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If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change

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Gráinne de Búrca

Abstract

The aim of this Essay is to probe the causes of the European Union's ("EU") second-referendum practice with a view to better understand what strikes many observers as a procedurally bizarre and democratically dubious exercise. It is not the intention of this Essay to offer any justification for the practice, but rather to explain the factors specific to the EU which have contributed to its recurrence.

ESSAYS

IF AT FIRST YOU DON'T SUCCEED: VOTE, VOTE AGAIN: ANALYZING THE SECOND REFERENDUM PHENOMENON IN EU TREATY CHANGE

*Gráinne de Búrca**

INTRODUCTION

The Lisbon Treaty came into force in December 2009¹ after a long and tortuous path that began with the Laeken Declaration of 2001,² authorizing the establishment of a Convention on the Future of Europe, followed by the eventual rejection of the resulting Treaty establishing a Constitution for Europe in 2005.³ When the Lisbon Treaty emerged two years later from the ashes of the failed Constitutional Treaty, the stakes were high and the investment of Member States and the European Union (“EU”) institutions in its success was substantial.⁴ A great deal of political time, energy, and capital had been invested in the process, and on this occasion, unlike the attempted ratification of the Constitutional Treaty, Ireland was, for reasons peculiar to its own constitutional provisions,⁵ the only Member State to hold a popular referendum as part of the domestic ratification process. When the result of the referendum held in June 2008 was negative, Ireland came under significant pressure from the EU

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1. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1 (entered into force Dec. 1, 2009).

2. Laeken European Council, *Laeken Declaration on the Future of the European Union*, Presidency Conclusions, Annex 1, E.U. BULL., no. 12, at 19 (2001).

3. Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified).

4. See Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 357 (2009).

5. See generally Gavin Barrett, *Building a Swiss Chalet in Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence*, 5 EUR. CONST. L. REV. 32 (2009) (explaining and critiquing the Irish constitutional provisions that caused Ireland to adopt a popular vote referendum).

and other Member States to find a way around the result, and to find a way of ratifying the treaty despite the popular no vote.

The idea of being asked to vote again in order to “get the answer right” provoked media and public outrage.⁶ Yet, the Lisbon Treaty was not the first occasion on which an EU Member State was asked to hold a referendum for a second time. No less than three times in the history of the EU, a Member State whose population had voted against the ratification of a new EU treaty in a constitutionally binding referendum opted under pressure to rerun the referendum in the hope that the negative result would be reversed by the second vote. The first occasion involved the rejection by the Danes of the Maastricht Treaty in 1992,⁷ while the second involved the rejection by the Irish of the Nice Treaty in 2001.⁸ The only two such popular “no” votes against an amending treaty that did not result in the holding of a second referendum were the votes of the French and the Dutch electorates on the ratification of the Treaty establishing a Constitution for Europe in 2005. On that occasion, the impact and significance of the double-no was considered to signal the death of the Constitutional Treaty, and to render the prospect of a second referendum undesirable.⁹

The fact that an EU treaty ratification referendum has been rerun under external pressure upon the Member State in question, not once but three times within fifteen years, suggests that it has become something of a European Union (“EU”) practice, and the curious and controversial nature of this practice calls for closer scrutiny. Critics have described it as undemocratic because it refuses to respect the will of the people as legitimately

6. See, e.g., Sarah Collins, *Demonstrators Claim EU is Trying to Railroad Irish Voters*, IRISH TIMES (Dublin), Dec. 12, 2008, at 13; Mary Lou McDonald & Dick Roche, *Head to Head: Is the Second Referendum on Lisbon an Abuse of Democracy?*, IRISH TIMES (Dublin), Dec. 22, 2008, at 12; Elaine Edwards, *Voters Being ‘Threatened’ on Lisbon*, IRISH TIMES (Dublin), Aug. 18, 2009, <http://www.irishtimes.com/newspaper/breaking/2009/0818/breaking47.html>.

