles.

This subsequent, gradual improvement of the rules of functioning of the BSEC Project Development Fund matured at a fairly swift pace in the minds of the delegates of the member states, owing to the general debate on the need to limit the undue rigidity of the decision-making process in the BSEC and to strengthen the role of the Committee of Senior Officials. In this connection, it is of particular interest to observe that at the meeting of the Working Group on Organisational Matters (with parallel session of Legal Experts, Istanbul, 26-27 January 2004), that took up the issue of the necessary amendments to the BSEC Charter and other by-laws with a view to strengthening the institutional capacity of the BSEC in line with the provisions of the BSEC Decennial Summit Declaration and the Economic Agenda for the Future – which failed to produce results – the *only* point on which the participants agreed was "to continue the deliberations on the issue [strengthening of the role and place of the Committee of Senior Officials in the BSEC system], particularly regarding the project implementation process, and invited the BSEC PERMIS to present its views on strengthening the decision-making capacity of the ... Committee."⁶⁸

The implementation of this change in the minds of the member states became legally feasible thanks to article 26, paragraph 2 of the Charter allowing the adoption of "specific rules and regulations" governing special BSEC funds; such rules and regulations can depart from the general decision-making scheme of the BSEC. Based on this provision, the BSEC PERMIS submitted and eventually succeeded in instituting a "decentralised" decision-making mechanism approved by the Council, for the BSEC Project Development Fund.⁶⁹ Not only was the Committee of Senior Officials entrusted with the en-

67. See Yalta Summit Declaration, 5 June 1998, paragraph 6, in *BSEC Handbook of Documents*, vol. IV (2000), p. 19; Istanbul Summit Declaration, 17 November 1999, paragraph 3, in *BSEC Handbook of Documents*, vol. IV (2000), p. 23.

68. See Working Group on Organisational Matters, Istanbul, 26-27 January 2004, Report, Doc. BS/WG/OM/R(2004)1, paragraph 7.

69. See Note of the BSEC PERMIS, BS/INFO.2004.79 dated 5 March 2004 and the there attached Background Paper on "Strengthening of the decision-making capacity of the Committee of Senior Officials in the project implementation process".

dorsement of the project proposals, which is a prerequisite for further consideration of the application for funding by the Fund, but also with the determination of the maximum total amount of money to be distributed to projects for every six-month submission period.⁷⁰ In an equally significant move, the "decision-making power on the distribution of the Fund's resources" is vested with the Steering Committee of the Project Development Fund.⁷¹ This organ, especially established for the management the Fund, has the authority to decide which projects will be funded, to allocate specific amounts of money to each project, and authorise the BSEC PERMIS to make the relevant payments to the selected applicants, as well as to take all relevant decisions ensuring the efficient implementation of projects and to inform the Committee of Senior Officials on the progress of operations of the Fund.⁷²

The functional character of the decision-making mechanism of the Project Development Fund, and the consequent rejection of any preconceived conceptual rigidity that BSEC instances often display when considering reforms aiming at the modernisation of the Organisation, is further attested by the opening of the decision-making process to third parties having contributed financially to the Fund (international intergovernmental and non-governmental organisations, interested third states, companies, project sponsors, and other donors). The paramount importance of attracting external contributions to the limited resources of the Fund incited the BSEC Council to allow the possibility of elaboration, upon agreement with the external contributors concerned, of modalities for the participation of the donors in decisions pertaining to operations financed or co-financed by them and according to their contribution.⁷³ Such agreements with individual donors are approved by the Steering Committee and the Committee of Senior Officials, without resort to the Council.⁷⁴

This is a major conceptual innovation in the approach of the BSEC member states and organs towards the decision-making in the Organisation, that needs to be underlined in the perspective of a consensus that was, gradually and laboriously, achieved. Although extrapolation from one situation to a dissimilar other may sometimes be a misleading exercise, it is submitted that the Rules and Regulations of the Project Development Fund clearly display that the conditions for a functional and effective decision-making scheme in the BSEC are ripe.

70. The submission of proposals takes place following an open call for proposals with two submission periods per year: one at the end of June and the other at the end of December.

71. Council of Ministers of Foreign Affairs, 9th Meeting, Baky, 30 April 2004, Report, Doc. Attachment 1 to Annex VI to BS/FM/R(2002)2, *Manual of Operations of the BSEC Project Development Fund*, Part One: Regulations and Rules of the BSEC Project Development, paragraph 18.

72. *Ibid.*, Part Two: Role and Basic Functions of BSEC Organs in Project Development, paragraph 3.

73. *Ibid.*, Part One: Regulations and Rules of the BSEC Project Development, paragraphs 20-21.

74. In the framework of its general competency in the BSEC, the Council may adopt general guidelines for the conclusion of agreements with third donors.

CHAPTER 2

AMENDING THE BSEC CHARTER IN THE PERSPECTIVE OF BETTER GOVERNANCE

The awareness that the decision-making process in the Organisation of the BSEC is too rigid and may impede the expected progress of the cooperation process, motivated the developments so far on the ways and means to make the best use of the existing legal framework of the BSEC in order to limit the inconveniences due to the rigour of the decision-making mechanism as it stands. The suggestions submitted constitute in their majority stand-by solutions of a provisional character. It is therefore necessary to reflect on long-term arrangements that will allow the Organisation of the BSEC to improve its functioning and responsiveness in contemporary and future needs. Effective arrangements to realise the good governance objective in the BSEC require certain amendments of the BSEC Charter itself. This fact signifies that the recommendations under this part can be envisaged, at best, in a medium-term perspective, because of the relatively time-consuming requirements for the entry into force of the amended provisions, in accordance with article 30 of the Charter (consideration and adoption by the Council, ratification or equivalent act by the member states, entry into force after nine member states have ratified/accepted/approved the amendment).⁷⁵ Nevertheless, the amendment process should set off, not losing sight of the fact that there is in the BSEC a broader necessity for revision of the Charter, in several aspects, among which priority should be given to the decision-making mechanism. A global vision reveals that the various aspects of functioning of an organisation are interconnected. Volatility in one area can undermine effectiveness far afield; but this equation is valid when it comes to the benefits of reform and good governance: these benefits will irradiate the whole spectrum of the organisation's activities.

A. A STANDING SHARING SCHEME OF THE DECISION-MAKING POWER

After the demonstration in the previous chapter of the existence of compelling grounds that render necessary an amendment of the BSEC Charter, it is opportune to address the pivotal issue of the beneficiaries of the eventual establishment of a decision-making power sharing mechanism and the recognition of such authority to other BSEC organs. The scrutiny thus far points unsurprisingly to the Committee of Senior Officials as the proper organ to be invested with a (delegated) decision-making power. The Charter depicts this organ as representing

75. Article 30 of the Charter reads as follows:

"Any Member State may propose an amendment to this Charter.

The text of any proposed amendment shall be circulated to the Member States through the PERMIS and submitted to the Council for consideration and approval.

Amendments to this Charter, approved pursuant to paragraph 2 above, shall be subject to ratification, acceptance or approval by the Member States and shall enter into force according to the procedure set forth in Article 33."

The issues and problems that arise out of the interpretation and application of this provision are not within the scope of the present inquiry and will not be addressed in this study.

the Council of Ministers of Foreign Affairs when the Council is not in session, and acting on its behalf.⁷⁶ In fact, both in the statutory texts and in practice, the Committee of Senior Officials is a pivotal organ where all BSEC issues are discussed and the relevant recommendations submitted to the Council for final approval are elaborated; contrary to what might be supposed, the Committee of Senior Officials does not have a "Cinderella status" within the BSEC. Consequently this proposal, which follows the teachings of governance, is also in line with the general philosophy and ideological direction of the Charter itself. The recognition, thus, *in the Charter* of decision-making authority to the Committee does not deviate from the broad principles of the founding fathers of the Charter. This suggestion should not be construed as excluding potential further layer of decision-making in the Charter, in concrete issues, to be defined individually or by categories, in favour of other BSEC organs, including the Chairman-in-Office, the Troika, the PERMIS or the Working Groups.⁷⁷ In fact this further extension of the principle of delegation of the decision-making power should be promoted in the first place by a wider use of the potential of article 1, paragraph 3 RP, feasible without any amendment of the Charter or other normative document of the BSEC; at a second stage this extension of delegated decision-making power in favour of other BSEC organs than the Committee of Senior Officials can be included in the Charter, as a further alternative.

An amendment of the BSEC Charter, adjusting the actual inappropriate decision-making format of the Organisation, is therefore a necessity for practical reasons of good governance and is moreover consonant with the initial yet incomplete design of the Charter not to make the Council of Ministers of Foreign Affairs the sole decision-maker of the BSEC. In addition, a further reason why such amendment is required is the expediency of rendering the Committee of Senior Officials, which has a central role in the BSEC cooperation process, more responsible for the conduct of the affairs in the BSEC. In this way the normative texts will be aligned with the existing practice of an assertive Committee of Senior Officials that strives to, and in the overwhelming majority of instances, succeeds in settling all the outstanding BSEC issues, in the framework of the directives adopted by the twice-yearly meetings of the Council. Laying down in legal terms a tested and successful practice is one of the core elements of good governance.

Turning now to the question of how best to introduce into the Charter the proposed devolution of some aspects of the decision-making in the BSEC to the Committee of Senior Officials (and potentially to other BSEC organs), it is submitted that the most efficient course of action, at a first stage without upsetting the existing institutional balance, is the delegation principle. Following this reasoning the flexibility needed in the BSEC institutional mechanism concerning the decision-making process can be introduced by a new paragraph (paragraph 3) in the article 11 of the Charter. This new paragraph 3 could read as follows:

76. See article 15 of the Charter: "The Committee of Senior Officials, representing the Ministers of Foreign Affairs of the Member States and acting on their behalf, is entrusted with the following competencies: ...".

77. Such case is different from the *ad hoc* delegation of decision-making power to concrete organs by virtue of article 1, paragraph 3 RP, *supra* nos 39-59, because it refers to attribution of decision-making power to organs originally and directly by the Charter.

"3. The Council of Ministers of Foreign Affairs may delegate to the Committee of Senior Officials, or other BSEC organ as appropriate, a decision-making power on issues to be specified in the Rules of Procedure."

Reading the above proposal one can reasonably question the "added value" of such a provision of the Charter compared to the already existing article 1, paragraph 3 of the Rules of Procedure:

"The decision-making within the BSEC is, apart from the Summit, bestowed upon the Council *which may charge subsidiary organs to make a decision on a particular question and inform the Council on it.*"

At first glance the proposed addition to article 11 of the Charter may appear even more restrictive than the existing authorisation clause of the RP, as the latter can be applied not only with respect to the Committee of Senior Officials, but also to each and every one of the BSEC subsidiary organs. It is however easy to extend the application of the proposed revision of the Charter to other organs of the BSEC, provided there is convergence on the desirability of such a comprehensive approach. In reality the restriction of the delegated decision-making exclusively to the Committee of Senior Officials is not a necessary element of the proposal and can easily be modified even at the first stage of an amendment process of the Charter.

The advantage of the afore mentioned new paragraph 3 to be added to article 11 of the Charter becomes conspicuous when it is examined from the perspective of its material scope. From this point of view the proposed new paragraph is conceived in wider terms: it is neither limited to a "particular question" nor presupposes the adoption of a framework decision by the Council to be further implemented through delegated decision-making. As a result, some decisions, as for example the adoption of the calendar of events or coordination functions, could be specified (in the Rules of Procedure also to be amended accordingly) as being within the competency of the Committee of Senior Officials. The major implication of the proposed solution would be to reverse the existing relationship established by article 1, paragraph 3 RP. While in its present form, the relevant paragraph upholds the primacy of the decision-making authority of the Council, which as a rule adopts decisions, and may *delegate* an *ad hoc* measure to another BSEC organ of its choice, the submitted amendment introduces a power-sharing scheme, according to which, for some issues, the Committee of Senior Officials adopts, as a rule, the necessary decisions, and the Council *may intervene* on its own initiative (thus revoking the delegation of decision-making power, either on a case-by-case basis or through a general clause) or when the Committee decides to refer a particular question to the Council, because of the importance and implications of the issue at hand or due to a failure to adopt a decision.

More importantly, the proposed addition to the Charter aims at increasing the significance and use of the delegation pattern in BSEC affairs. The starting observation in this respect is that the existing delegation option (article 1, paragraph 3 RP) has never been resorted to. This total lack of application renders necessary, as a matter of good governance, the insertion in the Charter of an explicit provision to this effect. First, the Rules of Procedure are adopted and amended through a regular resolution of the Council. An issue however of such importance,

affecting the decision-making capacity of the Organisation should have "constitutional" sanction, that is, for an international organisation, to be provided for in its constitutive Charter. Moreover, an amendment in the Charter will give a real stimulus to this option which has been totally neglected, even for issues of minor significance, that do not require consensus, for example appointments in the BSEC PERMIS, an issue for which the governance failure in 2003 and 2004 (*infra* p. 59) prompted the Council to instruct the Committee of Senior Officials to consider the review of the relevant BSEC normative texts and submit concrete proposals.⁷⁸

An additional point appropriate to be discussed in this connection is the idea that some issues should in any case be reserved for the Council. In such cases the relevant decisions would be validly decided upon exclusively by the Council and no sharing of the decision-making power would be allowed under the proposed amendment. In other words, would it be necessary or useful to forbid to the Council the option of delegating the decision-making for some issues? Although such a limitation would not be imposed by an internal necessity or teleological point of view, there are some external factors that should not be disregarded and could limit the sharing of the decision-making authority. From the political standpoint, decisions on some issues, in particular participation in the Organisation (membership and observer status) and budgetary issues, may be designated as an exclusive competency of the Council; the relevant decisions would be thus more authoritative (and persuasive). Accordingly a pertinent phrase could be added to the proposed new paragraph 3 of article 11 of the Charter, which could be couched as follows:

"3. The Council of Ministers of Foreign Affairs may delegate to the Committee of Senior Officials, or other BSEC organ as appropriate, a decision-making power on issues to be specified in the Rules of Procedure. *The delegation shall not affect issues relating to the adoption and amendment of the Rules of Procedure, membership and observer status as well as financial commitments affecting all member states.*"

B. A WIDER USE OF THE SILENCE PROCEDURE

In parallel with a decision-making sharing system in the BSEC, there is an additional measure that can serve the overall objective of improving governance in the Organisation and rendering the latter more efficient and responsive to the needs of the regional cooperation.

Aiming at complementing the institutional modernisation of the BSEC in the direction of good governance, the suggestion of adding a new paragraph 3 to article 11 of the Charter (on the institutionalisation of the possibility of delegation of decision-making authority from the Council to the Committee of Senior Officials) could be supplemented by a provision introducing the possibility of silence procedure for the adoption of resolutions and decisions when the Council is not in session. In its present form the Charter does not refer to this possibility.

78. Council of Ministers of Foreign Affairs, 8th Meeting, Yerevan, 18 April 2003, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(2003)1, paragraph 23. The Committee has not yet reached consensus on the proposals to be presented to the Council. It seems that the Committee has left the issue, until a new crisis will propel it again at the forefront of the BSEC concern...

In the existing system, a type of silence procedure is provided for in the article 16 RP:

"The Silence Procedure may be applied to routine decisions of the Chairman-in-Office, which do not require approval by the Council's Meeting in session. Decisions of this nature circulated to the Member States by the PERMIS shall be considered as approved unless an objection is received within 15 days."

It is striking that the relevant article of the Rules of Procedure recognises a pretty narrow scope in this procedure, despite the fact that the silence procedure can be very beneficial to an effective decision-making process. In accordance with the present formulation of the Charter, the silence procedure may apply only to "routine decisions of the Chairman-in-Office". The latter has, however, only coordination functions (cf. article 13, paragraph 1 of the Charter⁷⁹). Limited to the functions of the Chairman-in-Office and concerning only the routine decisions of this BSEC organ, the valuable tool that the silence procedure can be for the Organisation is deprived from practical use. In order to remedy this deficiency it is submitted to insert as a clause of general application, a second paragraph to the article 18 of the Charter ("Decision-making"):

"When the decision-making organs of the BSEC are not in session, the silence procedure may be applied for the adoption of resolutions and decisions. The draft resolutions and decisions circulated to the Member States by the PERMIS shall be considered as approved unless objection preventing the adoption of a resolution or a decision is received within 15 working days from the communication of the draft by the PERMIS."

In this way the balance of the decision-making system is not at all altered, since the resolution or decision to be adopted in pursuance of this wider use of the silence procedure shall remain an act of the competent decision-making organ of the BSEC (Council and, through delegation, Committee of Senior Officials). In addition, the introduction of such practice shall, beyond doubt, enhance the decision-making process in the BSEC alleviating the agenda of the decision-making organs, when they convene, and allowing timely response of the Organisation in urgent cases.

The proposal for the enlargement of the possibility of resorting to the silence procedure, submitted here above is not inconsistent with the (scarce in this point, due to the limitations of article 16 RP) practice in the BSEC. In one of these infrequent instances, the restrictive letter of the existing provision regulating recourse to the silence procedure has, discretely yet definitely, been overruled by resolution of the Council. This took place with respect to the negotiation and conclusion of the Headquarters Agreement between the BSEC and Turkey, an issue instanced earlier, in connection with the delegation of the decision-making power (*supra* pp. 29-30). At its first meeting (Thessaloniki, 17 October 1999), the Council

"entrusted the Troika to negotiate the draft [Headquarters] Agreement in the light of these [member states'] comments with the Government of Turkey and the Chairman-

79. "The Chairman-in-Office shall coordinate all activities carried out within the framework of the BSEC and ensure the proper conduct of the BSEC proceedings as well as the implementation of the Resolutions and Decision adopted."

in-Office to sign the final text with the Turkish Government upon approval by the Member States in accordance with the silence procedure by the end of the year."⁸⁰

The approval of the draft Headquarters Agreement between the Organisation and its host country is an issue acknowledged by the resolution itself as being included in the competencies of the members states; this is clearly not a "routine decision of the Chairman-in-Office, which does not require approval by the Council's Meeting in session". Even so the Council decided to activate the silence procedure, in order to have the Headquarters Agreement concluded without delay.⁸¹ The objective of the speedy conclusion was achieved (thanks also to the delegation of the power to finalise the Agreement to the Troika, *supra* pp. 29-30), since the Headquarters Agreement was approved through the silence procedure,⁸² in less than six months, and signed at the following, second, meeting of the Council (Chisinau, 27 April 2000).⁸³

This application of the silence procedure that, despite its inconsistency with the relevant legal provision of the Rules of Procedure, did not raise objections, manifests that a stipulation such as this proposed in this section as the second paragraph of article 18 of the Charter, is acceptable to, and even desirable by, the BSEC member states, because it offers important speed and flexibility to the decision-making mechanism.

C. A FLEXIBLE COMPOSITION OF THE COUNCIL OF MINISTERS

A third path of reform towards which the cogitation is directed, is that of the composition of the BSEC Council exclusively of Ministers of Foreign Affairs of the member states. This structure of the principal decision-making organ of the BSEC is provided for in the title of article 11 of the Charter "Council of Ministers of Foreign Affairs". In parallel to this constitutional provision, there is a widespread practice of convening sectoral ministerial conferences, with the participation of the Ministers who are in charge of the various areas of cooperation in their respective member states.⁸⁴ Up to April 2006, when its term as Chair-

80. Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 27 October 1999, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(99)2, paragraph 24, in *BSEC Handbook of Documents*, vol. IV (2000), p. 134.

81. The relevant paragraph 24 of the Resolutions of the 1st Meeting of the Council (see previous note) starts with the phrase: "The Council decided that *in view of the shortage of time...*"

82. The first round of the application of silence procedure, which followed the first Meeting of the Troika with the participation of the Republic of Turkey for Negotiation of the Headquarters Agreement (Istanbul, 17 December 1999, Report, Doc. BS/TRM/R(99)1, in *BSEC Handbook of Documents*, vol. IV (2000), p. 190), was not successful as objections have been raised by one member state, the Russian Federation. The procedure was launched again, this time successfully, after the second Meeting of the Troika with the participation of the Republic of Turkey for Negotiation of the Headquarters Agreement, Istanbul, 25 February 2000, Report, Doc. BS/TRM/R(2000)1, in *BSEC Handbook of Documents*, vol. V (2002), p. 253).

83. See Council of Ministers of Foreign Affairs, 2nd Meeting, Chisinau, 27 April 2000, Report, Doc. BS/FM/R(2000)1, paragraph 11, in *BSEC Handbook of Documents*, vol. V (2002), p. 4.

84. This practice was inaugurated in 1996, with the Meeting of the Ministers of Internal Affairs of the BSEC Participating States (Yerevan, 17 October 1996), Report, Doc. BS/IM/R(96)1, in *BSEC Handbook of Documents*, vol. III (1998), pp. 135-137, where a Joint Statement was signed by the participants (Joint Statement adopted at the Meeting of the Ministers of Internal Affairs of the BSEC Participating States, Yerevan, 17 October 1996, Doc. Annex IV to BS/IM/R(96)1, in *BSEC Handbook of Documents*, vol. III (1998), pp. 139-142).

man-in-Office comes to end, the Romanian Chairmanship-in-Office has scheduled three ministerial conferences (Environment, 3 March 2006; Transport, 15 March 2006 and Interior/Public Order, 24 March 2006, all three to take place in Bucharest). In the past year six sectoral ministerial meetings were held: Transport, Thessaloniki, 28 January 2005; Public Administration and Justice, Athens, 21 February 2005; Energy, Alexandroupolis, 4 March 2005; Tourism, Rhodos, 31 March 2005; Science and Technology, Athens, 28 September 2005; Education, Athens, 29 September 2005.