7. See Pernice, *supra* note 4, at 355.

8. See *id.* at 356.

9. See Gráinne de Búrca, *The Lisbon Treaty No-Vote: An Irish Problem or a European Problem?* (Univ. College Dublin Law Research Paper Series, Law Research Paper No. 3, 2009), available at <http://ssrn.com/abstract=1359042> (analyzing the difference between the reaction to the French and Dutch rejection of the Constitutional Treaty and the Irish rejection of the Lisbon Treaty).

expressed in the result of the referendum,¹⁰ and a respected international democracy think-tank criticized the pressure that was placed on Ireland to hold a second referendum on the Lisbon Treaty as “undermining the democratic legitimacy of the EU.”¹¹

The aim of this Essay is to probe the causes of the EU’s second-referendum practice with a view to better understanding the resort to what strikes many observers as a procedurally bizarre and democratically dubious exercise. It is not the intention of this Essay to offer any justification for the practice, but rather to explain the factors specific to the EU which have contributed to its recurrence.

I. *FACTORS UNDERLYING THE PRESSURE TO RESORT TO A SECOND REFERENDUM*

A. *Strictures of the EU Treaty Amendment Procedure*

The most significant factor that explains the regular recourse to this curious practice is the rigorous procedure for amending the EU treaties, which has been laid down in the treaties themselves.¹² Now contained in article 48(4) of the Treaty on the European Union (“TEU”),¹³ the basic requirement of the “ordinary revision procedure,” which is also the default requirement for treaty amendment in international law,¹⁴ is consent (“common accord” in the language of article 48 TEU) on the part of all the Member States and thus all of the Member

10. See Anthony Coughlan, *Same Referendum, Different Day—Why the Irish Should Vote ‘No’ Again*, EUROPEAN VOICE (Brussels), June 27, 2002, <http://www.europeanvoice.com/article/imported/viewpoint-same-referendum-different-day-why-the-irish-should-vote-no-again-45125.aspx> (discussing the potential unconstitutionality of a second referendum); see also Glen Ruffle, *Third Time Lucky*, INT’L REL., Oct.–Nov. 2009, <http://www.globalaffairs.es/en/third-time-lucky> (critiquing the second Lisbon Treaty referendum); *Irish EU Vote Plan ‘Undemocratic’*, BBC NEWS, Dec. 11, 2008, http://news.bbc.co.uk/2/hi/uk_news/politics/777713.stm (stating views of the U.K. conservatives).

11. Markus Schmidgen, *Evaluation of the Irish Referendum on Lisbon Treaty*, DEMOCRACY INT’L (Berlin), June 2008, at 14.

12. See generally Bruno de Witte, *Treaty Revision in the European Union: Constitutional Change through International Law*, 35 NETH. Y.B. OF INT’L L. 51 (2004).

13. Consolidated Version of the Treaty on European Union art. 48(4), 2008 O.J. C 115/13, at 42 [hereinafter TEU post-Lisbon].

14. See Vienna Convention on the Law of Treaties art. 39, May 23, 1969, 1155 U.N.T.S. 311 [hereinafter Vienna Convention].

States who are party to the treaty being amended.¹⁵ A further onerous requirement of the EU treaty amendment procedure laid down in article 48(4) is that of ratification by every Member State in accordance with their domestic constitutional requirements.¹⁶ Indeed, even the new simplified revision procedure introduced by the Lisbon Treaty appears to envisage approval by every Member State.¹⁷ The requirement of unanimous consent on the part of all Member States for an EU treaty amendment to come into force obviously has the consequence that when one Member State fails to ratify or rejects the ratification of a proposed treaty, the rejection by that state jeopardizes the possibility of the treaty coming into force for any and all other Member States. Unlike the general rules of international law,¹⁸ EU law makes no allowance for the provisional application of an EU amending treaty pending its ratification by all Member States,¹⁹ or for the entry into force of an EU treaty amendment following ratification by a specified number, but not all of the Member States. Instead, the requirement of unanimous consent and the requirement of domestic ratification by all Member States for EU treaty amendment are unqualified.²⁰