These meetings are very important for the promotion of the cooperation in the BSEC framework. As an economic endeavour, BSEC is aimed at promoting multifaceted cooperation in a host of areas of cooperation provided for in article 4 of the Charter.⁸⁵ This can be done through cooperation among the relevant national authorities in charge of the various areas of cooperation in the member states. Here lies the reason of the success of the practice of meetings of the Ministers who deal with one or the other subject matter. Their encounters, whenever the need arises (for example to decide a plan of actions, to adopt general declarations providing the BSEC subsidiary organs with agreed guidelines for their further action, to approve the outcome of the deliberations of the relevant Working Groups, etc.), are necessary for the achievement of the BSEC overall aim to promote economic prosperity in the region and well-being for its people. Moreover, the general record of these meetings shows success, because the exchange of views and dialogue among the competent authorities and personalities is concrete and fruitful, the measures discussed and adopted take into account the expert opinions expressed at such meetings and consequently their implementation at the national level (by the authorities and persons who have approved these actions) is greatly facilitated. The institution of the sectoral ministerial meetings is an asset for the BSEC, bringing the Organisation closer to the decision-makers and those who have to act upon the resolutions, decisions and recommendations of the BSEC.

This important asset is however hindered from manifesting all its benefits for the BSEC, due to the concentration of the decision-making power in the Organisation not only at the ministerial level (as presented earlier) but also exclusively in the hands of the Ministers of Foreign Affairs. In the current system even the decisions taken at the meetings of Ministers of the BSEC member states, who are in charge of particular areas of cooperation, and are the best suited to adopt such decisions, cannot have binding effect unless they are endorsed (as a resolution or decision, depending on their subject matter) by the Council of

85.

"Article 4

Areas of cooperation

In accordance with the agreed principles and with the aim of utilizing more effectively their human, natural and other resources for attaining a sustained growth of their national economies and the social well-being of their peoples, the Member States shall cooperate in the following areas: trade and economic development; banking and finance; communications; energy; transport; agriculture and agro-industry; health care and pharmaceuticals; environmental protection; tourism; science and technology; exchange of statistical data and economic information; collaboration between customs and other border authorities; human contacts; combating organized crime, illicit trafficking of drugs, weapons and radioactive materials, all acts of terrorism and illegal migration, or in any other related area, following a decision of the Council."

Ministers of Foreign Affairs.⁸⁶ This is so because the meetings of the Ministers, other than these of Foreign Affairs, do not constitute the Council of Ministers of the BSEC. This state of affairs amounts to an evident waste of resources and time, because the decisions of the sectoral ministerial meetings are, *without any exception*, endorsed by the Council. This is the only politically conceivable course of action and is therefore absolutely fitting for an organisation of predominantly economic character. In this case it is puzzling why the decision-making process in the BSEC (which is already lagging behind in terms of effectiveness), should comprise an additional layer, of pure form and totally useless from the point of view of substance. When trying to keep the decision-making in the BSEC abreast of the often bewildering pace of change in modern world, and the Organisation more responsive to the requirements of today's international relations, the maintenance of a system that leads to the postponement of the application of a decision, adopted by the competent political authorities of the BSEC member states, until authorities of equal political standing in their respective states have formally approved it, is an institutional anachronism, contrary to principles of the governance, in particular those of subsidiarity and of the adoption of decisions by the decision-maker best qualified.

At this point also, BSEC can draw from the teachings of the successful and tested experience of the European Union, where the Council of Ministers meets in various compositions depending on the issues on the agenda; the only requirement set by the relevant article 203 of the Treaty establishing the European Community being that

"The Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State."⁸⁷

If, for example, the Council is to discuss environmental issues, each EU country will be represented at the meeting of the Council by the minister responsible for that sector. The same is valid for every field under the competence of the Community (foreign affairs, finance, social affairs, transport, agriculture, etc.).⁸⁸ When such practice is efficacious in the EU, where the decision-making process is much more sophisticated, even arcane to outsiders, its transposition to the BSEC's simpler framework is both feasible and desirable.

86. See, for a recent example, the establishment of the BSEC Working Group on Institutional Renewal and Good Governance decided by the Ministers in charge of Public Administration and the Ministers of Justice, at their meeting in Athens, on 21 February 2005, Report, Doc. BS/PAJM/R(2005)1, paragraph 10, and Joint Declaration on Institutional Renewal and Good Governance of the Ministers in charge of Public Administration and the Ministers of Justice of the BSEC Member States, p. 3, that was endorsed by the Council at its twelfth meeting (Komotini, 23 April 2005), Resolutions, Decisions and Recommendations, Doc. Annex VII to BS/FM/R(2005)1, paragraph 16.

87. Treaty establishing the European Community (consolidated text), *Official Journal of the European Community*, C 325, 24 December 2002.

88. Altogether there are nine different Council configurations: i) General Affairs and External Relations (the EU's relations with the rest of the world are dealt with by the Council in this format. But this Council configuration also has wider responsibility for general policy issues, so its meetings are attended by whichever minister or state secretary each government chooses); ii) Economic and Financial Affairs (ECOFIN); iii) Justice and Home Affairs (JHA); iv) Employment, Social Policy, Health and Consumer Affairs; v) Competitiveness; vi) Transport, Telecommunications and Energy; vii) Agriculture and Fisheries; viii) Environment; ix) Education, Youth and Culture.

Clearly, the situation in other organisations does not exactly replicate the institutional background of the BSEC. However, what is similar, not to say identical, is the desire and need for efficiency and for achievement of goals as set out in the respective political and legal founding documents. This is particularly true for institutions operating in the European political landscape, based on the same fundamental underpinnings and aiming at substantially similar objectives. This observation implies that while cases in their entirety are not precisely transferable from one European institution to another, a host of specific lessons learned, strategies, methods and best practices are profitably applicable for organisations more recently established and therefore lacking an extensive history of experience.⁸⁹ The EU practice is already, to a certain degree, emulated by the BSEC, through the organisation of sectoral ministerial conferences, but without the normative empowerment of these gatherings that exist in the community framework.

The undeniable shortcoming of the actual BSEC double-layered system (one for political decision by the competent ministers and one of pure form, by the ministers of Foreign Affairs) had been noticed since the period before the entry into force of the Charter (when there were no organs, but the periodical Meeting of the Ministers of Foreign Affairs – MMFA, where all decisions were taken). During this period when BSEC operated as a diplomatic conference, when the informality of the BSEC structure allowed for more flexibility, there has been an instance when the Ministers of Foreign Affairs met together with their colleagues, the Ministers responsible for Economic Affairs, (Istanbul, 7 February 1997). The main object of this special ministerial meeting – and the reason for the exceptional double participation – was the adoption of a *Declaration of Intent for the Establishment of the BSEC Free Trade Area*.⁹⁰ The participants however also addressed other matters, normally within the competence of a regular Meeting of the Ministers of Foreign Affairs (adoption for the Plan of Actions for the implementation of the provisions of the Moscow Declaration and the Resolutions, Decisions and Recommendations of the Eighth Meeting of the Ministers of Foreign Affairs and also budgetary issues of the BSEC).⁹¹ Consequently the joint ministerial meeting was considered by the BSEC participating⁹² states as the regular decision-making structure of the BSEC (MMFA), with extended participation called for by the subject matter to be discussed and also, if not primarily, by the political design to invest the declaration on

89. BSEC has already sought guidance in the practice of other international organisations, see, for example, 13th MMFA (Tbilisi, 30 April 1999), Report, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(99)1, paragraph 16, in *BSEC Handbook of Documents*, vol. IV (2000), p. 89, where the Ministers of Foreign Affairs of the BSEC participating states agreed, with regard to the applications of the NGOs for Observer Status in the BSEC, "to refer to the practice of other related international organisations in order to elaborate, inter alia, the definition of the international non-governmental organisations in the framework of the BSEC at a Meeting of the WG on Organisational Matters".

90. Special Meeting of the Ministers of Foreign Affairs with the participation of the Ministers responsible for Economic Affairs, Istanbul, 7 February 1997, Declaration of Intent for the Establishment of the BSEC Free Trade Area, Doc. Annex V to BS/SFM/R(97)1, in *BSEC Handbook of Documents*, vol. III (1998), pp. 114-116.

91. *Ibid.*, pp. 110-111.

92. The linguistic distinction between BSEC "participating" and "member" states is explained by the difference of the participation pattern in the two successive phases of the existence of the BSEC, that of the informal periodical diplomatic conference and this of the intergovernmental regional organisation.

the intent to establish a BSEC free trade area, with the authority of the competent ministers. The ambition and the far-reaching implications of a free trade area endeavour justified the presence of the ministers in charge of economic affairs in the (otherwise inaccessible to fellow ministers) MMFA. In fact those ministers were politically responsible and answerable before the national legislative bodies and constituencies for a decision of this nature.

The aforesaid precedent-alternative to the two-layer ministerial decision-making provided for in the Charter, that is the option to convene the Council of Ministers of Foreign Affairs with the participation of their colleagues in charge of other areas of cooperation is not an effective option: it has been proven that it is in fact virtually impracticable to have the ministers or deputy ministers/state secretaries of Foreign Affairs present at the meetings of the BSEC Council. The option of enlarged ministerial participation will aggravate this inconvenience, with the risk of having meetings of the Council with few cabinet members/political personalities attending. Because of this practical obstacle, BSEC organs and the member states should consider the possibility of providing for a BSEC Council of Ministers to be composed of cabinet members in charge of the area(s) of cooperation that is(are) on the agenda of a given meeting of the Council. This move will constitute major progress in the decision-making process of the Organisation, preventing malfunction and significantly enhancing the efficiency and effectiveness of the BSEC action. It will in fact simplify today's *unnecessarily* complex and costly decision-making system and bring the normative texts in line with the practice of the Organisation, which already recognises the real prevalence of a decision adopted at a BSEC ministerial meeting, other than the meeting of the Council. What is left is a pure form of "endorsement", followed because of existing provisions that are now outdated. A form that does not serve any practical aim is futile and should not persist in encumbering the process of adopting the binding acts of BSEC.

The implementation of such a proposal requires a twofold approach, one stage being the amendment of the Charter and the next involving the modification of the RP, in order to reflect the new, constitutional, reality in the field.

The amendment of the Charter is technically very simple: it consists of the mere deletion of the words "of Foreign Affairs" from the title of article 11 of the Charter ("Council of Ministers of Foreign Affairs"), so that the new title of article 11 shall read

"Article 11 Council of Ministers"

Following this amendment of the Charter, the RP should undergo a large-scale modification in order to adapt to the new conditions. The provisions of the RP which directly deal with the meetings of the Council (articles 1-4, 6) are not a model of legal formulation and suffer from lack of clarity and repetitiousness. The revision after the amendment of the Charter, will also give the opportunity to streamline the relevant, inadequately couched, articles of the RP and correct the existing flaws and inadvertencies, which render this part of the document a quandary for whoever tries to interpret and apply them.

The RP to start with article 1, entitled "Council of Ministers of Foreign Affairs", exactly as article 11 of the Charter in its present form. The same expression, used in the paragraph 1 of article 1 RP. Article 2 is devoted to the regular meetings of the Council, which "shall, in principle, be convened at least once every six months" (paragraph 1).

The procedure for the regular meetings of the Council is set out in paragraphs 3, 4 and 5 of article 2 and in article 6 RP (Preparation of the draft agenda).

Article 3 and 4 deal with the special meetings of the Council which take place following the proposal of a member state and subject to the consensus of the other members, promptly informed by the Chairman-in-Office on the request and the background information submitted by the requesting member state(s). The special meetings of the Council are convened on short notice, generally 20 days after the proposal of the requesting member state has been submitted to the Chairman-in-Office, and the procedure for holding such special meetings is outlined with few details in articles 3 and 4 RP.

This general presentation with the distinction between regular and special meetings of the Council is however blurred by paragraph 2 of article 2 RP which provides seemingly for a third category of Council's meetings, the "additional meeting". In accordance with this provision, whose formulation is flawed, from the legal-technical point of view,

"2. Additional meetings of the Council may be held upon the request of one or more of the Member States, subject to consensus of the Member States. (...)"

The situation resulting from these provisions on the "special" (article 3 RP) and the "additional" (article 2, paragraph 2 RP) meetings of the Council is due to a hasty and negligent approach to and formulation of the relevant stipulations. In an in-depth comparison of the two situations one fails to see the real reason for the distinction of the language used; on the contrary no doubt is left concerning the overlapping between them. We are in the presence of a confusing situation when two words are used in the same document to describe identical situations. The initiative for both the "additional" and the "special" meetings of the Council comes from one or more member states, the organisation of both is subject to the consensus of the member states,⁹³ the procedure for being convened is identical,⁹⁴ and both may be convened on a shorter notice, in case of urgent circumstances. The only slight difference between the two provisions is that for the special meeting, there is the stipulation that the proposal to convene such meeting should be "forwarded to the Chairman-in-Office" at least 20 days before the proposed date of the meeting" – exceptionally on even shorter notice – (article 3, paragraph 1 RP) while for the additional meetings there is no time limit specified between the request of one or more mem-

93. For the "special" meeting of the Council, this requirement is necessary because "The special Meeting of the Council shall be convened unless a Member State raises an objection within 5 days after the receipt of the notification" (article 3, paragraph 3 RP).

94. There is no real difference between the notification of a proposal for a "special" meeting by the Chairman-in-Office (article 3, paragraph 1) and of a proposal for an "additional" one by the PERMIS (article 2, paragraph 2), because the PERMIS functions "under the authority of the Chairman-in-Office of the BSEC" (article 16, third paragraph of the Charter).

ber states and the date(s) of the meeting). This difference, insignificant from the material point of view, does not debar the conclusion that the third category of Council's meetings does not have any real distinction from the "special" meeting of the Council.

The proposed modification of the RP in order to align them with the foregoing proposed amendment of the Charter, also avails the opportunity of correcting the confusing inaccuracy that has slipped into the present text of the RP, with respect to the "additional" and "special" meetings of the Council. The common objective of this *single* category of meetings of the Council is to allow the BSEC to address situations of an urgent character that cannot be postponed to the regular semi-annual session of the Council. One such example may be the adoption of concerted measures in order to counter the spread of an epidemic or a lethal virus (e.g. avian influenza). This single category of meeting of the Council can be called "extraordinary meetings of the Council" (which may also be "urgent meetings of the Council", when they are convened at shorter notice than the usual twenty days). On the other hand, the term "special meeting of the Council" should be reserved to the meetings devoted to specific areas of cooperation or single issues, and therefore attended by the ministers in charge of the area of cooperation or specific issue on the agenda.

Before submitting the concrete proposals for the modification of the RP, it is important to make clear that in any case the RP shall not exclude the possibility of convening a meeting of the Council attended by ministers other than the ministers of Foreign Affairs but not impose such meetings. The rule shall remain the regular half-yearly meeting of the Council with participation of the ministers of Foreign Affairs of the BSEC member states. The Council meeting with its regular participation and at its regular intervals, shall be the one competent for the general affairs of the BSEC as well as for the issues that do not belong to the attributions of the special meetings of this organ.

Having in mind the previous observations and comments, the following general proposal for a revised version of the RP is submitted:

The title and paragraph 1 of article 1 RP is revised as follows:

"Article 1

Council of Ministers

1. The principal regular decision-making organ of the Organisation of the Black Sea Economic Cooperation is the Council of Ministers."

The existing article 2 RP (all five paragraphs) is replaced by the following three paragraphs:

"Article 2

Regular Meetings of the Council

1. The Council, composed of the Ministers of Foreign Affairs of the Member States, meets regularly at the end of the term of each Chairman-in-Office.
2. The Council, composed of the Ministers of Foreign Affairs of the Member States, is competent for the general affairs of the BSEC as well as for the issues that do not belong to the attributions of the special meetings of this organ.
3. The exact date of the regular meetings of the Council is decided by the Chairman-in-Office, in consultation with the Member States."

The existing article 3 RP (four paragraphs) is replaced by the following two paragraphs:

"Article 3

Special Meetings of the Council

1. Upon invitation of the Chairman-in-Office, the Council, composed of Ministers in charge of particular areas of cooperation, may meet in order to address issues of sectoral interest."
2. The date and venue of the special meetings of the Council are decided by the Chairman-in-Office, in consultation with the Member States."

The existing article 4 RP (two paragraphs) is replaced by the following four paragraphs:⁹⁵

"Article 4

Extraordinary Meetings of the Council

1. Upon request of one or more Member States and subject to the consensus of the Member States, the Chairman-in-Office shall convene an extraordinary meeting of the Council.
2. The proposal to convene an extraordinary meeting of the Council shall be forwarded to the PERMIS at least 20 days before the proposed date of the meeting together with background information and documents exposing the reasons for convening such meeting. The PERMIS shall circulate, without delay, the proposal and the accompanying information and documents to the Member States.
3. Unless a Member State raises an objection within 5 days after the receipt of the notification by the PERMIS, the extraordinary meeting is convened at a date and venue decided by the Chairman-in-Office in consultation with the Member States.
4. In case the urgency of the circumstances warrant it, the extraordinary meeting of the Council can be convened on shorter notice, subject to the other requirements of the present article."

From the formulation proposed above, it becomes clear that the extraordinary session of the Council concerns every constituting composition of the convocation. In consequence there can be an extraordinary meeting of the Council attended by the ministers of Foreign Affairs, in case, for example, of an urgent political crisis, or by the ministers in charge of health, in case of a health emergency, or in charge of environment in case of an environmental crisis, and so on.

As said before, the member states should seize the opportunity of the modification of the RP in order to improve the existing text. One aspect of required improvement concerns the chairing of the meetings. The document, as it stands, deals with this issue in an incomplete and erratic way (see articles 2, paragraph 3, 3, paragraph 4, 5, paragraph 1). The functioning so far of the BSEC has yielded, mainly *praeter legem*, a sufficient *corpus* of agreed practice that can now be couched in writing, in order to streamline the existing fragmentary provisions. For this purpose a new article needs to be inserted after article 4 RP, with the number 5.⁹⁶

95. For the fate of the existing article 4 see *infra* no 103.

96. For the fate of the present article 5, entitled "Meetings of the Subsidiary Organs", see *infra* p. 54.

"Article 5

Chair of the Meetings of the Council

1. The Chairman-in-Office chairs the meetings of the Council held in the headquarters of the Organisation.
2. In case a meeting of the Council is held outside the headquarters of the Organisation, the meeting is chaired by the host Member State.
3. Member States may waive their right to chair a meeting of the Council in favour of another Member State. They may also agree on co-chairing arrangements."

The incomplete and fragmented character of the RP regarding the chairing of the meetings, is even more obvious with respect to the preparatory meetings that shall precede the meetings (regular, special and extraordinary) of the Council (articles 1, paragraph 2 and 2, paragraph 3 RP). The acceptance of the proposed amendment in the composition of the BSEC Council of Ministers and the ensuing introduction of three types of meetings of this organ, necessitates the elaboration of a new comprehensive proposal covering the general notion of preparatory meeting before the meeting of the Council. Having in mind what has been earlier proposed with regard to the formulation of article 1, paragraph 2 RP in its present form (*supra* p. 36), it is submitted that a new article 6 providing for the preparation of each of the three types of session of the Council, is to be inserted after the new article 5 RP:

"Article 6

Preparatory Meetings of the Meetings of the Council

1. The regular meetings of the Council may be preceded by a meeting of the Committee of the Senior Officials, composed of delegates of the Ministries of Foreign Affairs of the Member States."
2. The special meetings of the Council may be preceded by a session of the relevant Subsidiary Organ, meeting at appropriate level.
3. Extraordinary meetings of the Council may be preceded by a meeting of the Committee of Senior Officials of the relevant Subsidiary Organ, as the case require."

The present article 4 RP, which deals with the agenda of a special meeting of the Council is organically related to article 6 RP, entitled "Preparation of the Draft Agenda"; it is therefore only logical and practical to bring under the same heading all the stipulations relating to the preparation of the draft agenda of the regular, special and extraordinary meetings of the Council, in an improved and slightly expanded new article 7 RP, to be inserted after the proposed article 6 PR ("Preparatory Meetings of the Meetings of the Council"):

"Article 7

Preparation of the Draft Agenda

1. The PERMIS shall prepare the draft agenda for every regular and special meeting of the Council, in full conformity with the decisions of its previous meetings, the recommendations of the Subsidiary Organs and proposals of the Member States, and circulate it at least 30 days before the meetings. The documents pertaining to the agenda items shall be circulated together with the draft agenda.

2. Within 15 days following the receipt of the draft agenda, the Member States may propose, through the PERMIS, addition of other items along with documents explaining the reasons for such request.
3. The PERMIS shall circulate the proposal to the Member States at least 15 days before the meeting together with background information and documents explaining the reason for the addition of the proposed items.
4. The draft agenda of the extraordinary meeting of the Council shall be distributed by the PERMIS together with the notification of the opening date of the meeting. This draft agenda shall, in principle, include the item(s) for which the extraordinary meeting is proposed.
5. The Member States may also, at the stage of the adoption of the agenda during every meeting of the Council, propose the inclusion of new items or changes to the draft agenda."

A further point that the modernisation of the RP should address is the existing structure of article 7, entitled "Applicability to Subsidiary Organs", consisting of two paragraphs that are in fact tautological:

- "1. The provisions of the Article 6 [author's note: Preparation of the Draft Agenda] of the present Rules of Procedure shall be applied to the proceedings of the Subsidiary Organs.
2. The rest of the provisions of this[sic] Rules of Procedure shall be applicable to the Subsidiary Organs unless otherwise specified."

The meaningful formulation of this article, taking into account the principle of economy in legislation, imposing a simple and not overlapping language for normative acts, requires merging the two paragraphs in one. It is easy to note that the single difference between the two paragraphs is the phrase "unless otherwise specified" in paragraph 2. However, even in the absence of this clause, the Council is master of the RP and can complement and amend their provisions by its resolution,⁹⁷ so that the present structure of the article is unduly repetitious. Therefore, a simple and comprehensive formulation, covering the thrust of the provision and allowing the necessary flexibility, should the Council decide to differentiate some procedural aspects of the BSEC subsidiary organs, is advisable:

"Article 10

Applicability to Subsidiary Organs

The provisions of the present Rules of Procedure shall be applicable to the Subsidiary Organs, unless otherwise specified herein."