The core of the critique of the second-referendum practice is that it fails to respect the outcome of legitimate constitutional processes and undermines the democratically expressed will of

15. See TEU post-Lisbon, *supra* note 13, art. 48(4), 2008 O.J. C 115, at 42.

16. See *id.*

17. The language of article 48(6) does not explicitly specify “all of the Member States” as article 48(4) does of the ordinary revision procedure, but, on the other hand, it would be difficult to interpret “approved by the Member States” in article 48(6) as meaning only *some* of the Member States. *Id.* art. 48(4), 48(6), 2008 O.J. C 115, at 42. With that said, Member States are obviously free to decide for themselves what their constitution requires for approval of a decision of the European Council to amend the treaties by the simplified procedure.

18. See Vienna Convention, *supra* note 14, arts. 24–25. The subject of provisional application is dealt with in article 25 and requirements concerning entry into force are contained in article 24. *Id.*

19. Provisional application of a treaty containing new institutional rules to states which have ratified it but not to those which have not would cause significant difficulties in the EU context. See de Witte, *supra* note 12, at 71–72.

20. The provision in article 48(5) of the Treaty on European Union was also present in the failed Treaty Establishing a Constitution for Europe, and envisaged a procedure to be followed in the event of ratification by four-fifths of the Member States. See *infra* note 60; see also TEU post-Lisbon, *supra* note 13, art. 48(5), 2008 O.J. C 115, at 42.

the people. However, it can also be viewed as a pragmatic response to an excessively strict EU treaty amendment process which may have been appropriate for a community of six Member States, but not for an EU of twenty-seven.²¹ It is perhaps unsurprising, given the strictures of the EU treaty amendment process, that pressure has been placed on Member States which have rejected ratification of a treaty to try to identify the reasons for the rejection and to address them, especially when most or all other Member States have already ratified, or plan to ratify, the treaty in question.

B. *Distinct Nature of the Context of EU Treaty Change Compared with Other International Contexts*

Pressure on a Member State to reconsider its failure to ratify a treaty is rarely found at the international level outside the EU. It is difficult to imagine significant external pressure being imposed on a state which is engaged in deciding whether or not to join the World Trade Organization, the Council of Europe, or any other regional or international organization. If the matter is put to a popular vote in a given state and the vote is negative, the matter is generally concluded. The state in question does not join, the organization does not gain a new member, a “no” vote in the referendum is taken to mean no and all parties move on. Further, even in the case of EU treaties governing accession, no prospective Member State whose population rejected the proposal to accede has yet been placed under external pressure to resubmit the referendum and to try again to have the treaty ratified. The population of Norway voted against EU membership,²² and that of Switzerland voted against European

21. See Hervé Bribosia, *Notre Europe, Réviser les traités européens: Plaidoyer en faveur de la suppression du veto* [Revising the European Treaties: Advocating in Favor of Abolishing the Veto], at 1–35, Policy Paper No. 37, Dec. 1, 2009, available at http://www.notre-europe.eu/uploads/tx_publication/Polycypaper37-HBribosia-R_viser_les_trait_s.pdf (Fr.) (outlining a proposal to abandon the strict unanimity-based amendment process in favor of a lighter procedure).

22. Two popular referenda were held on the question of whether to join the EU in 1972 and 1994, respectively, and the proposal was rejected each time by a comfortable majority. See 1 CENT. BUREAU OF STATISTICS OF NORWAY, *FOLKEAVSTEMNINGEN OM EF 30* [ADVISORY REFERENDUM ON NORWAY'S ACCESSION TO THE EC] (1972), http://www.ssb.no/histstat/nos/nos_a522.pdf; The Norwegian Mission to the EU, *Norway and the EU—Historical Overview*, <http://www.eu-norway.org/eu/History/> (last visited Aug. 18, 2010); 1994: *Norway Votes 'No' to Europe*, BBC NEWS, Nov. 28, 1994,

Economic Association membership,²³ yet no external pressure was imposed on either state to rerun the referenda. Unlike the case of non-ratification of broader and more general EU amending treaties, no other Member State is particularly affected by a popular “no” vote on a proposed accession treaty, and the EU is not affected other than in its failure to gain a new member.

The crucial difference in the case of referenda concerning EU amending treaties is that, unlike accession treaties and other similar agreements concerning EU association, cooperation, and neighborhood, amending treaties are not bilateral-type agreements between a new Member State and the EU. Once a state becomes a member of the EU, that Member State gains an effective veto over any treaty change affecting *all* Member States, even if all other Member States are in agreement and supportive of the change. Thus, the current EU treaty requirement of unanimous ratification of amending treaties²⁴ means that any one Member State can block change desired by all other Member States. It is this feature that generates pressure on Member States whose populations have rejected a treaty that has otherwise been accepted by all or most others to reconsider the negative vote.

C. *Growing Mistrust of Popular Referenda on Constitutional Matters*

The other crucial factor which has been present in each of the five cases in which ratification of an EU amending treaty has been rejected by a Member State is that the ratification process which led to rejection involved a popular referendum rather than, for example, a parliamentary vote or an executive decision. Had the failure to ratify an EU treaty followed from a presidential refusal to sign, as could have been case in the Czech Republic or Poland; or from a constitutional court decision, as could have been the case in Germany; the Member State in question might not have experienced the same kind of pressure to find a solution to enable ratification. The EU’s willingness to encourage

http://news.bbc.co.uk/onthisday/hi/dates/stories/november/28/newsid_4208000/4208314.stm.

23. See European Union, Switzerland, http://ec.europa.eu/external_relations/switzerland/index_en.htm (last visited Aug. 18, 2010); swissinfo, Switzerland and the EU, http://www.swissinfo.ch/eng/country_information/country_profile/switzerland_and_the_eu.html?cid=5764106 (Nov. 17, 2009).

24. See TEU post-Lisbon, *supra* note 13, arts. 48(4)–(5), 2008 O.J. C 115, at 42.

a Member State to try again, and to take action to reverse the rejection of a treaty, seems linked to the fact that the rejection was the result of a popular referendum.

One interpretation of this, as critics have charged, is that the willingness to bypass the results of domestic referenda indicates elite disregard for the popular will.²⁵ Less polemically, however, there seems to be a measure of political and intellectual skepticism about the suitability of popular referenda as instruments of constitutional reform.²⁶ Such mistrust of the popular referendum as a decision-making mechanism for constitutional matters may have translated into an unwillingness to accept the outcome of a referendum process in a given Member State as decisive. The EU political response to a popular no-vote, on every occasion except that of the rejection of the Treaty establishing a Constitution for Europe in France and the Netherlands, has been to encourage the Member State in question to investigate whether the objections underlying the no-vote were specific to that state, whether they could be accommodated or addressed within the terms of the new treaty in question, whether they were based on a misunderstanding of the treaty, or whether there was some other way in which the objections could be addressed without rejecting the entirety of the treaty and preventing its coming into force for the other Member States.²⁷

25. See, e.g., Collins, *supra* note 6, at 13 (noting the “railroading” of the Irish electorate by having a second vote on the Lisbon Treaty); Ruffle, *supra* note 10 (criticizing the second referendum in Ireland and the Lisbon Treaty).

26. See, e.g., Mark Franklin et al., *Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht*, 32 J. OF COMMON MKT. STUD. 455, 458–71 (1994); Sara Binzer Hobolt, *Direct Democracy and European Integration*, 13 J. OF EUR. PUB. POL’Y 153 (2006); Cameron Anderson & Elizabeth Goodyear-Grant, *Referenda Skepticism Among Highly-Informed Citizens: Assessing Three Explanations*, (Annual Meeting of the Canadian Political Science Association 2008), available at <http://www.cpsa-acsp.ca/papers-2008/anderson-goodyear-grant.pdf>. See generally LAWRENCE LEDUC, *THE POLITICS OF DIRECT DEMOCRACY: REFERENDUMS IN GLOBAL PERSPECTIVE* 185–92 (2003) (evaluating the potential for direct democratic processes to improve democratic government).