From the above developments it becomes clear that, though addressing the issue of a more flexible and responsive BSEC Council of Ministers, it is not possible to abstain from dealing with interconnected items affecting equally the functioning of the BSEC subsidiary organs. The present section will therefore be concluded with a proposal of modification of the existing article 5 ("Meetings of the Subsidiary Organs"), following the suggestions already made. In the first place, the article shall be renumbered article 9⁹⁸ and be inserted

97. Cf. article 11, second paragraph, *litt.* (d) of the Charter and articles 11, paragraph 2, *litt.* (e) and 23 RP.

98. There will be a proposed article 8 RP, dealing with the publicity of the deliberations of the BSEC organs, see *infra* p. 67.

before the new article 10 ("Applicability to Subsidiary Organs"). With reference to the merits of the provision, paragraph 1 shall be deleted, as it is covered by the new article 5 ("Chair of the Meetings of the Council"), in conjunction with the formulation of the new article 10 ("Applicability to Subsidiary Organs"). Paragraph 6 shall also be deleted and its subject matter (meetings of restricted attendance) will be discussed further down.⁹⁹ The remaining paragraphs (2 to 5 and 7) shall be re-arranged following their logical sequence, have their language improved, and be renumbered accordingly:

"Article 9

Meetings of Subsidiary Organs

1. The Subsidiary Organs shall carry out their mandate defined by the Council. They shall *inter alia* draw up cooperation projects and consider the possibility of implementing joint projects in their respective areas of activity.
2. The Subsidiary Organs shall submit to the Council reports on the progress of their activities and recommendations on specific issues. They may also prepare draft documents on new areas of cooperation for submission to the Council.
3. Subject to approval by the Chairman-in-Office, the Subsidiary Organs shall themselves determine the periodicity and venue of their meetings.
4. Proposals of the Member States on any matter pertaining to the functioning of the BSEC and corresponding to the BSEC principles and objectives shall be submitted to the Chairman-in-Office and PERMIS. If the initiator Member State so requests, such proposals will be distributed to the Member States. The Chairman-in-Office shall forward the proposals to the appropriate subsidiary organ or to the Committee of Senior Officials for consideration and recommended action."

Finally, the resolution of the Council modifying the RP in line with the proposal of a flexible composition of the Council of Ministers, shall contain a concluding stipulation providing that the subsequent articles of the RP, starting from the existing article 8, shall be renumbered accordingly: the existing article 8, "Official Languages", shall be article 11 and so on. The existing reference in article 12, paragraph 1 RP to article 11 of the same text should be equally adjusted to indicate the new number 14 of the article referred to.¹⁰⁰

Concluding this part of the analysis, and after having gone through the legal technical aspects of the proposal for a more flexible composition of the BSEC Council, it is extremely important to stress a fundamental requirement for the success of the proposed change: the necessary coordination at national level of the administrations dealing with BSEC affairs. In the present system such coordination is safeguarded by the decision-making monopoly of the Ministers of Foreign Affairs. If and when the proposal for a BSEC Council with varying compositions is accepted, the coordination should be an ever present concern for the effectiveness of the BSEC. It is therefore submitted that the member states establish domestic mechanisms of consultation, involving ministries and other public agencies representing the state concerned in BSEC meetings.

99. See *infra* pp. 66-67.

100. The reference contained in the existing article 7, paragraph 1 does not figure in the formulation of the new article 9.

PART B: TRANSPARENCY AND ACCOUNTABILITY

In introducing the present inquiry on governance in the BSEC, it has been stressed that improving the decision-making process towards effectiveness is not the last word in this important aspect of the functioning of an international organisation. Effective and resourceful mechanisms and technicalities that ensure the highest quality of deliberations and decisions are a necessary step, but not an end in itself. The end objective is to produce decisions that respond to the expectations of their recipients and are acceptable to them. This is the only real guarantee that the international forum, where such decisions are adopted, will gain credibility. In the words of five members of the European Commission, in their Communication to the Commission proposing the launch of a European Transparency Initiative "Compliance with the highest standards of transparency is an essential condition for the legitimacy of any modern administration."¹⁰¹

Although routed on different tracks, the two concerns, effectiveness and credibility, are closely interrelated. Shortcomings in one of these aims impair the achievement of the other one. "Transparency is needed to ensure a proper functioning of the decision-making process"¹⁰² and as such it is a major concern of various international and regional institutions, in particular in the European space. It has moved to the frontline of the public debate across the European board and is high on the agenda of most public institutions, international as well as national and local. BSEC does not score very well in this respect, and the situation has lately shown signs of regression, which are all the more disconcerting, taking into account the net progress witnessed in other regional European organisations. The challenge is, therefore, to render the BSEC decision-making process transparent and understandable to its stakeholders and gain their adherence. In approaching the relevant issues, we have to bear in mind that BSEC (and for that matter any international actor whosoever) does not operate in a political and legal *vacuum*, unaffected by developments occurring next door, in the environment where it is called to operate and attain its objectives. The advisability and feasibility of transposition, in particular cases, of best practices and lessons learned from one international organisation to another has been already established with respect to the enlargement of the composition of the BSEC Council (*supra* pp. 45 ff). These external experiences and lessons to be learned confirm the findings that an inside observer draws from scrutiny of BSEC practices. The most recent manifestations of this practice show the advent of a "cult of secrecy" that

101. Communication to the Commission from the President [Mr. Barroso], Ms. Wallström, Mr. Kallas, Ms. Hübner and Ms. Fischer Boel proposing the launch of a European Transparency Initiative, 9 November 2005, pp. 1 and 3.

102. Siim Kallas (Vice-President of the European Commission and Commissioner for Administrative Affairs, Audit and Anti-Fraud), "Transparency restores confidence in Europe", Speech 05/628, at the European Policy Institutes Network, Centre of European Policy Studies, Brussels, 20 October 2005, p. 2.

perniciously starts to creep in the endeavours of the Organisation, reversing the previously established tradition of transparency. It is in the best interest of the BSEC not to be entrenched in this morass, but to stick to its tested practice of openness to the institutional family, the observers and international actors with whom BSEC entertains official or working relations, and, in addition, to expand the transparency to other stakeholders, mainly the civil society actors, whose sound involvement in the BSEC endeavours is a source of enrichment and credibility.

CHAPTER 1

BREAKING WITH THE "CULT OF SECRECY"

A. THE SITUATION IN THE BSEC

i) The normative framework

Following the methodology of the present study, the starting point of the discussion on transparency and accountability in the BSEC will be the relevant provision of the statutory documents. This is to be found in article 2, paragraph 4 RP stipulating that

"Unless otherwise decided, the Council's Meetings will be held in camera."

The same provision has been adopted with respect to the meetings of the BSEC subsidiary organs (article 5, paragraph 6 RP).¹⁰³ Of relevance is also article 21, paragraph 7 RP providing that

"Observers may attend, with special permission of the Chairman-in-Office, a meeting of restricted nature or a part of a meeting during which an item of restricted nature is being discussed."

The language of the RP makes it clear that with respect to the publicity of the deliberations of the Council and the subsidiary organs, the rule is confidentiality, while transparency is rather the exception. However, the slightest, even superficial, experience of the BSEC reveals a fundamentally converse image: the totality of the meetings of the Council and other collective organs, except the Committee of Senior Officials, and the overwhelming majority of meetings of the latter Committee have been public and open to the BSEC related bodies, the observers as well as the sectoral dialogue partners. In fact the aforementioned article 2, paragraph 4 has never been applied, while article 5, paragraph 6 RP has seldom been resorted to (exclusively for meetings of the Committee of Senior Officials, or to be precise for some parts of these meetings, when appointments of PERMIS officers and, less frequently, financial issues were discussed). Consequently, the rule has been the public character of the deliberations, which were secret only in quite exceptional cases.

The necessity to permit the delegations of the member states to discuss issues pertaining

103. Taking into account the existence of article 7, paragraph 2 RP ("The rest of the provisions of this [sic] Rules of Procedure shall be applicable to the subsidiary organs unless otherwise specified"), the provision relating to the subsidiary bodies is redundant.

to the Organisation or other issues of general interest or even of bilateral character, whenever desirable and appropriate, in a more relaxed and confidential setting has been addressed in BSEC through the institution of the so-called "retreat session" of the Council and "informal" meetings of the Committee of Senior Officials. The former bear some analogies to the informal meetings, known as "Gymnich" meetings,¹⁰⁴ of the Council of the European Union and have been inaugurated at the 4th meeting of the Council of Ministers of Foreign Affairs of the BSEC member states (Moscow, 27 April 2001). The "retreat" meetings consist in a fairly brief encounter of the Ministers (normally not exceeding one hour), on the day of the meeting of the Council and before the official opening of the session. The initiative to call such a retreat meeting belongs to the Chairman-in-Office, and there is no official agenda but only topics that the Ministers take up, without record or report, or outstanding issues that the Committee of Senior Officials failed to settle. In recent meetings of the Council, the practice of the "retreat" meeting of the Ministers of Foreign Affairs has been on the wane.

With respect now to the Committee of Senior Officials, since 2004 there have been few "informal" meetings, reviewing the course so far of the Organisation's endeavours and reflecting on its future. Contrary to the "retreat" meetings of the Council, the informal meetings of the Committee of Senior Officials are open to BSEC related bodies, whose contribution is requested. It is significant to underline the fact that this practice set out from a concrete proposal from a related body, the BSEC Business Council. The only exception to the participation of the BSEC related bodies, along with the member states, so far has been the most recent informal meeting of the CSO, in Sinaia, on 3-5 February 2006. The organisers did not explain the departure of the traditional practice in this respect, and the lack of justification becomes more disturbing, taking into account that the agenda of the meeting (not communicated through official channels, but nevertheless made accessible in the website of the Romanian Ministry of Foreign Affairs, see *infra* p. 60) did not include any of the items that are usually discussed in closed session (appointments to the BSEC PERMIS or financial issues).¹⁰⁵

This exception of recent date becomes more perplexing, bearing in mind that the *rationale* for such meetings is to conduct an informal and free brainstorming concerning the ways to tackle the challenges ahead. The common point of this type of meetings is that no report is prepared and no decision is adopted.¹⁰⁶ They are expected to serve as appropriate *fora* for sounding out and freely exchanging views, without commitment, negotiation of delicate

104. Named after the German locality, Gymnich castle, near Bonn in Germany, where the first meeting of this type was held in 1974. The "Gymnich" meetings take place twice a year and give the ministers the opportunity for strategic brainstorming in a relaxed atmosphere.

105. The items on the agenda were: 1/ reform and restructuring of BSEC with a view to improving its effectiveness, 2/ modalities for monitoring the implementation of Resolutions, Decisions and Recommendations adopted by the Council, 3/ enhancing the contribution of states with observer status to the BSEC activities, 4/ actions undertaken by the Hellenic Republic concerning the BSEC – EU interaction.

106. The Chairman-in-Office may prepare non-papers resuming the conclusions of the informal meetings, cf. Non-paper: Brief summary of the brainstorming sessions, with respect to the informal meeting of the Committee of Senior Officials, which took place in Batumi (Chakvi), Georgia, on 3-4 September 2004.

issues and preparation of the decisions to be adopted. There is however insufficient established practice to draw a solid conclusion on whether these meetings have fulfilled the expectations of the BSEC member states and would continue to be convened. It is submitted, nevertheless, that the reasons prompting their institution still exist, and will continue to exist, so that the Organisation and the member states should maintain the opportunity to resort to these informal meetings, whenever the need arises.¹⁰⁷

ii) The current deviation

While the practice of informal meetings of the main organs of the BSEC is inconclusive (there has been no "retreat session" of the Council since 2003, while in the last years there have been two informal meetings of the Committee of Senior Officials, one in September 2004, in Batumi, Georgia and the other in February 2006, in Sinaia, Romania), the Organisation is experiencing a reverse tendency affecting the formal meetings of the Committee of Senior Officials. As of 2003, the Committee of Senior Officials instituted regular sessions in order to discuss issues such as the appointments of personnel of the PERMIS, the membership and observer status in the Organisation, budgetary issues or amendments to the statutory documents. This reversal of the established practice of public deliberations in the BSEC organs is due to the governance "bungle" beginning in early 2003 and ending more than a year later in June 2004, with respect to the appointment of one deputy secretary general of the PERMIS. The adoption of this decision constituted a genuine *ordeal* for the Organisation and the process of decision-making in it, and is also at the origin of the "cult of secrecy" observable at present. A host of lessons have to be learned from this experience,¹⁰⁸ one of the most significant concerning the openness of the debates in the BSEC decision-shaping and decision-making organs.

Taking into account the existing provisions of the RP, referred to in the beginning of this chapter, it must be admitted that secret deliberations of some BSEC organs might have been justified, in the long-standing, though long-contested and rather outdated tradition of secret diplomacy. Even this proposition needs qualification, in light of the current devel-

107. Cf. *Working Paper by the Chairman-in-Office (Republic of Azerbaijan) for the participants of the WG on Organisational Matters (to be held in Istanbul, on 26-27 January 2004)*, pp. 3-4: "It is expedient to introduce the practice of the informal discussion on the main challenges, faced by the BSEC and its procedural shortcomings, to be regularly held on the level of the Committee of Senior Officials, thus seeking identification of the main threats and opportunities for the Organisation itself."

108. In the aftermath of this difficult experience, the Council considered the issue of amending the relevant BSEC normative documents in order to streamline the existing procedure for the appointments of personnel (Directorial (D) and Professional (P) categories) to the PERMIS: set a definite time limit of presentation of candidatures, determine appropriate background for the positions of executive manager and interview the candidates before the decision on the appointment. Furthermore, "in order to facilitate the amendment of the concerned normative texts, the Council instructed the Committee of Senior Officials to elaborate on these issues and submit concrete proposals", Council of Ministers of Foreign Affairs, 8th Meeting, Yerevan, 18 April 2003, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(2003)1, paragraph 23. The Working Group on Organisational Matters examined these issues (Istanbul, 18-19 June 2003), Report, Doc. BS/WG/OM/R(2003)1, paragraphs 5-8, but the Committee of Senior Officials has yet to fulfill the mandate received from the Council...

opments in governance; the practice in the BSEC is contradictory: while, for example, the agenda of the informal meeting of the Committee of Senior Officials, in Sinaia (3-5 February 2006) was not disseminated to the BSEC related bodies and observers, due to the confidential character of the meeting, the same agenda was posted in the official website of the host Ministry of Foreign Affairs of Romania.¹⁰⁹ This conception of closed meeting is at the very least curious... unless the promoters of this unusual form of confidentiality believed, like the playwright, that "there are no secrets better kept than the secrets that everybody guesses."¹¹⁰

In any case secret deliberations do not imply secret decision. Such a radical measure would have required a specific rule, which the BSEC member states have not found, quite wisely, appropriate to introduce. Even when the discussion in a given BSEC organ is held in closed session, the final decisions or recommendations are disclosed to the general public. In the opposite case we would have had the absurd situation that the names of the staff members of the PERMIS, the state(s) and organisation(s) granted or refused membership or observer status, etc. would have been kept *in pectore* of the decision-makers, while quite naturally, the persons concerned would assume their posts in the PERMIS and the organisations and states their seats as observers. This utterly incongruous situation is however what the BSEC related bodies, the observers and other partners of the Organisation have been experiencing in several instances recently, when receiving from the PERMIS reports of meetings of BSEC organs containing blanks and the inexplicable mention "*Since the related issues have been discussed in camera, this portion [of the Report] is accessible only to the Member States of BSEC*", as if the Committee of Senior Officials and the Council had something to hide!¹¹¹ This is an excessive by-product of the "cult of secrecy" and utterly incompatible with the legal framework of the BSEC. What is even more perplexing is the repercussions that such ill-advised practices may have on the functioning of the Organisation: in an really extreme case the report of one of the recent meeting of the Committee of Senior Officials (14-15 September 2005) contained the lately introduced blanks with the aforesaid mention: "Since the related issues...",¹¹² though the relevant items *were not discussed* in camera, but in the presence of the representatives of the BSEC related bodies and the observer states. In this case the "selective information practice" has reached inadmissible levels, as it distorted what has really happened at the meeting. A report has at least to reflect the reality accurately and not to tamper with it...

109. www.mae.ro.

110. George Bernard Shaw, *Mrs Warren's Profession*, 1893, Act III.

111. The same mention figures in the Report that the Secretary General of the BSEC PERMIS is submitting to the Council before the regular meetings of the latter. From 2004, there appear two versions, one complete addressed to the member states and one edited, from which the sections relating to items that the PERMIS anticipates that they are going to be discussed *in camera* are expunged.

112. See Report of the Meeting of the Committee of Senior Officials, Istanbul, 14-15 September, Doc. BS/SOM/R(2005)3, for paragraphs 12 to 16, concerning Financial Matters, Elaboration of the Modalities of the Usage of the Reserve Fund, and Observer Status and Sectoral Dialogue Partnership Status with the BSEC.

B. THE APPROACH IN THE EUROPEAN UNION

One can easily see the deviation and abuse that this lack of transparency can bring in the BSEC cooperative process. Moreover, all this happens while in the immediate neighbourhood of the Organisation of the BSEC, in the European Union and in other European regional institutions there is a strong commitment towards openness and transparency.¹¹³ The European leaders that elaborated the Maastricht Treaty declared, already in 1992, that "The Conference consider[ed] that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommend[ed] that the Commission submit[ted] to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."¹¹⁴ This intergovernmental initiative was followed by the adoption, at the Interinstitutional Conference (Luxembourg, 25 October 1993), of a joint *Interinstitutional Declaration on democracy, transparency and subsidiarity*, expressing the adherence of the Council, Parliament and Commission to the objective of transparency in their activities.¹¹⁵

i) Article 49 of the draft Treaty establishing a Constitution for Europe

This commitment was also evidenced during the elaboration of the draft Treaty establishing a Constitution for Europe.¹¹⁶ The European Convention mandated to negotiate the draft constitutional treaty agreed to include article 49, which is very instructive and deserves to be quoted in *extenso*:

"Article 49

Transparency of the proceedings of Union Institutions

1. In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, bodies and agencies in whatever form they are produced, in accordance with the conditions laid down in Part III.
4. A European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.

113. Juliet Lodge, *Communicating Europe: transparency and democratic EU governance*, <http://www.leeds.ac.uk/jmce/p-commun.htm> (visited on 6 February 2006).

114. Maastricht Treaty Intergovernmental Conference, Declaration no. 17.

115. *Bulletin of the European Communities*, no. 10-1993, p. 118.

116. Draft Treaty establishing a Constitution for Europe adopted by consensus by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome on 18 July 2003.

5. Each institution, body or agency referred to in paragraph e shall determine in its own rules of procedure specific provisions regarding access to documents, in accordance with the European law referred to in paragraph 4."

This is not the place to proceed to an in-depth analysis of the preceding article. For the purposes of the present study it is sufficient to note the acknowledgement of the close relationship between, on the one hand, good governance and participation of civil society actors, and on the other, openness and transparency. Equally important is the plainly expressed legal principle according to which the general rule for the functioning of the institutions, bodies and agencies of the EU is one of openness, while confidentiality, as an exception, should be specifically provided for. Such exception is not allowed for the meetings of the European Parliament and the Council of Ministers in the fulfilment of their legislative tasks (acting as European co-legislators). The following three paragraphs regulate in general terms the right of the citizens of the Union and of natural and legal persons residing or having their registered office in a EU member state to have access to documents of the EU institutions, bodies and agencies and provide for the adoption of a specific European law detailing the principles of, conditions for and limits to the exercise of this right.

ii) Practical initiatives

The EU institutions did not wait for the entry into force of the Treaty establishing a Constitution for Europe in order to start implementing the measures contained in the afore quoted article 49.

1. European Commission

The European Commission championed the cause and "made transparency one of its strategic objectives for the 2005-2009 mandate period."¹¹⁷ Therefore, before the referenda in France and in The Netherlands, the Commission held an orientation debate on the theme "A Possible European Transparency Initiative" (18 May 2005), based on a communication presented by the President Barroso and Commissioners Wallström and Kallas.¹¹⁸ The objective of this debate was to assess the achievements in the EU in this field and to consider what further steps could be taken to increase the transparency with which the EU handles the responsibilities and funds entrusted to it by the European citizens. As an outcome of this debate, the European Commission launched the idea of a *European Transparency Initiative* and set up an Interdepartmental Work Group (chaired by the Secretariat-General), with the task of presenting, by October 2005, a report analysing the points raised in the communication and the orientation debate, covering the technical and legal feasi-

117. Siim Kallas (Vice-President of the European Commission and Commissioner for Administrative Affairs, Audit and Anti-Fraud), "The Need for a European Transparency Initiative", Speech 05/130, at the European Foundation for Management, Nottingham Business School, Nottingham, 3 March 2005, p. 3.

118. Communication to the Commission from the President, Mr Kallas and Ms Wallström for an orientation debate on a possible European Transparency Initiative, SEC(2005)644/4, 17 May 2005.

bility and implications in terms of resources of concrete measures under the planned European Transparency Initiative.¹¹⁹

On 9 November 2005 the European Commission formally adopted a *Transparency Initiative* proposing better access to a wider range of documents, including letters sent to commissioners and lists of EU fund recipients. The initiative requires the EU executive to take a number of immediate steps, such as to "improve the coverage of the existing commission register of documents." The move should lead to European Commission's documents, including mail to both the Commission as such and its individual members, being accessible for public scrutiny through an upgraded database. This is a step forward from regulation 1049/2001, in existence since 2001, providing for public access to documents of the European Parliament, Council and Commission.¹²⁰ The Initiative provides also that, in view of the publishing of EU fund recipients, the Commission will "create a central web portal, acting as a single entry point, which will establish links to information on end beneficiaries of funds" which are managed by directorates-general. The Commission's portal should then be interconnected with the websites of member states and provide information about EU beneficiaries, controlled at national level.¹²¹ Moreover the Commission is presently studying the sensible issue of lobbying transparency and ethics.