27. See de Búrca, *supra* note 9.

II. LEGAL AND POLITICAL RESPONSES TO THE VETO-PRESSURE IN THE CONTEXT OF EU TREATY CHANGE

A. *Ex-Ante Flexibility Mechanisms*

The pressure imposed by the existence of the multiple veto points on EU treaty reform has, in the past, given rise to other distinctive mechanisms seeking to ensure adoption of a treaty by all Member States, while accommodating strong concerns or objections by particular Member States to certain parts of it.²⁸ Examples over the years of such flexibility mechanisms include the availability of extended transition periods, and, more recently, a variety of arrangements listed under the heading of “differentiated integration,” such as the opt-out for the U.K. social policy under the Maastricht Treaty protocol; the opt-outs for the Denmark, Sweden, and the United Kingdom from the Economic and Monetary Union; the opt-outs for Denmark, Ireland, and the United Kingdom from the area of freedom, security, and justice; and more structured arrangements for closer cooperation²⁹ or enhanced cooperation³⁰ under the Amsterdam and Nice Treaties, respectively. Such mechanisms have enabled a Member State that has particular concerns about an amendment due to be introduced in a new EU treaty to ratify the treaty despite its opposition by providing the state with an exemption from the policy or provisions in question.

B. *Unavailability of Unilateral Reservations*

In international law, one of the key mechanisms used to address the tension between the desire for widespread ratification of a treaty and controversy among potential signatories over its content is the possibility for states to enter a

28. Several book-length treatments of different aspects of this subject exist. *See, e.g.*, GRÁINNE DE BÚRCA & JOANNE SCOTT, *CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY* (2000); BRUNO DE WITTE ET AL., *THE MANY FACES OF DIFFERENTIATION IN EU LAW* (2002); FILIP TUYTSCHAEVER, *DIFFERENTIATION IN EUROPEAN UNION LAW* (1999).

29. *See generally* Eric Philippart & Geoffrey Edwards, *The Provisions on Closer Cooperation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union*, 37 J. OF COMMON MKT. STUD. 87 (2002).

30. *See generally* Thomas Jaeger, *Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy*, 7 EUR. FOREIGN AFF. REV. 297 (2002).

unilateral reservation to parts of the treaty.³¹ Now governed in part by articles 19 through 23 of the Vienna Convention on the Law of Treaties (“Vienna Convention”),³² reservations can perform a similar function to that of ex-ante opt-outs in the EU context by allowing states to sign onto and ratify a treaty even while preventing the application to themselves of certain parts of the treaty that they find objectionable.

The EU, however, with its closely integrated legal and political system, does not appear to allow for this traditional international law technique to be used by EU Member States in relation to EU treaties. Although there has been, to my knowledge, no academic or policy discussion of the possibility of Member States using reservations to treaties within the EU system, the very idea of unilateral reservations seems to conflict with the nature of the legal and political community founded by the EC treaties and with the assumption of collective participation in a strong common project. It could perhaps even be argued that the act of entering a unilateral reservation to an EU treaty on the part of an EU Member State would, given the nature of the European Union, be per se incompatible with the object and purpose of the EU Treaty, under the terms of article 19(c) of the Vienna Convention.³³ Nevertheless, the same tensions that give rise to the practice of reservations in international law exist also within the EU. The practice that has developed under EU law in response to these tensions, however, involves a process of reaching collective agreement on the making of a “declaration” or a supplementary legal “decision” to try to address the concerns of the dissenting state, instead of states unilaterally attaching reservations to an amending treaty.

C. *Ex-Post Mechanisms: Declarations and Decisions*

Where specific concerns are not identified or flagged by a state during the process of negotiating a treaty, they cannot be accommodated within the treaty itself through the mechanism of

31. See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) (concerning the permissibility of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide).