The most recent section of the transparency drive of the European Commission was presented in Vice-President Wallström's White Paper on a European communication policy (1 February 2006).¹²² The White Paper aims at establishing a European communication policy that focuses on citizens instead of institutions, promotes dialogue with, rather than a monologue of European institutions and the proposals therein are to be discussed with several stakeholders at meetings organised by the European Commission to that effect. The consultation period during which institutions, governments, industry, NGOs, think tanks and citizens will be given the opportunity to comment on the ideas put forward in the White Paper will run from February to July 2006, and it is expected to draw the interest of a wide public and mobilise the "European public opinion" in the drive towards openness of the European institutions to the citizens.

2. Council of the European Union

In an equally significant move, and also pertinent to the BSEC situation, the Council of the European Union decided, in December 2005, to render its proceedings (already open to a very large extend) more transparent and accessible to the public. The decision was taken

119. Commission Staff Working Document, Report of the Inter-Departmental Working Group on a possible "European Transparency Initiative", SEC(2005) 1300 final (annex to the Communication to the Commission from the President, Ms. Wallström, Mr. Kallas, Ms. Hübner and Ms. Fischer Boel proposing the launch of a European Transparency Initiative, 9 November 2005).

120. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission document, *OJEC* L 145, 31 May 2001, pp. 43ff.

121. Lucia Kubosova, "Letters to commissioners to go public in EU transparency drive", *EUObserver*, Brussels, 9 November 2005.

122. Doc. COM(2006) 35 final, 1 February 2006.

with immediate effect and enumerates "practical steps to improve openness and transparency of its formal sessions and to reach the widest possible audience."¹²³ The approved measures include public attendance at all sessions of the EU Council of Ministers under the co-decision procedure, where the legislative proposals of the European Commission, given their importance, are presented orally by the Commission, and at the ensuing debate. Equally open to the public shall be all final Council deliberations on legislative proposals under the co-decision procedure, i.e. all debates that take place once the other institutions or bodies have submitted their opinions. The relevant items on the provisional agenda for the Council session concerned will be marked with the words "public deliberation". The vote on all legislative acts adopted under the co-decision procedure is taken in public and the outcome of the vote shall be displayed visibly on the television screen relaying the vote to the public.

In addition to these measures with immediate effect, which allow citizens and journalists to follow the positions taken by ministers in meetings of the EU Council, the European Union's main decision-making institution, the Council indicated its intention to take the transparency initiative forward, deciding that it will in the future hold more debates in public on important new legislative proposals on items other than those covered by the co-decision procedure, and enabling also the EU Presidency to propose that the Council opens up to the wide public deliberations on non-legislative issues, if they involve important issues affecting the interests of the Union and its citizens. In order to implement the above mentioned decisions, the Council of the European Union announced that the general public and the media will be informed in advance of upcoming public discussions in Council sessions by announcements on the Council's website and by publication of Council agendas on the Council's public register. Additionally, in order to ensure access as widely as possible to the general public, all public debates and deliberations, as well as public votes on co-decision items, will be broadcast in all languages through video-streaming on the Council's website starting from the summer 2006. Finally it was decided that the functioning of all these practical steps would be assessed during 2006, and in the light of this assessment, the Council would reflect on all possible options for further improving openness and transparency, including, inter alia, the possibility of amending the rules of procedure. In this context and in view of its forthcoming EU Presidency (starting in July 2006), Finland announced that "in order to improve openness to the public of the Council's activity, transparency w[ould] have a major role in communications during the Presidency" and to this effect it included in the programme of Presidency the proposal that "Council sessions on all key issues and matters of interest to citizens be made public."¹²⁴

These decisions of the EU Council of Ministers and initiatives of individual EU member states indicate progress towards transparency. They failed however totally to satisfy the

123. Council of the European Union, 2702nd session, Brussels, 21 December 2005, Conclusions on improving openness and transparency in the Council (15834/05 + ADD1).

124. Ministry of Justice, Finland, "Transparency of European Union decision-making to increase during Finland's Presidency", Press release, 31 March 2006.

European Ombudsman, Mr. Nikiforos Diamantouros, who has been seized by a complaint against the lack of transparency in the EU Council's deliberations. Acknowledging the above decision of the Council of 21 December 2005, the European Ombudsman stated that "it is obvious that more steps remain to be taken" in this field, and that the Council had "only partially" responded to his demand for full transparency of its legislative activity.¹²⁵ The Ombudsman thus appealed for the extension of the transparency to all the debates of the EU Council of Ministers.¹²⁶ A similar plea was also voiced by the European Parliament's Committee on Petitions in February 2006 and debated in the Parliament Plenary in April 2006.¹²⁷

C. TRANSPARENCY DRIVE IN THE BSEC

i) Project selection process: the Project Development Fund once more shows the way ahead

The cases we have instanced, and many we have not, clearly demonstrate the importance of transparency in relation to good governance in Europe and worldwide. In the BSEC the claim for transparency has to some extent been vindicated in the most recent instance of adopting a procedure for decision-making, that of the approval by the Council of the *Manual of Operations of the BSEC Project Development Fund*.¹²⁸ As previously seen, the *Manual* incorporated lessons learned from several shortcomings of the decision-making process in the BSEC, in particular with the empowerment of BSEC organs other than the Council – Committee of Senior Officials and Steering Committee of the Fund – (*supra* p. 37 ff). This sign of maturity in governance can also be observed with respect to the procedure of rating the project proposals submitted for funding by the Fund and by selecting these that will eventually be granted from the Fund's resources. Paragraphs 11 and 12 of Part Three of the Manual ("Modalities of Work of the Steering Committee of the BSEC Project Development Fund"), provide for a transparent evaluation process:

"11. In order to ensure the *transparency* of the project selection process the decision of the Steering Committee to award contracts will be primarily determined by the marks given to each proposal by all Committee Members. This will be achieved through standardised 'Evaluation Sheets' compiled by each member of the Steering Committee for each project proposal.

125. "Ombudsman criticises EU council opaqueness", Interview of European Ombudsman, Mr. Nikiforos Diamantouros, to Mark Beunderman, *EUObserver*, 20 January 2006, p. 1.

126. "The [21 December 2005] decision is limited to the Council's first deliberations after the European Commission has presented its proposal and the final vote. The debates in between are still closed to the public.", *ibid.*

127. European Parliament, Committee on Petitions, *Report on the Special Report from the European Ombudsman following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG concerning the openness of the meetings of the Council when acting in its legislative capacity (2005/2243(INI))*, Doc. A6-0056/2006, 2 April 2006 (Rapporteur: David Hammerstein Mintz).

128. Council of Ministers of Foreign Affairs, 9th Meeting, Baky, 30 April 2004, Report, Doc. Attachment 1 to Annex VI to BS/FM/R(2002)2, *Manual of Operations of the BSEC Project Development Fund*.

12. Evaluation Sheets are based on the list of project selection criteria, and the final mark given by each Committee member is determined by the relative weight that each criterion carries in the evaluation process. The marks allocated for each selection criterion will be accompanied by a brief explanatory text for the mark awarded. The final result of the evaluation will be the average mark obtained for the proposal by all Evaluation Sheets, to be expressed with a number from 0 to 100 and up to one decimal digit."

In order to facilitate the transparency of the selection process, the *Manual of Operations of the BSEC Project Development Fund* contains also the list of the criteria of evaluation of the submitted project proposals:

"PART FOUR

BSEC PROJECT SELECTION CRITERIA

1. The expected outputs of the project should further the principles and objectives of the BSEC.
2. The expected outcome of the project must be relevant to the proposed project objectives and sufficiently described.
3. Timetable for operations, estimated costs and project management structure must be reasonable.
4. The applicants must have the capacity to implement the project.
5. The project should involve as many BSEC countries as possible.
6. Possibility of the project to be implemented after the completion of the BSEC-financed component.
7. The proposed project should seek to increase synergies between BSEC and EU."

The above provisions of the *Manual of Operations of the BSEC Project Development Fund* are not marginal, though they concern a specific aspect of decision-making. First, their acceptance by the Council demonstrates the growing sensibility at the higher level for an open and accountable Organisation. This receptivity at top level will also radiate to the lower levels, including the PERMIS and the subsidiary organs, making them more transparency-friendly. Moreover, these provisions are not negligible because they contribute to the culture of accountability of the Organisation; it is of paramount importance for the people of the member states, as well as for the wider public, to see for themselves which projects are selected and funded and to ascertain that the sparse resources of the BSEC Project Development Fund are well spent. It is the first time that concern for accountability enters into in a BSEC decision-making procedure.

ii) The required change in the mentalities

The progress observed in many respects of governance, including transparency and accountability, in the rules and procedures of functioning of the Project Development Fund, demonstrates the increasing maturity of the decision-making process in the BSEC. This is the outcome of the experience acquired by the Organisation over the well-nigh fifteen years of its existence and also of the observation of developments outside the Organisation. The conditions are therefore favourable for replacing the existing provisions of arti-

cles 2, paragraph 4 and 6, paragraph 6 RP stipulating the closed sessions of the meetings of the Council and subsidiary organs. It is however the exception to this rule that has superabundantly been observed in the BSEC meetings (*supra* p. 57) and the law cannot ignore such radical reversal of the reality. Even as they stand, these two provisions are not an obstacle to the transparency of deliberations of the BSEC organs; they may however afford some real or alleged motivation favouring secrecy in the BSEC dealings.

In view of the preceding observations, it is important to establish clear rules with respect to the public character of the meetings of the BSEC organs, that will on the one hand restrain any regression towards secrecy and on the other, promote the consciousness that openness advances the Organisation while concealment is deleterious to its very foundations. In order to succeed in this, the new rules should make clear that the restricted meetings are the exception to their open character. Such restricted meetings will be accessible only to the member states. The rules should however allow also, on an exceptional case-by-case basis, the presence of the BSEC related bodies and/or of the observers and/or the third parties, with which BSEC entertains relations, in accordance with article 9 of the Charter (sectoral dialogue partners, dialogue partners and guests). It is consequently submitted that the existing paragraph 4 of article 2 RP be substituted by the following text and that in the same article a new paragraph 5 be inserted as follows:

"4. Subject to the consensus of the Member States, the Chairman-in-Office may decide that the deliberations on specific item(s) on the agenda be held in the presence of the Member States.

5. Related Bodies and/or Observers and/or Third Parties provided for in article 9 of the Charter, may attend, with special permission of the Chairman-in-Office and subject to the consensus of the Member States, a meeting of restricted nature or a part of a meeting during which an item of restricted nature is being discussed."

Following the insertion of a new paragraph 5 to article 2 RP, the present paragraph with this number shall be renumbered as 6. In addition, the proposed new paragraph 5 of article 2 will render article 21, paragraph 7 RP superfluous and it should be deleted, as its subject matter is fully covered.

In case the proposal for a more flexible participation in the Council is accepted, with the attendant necessary changes in the RP (see *supra* pp. 45 ff), the two paragraphs of the above mentioned suggestion should form a new article numbered 8 entitled "Transparency of the meetings". This new article should be inserted in the amended RP between the new article 7 ("preparation of the Draft Agenda") and the new article 9 ("Meetings of the Subsidiary Organs").

The changes in the RP are also aimed at contributing to the change of mentalities. The message of the amendments proposed, is to promote the conviction that the closed character of the deliberations in the BSEC would be doing a grave disservice to the Organisation. In our day an institution cannot afford to maintain secretive policies, because such policies would undermine its efficiency and lead to distrust and eventually indifference rendering the institution concerned utterly irrelevant.

CHAPTER 2

PARTNERSHIP WITH CIVIL SOCIETY

The transparency we have been advocating so far aims at restoring the openness, existing until 2003, to the BSEC institutional family, that is the BSEC related bodies, including the affiliated centres, and the observers, states and international organisations, intergovernmental and non-governmental. Nevertheless, measures toward greater transparency limited to these actors, albeit indispensable for effective decision-making in the BSEC, is simply not enough. What is further needed in the modern day for every institution, national or international, is openness equally to the civil society, to the active citizens, because good governance cannot be delivered without a meaningful contribution from non-state actors.¹²⁹

Civil society belongs among the social phenomena more usefully described than defined. The difficulty, and ultimately pointlessness, of the attempt to define civil society has been underscored by the European Commission in a Discussion Paper submitted by the President and the Vice-President, Romano Prodi and Neil Kinnock, in 2000: "The NGO-sector has often been described as extremely diverse, heterogeneous and populated by organisations with hugely varied goals, structure and motivations. It is therefore not an easy task to find a common definition of the term 'non-governmental organisation'. It cannot be based on a legal definition given the wide variations in laws relating to NGO activities, according to which an NGO may have, for instance, the legal status of a charity, non-profit association or foundation."¹³⁰ The same spirit also characterises the approach of Emmanuel Roucouas, who lucidly observes that "The concept of civil society *is abstract as well as virtual*. Nobody knows how many organisations have mobilised in its name. These groupings have many denominations and include non-governmental organisations (NGOs), but also a multitude of other unions of people, associations and 'initiatives'. None of them alone represents society as a whole, or even civil society as such. Yet, the impossibility of defining their agendas has a positive aspect, since established social forces would never be able to control, domesticate or appropriate all of them. Most groups in civil society are organised in one of the forms provided for by domestic civil law (associations, non-profit organisations, societies, informal groups under civil law). The acquisition of legal status under domestic law is necessary for reasons of identification and transparency."¹³¹

Without entering into the vigorous analytical debate on the concept and manifestations of

129. Cf. Giovanni Moro, "Active Citizens as Actors of Democratic Governance", *Romanian Journal of International Affairs* 2000 (v. VI), pp. 233-238.

130. European Commission, Discussion Paper presented by President Prodi and Vice-President Kinnock, "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", COM(2000) 11 final, OJEC L 002, 5 January 2000, p. 67. One can draw the same conclusion by the limited number of ratifications (10 as of 2 February 2006) that has received so far the European Convention on the recognition of legal personality of international non-governmental organisations, Strasbourg, 24 April 1986, *European Treaty Series* - No. 124.

131. Emmanuel Roucouas, "Civil society and its international dimension" in *Mélanges Jean J.A. Salmon*, 2006 (forthcoming), italics in the text.

civil society,¹³² for the purpose of the present inquiry, the phenomenon of NGOs and civil society in more general terms is understood in the sense of the intermediary organisation, as Alexis de Tocqueville envisaged it, between the individual (or the family) on the one side and the state on the other.¹³³ In this sense, civil society encompasses actors that operate within the formal organisation of the society (state and institutions) and aim at promoting the common good. This function can be supplementary to the action of the formal organisation of a given society or divergent from it when the perception of the common good differs; it may also be opposite to it, when the civil society actors operate within an authoritarian formal system. A third stance of the civil society towards formal organisation of the society (state, international organisations) might be indifference.¹³⁴ In most cases the third model of activity is not a productive option for the civil society; it may, for example, be so in the case of the so-called weak or failed states (when NGOs operate without reference to the quasi-inexistent state structures). Yet the impact of indifference of civil society organisations towards the state remains limited on the international level, where the action of civil society organisations in most cases seeks synergies with states and intergovernmental organisations. This position becomes a necessity not only due to a utility criterion, the search to maximise the impact of the action, but also owing to the legal difficulty that presents the operation of NGOs beyond the borders of the state where they are established and/or have their statutory seat. In such cases the support of the territorial state and of public international organisations is crucial for the achievement of the objectives of the civil society actors.

The cooperation between NGOs and intergovernmental organisations is not a one-way course. The complementariness principle operates in both directions. Observation of the international society affords a multitude of concrete examples where international organisations (and also states) seek the advice, support, help and experience of non-governmental organisations and other civil society actors in order to promote their objectives and achieve their policy goals. This does not mean that there is no opposition or antagonism between states, intergovernmental and non-governmental organisations in particular in questions of major or lesser significance. However civil society actors are accepted as partners of the more traditional international actors and the action of the latter

132. Utz Haltern, *Bürgerliche Gesellschaft. Sozialtheoretische und sozialhistorische Aspekte*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1985; Krzysztof Michalski (ed.), *Europa und die Civil Society*, Castalgandolfo-Gespräche 1989, Stuttgart: Klett-Cotta, 1991; Adam B. Seligman, *The Idea of Civil Society*, Princeton, N.J.: Princeton University Press, 1995; Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations*, London: Verso, 1994; José Manuel Barceló & Carlos Mendoza Sepúlveda, *Sociedad civil y poder político*, Guadalajara, México: Editorial Agata, 1995; John Ehrenberg, *Civil Society. A Critical History of an Idea*, New York: New York University Press, 1999; Michel Offerlé (dossier réalisé par), *La société civile en question*, Paris: La Documentation française, 2003; John Keane, *Global Civil Society?*, Cambridge: Cambridge University Press, 2003.

133. Alexis de Tocqueville, *De la démocratie en Amérique*, vol. III, Paris: Pagnere, 1848 (12th ed.; 1st ed. 1840), pp. 201-250.

134. See Anne-Marie Slaughter, "International Law and International Relations", *RCADI*, vol. 285 (2001), pp. 101 ff, classifying the activities of NGOs into three categories: "(a) with the state, (b) against the state, (c) forget the state".

is influenced, even determined (in terms of agreement or opposition) by the operation and activities of the former. The civil society actors are legitimate interlocutors of states and international organisations, though, naturally, there can be no general agreement at every issue at stake.

The interaction between civil society organisations and intergovernmental organisations is a phenomenon, that (though not wholly new¹³⁵) has acquired an unprecedented vigour in the last two or three decades.¹³⁶ Over this span of time the composition of the international society experienced a significant enlargement by the addition to its traditional components, states and inter-governmental organisations, of new actors that do not share with the previous two, a fundamental characteristic of international law, that is sovereignty as an exclusive domain of power.¹³⁷ In this category one can include individuals, transnational corporations, various types of NGOs, interest groups, neighbourhood or community associations, religious organisations, labour associations, the media, etc. Taking into account the developments so far, it would not be a wild guess to assume that the already rising influence of these entities in international relations will further expand in various fields of national and international interest.¹³⁸

This influence is manifest in the many instances – increasing in number and importance – where non-state entities play a critical role in international decision-shaping and treaty-making by initiating and facilitating campaigns aiming at introducing international binding texts.¹³⁹ One of the most striking illustrations of such decisive involvement is the negotiation and conclusion of the 1997 Convention banning anti-personnel landmines.¹⁴⁰ The signing of this Convention is the result of a major campaign instigated by a motivated and well-organised number of NGOs, eventually supported by some states with similar concerns (like-thinking), and matured into formal negotiations, which were

135. Until and during the modern nation-state formative period, the papacy, churches and monastic orders, maritime companies administering the newly discovered territories, and other private initiatives were having an active role in the international relations.

136. On the international dimension of the civil society, see Emmanuel Roucouas, "Civil society and its international dimension" in *Mélanges Jean J.A. Salmon*, 2006, (forthcoming); Rainer Hofmann (ed.) and Nils Geissler (assoc. ed.), *Non-State Actors as New Subjects of International Law. International Law – From the Traditional State Order Towards the Law of the Global Community*, Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law, March 25-28, 1998, Berlin: Duncker & Humblot, 1999; Ariel Colonosmos, "Transnational Networks. Old Game, New Rules", in Marie-Claude Smouts (ed.), *The new international relations. Theory and practice*, New York: Palgrave, 2001, 112-125.

137. Sovereignty is traditionally attached to the state. Intergovernmental organisations, which thrived over the past century, brought about new elements in international relations and law but, composed of mainly, if not exclusively, sovereign States, remain qualitatively part of the classical, Grotian, paradigm of international law, with sovereignty as its unavoidable keystone and constitutive element, cf. Nico Schrijver, "The Changing Nature of State Sovereignty", *BYBIL* 1999 (vol. 70), p. 83, where inter-state organisations are qualified as "surrogates or forums for State activity".

138. Emmanuel Roucouas, "Facteurs privés et droit international public", *RCADI* vol. 299 (2002), pp. 23-103.

139. David Chandler, "The Road to Military Humanitarianism: How the Human Rights NGOs shaped a New Humanitarian Agenda", *Human Rights Quarterly* 2001 (vol. 23), pp. 678-700.

140. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, *ILM* 1997 (vol. 36), pp. 1507 ff.

kept outside the UN Disarmament Conference.¹⁴¹ The role played by the International Campaign to Ban Landmines (an association of interested NGOs), together with the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies has been of vital importance in the process of the negotiation of this Convention and adoption of the final text.¹⁴² The International Campaign to Ban Landmines was therefore awarded the Nobel Peace Prize for the cooperation between NGOs and governments that led to a "convincing example of an effective policy for peace."¹⁴³ The process of establishment of the International Criminal Court provides another eloquent example of this tendency.¹⁴⁴ More generally most of the international conventions adopted over the last thirty or more years bear the mark of the involvement of civil society organisations, and the latter have been present in almost all international conferences, from the Conference on Environment and Development (Rio de Janeiro, 1992) to those on Human Rights (Vienna, 1993), Population and Development (Cairo, 1994), status of women (Beijing, 1995) to the Conference on sustainable development (Johannesburg, 2002).

The international organisations, universal and regional, have also opened their doors to NGOs. The list is equal to the directory of intergovernmental organisations. Only the degree of participation varies: in some of them there is still cautiousness while in others the participation covers almost all the activities of the institution concerned. In the WTO, for example, the Dispute Settlement Body (DSB) found that information provided by NGOs on their own initiative should not be considered inadmissible by the panels and hence disregarded from the outset.¹⁴⁵ The WTO Appellate Body reiterated (two years later) the possibility of NGOs to "participate" in its proceedings.¹⁴⁶ By these moves, the Appellate Body opened the way towards potentially extensive participation on the part of NGOs in the proceedings on world trade issues, in terms sometimes perceived as being more favourable than those applicable to the WTO members them-

141. Some ninety states fully participated in the negotiations, while thirty states, the UN, the ICRC, the International Federation of Red Cross and Red Crescent Societies and the International Campaign to Ban Landmines attended as observers.

142. Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society", *EJIL* 2000 (vol. 11), pp. 91-120; Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines", *International Organization* 1998, pp. 613-644.

143. Press Release by the Norwegian Nobel Committee, 10 October 1997, p. 1.

144. See William R. PACE & Jennifer Schense, "The Role of Non-governmental Organizations", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, Oxford: Oxford University Press, 2002, pp. 105-143.

145. WTO Appellate Body, *US – Import Prohibition on Certain Shrimp and Shrimp Products*, 12 October 1998, AB Report, Doc. WT/DS58/AB/R; paragraphs 108, 107. The Appellate Body has thus quashed the more restrictive interpretation of the Panel in the same case: WTO Panel, *US – Import Prohibition on Certain Shrimp and Shrimp Products*, 15 May 1998, Panel Report, Doc. WT/DS58/R, paragraph 7.8.

146. See Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, *Communication concerning additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to the dispute "EC - Measures Affecting Asbestos and Asbestos-Containing Products"*, Doc. WT/DS135/9, 8 November 2000.

selves.¹⁴⁷ For the WTO and a host of other international actors, the participation of NGOs in international relations is not only useful but also necessary. Such is the attitude of regional or sub-regional initiatives and organisations, established in the wider European area during the early nineties. Their vision is embedded in the belief (and expectation) that NGOs can play a supportive role in the attainment of the common goals set forth by governments and their agencies and therefore they can contribute to the promotion and implementation of the objectives of inter-governmental initiatives and organisations.

The trend of active involvement of civil society organisations in international affairs has been so powerful that even *fora* that were initially reserved to states have become to a greater or lesser extent accessible to NGOs and other non-state actors. This is the case for the UN Security Council¹⁴⁸ or the International Court of Justice.¹⁴⁹

A. COOPERATION BETWEEN BSEC AND NON-GOVERNMENTAL ACTORS

Sharing this overall openness towards civil society, since its inception the BSEC sought interaction with the civil society.¹⁵⁰ The Summit Declaration of 25 June 1992 establishing the Black Sea Economic Cooperation acknowledged the position and role of participants other

147. Following the interpretation of the Dispute Settlement Understanding (DSU) by the Appellate Body which allows NGOs to submit briefs in cases under review by the DSB of the WTO, several WTO Members considered their situation with respect to the possibility to intervene in procedures before the panels less advantageous than that recognized to NGOs. Actually, in accordance with the Article 10 DSU, only a WTO Member "having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel", while the interpretation of Article 13 DSU given by the AB made it possible for NGOs to participate virtually in any matter they wished. Therefore WTO Members were placed, with respect to the participation to panels' procedures, in a more onerous position than non members, in that they had to prove a substantial interest in the proceedings and to notify it to the DSB. Cf. Doc. WT/GC/M/60, 23 January 2001.

148. See Jurij Daniel Aston, "The UN Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House", *EJIL*, 2001 (vol. 12), pp. 943-962; Pierre Klein, "Les Nations Unies, les Etats et le Conseil de sécurité: la place et le rôle des organisations non gouvernementales au sein de l'ONU", in Rostane Mehdi (éd.), *La démocratisation du système des Nations Unies*, Paris: Pédone, 2001, pp. 97-113.

149. The Statute of the judicial organ of the United Nations excludes the private actors from any role in the proceedings. However NGOs have exercised a significant role in the process of submitting to the ICJ the requests for advisory opinions on the legality of threat or the use of nuclear weapons, by both the UN General Assembly and the World Health Assembly. They have also been active during the procedures that have followed this move, albeit indirectly; it is no secret that some states participating in the proceedings have benefited from the know-how of NGOs active in the fields of environmental protection, scientific research or pacifism. See ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 June 1996, Dissident Opinion Judge Shigeru Oda, *ICJ Reports*, p. 96, paragraph 16; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 June 1996, Separate Opinion Judge Gilbert Guillaume, *ICJ Reports*, pp. 287-288, paragraph 2; Dissident Opinion Judge Shigeru Oda, *ibid.*, pp. 335-336, paragraph 8.

In general for international judicial organs, see Dinah Shelton, "The Participation Of Nongovernmental Organisations In International Judicial Proceedings", *AJIL* 1994 (vol. 88), pp. 611-642; Hervé Ascensio, "L'*amicus curiae* devant les juridictions internationales", *RGDIP* 2001 (vol. 105), pp. 897-929.

150. The issue has been the object of a separate study: Ioannis Stribis, "Institutionalisation of Cooperation Between Inter-Governmental Organisations and NGOs: The BSEC Experience", *NAIL* 2005 (vol. 5), pp. 21-57. Several of the developments that follow have been already presented in this paper.

151. *Summit Declaration on Black Sea Economic Cooperation*, Istanbul, 25 June 1992, paragraphs 11, 18, in *BSEC Handbook of Documents*, vol. I (1995), pp. 4, 6.

than states in the newly established regional economic forum.¹⁵¹ Acting upon this assumption, the Ministers of Foreign Affairs of the BSEC Participating States considered the issue of the relations between the BSEC and Non-Governmental Organisations at their first meeting (Antalya, 10 December 1992) and instructed the Working Group on Organisational Matters to study this topic and report to them.¹⁵² Significantly, equally swift was the interest of NGOs to cooperate with the new regional initiative: an impressive score of 26 had approached BSEC in its first six months with the wish for cooperation.¹⁵³ For the importance attached by the BSEC to the cooperation with non-state actors, it is also worth noting that in the first two instances that BSEC granted observer status, it did so to third states and non-governmental organisations (1st MMFA: BSEC Council¹⁵⁴ along with Poland;¹⁵⁵ 3rd MMFA: International Black Sea Club¹⁵⁶ along with Egypt, Israel, Slovakia¹⁵⁷).

This speedily manifested interest for involving civil society actors in the BSEC development is consistent with the belief that in the political and economic conditions that emerged after the end of the Cold War, the main goal of the BSEC, i.e. economic development of the region and of the participating States could no longer be regarded as the responsibility of governments alone; it required a genuine partnership of governments with the social partners, the private sector, labour unions and non-governmental organisations. It was believed that such an approach could contribute to the interaction between the societies of the participating states and broaden the network of contacts in the Black Sea region. For these reasons the BSEC founding fathers provided for an open organisation, an organisation that welcomes interaction with other international organisations, intergovernmental and non-governmental.

This openness found its normative expression in articles 8 and 9 of the Charter. These provisions envisage several possibilities for cooperation between the BSEC and civil society organisations: observer status (article 8), sectoral dialogue partnership, dialogue partnership, invitations to BSEC events (article 9).¹⁵⁸ Moreover, in order to streamline the relationship

152. Meeting of the Ministers of Foreign Affairs, Antalya, 10 December 1992, Resolutions, Decisions and Recommendations, Doc. Annex IV to BS/FM/R(92)1, paragraph 14, in *BSEC Handbook of Documents*, vol. I (1995), p. 29.

153. See list in *Working Paper on Relations between the BSEC and NGOs*, 17 September 1993, Doc. BS/OM/WG(93)11, Annex 1-3.

154. The BSEC Council was established as a grouping of businesspeople from the BSEC member states. Its current title is BSEC Business Council and, since the entry into force of the Charter, it is a BSEC Related Body (article 21).

155. Meeting of the Ministers of Foreign Affairs, Antalya, 10 December 1992, Report, Doc. BS/FM/R(92)1, paragraph 3, in *BSEC Handbook of Documents*, vol. I (1995), p. 24, for Poland; Resolutions, Decisions and Recommendations, Doc. Annex IV to BS/FM/R(92)1, paragraph 27, *ibid.*, p. 31, for the BSEC Council.

156. The IBSC is a non-governmental organisation of local authorities of some twenty cities from six member and one observer – Italy – states, established in 1992 and registered as legal entity under Bulgarian legislation in 1993.

157. Third Meeting of the Ministers of Foreign Affairs, Sofia, 9 December 1993, Resolutions, Decisions and Recommendations, Doc. Annex VII to BS/FM/R(93)2, paragraph 10, in *BSEC Handbook of Documents*, vol. I (1995), p. 61.

158. Ioannis Stribis, "Institutionalisation of Cooperation Between Inter-Governmental Organisations and NGOs: The BSEC Experience", *NAIL* 2005 (vol. 5), pp. 46-51.

between the Organisation and civil society actors, the Council adopted, at its first meeting (Thessaloniki, 27 October 1999), "Criteria for Granting Observer Status to NGOs".¹⁵⁹ Recently (in 2005 and 2006), the objective of interaction with civil society organisations, both at domestic and regional levels, was reiterated in the context of the cooperation in the field of institutional renewal and good governance.¹⁶⁰

Departing from these premises, BSEC definitely places the action of NGOs in the perspective of subsidiarity, assisting the Organisation in attaining its objectives as defined by the Charter, the political declarations and the legally binding acts of its competent organs. NGOs cooperating with the BSEC as observers (article 8 Charter) or in the capacities provided for in article 9 of the Charter (sectoral dialogue partnership, dialogue partnership, guest) have the "possibility of attending meetings on specific subjects" (article 9, *litt.* (b) Charter); in addition observers may attend BSEC meetings without limitation (article 21, paragraph 8 RP). They may even "attend, with special permission of the Chairman-in-Office, a meeting of restricted nature or part of a meeting during which an item of restricted nature is being discussed" (article 21, paragraph 7 RP). When attending BSEC meetings, observers may be authorised by the Chairman-in-Office

"a) to address the meeting; b) to participate in the discussions of technical or expert level meetings; c) to receive official BSEC documents; d) to submit written statements on particular items of the agenda" (article 21, paragraph 8 RP).

With respect to the sectoral dialogue status, which has been regularly been granted to NGOs,¹⁶¹ the Charter and the RP do not specify the rights and obligations of the beneficiary NGOs. However, the practice has filled this gap by assimilating, for the purposes of rights and obligations, the sectoral dialogue partnership with observer status.

Whichever status is applied for or granted by the Council, non-state entities actively contribute to policy shaping in the BSEC process. There are numerous examples of this active interaction between BSEC and NGOs enjoying sectoral dialogue partnership. The inclusion into the program of work of the BSEC of the issue of facilitation or simplification of issuance of entry visas for particular categories of economic actors nationals of the BSEC member states (businessmen engaged in export, import or investment activities in the BSEC mem-

159. Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 25 October 1999, Resolutions, Decisions and Recommendations, Doc. Attachment 1 to Annex V to BS/FM/R(99)2, in *BSEC Handbook of Documents*, vol. IV (2000), p. 138.

160. See *Joint Declaration on Institutional Renewal and Good Governance of the Ministers in charge of Public Administration and the Ministers of Justice of the Member States of the Organisation of the Black Sea Economic Cooperation*, Athens, 21 February 2005, Doc. Annex V to BS/PAJM/R(2005)1, p. 2, and *Terms of Reference of the BSEC Working Group on Institutional Renewal and Good Governance*, adopted at the 14th meeting of the CMFA, Bucharest, 26 April 2006, Doc. Attachment 2 to Annex VII to BS/FM/R(2006)1, pp. 1, 2, reproducing *verbatim* the relevant parts of the ministerial *Joint Declaration* of 21 February 2005 as tasks of the Working Group on Institutional Renewal and Good Governance.

161. On the supposition that the sectoral dialogue partnership status befits better NGOs and observer status states and intergovernmental organisations, see Ioannis Stribis, "Institutionalisation of Cooperation Between Inter-Governmental Organisations and NGOs: The BSEC Experience", *NAIL* 2005 (vol. 5), pp. 48-50.

ber states,¹⁶² lorry drivers engaged in international road transport of goods in the BSEC region¹⁶³) is the result of the initiative of the BSEC Business Council, for the first category of persons, and of the Union of International Road Transport Association in the BSEC Region (BSEC-URTA), for the lorry drivers. BSEC-URTA has also submitted a proposal to conclude an Agreement among the BSEC Member States on Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualification for Road Vantage Operators and Road Passenger Transport Operator,¹⁶⁴ which is under consideration by the BSEC Working Group on Transport. The same Working Group had on its agenda a vast proposal on maritime transportation, submitted by two interested NGOs (Black Sea Region Association of Shipbuilders and Ship Repairers and Black Sea International Ship Owners Association). Recently the Council has established an *ad hoc* Expert Group with the aim to study the draft Memorandum of recommendations in the sphere of development of shipbuilding, shiprepairing and shipping.¹⁶⁵ Moreover, NGOs having a cooperation scheme with the BSEC are also given the possibility to be associated in the management of concrete projects in the field of their activities and even to submit proposals for projects to be financed through the BSEC Project Development Fund.¹⁶⁶

B. OPENNESS TO WIDER SEGMENTS OF THE CIVIL SOCIETY

i) Voluntary associations

It appears from the above presentation that most of the non-state actors that have sought and entertain institutionalised relations with the BSEC are professional or lobbying groups. This situation calls for some balancing. It is indisputable that BSEC, as an economic organisation fostering cooperation in the field of economic development, constitutes a forum where the professional associations of its member states seek to table their proposals and eventually influence in their favour the decision-making process on a regional level. Nonetheless the overall aim of sustainable development can benefit from the implication in the BSEC work of a wider range of non-state actors, including civil society, environmen-

162. Draft Agreement on Simplification of Visa Procedures for the Businessmen Nationals of the BSEC Member States, *Ad hoc* Expert Group on Visa Simplification Procedures, Istanbul, 29-30 January 2003, Doc. Annex III to BS/SVPBLD/GE/R(2003)1.

163. Draft Agreement on Simplification of Visa Procedures for Professional Drivers Nationals of the BSEC Members, *Ad hoc* Expert Group on Visa Facilitation for Lorry Drivers, Istanbul, 22-23 January 2004, Doc. Annex III to BS/SVPBLD/GE/R(2004)1.

164. See Working Group on Transport, Istanbul, 19-20 February 2004, Annotated Agenda, 2 February 2004, Doc. BS/TR/WG/AA(2004), p. 3.

165. Council of Ministers of Foreign Affairs, 13th Meeting, Chisinau, 28 October 2005, Doc. Annex VII to BS/FM/R(2005)2, paragraph 17.

166. Proposal submitted by the BSEC-URTA for the project "Development of Distant Professional Learning Software for the International Road Transportation Industry" aimed at developing a sophisticated professional competency training software for the international road transport as well as implementing and monitoring a harmonised and sustainable distance-learning programme with the intention of delivering the Certificate of Professional Competence (CPC) training for international freight transport operators in the BSEC region, Working Group on Transport, Baky, 1-2 October 2003, Report, Doc. BS/TR/WG/R(2003)1, paragraph 15, p. 3.

tal, human development, labour, cultural, etc. NGOs. There is therefore a real advantage, if not the necessity, for the BSEC to be attractive to such type of organisations as well and to be open to them whenever they manifest their desire to cooperate with the Organisation. In that way the BSEC would become more open to the citizens' concerns; this is also expected from the interaction with NGOs.

An example of such regional initiative, which contributed in a specific way to the BSEC endeavours, has been the Conference of the Red Cross and Red Crescent Societies of the BSEC participating states (Istanbul, 11-13 April 1997). The Ministers of Foreign Affairs, at their Ninth Meeting (Istanbul, 30 April 1997), expressed their appreciation at this Conference. The recommendations of the Red Cross/Red Crescent Black Sea Conference concretely promoted the expansion of the regional cooperation to a new field, emergency assistance and relief, as the Ministers "referring to the Conference's desire for more active regional cooperation (...) invited the Participating States to create the necessary mechanism to cope jointly with emerging [*sic*] natural and man-made disasters"¹⁶⁷ and "agreed that the proposals contained in the concluding documents of the Conference should be taken into account during the elaboration of a draft Agreement between the Governments of the BSEC Participating States on practical cooperation in emergency mitigation and elimination of consequences of natural and man-made disasters."¹⁶⁸

The more recent record affords another instance of association of voluntary civil society organisations, the Black Sea NGOs Network, whose contribution to the BSEC process could be envisaged. This Network, established at the first Black Sea Regional Civil Society Forum (Yerevan, 15-17 January 2004), convened under the auspices of the International Social Welfare Council,¹⁶⁹ is an informal grouping of nearly forty national NGOs from the BSEC member states active in social affairs (healthcare, human development, assistance to vulnerable categories of persons: senior citizens, internally displaced persons, etc., poverty reduction and other social policy issues). The Network, which held its second Forum in Yerevan, on 17-20 December 2005, on the theme "Poverty Reduction and Sustainable Development in the Region: Effective Advocacy and Lobbying for Social Services in the Black Sea Area", reiterated the invitation to other civil society organisations from all the BSEC member states to take part in its activities. The aim of the Network as stated in the outcome documents of the two Fora, is to consolidate the efforts of regional NGOs in order to assist in resolving existing region-wide social problems through cooperation with regional intergovernmental organisations, national governments, parliaments and local self-governing bodies. These documents put special emphasis on the wish of the

167. Meeting of the Ministers of Foreign Affairs, 9th Meeting, Istanbul, 30 April 1997, Resolutions, Decisions and Recommendations, Doc. Annex V to BS/FM/R(97)1, paragraph 19, in *BSEC Handbook of Documents*, vol. III (1998), p. 41.

168. *Ibid.*, paragraph 20.

169. The ICSW is a London-based global non-governmental organisation, which represents a wide range of national and international member organisations that seek to advance social welfare, social justice and social development. ICSW has members in 70 countries throughout the world that work to support people in poverty, distress and injustice to international or national policy advocacy.

participating NGOs to cooperate with the BSEC by raising awareness of social policy issues in the regional developments.

This appeal to the BSEC should and actually cannot be ignored in today's international life. This is not the appeal of x or y civil society group, it is the imperative of modern times. And it benefits BSEC that civil society actors turn to the Organisation; it is a sign of its relevance. The indifference of civil society towards an organisation is a symptom of the latter's weakness. For these reasons the issue of the interest of voluntary associations of civil society should be taken up by the competent instances of the BSEC, in the first place by the various Working Groups in the field of their activities. The Working Group on Environmental Protection, for example may wish to debate the issue and invite interested NGOs focusing on environment and/or sustainable development to submit in writing their views on the regional cooperation in the field of the protection of the environment, the Working Groups on Healthcare and Pharmaceuticals, on Education and so on, may proceed in the same way with NGOs active in the field of their respective competencies. The relations should start at a working level, while institutionalisation of the collaboration should be left for a later stage and shall follow the modalities established by the Charter and the BSEC by-laws. When the various Working Groups shall have acquired sufficient experience of working relations the Committee of Senior Officials should be seized with this issue, in order to elaborate, based on the recommendations of the Working Groups, a general approach towards the voluntary associations of the civil society, which has to take into account the particularities of these organisations compared with the "professional" NGOs and lobbies.

ii) Working relations with national NGOs

Another category of civil society actors that need to be considered as a distinct case in the BSEC are the national NGOs. These organisations cannot benefit from the cooperation schemes provided for in articles 8 or 9 of the Charter, which are reserved to *international* NGOs.¹⁷⁰ This is a formal requirement of the Charter and as such has overriding power. For this reason the few applications of national NGOs seeking institutionalised cooperation with the BSEC have not been submitted to the competent BSEC organs and any national civil society organisation has hitherto been kept at distance from the BSEC. However, the issue of national NGOs wishing to cooperate with the BSEC could not be considered as disposed of, at least *de lege ferenda*. The openness of intergovernmental *fora* to citizens' concerns requires further consideration of the issue also in the BSEC con-

170. See articles 8 and 9 of the Charter. Also the first of the *Criteria for Granting Observer Status to NGOs*, Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 25 October 1999, Doc. Attachment 1 to Annex V to BS/FM/R(99)2, in *BSEC Handbook of Documents*, vol. IV (2000), p. 144:

"a) Observer Status shall only be granted to NGOs, which are truly international.

An organisation shall be deemed international (regional or sub-regional) if it has its statutory and real seat in one of the BSEC Member or Observer State, its administrators are under the jurisdiction of two or more BSEC Member States, and it is operational in at least two BSEC Member States."

text. National NGOs can be also helpful in allowing civil society expression and may as well contribute to addressing major issues of interest.¹⁷¹ It is therefore submitted that practical arrangements could and should be found in order to associate national NGOs to the BSEC activities.

The arrangements to be found for opening the BSEC to national NGOs shall not contravene the Charter and shall take the form of *working relations*, including consultations with BSEC organs, in particular PERMIS, as well as invitation (by the Chairman-in-Office and/or the PERMIS) to specific BSEC events of mutual interest, with the consent of the member states. In such cases the principle *expressio unius est exclusio alterius* could not be invoked in order to rule out any involvement whatsoever of national NGOs in the BSEC activities. What the Charter prohibits, in its present form, is granting observer status and sectoral dialogue partnership to national NGOs. The extension of such limitation to other forms of interaction is not warranted and disregards policy considerations for openness to all non-state actors, albeit through other means of cooperation. The BSEC practice provides an instance of such alternative ways of allowing national NGOs to have a say in the BSEC process: a national association of maritime industry of Ukraine, UKRUSUDPROM, submitted jointly with two international NGOs, sectoral dialogue partners of the BSEC (Black Sea Region Association of Shipbuilders and Ship Repairers and Black Sea International Ship Owners Association) a proposal on "General Directions of Governmental Policy of the BSEC countries in the sphere of shipbuilding, marine fleet and shiprepair."¹⁷² BSEC did not deny considering the joint proposal, despite the fact that it has been submitted also by a national NGO with no standing in the BSEC. Such kind of arrangement could be a precedent for involving national NGOs in BSEC activities.

No modification of the BSEC normative documents is required in order to implement this proposal. The relevant issues will be dealt with on an individual basis, with *ad hoc* decisions of the Council or the Committee of Senior Officials (duly empowered, see *supra* pp. 25 ff) to authorise some type of working relations with national civil society organisations that are willing and able to contribute in specific ways to the BSEC process.