32. See Vienna Convention, *supra* note 14, arts. 19–23.

33. *Id.* art. 19(c).

an ex-ante opt-out, but they may subsequently surface during the domestic debate on ratification. Equally, when the concerns felt by a particular state or its population do not relate to a specific EU policy or issue from which an opt-out could realistically be secured, but rather constitute a more general objection—for example, to the perceived democratic deficit of the EU—they cannot be addressed by means of a state-specific opt-out in the treaty itself.

The response of the EU to situations of this kind—those in which particular concerns were not identified during the negotiation process and no opt-out was sought, or where the nature of the concerns are such that they cannot be addressed by a state-specific opt-out—has been to resort to intermediate political and legal solutions such as a declaration or a decision containing assurances. This was first seen in the response to the Danish popular no-vote to the Maastricht Treaty in 1992.³⁴

After the Danish no-vote, which was the first time an EU amending treaty was rejected by an existing Member State following a popular ratification vote, the European Council (composed of the heads of state and government of the EU Member States) came up with a solution in the conclusions to its Edinburgh meeting in 1992. Generally referred to as the Edinburgh Agreement, it encompassed a decision and two declarations.³⁵ In legal terms, part of this agreement was a decision of the heads of state and government of the EU Member States that, together with the declaration and the conclusions, contained various assurances and clarifications vis-à-vis Denmark on issues such as defense policy, Economic and Monetary Union (“EMU”), EU citizenship, justice, and home affairs.³⁶ As a decision of the heads of state and government, this was an instrument that, despite its atypical nature within the EU legal

34. See Helle Krunke, *Peoples' Vengeance: From Maastricht to Edinburgh: The Danish Solution*, 1 EUR. CONST. L. REV. 339, 345 (2005).

35. See Edinburgh European Council, Conclusions of the Presidency, Pt. B, Annexes 1–3, 25 E.C. BULL., no. 12, at 14 (1992); see also EU-Oplysningen, Edinburgh Agreement, http://www.eu-oplysningen.dk/emner_en/forbehold/edinburgh (last visited Aug. 18, 2010) (discussing the decision of the heads of state and government meeting within the European Council in Edinburgh in 1992). An official copy of the conclusions reached by the Council at Edinburgh is available on the European Parliament's website at http://www.europarl.europa.eu/summits/edinburgh/default_en.htm.

36. See EU-Oplysningen, *supra* note 35.

system, was binding as a matter of international law, although it is not entirely clear what effect a binding international law decision of this kind could have on the provisions of an EU treaty.³⁷ No part of the decision or declaration actually sought to change existing law or to amend the EU treaties, but rather to offer interpretative reassurance that the various concerns of Danish voters in relation to citizenship, justice and home affairs, and defense policy were satisfied by the terms of the new treaty.³⁸ The political effect, on the other hand, was clear: a sufficient number of Danish voters were evidently reassured by the assertions in the declaration and decision that the relevant aspects of Danish policy and sovereignty would remain unaffected,³⁹ and the Maastricht Treaty was ratified following a second, successful referendum.⁴⁰

In the case of Ireland's no-vote to the Nice Treaty in 2001, most of the arguments in favor of holding a second referendum hinged on the poorly conducted campaign and the very low turnout for the first referendum.⁴¹ As has since become the practice, an analysis of the no-vote was carried out with funding from the European Commission,⁴² and the various reasons for the rejection of the treaty were identified as precisely as possible, with a view toward enabling these issues to be addressed in the campaign preceding a second referendum. The only declarations made were by the Irish government and the European Council at the Seville European Council meeting in June 2002. These declarations concerned the EU Common Foreign and Security

37. See *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)*, Case 43/75, [1976] E.C.R. 455, ¶ 58 (holding that the treaties could only be amended in accordance with the procedure set out in article 48 of the Treaty on European Union); see also Gavin Barrett, *Guarantees on Lisbon Do Change Nature of Vote*, *IRISH TIMES* (Dublin), June 30, 2009, at 14.