An additional recommended action should be the encouragement of national NGOs approaching the BSEC and seeking to cooperate with it, to work towards the establishment of regional networks bringing together national or regional organisations with similar interests, with a view to setting up NGOs with international character, eligible for institutionalised cooperation with the BSEC. It is submitted that, whenever the Organisation is approached by national NGOs with a request for cooperation, the BSEC organs, primarily PERMIS, should advise the applicant(s) to set up a region-wide network of civil society associations active in the same or related fields and approach the BSEC with this international format, which will have better chances for meaningful cooperation with the Or-

171. For an interesting case study of the impact of a national NGO in inter-governmental institutions see Liza D. Fallon and Lorne K. Kriwoken, "International Influence of an Australian Nongovernmental Organization in the Protection of Patagonian Toothfish", 35 *Ocean Development & International Law* 2004 (vol. 35), pp. 221-266.

172. Joint letter of BRASS, BINSAs and UKRUSUDPROM dated 9 February 2001.

organisation.¹⁷³ In such cases the Chairman-in-Office should facilitate the endeavour by assisting and hosting meetings of the interested NGOs from the member states, in the BSEC headquarters. In this way, the Organisation will benefit from several aspects. It will first succeed in having representative interlocutors from the civil society of the member states for its activities in different areas of cooperation. In addition, the BSEC shall also achieve to pool resources for the realisation of its objectives in the specific areas of cooperation (environment, healthcare, emergency assistance, tourism, migration, etc.). Ultimately, the assistance to the creation of regional networks of civil society actors shall in and of itself enlarge the regional cooperation in promoting human contacts, a distinct area of cooperation provided for in article 4 of the Charter. Cooperation of NGOs and other civil society organisations across the BSEC region is an essential means for developing pluralistic, open societies and for forming regional solidarities, which transcend the national borders and contribute to the realisation of the objectives pursued by any regional cooperation organisation.¹⁷⁴ The afore cited examples of the Black Sea Regional Civil Society Forum or the Conference of the Red Cross and Red Crescent Societies of the BSEC member states testify of the possibility and the benefits of such initiatives.

In the longer term, the member states could envisage an amendment to article 9 of the Charter, by adding the phrase "*or national*" to the third parties eligible for the cooperation schemes provided in this article. In this way the observer status will remain reserved to international organisations, intergovernmental or non-governmental,¹⁷⁵ while the Council have the discretion to grant one of the less formal cooperation partnerships (sectoral dialogue partnership, dialogue partnership, invitation as guest) to national NGOs that warrant, in the appreciation of the member states,¹⁷⁶ an institutionalisation of their relationship with BSEC. The proposed formulation shall be:

**"Article 9
Relations with Third Parties**

The BSEC shall promote a relationship with third parties (states, international *or national* organisations and institutions) interested to cooperate on various matters of mutual concern through: (...).

Such an amendment should be considered in the framework of the broader discussion on

173. This piece of advice was given in 2002 to the Turkish environmental NGO TURKMEPA, which was seeking cooperation with the BSEC Working Group on Environmental Protection. Despite of the existence of similar MEPAs or other environmental NGOs in several BSEC member states, BSEC instances have had no information on a possible follow-up of this advice. The Working Group on Environmental Protection should probably inquire the issue.

174. Cf. Baltic Sea States Co-Operation, Fifth Ministerial Session, Kalmar (Sweden), 2-3 July 1996, *Action Program for the Baltic Sea States Co-operation*, paragraph 1.3, "Independent civil organisations are an indispensable element of democratic societies. An adequate role for these organisations in public life, in keeping with the priorities, which they themselves set, must be ensured. Regional co-operation between NGOs will further strengthen them, and such co-operation is an end in itself".

175. Cf. article 2, of the Charter ("Definitions"), *litt. (d)*: "For the purpose of the present Charter: (...) d) "International Organisations" means those organizations which are intergovernmental or non-governmental".

176. The relevant decision requires consensus (article 11, paragraph 2, *litt. (c)* RP).

amending the BSEC Charter, in particular with respect to the relations with third parties. In this framework, a decision is to be taken whether to expand the scope of the observer status (limited in the present formulation to states and international organisations) to international institutions, primarily the European Commission, about which there is an ongoing discussion, but also UN programmes and agencies, such as the UN Environmental Programme (UNEP) or Development Programme (UNDP), the UN Economic Commission for Europe, etc.¹⁷⁷

C. SECURING TRANSPARENCY AND ACCOUNTABILITY OF THE CIVIL SOCIETY ACTORS

Developments so far have quite clearly established the design of the BSEC founding fathers (both in 1992, Summit Declaration Establishing the BSEC, and in 1998, Charter of the Organisation of the BSEC) to associate civil society actors in the regional cooperation process and the necessity of this partnership for the quality of the decisions adopted in the BSEC framework. It is both desirable and positive to have civil society actors submitting contributions in the context of open public meetings of the Committee of Senior Officials and the BSEC Working Groups, Group of Experts, Task Forces and other *ad hoc* bodies, because each decision-making process needs proper information from different angles, and not only from official governmental sources, in order to be legitimate and efficient. There is nothing suspect or wrong in this activity *per se*. The fact should however not be concealed that the organisations and groupings of the civil society which provide data, offer advice and defend public causes in the decision-making process, represent distinct interests. Because of this objective situation, the civil society actors, which, especially in the BSEC at this date, include interest groups (*alias* lobbies) *should also be transparent and accountable*; therefore they should make information available about their activities, especially those concerning their relations and cooperation with the BSEC.

In general terms, NGOs have often been the target of critics who support that in terms of representation, legitimacy, transparency and accountability by definition they rate no better than the national governments of particular states.¹⁷⁸ The warning is to a degree well founded, to another, misleading. The record of some NGOs in the fields of transparency

177. BSEC has already cooperation agreements with UNECE and UNEP (signed in Istanbul, on 2 July 2001 and 20 February 2002, respectively) and working relations with some of such international institutions, that could be upgraded into formal observer status.

178. There are warnings against the risk of "ideological" NGOs, which aspire to becoming international political parties and try to develop diplomacy, parallel to that of governments, although without legitimacy, democratic basis or control. These issues rank among the most important inquiries in the debate concerning NGOs. See, among many others, Serge Sur, "Vers une Cour pénale internationale: la Convention de Rome entre les ONG et le Conseil de sécurité", *RGDIP* 1999 (vol. 103), p. 36; Julie Mertus, "Human Rights and the Promise of Transnational Civil Society", in B.H. Weston and S.P. Marks (eds.), *The Future of International Human Rights*, Ardsley, New York: Transnational Publishers, Inc., 1999, pp. 433, 452-455; J. Keane, "Who's in Charge Here? The Need for a Rule of Law to Regulate the Emerging Global Society", *The Times Literary Supplement*, 18 May 2001; Adrián Gurza Lavalle, Peter P. Houtzager and Graziela Castello, *In whose name? Political representation and civil organisations in Brazil*, Institute of Development Studies Working Paper 249, Brighton, 2005.

and legitimacy is not always positive or satisfactory, in comparison to national governments or other state agencies. Yet, one cannot ignore the widespread and ever growing aspiration of international public opinion for representation, transparency and legitimacy. Civil society actors can contribute, in the already mentioned perspective of subsidiarity (*supra* p. 69), to the fulfilment of these aspirations. To quote a former Secretary General of the BSEC Permanent International Secretariat, "As SMEs are the backbone of market economy, civil society is the backbone of democracy."¹⁷⁹ This general statement calls for qualification, but the main idea expressed therein is widely echoed and seems unchallenged in the present state of international affairs.

In any case it must be kept in mind that there is no irrefutable presumption that NGOs alone may serve the causes of transparency, legitimacy and good governance more effectively than other actors on the international scene; it is however beyond doubt that the cooperation among all international actors (states, intergovernmental organisations and civil society) can be instrumental to the attainment of the afore-mentioned goals. The international society, as any other society, needs many custodians (in the Aristotelean parlance), or in modern terms, checks and balances.

The civil society actors are thus equally subject to checks and balances. In this respect BSEC still has to take some steps that will enhance the contribution of NGOs in the decision shaping and reduce uncertainty and opaqueness.

D. PERIODIC EVALUATION OF THE COOPERATION BETWEEN BSEC AND NGOS

The first observation in this respect relates to the need to establish as a rule the periodic evaluation of the cooperation between the Organisation and NGOs enjoying institutionalised relations with the former (articles 8, 9 of the Charter), in order to decide whether to maintain such relations or to discontinue them. It is exact that the Rules of Procedure provide that "observer status may be granted to international organisations for an unlimited period" (article 21, paragraph 5 RP). The critical word is "may", which does not impair the right of the Council to grant observer status for a renewable definite period. The adoption in practice of such limitation is advisable and would be beneficial for the quality of the BSEC – NGOs interaction that might, in the opposite case, become void of any practical content. An evaluation, for example, of the observer status granted in 1993 to the International Black Sea Club (*supra* p. 73) is necessary in the light of the "practical and valuable contribution to the work of the BSEC" rule (article 8 of the Charter). It is important in this respect to underline that for the sectoral dialogue partnership, in respect to which the normative texts do not contain any indication about the duration of the term, the Council has consistently granted this status for a renewable period of two years, by analogy to the provision relating to the observer status for states (article 21, paragraph 4 RP¹⁸⁰). This practice

179. *Progress Report of the Secretary General of the BSEC PERMIS for the period October 1999 – April 2000*, Doc. Attachment 4 to Annex VII to BS/FM/R(00)1, in *BSEC Handbook of Documents*, vol. V (2002), p. 62.

180. "Observer status shall be granted to a State for a renewable period of 2 years."

has been unswerving and without exception so that it can be assumed that there is an *opinio iuris* according to which this limitation to renewable two-year terms is a legal obligation binding upon the Organisation. Therefore it would not cause perplexity to admit that a relevant custom *praeter chartam* has been generated. As we have established there is no legal reason why the regime valid for observer status for states and by analogy for sectoral dialogue partnership for NGOs cannot be applied to international, intergovernmental or non-governmental, organizations. On the contrary, as convenience and result-oriented action require and the law does not impede, the same practice can and should be followed with respect to the observer status granted to international organisations.¹⁸¹ Last but not least, the renewable term allows the BSEC organs to review whether the observer international NGOs continue to fulfill the criteria for this status in the BSEC,¹⁸² the situation of a given NGO may change over the years, so that a condition existing at the time when observer status has been granted, may not exist at a later stage (for example, administrators or even participants from one member state), without the BSEC instances being aware of such development.

i) Reporting obligation

A meaningful periodic evaluation of the level of cooperation between BSEC and NGOs requires an obligation of the latter to submit periodically a report on their activities, past and planned, with particular emphasis to their contribution to the BSEC work, on the sources of their funding, the participation, the governing organs (new appointments) and other data, that the NGOs may consider relevant or the BSEC organs may require. Such report should be submitted in particular together with the application for extension of the existing cooperation scheme, even in the case the Council has not requested it in order to consider applications for renewal.

In order to facilitate the process of the periodical review of the cooperation with NGOs, the BSEC PERMIS should elaborate and communicate to the NGOs interested in cooperation with the Organisation an informative guidebook, of technical character, containing the rights and obligations of these organisations deriving from such cooperation. In this way, the BSEC – NGOs relations could be transparent and without misunderstandings on either side.

ii) Periodic conference of NGOs cooperating with the BSEC

The last measure necessary in the drive to ensure transparent and legitimate participation of civil society actors to the decision-making process in the BSEC, is to introduce in the prac-

181. The expansion to international organisations of the practice of two-year renewable term of observer status as for the states is not hampered by article 21, paragraph 5 RP ("Observer status may be granted to international organisations for an unlimited period"). However, as the *ratio existendi* of this provision is not clear, it may well be deleted and covered by the deletion of the words "to a State" from the previous paragraph 4 of article 21, which shall read, without any distinction as to the beneficiary of the status;

"4. Observer status shall be granted for a renewable period of two years."

182. *Criteria for Granting Observer Status to NGOs*, Council of Ministers of Foreign Affairs, 1st Meeting, Thessaloniki, 25 October 1999, Doc. Attachment 1 to Annex V to BS/FM/R(99)2, in *BSEC Handbook of Documents*, vol. IV (2000), p. 144.

tice of the Organisation a periodic conference of NGOs that have institutionalised relations with the BSEC (observers, sectoral dialogue and dialogue partners). Such a conference should be convened once a year (or maximum every other year), preferably on the sidelines of an event where all the NGOs would be invited. The most appropriate event for such purpose would be a meeting with the Committee of Senior Officials, during which a specific agenda item concerning the review of the cooperation with NGOs would be included.

This practice will allow first hand briefing of the senior officials on the activities of the civil society organisations engaged in the BSEC endeavours, as well as on the expectations that the Committee has from the interaction with NGOs. The same will be valid also on the part of the participating NGOs, which will be given the opportunity to state the orientation of their relations with BSEC and to acquire a global image of the course of the Organisation, that only the Committee of Senior Officials can give, due to its pivotal role in the BSEC process. In addition, the personal contact between the NGOs and the members of the CSO as well as among the NGOs taking part in the conference is invaluable in establishing a wide-ranging and future-oriented mutually beneficial cooperative partnership, which will promote the attainment of the Organisation's objectives. Moreover, the periodic conference proposed will contribute in raising the awareness of all participants of their belonging to the BSEC, with beneficial effects on their mobilisation towards the realisation of the aims of the Organisation. The organisation of such "thematic" conferences will also have the positive effect of appeasing the fears, justified or not, that NGOs have acquired far too much participatory rights in the BSEC process, by addressing all meetings of the Council and other ministerial conferences.¹⁸³ The proposed type of conference, though not at ministerial level, will be with the BSEC organ that represents the Council (article 15 of the Charter, *supra* pp. 35-36) and is in the position to afford a global perspective on the BSEC developments, as opposed to the unavoidably fragmented image yielded in the BSEC Working Groups, which civil society organisations regularly attend.

The implementation of the above proposals does not require any change in the Charter or other BSEC by-laws. The Chairman-in-Office can introduce, in the programme of the chairmanship, the organisation of a conference bringing together the NGOs with institutionalised relationship with the BSEC and the Committee of Senior Officials, also inserting the relevant item in the agenda of the meeting. It would nevertheless, be better for the establishment and continuation of this practice, if the Council adopted a relevant resolution on the lines of the following terms:

"In order to increase the positive effects of the interaction between the BSEC and NGOs with institutionalised relationship with the BSEC (articles 8 and 9 of the Charter), the Council instructed the Committee of Senior Officials to hold a meeting, at least once a year, with the participation of the aforesaid NGOs, in order to exchange views and elabo-

183. On this tendency, see Ioannis Stribis, "Institutionalisation of Cooperation Between Inter-Governmental Organisations and NGOs: The BSEC Experience", *NAII* 2005 (vol. 5), pp. 56-57.

rate ways for an enhanced cooperation. The Council authorised the successive Chairmen-in-Office to take the necessary steps for the implementation of the present resolution."

CHAPTER 3

EXTENDING PUBLIC KNOWLEDGE OF THE BSEC

Effective and transparent decision-making depends not only on the production of the decisions but also on their dissemination. Public knowledge of the decisions adopted is an essential component of the rule of law. All modern, law-abiding institutions have a system of making public their binding acts. This practice is not simply the vindication of an abstract directive of the rule of law, but also greatly contributes to the very concrete expectation of implementation of the decisions. This last chapter of the present work is devoted to this aspect of governance in the BSEC.

In the previous chapter some important elements of the public's knowledge of the BSEC have been addressed. The openness to the civil society is an extremely significant factor of the effort to enhance the visibility of the BSEC on the internal and international level, because NGOs, interest groups and other civil society actors contribute effectively, through their action, in this direction. Nonetheless there is still in the BSEC an "information gap" that the interaction with civil society organisations is not sufficient to fill. The present chapter shall focus on other available means to which international institutions can resort in order to disseminate in an as wide as possible public their activities.

A. PROMOTION AND USE OF INFORMATION TECHNOLOGY

I shall not dwell on the over-familiar impact of modern information technologies and the internet in particular, on the dissemination of information in today's world. The phenomenon has been abundantly described – though still not fully explored – by many experts in this field, so that we can reasonably avoid the necessity of traveling again over much ground that is already fairly well-trodden. Suffice it here to say that every institution, and BSEC is no exception, operates in a world environment where limitless amounts of information are instantly accessible on demand. Using modern information and communication tools, public institutions can offer to every interested party an unprecedented access to information. There is, therefore, a legitimate expectation of the wider public that it can easily consult a broad range of data of a given institution. On the other hand, the presence in the web is not merely convenient for an organisation, but is an essential module of its real influence. BSEC has paid the necessary attention to this fact and has since 1998 a presence in the internet through its website.

Experience has shown that the wealth of information is frequently not accompanied by easy and useful access to it. In order to have meaningful access to information on the

web, it is necessary to pay attention to the structure of the web page. The BSEC should focus on ensuring a well-structured website with a coherent portal using a thematic approach and a user-friendly format and technical service. The present BSEC website is set up in a suitable manner and PERMIS has to be commended for the considerable effort made to post and make available information and data concerning the Organisation that can be downloaded and printed on the BSEC website. We should also not forget the necessity for continuing improvement and development of the website in order to meet the needs and expectations of the interested persons (decision makers, state officers, scholars, etc.). The functional online BSEC presence maintained by the BSEC PERMIS can be more dynamic in some aspects: the website can provide regularly updated news and eventually tailored news feeds; contacts and e-mail lists (of BSEC PERMIS officers as well as focal points, officials and agencies of the member states); inter-organ/inter-agency weblinks easily available; specialised and customisable search engines; thematic databases, as well as other services and facilities that may be required and technically feasible. In this way the existing website will be a single entry portal, as gateway, as it is often called, to each and every BSEC structure, thus increasing their interaction with interested people and bringing BSEC "virtually" one click away from the citizens of its member states and the wider public.

This concern is common to all BSEC institutions and they should all undertake such focused initiatives aiming at constantly updating and improving their websites. The Working Groups and the Countries-Coordination should also consider this issue seriously, taking into account the benefits from a quality BSEC website. In this respect, it is important to note that the Action Plan of the Working Group on Good Governance and Institutional Renewal submitted by Greece (in the capacity of Country-Coordinator) at the most recent meeting of the Group (Istanbul, 14-15 February 2006) contains an explicit action on the creation of a web page in the BSEC website covering the activities of the Working Group. The implementation of this particular action should be closely monitored by the BSEC instances and, if it is successful, can serve as a model for setting up analogous web pages (links in the main website) for other Working Groups.

In order to have a clear image on the efficiency of the BSEC website it would be helpful to make statistics available at regular intervals (annually or ideally monthly) for the consultations that the website receives, the most visited pages in it as well as the most frequent requests. This feedback is a key condition for maintaining the website's usefulness for its visitors and responsiveness to their requests.

Last but not least, a measure that member states must consider in order to help the dissemination of information on the BSEC, is to establish links to the Organisation's website in their national webpages. Such links shall in the first place be created in the websites of the Ministries of Foreign Affairs of the member states and also, depending upon relevance, also in the websites of other member states' ministries or agencies. This technically simple and inexpensive method will have a multiple effect on improving visibility of the BSEC towards national stakeholders.

B. TRADITIONAL MEANS OF DISSEMINATION OF INFORMATION

The undeniable importance of the internet should not lead to neglecting other means of communication, in particular the more traditional, such as paper editions, leaflets or brochures, articles in the press, etc. This printed material can give a comprehensive picture of the developments in the BSEC in general or in specific areas of its activities, an image which is lacking from the often fragmentary presentation on the web.

In this field BSEC has an invaluable tool whose importance in upgrading transparency and public knowledge cannot be overestimated. This is the series *BSEC Handbook of Documents*, which after the publication of five volumes covering the period 1992 – 2001¹⁸⁴ has ceased to appear, hopefully suspending and not terminating its edition. This publication is very helpful for large segments of persons interested in the BSEC and was a response of the PERMIS to the "growing requests on the part of specialists to supply them with relevant and updated materials for proper documentation regarding the Black Sea multilateral process."¹⁸⁵ The *Handbook*, which has been referred to throughout the present study, is a precious instrument destined not only to official representatives to BSEC meetings and other civil servants dealing with the BSEC affairs, but also to business and financial circles, civil society, scholars and students wishing to follow the developments in the BSEC. The series is comprehensive and in the same time handy and easy to consult, for example during a meeting or conference. It is therefore suggested that BSEC PERMIS should reconsider continuing this publication in its initial form. Also to be considered is a combination of traditional and more modern means by the continuation of the series *BSEC Handbook of Documents* both in printed and in electronic form (CD-ROM). In this way the information on the BSEC shall find its way to a more wide and diversified public.

184. Vol. I (published in 1995) covers the period from June 1992 to June 1995; vol. II (published in 1996) covers the period from July 1995 to September 1996; vol. III (published in 1998) covers the period from October 1996 to the end 1997; vol. IV (published in 2000) covers the years 1998 and 1999; vol. V (published in 2002) covers the years 2000 and 2001.

185. Foreword, *BSEC Handbook of Documents*, vol. I (1995), p. iii.

CLOSING REMARKS

This part is not intended as, nor is certainly a conclusion. The objective of this study is to launch the debate, to mobilise energies and competencies on the crucial issue of good governance in the BSEC. A conclusion cannot be written at present as the preceding pages are but the outset on a long path.

The debate on institutional issues in the BSEC, launched at the Moscow Summit meeting (25 October 1996), with the decision to transform the BSEC initiative into a fully-fledged regional economic organisation, with international legal personality, has always had great political and legal implications. The relevant discussion and decisions would not only aim at giving the BSEC wider opportunities for action and more efficient tools for achieving its goals, but also formally asserted the commitment of the member states to the regional co-operation process fostered by the BSEC and their trust to the potential of such cooperation for their benefit. It is significant to note that from all the existing regional structures in the European space (South-east European Cooperation Initiative (SECI), South East European Cooperative Process (SEECP), Adriatic Ionian Initiative (AII), Central European Initiative (CEI), Danube Cooperation, GUAM (and its prospected metamorphosis into Organisation for Democracy and Economic Development – ODED), etc.), only BSEC has been transformed into an international organisation.

The successful record of the BSEC in institution building, is a solid basis for re-launching the debate on related issues. There is experience and expertise, so it may be expected that the consideration of the good governance issues in the Organisation will be fruitful. This work undertook to stimulate a debate that had gradually been neglected in the BSEC. It is expected that delving deeper minds could reach better results and propose more effective remedies to the weak points of the BSEC decision-making mechanism. In this perspective, the undoubted incompleteness of the pages here above is not viewed by the author as a failure, but as a call to others to continue, improve and expand the reflection therein. The other goal of the author is to reach out of his study room and seek the good advice of others. The present volume would have achieved its ambitions if it served as a stepping-stone for an all-round and comprehensive discussion of the topic by other enlightened authorities, because good governance is sometimes hard to achieve and it frequently takes time, but it is always worth it.

186. Moscow Declaration of the Heads of State or Government of the Participating States of the BSEC, Moscow, 25 October 1996, *in* BSEC, Handbook of Documents, vol. II, 1996, p. XI, the participants "agree[d] that one of the priorities at present [was] the strengthening of the institutional and legal basis of the BSEC which will contribute to enhancing effectiveness of the Black Sea economic cooperation".

SUMMARY OF THE PROPOSALS

The numbers in parentheses that appear after each summarized proposal refer to the page(s) in the main text that contain the complete presentation of the recommendation.

Make full use of the existing normative framework

1

Apply the provisions of the Charter allowing a limited decision making authority to the Committee of Senior Officials (articles 11, 15 and 2, *litt.* (f) of the Charter. (22-25)

Required action: Resolution of the Council.

2

Activate the possibility of delegated decision making, in accordance with article 1, paragraph 3 RP. (25-27)

Required action: Resolution of the Council.

3

When delegating its decision-making power on a particular question, the Council may, whenever possible, adopt the general framework of an action to be implemented by the Organisation of the BSEC and authorise a designated BSEC organ to take the relevant concrete decisions for the implementation of the concerned action. (27)

Required action: Resolution of the Council.

4

Adopt a resolution with permanent effect:

"In order to increase the positive effects of the interaction between the BSEC and NGOs with institutionalised relationship with the BSEC (articles 8 and 9 of the Charter), the Council instructed the Committee of Senior Officials to hold a meeting, at least once a year, with the participation of the aforesaid NGOs, in order to exchange views and elaborate ways for an enhanced cooperation. The Council authorised the successive Chairmen-in-Office to take the necessary steps for the implementation of the present resolution." (84)

Required action: Resolution of the Council.

5

Elaborate and communicate to the NGOs interested in cooperation with the Organisation, an informative, technical, guidebook containing the rights and obligations deriving from such cooperation. In this way, the BSEC – NGOs relations could be transparent and without misunderstandings on either side. (82)

Required action: Preparation by the BSEC PERMIS.

6

Permanently update and modernize the BSEC website, so that it can provide regularly updated news and eventually tailored news feeds; contacts and e-mail lists; inter-organ/inter-agency weblinks easily available; specialised and customisable search engines; thematic databases, as well as other services and facilities that may be required and technically feasible. (84-85)

Required action: Preparation by the BSEC PERMIS.

7

Resume the publication of the series BSEC Handbook of Documents, in paper edition and in electronic form (CD-ROM). (86)

Required action: Preparation by the BSEC PERMIS.

Immediate measures aimed at ameliorating the decision-making process

8

Insert in the Terms of Reference, adopted by the Council for each Working Group, the following authorisation:

"The Working Group on ... has the authority to establish Group of Experts, Task Forces, Committees or services that are necessary for the effective and efficient accomplishment of its tasks, as provided for in the present Terms of Reference." (33)

Required action: Resolution of the Council.

9

Insert to rule II of the Regulations for the Staff of the BSEC PERMIS ("Functions" of the PERMIS) the following item:

"The PERMIS shall be entrusted with the following functions:

(...)

- to establish task forces or services, as may be necessary for the accomplishment of its functions" (34)

Required action: Resolution of the Council.

10

Replace the existing paragraph 4 of article 2 RP with the following text and insert the same article a new paragraph 5:

"4. Subject to the consensus of the Member States, the Chairman-in-Office may decide that the deliberations on specific item(s) on the agenda be held in the presence of the Member States.

5. Related Bodies and/or Observers and/or Third Parties provided for in article 9 of the Charter, may attend, with special permission of the Chairman-in-Office and subject to the consensus of the Member States, a meeting of restricted nature or a part of a meeting during which an item of restricted nature is being discussed." (67)

Required action: Resolution of the Council.

(a) Renumber the present paragraph 5 of article 2 RP as number 6. (67)

Required action: Resolution of the Council.

(b) Delete article 21, paragraph 7 RP, which becomes superfluous in case the proposed new paragraph 5 of article 2 RP is adopted. (67)

Required action: Resolution of the Council.

11

Insert a new provision in the RP, with the heading "Provisional Application", after the existing article 16:

"Article *

Provisional Application

In case of ascertained urgency, the Committee of Senior Officials is entitled to adopt acts that are provisionally applicable. In such case, the Committee of Senior Officials shall respect the rules pertaining to the decision-making applicable to the Council. Acts provisionally applicable shall cease to exist, unless the Council of Ministers of Foreign Affairs of the BSEC Member States explicitly approves them at its earliest meeting after their adoption by the Committee of Senior Officials." (37)

Required action: Resolution of the Council.

12

Allow cooperation of the BSEC with national civil society organisations:

(a) Encourage national NGOs approaching the BSEC and seeking to cooperate with it, to work towards the establishment of regional networks bringing together national or regional organisations with similar interests, with a view to setting up a region-wide network of civil society associations active in the same or related fields, having international character and thus being eligible for institutionalised cooperation with the BSEC. (78-79)

Required action:

- *Advice to interested national civil society organisation(s) by PERMIS or other BSEC organ;*
- *Facilitation from the Chairman-in-Office by hosting in the BSEC headquarters, meeting of the interested national civil society organisations.*

(b) Establish working relations of BSEC with national NGOs, including consultations with BSEC organs, in particular PERMIS, as well as invitation (by the Chairman-in-Office and/or the PERMIS) to specific BSEC events of mutual interest, with the consent of the member states. (78)

Required action: Resolution of the Council.

Streamline the by-laws with the Charter

13

Replace the existing language of article 1, paragraph 2 RP with the following formulation:

"The Council may be preceded by a meeting of the Committee of the Senior Officials, composed of delegates of the Ministries of Foreign Affairs of the Member States." (36)

Required action: Resolution of the Council.

14

Revise rule 23, paragraph 5 of the Financial Regulations and Procedures of the BSEC PERMIS, in line with article 15, litt. (e) of the Charter:

"23.5) The member states of the Troika shall announce their representatives to the Group of Auditors by the second half of October of each year and request from the Committee of Senior Officials to agree the composition of the Group of Auditors accordingly." (33)

Required action: Resolution of the Council.

Modifications requiring the amendment of the Charter

15

Correct the language of the beginning of article 15 of the Charter:

"The Committee of Senior Officials, representing the Council of Ministers and acting on its behalf, is entrusted with the following competencies:" (36)

Required action: Amendment of the Charter.

16

Introduce a new paragraph (paragraph 3) in the article 11 of the Charter:

"3. The Council of Ministers of Foreign Affairs may delegate to the Committee of Senior Officials, or other BSEC organ as appropriate, a decision-making power on issues to be specified in the Rules of Procedure. The delegation shall not affect issues relating to the adoption and amendment of the Rules of Procedure, membership and observer status as well as financial commitments affecting all member states." (41-43)

Required action: Amendment of the Charter.

17

Introduce a second paragraph to the article 18 of the Charter ("Decision-making"):

"When the decision-making organs of the BSEC are not in session, the silence procedure may be applied for the adoption of resolutions and decisions. The draft resolutions and decisions circulated to the Member States by the PERMIS shall be considered as approved unless objection preventing the adoption of a resolution or a decision is received within 15 working days from the communication of the draft by the PERMIS." (44)

Required action: Amendment of the Charter.

18

Delete the words "of Foreign Affairs" from the title of article 11 of the Charter:

**"Article 11
Council of Ministers" (49)**

Required action: Amendment of the Charter.

This amendment to the Charter shall entail the following amendments to the Rules of Procedure:

(a) Revise the title and paragraph 1 of article 1 RP as follows:

"Article 1

Council of Ministers

1. The principal regular decision-making organ of the Organisation of the Black Sea Economic Cooperation is the Council of Ministers." (51)

Required action: Resolution of the Council.

(b) Replace the existing article 2 RP (all five paragraphs) as follows:

"Article 2

Regular Meetings of the Council

1. The Council, composed of the Ministers of Foreign Affairs of the Member States, meets regularly at the end of the term of each Chairman-in-Office.

2. The Council, composed of the Ministers of Foreign Affairs of the Member States, is competent for the general affairs of the BSEC as well as for the issues that do not belong to the attributions of the special meetings of this organ.

3. The exact date of the regular meetings of the Council is decided by the Chairman-in-Office, in consultation with the Member States." (51)

Required action: Resolution of the Council.

(c) Replace the existing article 3 RP as follows:

"Article 3

Special Meetings of the Council

1. Upon invitation of the Chairman-in-Office, the Council, composed of Ministers in charge of particular areas of cooperation, may meet in order to address issues of sectoral interest.

2. The date and venue of the special meetings of the Council are decided by the Chairman-in-Office, in consultation with the Member States." (52)

Required action: Resolution of the Council.

(d) Replace the existing article 4 RP as follows:

"Article 4

Extraordinary Meetings of the Council

1. Upon request of one or more Member States and subject to the consensus of the Member States, the Chairman-in-Office shall convene an extraordinary meeting of the Council.

2. The proposal to convene an extraordinary meeting of the Council shall be forwarded to the PERMIS at least 20 days before the proposed date of the meeting together with background information and documents exposing the reasons for convening such

meeting. The PERMIS shall circulate, without delay, the proposal and the accompanying information and documents to the Member States.

3. Unless a Member State raises an objection within 5 days after the receipt of the notification by the PERMIS, the extraordinary meeting is convened at a date and venue decided by the Chairman-in-Office in consultation with the Member States.

4. In case the urgency of the circumstances warrant it, the extraordinary meeting of the Council can be convened on shorter notice, subject to the other requirements of the present article." (52)

(e) Insert after article 4 RP a new article, numbered 5:

"Article 5

Chair of the Meetings of the Council

1. The Chairman-in-Office chairs the meetings of the Council held in the headquarters of the Organisation.

2. In case a meeting of the Council is held outside the headquarters of the Organisation, the meeting is chaired by the host Member State.

3. Member States may waive their right to chair a meeting of the Council in favour of another Member State. They may also agree on co-chairing arrangements." (52-53)

Required action: Resolution of the Council.

(f) Insert after the proposed article 5 RP a new article, numbered 6:

"Article 6

Preparatory Meetings of the Meetings of the Council

1. The regular meetings of the Council may be preceded by a meeting of the Committee of the Senior Officials, composed of delegates of the Ministries of Foreign Affairs of the Member States.

2. The special meetings of the Council may be preceded by a session of the relevant Subsidiary Organ, meeting at appropriate level.

3. Extraordinary meetings of the Council may be preceded by a meeting of the Committee of Senior Officials of the relevant Subsidiary Organ, as the case require." (53)

Required action: Resolution of the Council.

(g) Insert after the proposed article 6 RP a new article, numbered 7 (substituting the present form of articles 4 and 6 RP):

"Article 7

Preparation of the Draft Agenda

1. The PERMIS shall prepare the draft agenda for every regular and special meeting of the Council, in full conformity with the decisions of its previous meetings, the recommendations of the Subsidiary Organs and proposals of the Member States, and circulate it at least 30 days before the meetings. The documents pertaining to the agenda items shall be circulated together with the draft agenda.

2. Within 15 days following the receipt of the draft agenda, the Member States may propose, through the PERMIS, addition of other items along with documents explaining the reasons for such request.

3. The PERMIS shall circulate the proposal to the Member States at least 15 days before the meeting together with background information and documents explaining the reason for the addition of the proposed items.

4. The draft agenda of the extraordinary meeting of the Council shall be distributed by the PERMIS together with the notification of the opening date of the meeting. This draft agenda shall, in principle, include the item(s) for which the extraordinary meeting is proposed.

5. The Member States may also, at the stage of the adoption of the agenda during every meeting of the Council, propose the inclusion of new items or changes to the draft agenda." (53-54)

Required action: Resolution of the Council.

(h) Insert after the proposed article 7 RP a new article, numbered 8 (comprising the two paragraphs 4 and 5 of article 2 RP, proposed under Immediate measures aimed at ameliorating the decision-making process):

"Article 8

Publicity of the meetings

1. Subject to the consensus of the Member States, the Chairman-in-Office may decide that the deliberations on specific item(s) on the agenda be held in the presence of the Member States.

2. Related Bodies and/or Observers and/or Third Parties provided for in article 9 of the Charter, may attend, with special permission of the Chairman-in-Office and subject to the consensus of the Member States, a meeting of restricted nature or a part of a meeting during which an item of restricted nature is being discussed." (67)

Required action: Resolution of the Council.

(i) Insert after the proposed article 8 RP a new article, numbered 9 (amending present article 5 RP):

"Article 9

Meetings of Subsidiary Organs

1. The Subsidiary Organs shall carry out their mandate defined by the Council. They shall inter alia draw up cooperation projects and consider the possibility of implementing joint projects in their respective areas of activity.

2. The Subsidiary Organs shall submit to the Council reports on the progress of their activities and recommendations on specific issues. They may also prepare for the Council draft documents on new areas of cooperation

3. Subject to the approval of the Chairman-in-Office, the Subsidiary Organs shall determine themselves the periodicity and venue of their meetings on a voluntary basis.

4. Proposals of the Member States on any matter pertaining to the functioning of the BSEC and corresponding to the BSEC principles and objectives shall be submitted to the Chairman-in-Office and PERMIS. If the sending Member State so requests, such proposals will be distributed to the Member States. The Chairman-in-Office shall forward the proposal to the appropriate subsidiary organ or to the Committee of Senior Officials for consideration and recommendation." (54-55)

(j) Insert after the proposed article 9 a new article, numbered 10 (amending existing article 7 RP):

"Article 10

Applicability to Subsidiary Organs

The provisions of the present Rules of Procedure shall be applicable to the Subsidiary Organs, unless otherwise specified herein." (54)

Required action: Resolution of the Council.

(k) Renumber the articles of the RP, starting from the existing article 8, "Official Languages", which shall be article 11 and so on. (55)

Required action: Resolution of the Council.

(l) Adjust the existing reference in article 12, paragraph 1 RP to article 11 of the same text, to the new number 14 of the article referred to. (55)

Required action: Resolution of the Council.

19

Amend article 9 of the Charter, so that it will be applicable also to national civil society organisations:

"Article 9

Relations with Third Parties

The BSEC shall promote a relationship with third parties (states, international or *national* organisations and institutions) interested to cooperate on various matters of mutual concern through: (...)" (78-80)

Required action: Amendment of the Charter.

ANNEXES

ANNEX A

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ANNEX B

ABBREVIATIONS

- AJIL** *American Journal of International Law*
- BSEC** Black Sea Economic Cooperation, from 1992 to 30 April 1999, and Organisation of the Black Sea Economic Cooperation as of 1 May 1999, date of entry into force of the Charter of the Organisation.
- BYBIL** *British Yearbook of International Law*
- Charter** Charter of the Organisation of the Black Sea Economic Cooperation, done in Yalta, on 5 June 1998
- CEPMLP** *Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy* (Dundee)
- CSO** Committee of Senior Officials
- EJIL** *European Journal of International Law*
- ICJ Rep.** *International Court of Justice Reports of Judgments, Advisory Opinions and Orders*
- MMFA** Meeting of the Ministers of Foreign Affairs (the decision-making instance of the Black Sea Economic Cooperation, before its transformation to international organisation, June 1992 – April 1999)
- NAIL** Non-State Actors and International Law
- OJEC** *Official Journal of the European Communities* (since 1 February 2003 becomes *Official Journal of the European Union*)
- PERMIS** Permanent International Secretariat of the Organisation of the Black Sea Economic Cooperation
- RCADI** *Recueil des cours de l'Académie de droit international de La Haye*
- RGDIP** *Revue générale de droit international public*
- RP** Rules of Procedure of the Organisation of the Black Sea Economic Cooperation, adopted in Kyiv, on 22 October 1997
- WTO** World Trade Organisation

ANNEX C

CHARTER OF THE ORGANIZATION OF THE BLACK SEA ECONOMIC COOPERATION

The Founding Members of the Black Sea Economic Cooperation - the Republic of Albania, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Bulgaria, Georgia, the Hellenic Republic, the Republic of Moldova, Romania, the Russian Federation, the Republic of Turkey, and Ukraine,

HAVING signed on 25 June 1992 in Istanbul the "Summit Declaration on Black Sea Economic Cooperation",

CONFIRMING their adherence to the principles and objectives of cooperation stated therein as well as in the "Bosphorus Statement" of 25 June 1992, the "Bucharest Statement of the High Level Meeting of the BSEC Participating States" of 30 June 1995, and the "Moscow Declaration of the Heads of State or Government of the Participating States of the BSEC" of 25 October 1996,

REAFFIRMING their adherence to the principles of the United Nations Charter, the Helsinki Final Act, the Paris Charter for a New Europe as well as the generally recognized principles and rules of international law,

DETERMINED to promote a lasting and closer cooperation among the states of the BSEC Region,

CONSCIOUS of the growing role and importance of regional initiatives in promoting progress and shaping contemporary international life,

REITERATING their determination to achieve through joint efforts the constant improvement of the well-being of their peoples,

AWARE of the potential of the Founding Members and the opportunities for enhancing the mutually advantageous economic cooperation,

SHARING the common vision of their regional cooperation as a part of the integration process in Europe, based on human rights and fundamental freedoms, prosperity through economic liberty, social justice, and equal security and stability which is open for interaction with other countries, regional initiatives and international organizations and financial institutions,

RESOLVED to develop economic cooperation as a contribution to the achievement of a higher degree of integration of the Founding Members into the world economy,

EXPRESSING the desire of their countries and peoples for constructive and fruitful collaboration in wide ranging fields of economic activity with the aim of turning the BSEC Region into one of peace, stability and prosperity,

RECOGNIZING that the progress of the Black Sea Economic Cooperation since its inception increased the need to consolidate the international legal personality of the Black Sea Economic Cooperation,

DETERMINED to transform the Black Sea Economic Cooperation into a regional economic organization,

HAVE AGREED as follows:

CHAPTER I
GENERAL PROVISIONS

Article 1

Establishment of the Organization

The Founding Members establish the Organization of the Black Sea Economic Cooperation, as a regional economic organization, hereinafter referred to as the BSEC.

Article 2

Definitions

For the purpose of the present Charter:

- a) "Organization" means the Organization of the Black Sea Economic Cooperation, which may also be referred to as "BSEC".
- b) "Founding Members" are the States which signed the "Summit Declaration on Black Sea Economic Cooperation" on 25 June 1992 in Istanbul.
- c) "Observer" means States or International Organizations which are granted Observer status by the BSEC.
- d) "International Organizations" means those organizations which are intergovernmental or non-governmental.
- e) "BSEC Region" means the territories of the Member States.
- f) "Subsidiary Organs" means any Working Group, Group of Experts, Task Force, Committee or service established by the Council of the Ministers of Foreign Affairs or under its authority.
- g) "Secretary General" means the Secretary General of the BSEC Permanent International Secretariat.
- h) "Chairman-in-Office" means the Minister of Foreign Affairs of the Member State which assumes the Sessional Chairmanship of the BSEC or any other Minister designated for this purpose by the Government of State in question.
- i) "Troika" means the System which consists of the Chairman-in-Office, the previous and the next Chairmen of the BSEC or their representatives.
- j) "Rules of Procedure" means the Rules of Procedure of the BSEC.

CHAPTER II
PRINCIPLES AND AREAS OF COOPERATION

Article 3

Principles and Objectives

The following principles and objectives shall be promoted through the BSEC activities at various levels:

- a) to act in a spirit of friendship and good neighborliness and enhance mutual respect and confidence, dialogue and cooperation among the Member States;

- b) to further develop and diversify bilateral and multilateral cooperation on the basis of the principles and rules of international law;
- c) to act for improving the business environment and promoting individual and collective initiative of the enterprises and companies directly involved in the process of economic cooperation;
- d) to develop economic collaboration in a manner not contravening the international obligations of the Member States including those deriving from their membership to international organizations or institutions of an integrative or other nature and not preventing the promotion of their relations with third parties;
- e) to take into account the specific economic conditions and interests of the Member States involved;
- f) to further encourage the participation in the BSEC process of economic cooperation of other interested states, international economic and financial institutions as well as enterprises and companies.

Article 4

Areas of cooperation

In accordance with the agreed principles and with the aim of utilizing more effectively their human, natural and other resources for attaining a sustained growth of their national economies and the social well-being of their peoples, the Member States shall cooperate in the following areas: trade and economic development; banking and finance; communications; energy; transport; agriculture and agro-industry; health care and pharmaceuticals; environmental protection; tourism; science and technology; exchange of statistical data and economic information; collaboration between customs and other border authorities; human contacts; combating organized crime, illicit trafficking of drugs, weapons and radioactive materials, all acts of terrorism and illegal migration, or in any other related area, following a decision of the Council.

C H A P T E R I I I

PARTICIPATION

Article 5

Membership

Members of the BSEC are the States which are Parties to this Charter.

Article 6

Admission

The BSEC is open to any State which desires to become a Member and is deemed to be able and willing to fulfill the principles and objectives of the BSEC as set forth in the present Charter.