38. See Alexander Türk, *The Lisbon Treaty After the Irish 'No' Vote: Ways Out of the Impasse*, http://www.lexisnexis.com/documents/pdf/20090514125647_large.doc.

39. See Nicolai Ronnebek Hinrichsen, *The Constitutional Objection to European Union Membership: A Challenge for the Danish Supreme Court*, 15 B.U. INT'L L.J. 571, 582–83 (1997).

40. See *id.* at 583.

41. See Brigid Laffan & Adrian Langan, *Notre Europe, Securing a "Yes": From Nice I to Nice II* at 3, 7, Policy Paper No. 13, Apr. 26, 2005, available at <http://www.notre-europe.eu/fileadmin/IMG/pdf/Policypaper13.pdf>.

42. See generally Richard Sinnott, *Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice* (Feb. 26, 2003) (unpublished report, Univ. College Dublin), available at <http://www.ucd.ie/dempart/workingpapers/nice2.pdf>.

Policy, and their main purpose was to reiterate the nature and status of Irish military neutrality and to provide reassurance given that this was not threatened in any way by the Nice Treaty.⁴³ The second campaign in favor of the treaty was more actively conducted than the first, and the Nice Treaty was successfully ratified following a second referendum held in October 2002.⁴⁴

Matters were somewhat more complicated in the case of Ireland's no-vote on the Lisbon Treaty in 2007. First, the Lisbon Treaty was considerably more ambitious, more complex, and more controversial than the Nice Treaty. Second, it was widely known to be a formally de-constitutionalized and reorganized, but substantially similar, version of the Constitutional Treaty, which had unexpectedly been rejected two years previously by referenda in France and the Netherlands.⁴⁵ This meant that the option of resorting to a second referendum on the Lisbon Treaty was politically more difficult than it had been in the case of the Nice Treaty in 2001, or, indeed, in the case of the Maastricht Treaty in Denmark in 1992, when the situation of a failed popular referendum on an EU amending treaty was confronted for the first time.⁴⁶ The particular circumstances of the Lisbon Treaty, coming after the debacle of the Constitutional Treaty, and at a time when popular opposition to the EU had grown in Ireland, were much less easy to resolve by rapid resort to a second referendum. Nonetheless, after extensive discussion of the various options,⁴⁷ particularly as to whether Ireland should

43. See Seville European Council, Conclusions of the Presidency, Annexes 3–4, E.U. BULL., no. 6, at 20–21 (2002).

44. See Peter Katz, *The Treaty of Nice and European Union Enlargement: The Political, Economic, and Social Consequences of Ratifying the Treaty of Nice*, 24 U. PA. J. INT'L ECON. L. 225, 226 (2003).

45. See Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union's State-like Attributes*, 14 U.C. DAVIS J. INT'L L. & POL'Y 1, 3 (2007) (stating that there would be substantive similarities between the proposed Lisbon Treaty and the EU Constitution); *Dutch Say 'Devastating No' to EU Constitution*, GUARDIAN (London), June 2, 2005, <http://www.guardian.co.uk/world/2005/jun/02/eu.politics>.

46. See Nicolai Ronnebek Hinrichsen, *The Constitutional Objection to European Union Membership: A Challenge for the Danish Supreme Court*, 15 B.U. INT'L L.J. 571, 582 (1997); *Ireland Rejects EU Expansion*, BBC NEWS EUROPE, June 8, 2001, <http://news.bbc.co.uk/2/hi/europe/1376379.stm>.

47. See, e.g., HOUSES OF THE OIREACHTAS [IRISH NATIONAL PARLIAMENT] SUB-COMM. ON IRELAND'S FUTURE IN THE EUR. UNION, IRELAND'S FUTURE IN THE EUROPEAN UNION: CHALLENGES, ISSUES AND OPTIONS (2008), available at <http://euaffairs.ie/sub-committee/sub-committeereport.pdf>.

attempt parliamentary ratification of parts of the treaty, the inevitable route of a second referendum was chosen.⁴⁸ This time however, given the heightened controversy over the Lisbon Treaty and the more active and engaged campaign which had taken place prior to the first referendum, Ireland sought a strengthened version of the usual declaration of reassurance.