Applications for new membership shall be submitted to the Council of Ministers of Foreign Affairs, hereinafter referred to as the Council, for consideration and approval according to the Rules of Procedure.

Article 7
Withdrawal

Any Member State may withdraw from the BSEC by formally notifying the Secretary General of the BSEC Permanent International Secretariat of its decision thereof.

Withdrawal shall become effective on the date specified in the notification. As far as the financial obligations are concerned, such withdrawal shall take effect at the end of the financial year in which it is notified.

Article 8
Observer Status

Observer status in the BSEC shall be open, upon request, to any State or international organization which expresses its readiness to make practical and valuable contribution to the work of the BSEC.

Observer status may be granted, suspended or terminated by the Council in accordance with the Rules of Procedure.

Article 9
Relations with Third Parties

The BSEC shall promote a relationship with third parties (states, international organizations and institutions) interested to cooperate on various matters of mutual concern through:

- a) dialogue partnership, within a frame of periodic exchanges and consultations;
- b) sectoral dialogue partnership; possibility of attending meetings on specific subjects;
- c) invitation of guests; possibility of attending sessions of the BSEC upon the invitation of the Chairman-in-office and with the consent of all the Member States.

Dialogue partnership and sectoral dialogue partnership may be granted following the resolution of the Council.

C H A P T E R I V
SUMMIT MEETINGS

Article 10

The Heads of State or Government of the Member States may meet, when the need arises.

C H A P T E R V
PRINCIPAL AND SUBSIDIARY ORGANS

Article 11

Council of Ministers of Foreign Affairs

The Council is the principal regular decision making organ of the BSEC.

The Council, in the framework of the BSEC objectives, shall:

- a) decide on all issues pertaining to the functioning of the BSEC;
- b) consider all matters submitted by the Subsidiary Organs and to take accordingly appropriate decisions;

- c) take the decisions on membership and observer status;
- d) adopt and modify the Rules of Procedure;
- e) establish Subsidiary Organs within the BSEC, to assign tasks to them, to define, modify or terminate their mandates;
- f) consider any other related matters it may deem appropriate.

Article 12
Subsidiary Organs

The Council may establish Subsidiary Organs.

The Subsidiary Organs shall carry out their mandate defined by the Council, draw up joint projects as well as pursuing the implementation of such projects/activities in their respective areas.

The Subsidiary Organs shall submit to the Council reports on the progress of their activities, as well as relevant recommendations.

Article 13
Chairman-in-office

The Chairman-in-office shall coordinate all activities carried out within the framework of the BSEC and ensure the proper conduct of the BSEC proceedings as well as the implementation of the Resolutions and Decisions adopted.

The Chairmanship shall rotate every six months according to the English alphabetical order. Should the Chairmanship be waived by a Member State, it will be assumed by the next Member State in line.

Article 14
Troika System

Upon request of the Chairman-in-office, the Troika convenes at the appropriate level in order to exchange views on current and prospective activities of the BSEC and on its relations with other international organizations and institutions.

Article 15
Committee of Senior Officials

The Committee of Senior Officials, representing the Ministers of Foreign Affairs of the Member States and acting on their behalf, is entrusted with the following competencies:

- a) reviews activities of the Subsidiary Organs, evaluates the implementation of decisions and recommendations of the Council and elaborates recommendations and proposals to be presented to the Council;
- b) considers issues related to coordination and cooperation with BSEC related bodies, informs the Council about these issues and works out, if necessary, pertinent recommendations and proposals;
- c) studies organizational aspects of the BSEC activities, participates in the elaboration of preliminary calendar of events, takes decisions on relevant matters except the issues under the competence of the Council and the Chairman-in-office;
- d) submits to the Council for approval the annual budget of the BSEC;
- e) nominates experts to a specialized sub-group for carrying out the budget auditing.

Article 16

Permanent International Secretariat

The Secretarial services of the BSEC shall be carried out by the Permanent International Secretariat, called hereinafter PERMIS, established for this purpose.

The PERMIS of the BSEC is located in Istanbul, Republic of Turkey.

The PERMIS will function under the authority of the Chairman-in-office of the BSEC. That authority shall be executed by the Secretary General.

The staff of the PERMIS shall perform their duties as international officials with due regard to the principles and objectives of the BSEC. Their conduct shall always conform to the principles of integrity and impartiality required for their work.

In the performance of their duties the staff of the PERMIS shall not seek or receive instructions from any government or from any authority external to the BSEC. They shall refrain from any action which might reflect on their position as international officers responsible only to the Organization.

CHAPTER VI

QUORUM AND DECISION- MAKING

Article 17

Quorum

Quorum for the Council shall be 2/3 majority of the Member States.

Article 18

Decision-making

The decision-making mechanism is set forth in the Rules of Procedure. The Council shall endeavor to achieve consensus on all issues. On some issues, as defined in the Rules of Procedure, consensus is mandatory.

CHAPTER VII

BSEC RELATED BODIES

Article 19

General Terms

The BSEC related bodies that have their own budgets shall perform their functions in accordance with their basic instruments and with due respect to the principles of the BSEC set forth in the "Summit Declaration on Black Sea Economic Cooperation" of 25 June 1992 and in this Charter.

Article 20

Parliamentary Assembly of the Black Sea Economic Cooperation

The Parliamentary Assembly of the Black Sea Economic Cooperation, called hereinafter PABSEC, representing national Parliaments of the Member States, provides consistent support to the Black Sea cooperation process on a consultative basis.

The BSEC will closely cooperate with the PABSEC in promoting the BSEC objectives.

The BSEC-PABSEC relations shall be based on the principles of the "Summit Declaration on Black Sea Economic Cooperation" of 25 June 1992 signed in Istanbul, the subsequent Summit Meetings' decisions, as well as the "Declaration on the Establishment of the Parliamentary Assembly of the Black Sea Economic Cooperation", adopted on 26 February 1993 in Istanbul.

Article 21

BSEC Business Council

The BSEC Business Council, an international non-governmental organization, consists of representatives of the business communities of the BSEC Member States.

The Reports of the Business Council may be submitted to the Council for information and, if necessary, appropriate action.

Article 22

Black Sea Trade and Development Bank

The Member States, by the "Agreement Establishing the Black Sea Trade and Development Bank" (BSTDB) done in Tbilisi on 30 June 1994, set up the BSTDB.

The purpose of the Bank shall be to effectively contribute to the transition process of the Member States towards the economic prosperity of the people of the region and to finance and promote regional projects and provide other banking services to projects of the public and private sectors in the Member States and trade activities among the Member States in conformity with the provisions of the Agreement Establishing the BSTDB.

Article 23

Academic cooperation

The BSEC will promote the cooperation among academic communities, scholars and scientists of the Member States, with the aim to promote the principles and objectives of the BSEC within their competence.

Article 24

BSEC affiliated centers

The BSEC affiliated centers are established upon approval of the Council to serve all the interested Member States on specific areas of cooperation.

The respective centers should work in close relationship with the relevant Subsidiary Organs of the BSEC, in accordance with their specific areas of activity.

The results of the centers' activities are of consultative nature.

CHAPTER VIII

FINANCIAL PROVISIONS

Article 25

Budget of the Organization

The Budget of the BSEC is composed of the financial contributions from the Member States determined according to relevant resolutions of the Council.

The budget shall be authorized and audited on an annual basis. The financial year shall run from 1 January to 31 December.

Failure of fulfillment of financial obligations shall be submitted to the Council for consideration.

Article 26

Voluntary contributions to the Organization

Special funds may be created upon the resolutions of the Council. To this purpose, contributions on voluntary basis from the BSEC Member States, group of States, Observers, third parties-donors shall be welcomed, provided that the conditions attached to such voluntary contributions are consistent with the principles and objectives of the BSEC.

Each special fund shall be governed by specific rules and regulations adopted for such fund by the Council.

C H A P T E R I X

LEGAL PROVISIONS

Article 27

Legal capacity

The BSEC shall possess juridical personality. It shall have the capacity:

- a) to contract;
- b) to acquire and dispose of movable and immovable property;
- c) to initiate legal proceedings.

Article 28

Privileges and Immunities

The BSEC, its Officials and the Representatives of Member States shall enjoy in the territories of Member States the privileges and immunities defined in the "Convention on Privileges and Immunities of the United Nations", adopted by the General Assembly of the United Nations on 13 February 1946, which are necessary for the independent exercise of their functions in accordance with the principles and objectives of the BSEC.

Officials of the PERMIS and the Representatives of Member States who are nationals of, or permanent residents in the Host country shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

The Members shall conclude an Additional Protocol regarding the privileges and immunities of the BSEC and the PERMIS staff.

Article 29

Settlement of disagreements

In case of a disagreement between two or more Member States concerning the interpretation or application of this Charter, the Parties concerned shall consult and, if necessary, they shall submit the disagreement to the Council for consideration and appropriate actions.

Article 30
Amendments

Any Member State may propose an amendment to this Charter.

The text of any proposed amendment shall be circulated to the Member States through the PERMIS and submitted to the Council for consideration and approval.

Amendments to this Charter, approved pursuant to paragraph 2 above, shall be subject to ratification, acceptance or approval by the Member States and shall enter into force according to the procedure set forth in Article 33.

C H A P T E R X
FINAL PROVISIONS

Article 31

Signature, ratification, acceptance, approval, accession.

The present Charter shall be open for signature by all Founding Members of the BSEC.

This Charter is subject to ratification, acceptance or approval by the signatory Founding Members of the BSEC.

This Charter shall be open for accession by any non-signatory state in accordance with the provisions of this Charter.

Instruments of ratification, acceptance, approval or accession shall be deposited with the Depository.

Article 32
Reservations

No reservations may be made to this Charter.

Article 33
Entry into force

This Charter shall enter into force on the first day of the month following the date when nine Founding Members have deposited their instruments of ratification, acceptance or approval.

For each State which ratifies, accepts, approves or accedes to this Charter after the date of its entry into force, as provided in paragraph 1, this Charter shall enter into force on the date of the deposit by that State of its respective instruments.

Article 34
Depository

The PERMIS shall be the depository of this Charter.

The original of this Charter in a single copy in the English language shall be deposited with the PERMIS, as Depository.

IN WITNESS WHEREOF, the undersigned, being duly authorized to that effect, have signed this Charter.

Done at Yalta this fifth day of June one thousand nine hundred ninety eight.

ANNEX D

RULES OF PROCEDURE OF THE ORGANIZATION OF THE BLACK SEA ECONOMIC COOPERATION (BSEC)

Article 1

Council of the Ministers of Foreign Affairs

1. The principal regular decision making organ of the Organization of the Black Sea Economic Cooperation is the Council of the Ministers of Foreign Affairs.
2. The Council may be preceded by a meeting of the Committee of the Senior Officials of the Ministers of Foreign Affairs of the Member States.
3. The decision making within the BSEC is, apart from the Summit, bestowed upon the Council which may charge subsidiary organs to make a decision on a particular question and inform the Council on it.

Article 2

Regular Meetings of the Council

1. The Council shall, in principle, be convened at least once every six months.
2. Additional meetings of the Council may be held upon the request of one or more of the Member States, subject to consensus of the Member States. This request, together with the background documents shall be communicated by the PERMIS to the Member States promptly to allow them the time to consider the matter. In case of a consensus on the question, the meeting may be convened on a shorter notice.
3. In case the Council's Meeting is preceded by a preparatory meeting, such meeting shall be chaired by the host country.
4. Unless otherwise decided, the Council's Meetings will be held in camera.
5. The date and venue of the subsequent meeting will be determined in principle at the end of each meeting. Should this not be possible, the incoming Chairman-in-Office shall hold consultations with the Member States in order to determine a date acceptable to all Member States.

Article 3

Special Meetings of the Council

1. One or more Member States may propose the convening of a special Meeting of the Council. The proposal shall be forwarded to the Chairman-in-Office at least 20 days before the proposed date of the meeting together with background documents explaining the reasons for convening a special meeting. The special Meeting may also be convened on shorter notice of the urgency if the circumstances warrant it.

2. The Chairman-in-Office shall circulate the proposal to the Member States together with the background documents.
3. The special Meeting shall be convened unless a Member State raises an objection within 5 days after the receipt of the notification.
4. The special Meeting shall be convened in the country of the requesting Member State with the consent of the Chairman-in-Office and chaired by the Latter.

Article 4

Agenda of a Special Meeting of the Council

1. The agenda of the Special Meeting of the Council will be distributed by the PERMIS together with the notification of the opening date of the meeting. This agenda shall, in principle, consist of the item for which the meeting is proposed.
2. However, other issues may also be considered during the meeting should all the Member States agree to it.

Article 5

Meetings of Subsidiary Organs

1. Meetings of subsidiary organs established by the Council shall be chaired by the host country. If the host country so wishes, it may propose another Member State to chair those meetings in accordance with the general principle of rotation or by any other common agreement.
2. The subsidiary organs shall themselves determine the periodicity and venue of their meetings on a voluntary basis.
3. The subsidiary organs shall carry out their mandate defined by the Council, draw up the cooperation projects as well as consider the possibility of implementing joint projects in their respective areas of activity.
4. The subsidiary organs shall submit reports to the Council on the progress of their activities.
5. The subsidiary organs shall also prepare for the Council draft documents on new areas of cooperation.
6. Unless otherwise decided, the meetings of the subsidiary organs will be held *in camera*.
7. Proposals of any Member State on any matter pertaining to the functioning of the BSEC and corresponding to the BSEC principles and objectives shall be submitted in writing to the Chairman-in-Office and PERMIS. If the sending country so requests, such proposals will be duly numbered and distributed among the Member States according to the established practice. The Chairman-in-Office shall forward the proposal to appropriate subsidiary organ for consideration and recommendation. Should this not be possible, the proposal may be submitted to preparatory Meetings of the Committee of Senior Officials preceding the Council's Meeting.

Article 6

Preparation of the Draft Agenda

1. The PERMIS shall prepare a draft agenda for every Meeting of the Council in full conformity with the decisions of its previous meetings, the recommendations of the subsidiary organs and proposals of the Member States, and circulate it at least 30 days before the meetings. The documents pertaining to the agenda items shall be circulated together with the draft agenda.
2. The Member States may propose to the Chairman-in-Office, within 10 days following the receipt of the draft agenda, addition of other items along with documents explaining the reasons for such a request.
3. The Chairman-in-Office shall circulate the proposal to the Member States at least 15 days before the meeting together with background documents explaining the reasons for the addition of the other items.
4. The Member States may also, at the stage of the adoption of the agenda during the meeting, propose the inclusion of new items or changes to the proposed agenda with respect to important and urgent issues.

Article 7

Applicability to Subsidiary Organs

1. The provisions of the Article 6 of the present Rules of Procedure shall be applied to the proceedings of the subsidiary organs.
2. The rest of the provisions of this Rules of Procedure shall be applicable to the subsidiary organs unless otherwise specified.

Article 8

Official Languages

1. The official language of the BSEC documents is English.
2. The official languages of the BSEC meetings are English and Russian.
3. During meetings at ministerial level, simultaneous interpretation shall be provided by the host country in English, French and Russian.

Article 9

Other Languages

1. The Member States shall be free to make, on their own expenses, special arrangements for simultaneous or consecutive translation to and from the working languages of their choice.
2. The intention to make special arrangements shall be notified to the authorities of the state hosting the meeting at least 15 days before the date of the meeting in order to allow them to make appropriate arrangements.

Article 10

Quorum

1. Quorum for meetings of the Council, as stipulated in Article 17 of the BSEC Charter, shall be 2/3 majority of the Member States.
2. Quorum for meetings of subsidiary organs shall be simple majority of the Member States taking part in the respective subsidiary organs.

Article 11

Consensus

1. Consensus shall be understood as the absence of any objection expressed by any Member State and presented by the Latter as constituting an obstacle to the taking of the decision in question.
2. Member States shall decide by consensus on the following subjects:
 - a) admission of new Member States in the BSEC ;
 - b) granting and extending of observer status to third states and international organizations;
 - c) establishing dialogue partnership and sectoral dialogue partnership with third parties;
 - d) creation of new organs of the BSEC; defining, modifying and terminating their mandates; and structural mechanisms;
 - e) adoption and modification of the Rules of Procedure;
 - f) adoption of the agenda for the BSEC meetings if the issues included therein require consensus;
 - g) approval of cooperation projects (consensus of States interested);
 - h) financial commitments affecting all Member States.

Article 12

Majority Vote

1. When there is no consensus on issues other than those enumerated in Article 11, they may be put to vote. Decisions shall be made by the 2/3 majority of the Member States present and voting.
2. Recommendations shall be made by the simple majority of the Member States present and voting.
3. In case the required majority vote could not be attained on an issue, the proposal shall be regarded as rejected.

Article 13

Abstention and Absence

1. Abstaining in voting by a Member State shall be considered as not voting and consequently shall not have any effect on the result of the voting.
2. The vote of a Member State which was not present during the process of voting shall have no effect on the result of the voting.

Article 14

Method of Voting

The vote shall normally be taken by show of hands. Any Member State may request a roll-call vote which shall be taken in English alphabetical order of the names of the States present in the meeting, beginning with the name of the state drawn by lot by the Chairman-in-Office. In such voting, the representatives shall reply "yes", "no", or "abstention".

Article 15

Conduct During Voting

1. After the Chairman-in-Office has announced the beginning of voting, it may not be interrupted before the results are announced. Once the Chairman-in-Office announces the results of the voting, it shall be considered completed and results shall be considered final.
2. Any Member State has the right to make interpretative statements, formal reservation or explanation of their vote before the voting has commenced or after the voting has been completed. They may ask that their respective declaration be duly registered and circulated by the PERMIS.
3. After the Chairman-in-Office has announced the commencement of voting, no representative may interrupt the voting except on a point of order in connection with the actual process of voting.

Article 16

Silence Procedure

The Silence Procedure may be applied to routine decisions of the Chairman-in-Office, which do not require approval by the Council's Meeting in session. Decisions of this nature circulated to the Member States by the PERMIS shall be considered as approved unless an objection is received within 15 days.

Article 17

Resolutions

1. A Resolution is a text adopted by the Council on substantive issues pertaining to the structure and/or functioning of the BSEC, as enumerated in Article 11.
2. Resolutions shall be adopted by consensus.

3. All Member States shall abide by the provisions of the Resolutions.

Article 18

Decisions

1. A Decision is a text adopted by the Council on a specific issue pertaining to technical matters and/or functioning of the BSEC.
2. Decisions shall be adopted by a 2/3 majority of votes .
3. All Member States who have voted in favor shall abide by the provisions of the Decisions.

Article 19

Recommendations

1. A Recommendation is a text duly adopted either by the Council or by the subsidiary organs, without binding effects on the Member States .
2. A Recommendation of the subsidiary organs will bear effect upon its approval by the Council.
3. When a Recommendation is adopted by the subsidiary organs, it is for the consideration by the Council.

Article 20

Admission

1. The Chairman-in-Office shall circulate to the Member States a copy of the application together with a document indicating the financial implications arising from the admission of the new Member State.
2. In its application, the applicant State shall declare its readiness to comply with the principles and objectives of the Charter and to accept the resolutions adopted by the Council.
3. The application will be included in the agenda of the earliest possible Council's Meeting for consideration.

Article 21

Observer Status

1. The Chairman-in-Office shall circulate to the Member States a copy of the application to the Chairman-in-Office expressing its willingness to obtain such a status.
2. Applications shall be examined on a case by case basis, on an equal level, in view of the readiness of the applicants to make practical and valuable contribution to the work of the BSEC.
3. The application for an observer status shall be included in the agenda of the earliest possible Council's Meeting.

4. Observer status shall be granted to a State for a renewable period of 2 years.
5. Observer status may be granted to international organizations for an unlimited period.
6. Observer status granted to third States or to international organizations may be valid for all or only selected activities of the BSEC to be determined by the Council.
7. Observers may attend, with special permission of the Chairman-in-Office, a meeting of restricted nature or a part of a meeting during which an item of restricted nature is being discussed.
8. Observers attending the meetings of the BSEC may be authorized by the Chairman-in-Office :
 - a) to address the BSEC meetings;
 - b) to participate in the discussions of technical or expert level meetings;
 - c) to receive official BSEC documents;
 - d) to submit written statements on particular items of the agenda.
9. The observer status of a State or an international organization may come to an end upon the request of the State or the organization in question.
10. The observer status of a State or an international organization may be suspended or terminated by the Council.
11. If consensus can not be secured to renew the observer status at the end of the two year period, such status shall come to an end for the State in question.

Article 22

Expenses Incurred for the Organization of Meetings

1. Expenses incurred for the organization of meetings shall be born by the host country.
2. The host country of the Council's Meeting and of the meetings of the subsidiary organs shall cover the board and lodging expenses of the members per delegation and representatives of the PERMIS participating in the BSEC meetings, the numbers of which will be determined by the host country itself. Travel expenses shall be covered by the participants themselves.
3. Expenses stemming from the participation of observers and guests in the BSEC meetings shall be covered by themselves.

Article 23

Incorporation of New Rules

If new Rules of Procedure or modifications regarding the functioning of the BSEC are adopted, they will be incorporated in the present Rules of Procedure.

The Organisation of the Black Sea Economic Cooperation is currently considering a set of proposals for reform with a view to increasing its effectiveness and cohesion. This *Xenophon Paper* is intended to contribute to the effort for improved governance of the BSEC in order to enable the Organisation to cope with current and future challenges. The focus is on the cardinal issue of decision-making, identifying existing shortcomings and suggesting concrete ways to overcome them.

The proposed remedies aim to make full use of the provisions already inscribed in the BSEC statutory documents and to propose amendments of the existing normative framework in order to improve decision-making procedures and practices. The other axis of envisaged reforms concerns the transparency of decision-making process. Informed decision-making needs to be accessible to all stakeholders and to provide them with an opportunity to voice their opinions and proposals. The paper also compares the operation of the BSEC with other European institutions, in particular the European Union, and presents concrete proposals for engaging professional associations, civil society and the wider public in the BSEC decision-shaping process.