The conclusions of the European Council meeting of June 2009 contain, in their annexes, two separate sets of measures addressing Ireland's position, as well as a declaration by the Irish government setting out its own understanding of the legal effect of the Lisbon Treaty.⁴⁹ The first of the two sets of measures is in somewhat similar form to that adopted in relation to Denmark at Edinburgh in 1992.⁵⁰ It is a statement by the EU heads of state and government, which purports to "guarantee," by means of a binding decision, that nothing in the Lisbon Treaty affects in any way the scope and applicability of the protection of the right to life, family, and education in the Irish Constitution; affects the EU's existing competence in relation to taxation; or prejudices Ireland's policy of military neutrality.⁵¹ The legal status of this part of the declaration is further bolstered by the decision that it is to be included in a future protocol to the EU treaties. Thus, it is currently binding as a matter of international law as a decision of the states, and it will, following its future enactment as a protocol to one of the EU treaties, be made binding as a matter of EU treaty law. Its content, however, is similar to the Edinburgh Declaration in that it does not purport to alter or amend anything contained in the Lisbon Treaty, but rather to provide legal guarantees and assurance that the provisions of the Lisbon Treaty, properly interpreted, do not contain anything that threatens these sensitive areas of Irish law and policy.⁵² The

48. See Eric Pfanner & Sarah Lyall, *Irish Vote for Treaty Centralizing Power in the European Union*, N.Y. TIMES, Oct. 4, 2009, at A6 (stating that Irish voters approved the Lisbon Treaty on October 3, 2009); see also Gavin Barrett, *Is a Second Referendum Appropriate in order to Allow Ireland to Ratify the Treaty of Lisbon?* (Univ. College Dublin School of Law, Working Paper, 2008), available at <http://ssrn.com/abstract=1263300> (discussing the possibility of a second referendum and whether this would be feasible and appropriate to secure Irish ratification of the Lisbon Treaty).

49. See Brussels European Council, Presidency Conclusions, Annexes 1–3, E.U. BULL., no. 6, at 14–17 (2009).

50. See *supra* note 35 and accompanying text.

51. See E.U. BULL., *supra* note 49, at 15.

52. See *id.* at 9.

second part of the declaration does not purport to be a legally binding decision, but merely a declaration that confirms the high importance attached by the EU to workers rights and social progress, and related matters, and recalls the relevant provisions of the EC and EU treaties as amended by the Lisbon Treaty.⁵³ The third part of the European Council package is the declaration by Ireland itself, which, like the Irish Declaration on the Nice Treaty at Seville,⁵⁴ asserts Ireland's understanding that its policy of military neutrality will remain unaffected by the changes to be introduced in the Lisbon Treaty.⁵⁵

Declarations and decisions of this kind have now been used on several occasions by the EU, and although they have apparently contributed to a successful second referendum result each time, they remain an essentially ad hoc and legally uncertain response which does not address the fundamental concerns about the practice of holding a second referendum. In other words, while they seek to isolate and address the specific concerns of the population of the Member State which rejected the EU treaty and aim to overcome the claim that a second referendum is undemocratic, they remain unsatisfactory in several key respects. First, decisions and declarations cannot have the effect of amending the treaty whose ratification has been rejected, which means they are limited to providing either an interpretative declaration, or a purported legal guarantee whose effect amounts to little more than an interpretative declaration. It is far from clear whether or to what extent the Court of Justice in the future would read such a declaration as controlling or influencing the interpretation of a provision of the treaty itself. Second, it remains the case that the outcome of the procedure laid down for EU treaty amendment is not being respected, and that recourse to ad hoc mechanisms is regularly sought to sidestep the unwanted results of a legitimate process.

CONCLUSION

The repeated resort—three times in just over fifteen years—to a second national referendum in the context of EU treaty

53. *See id.* at 15–16 (Annex 2).

54. *See supra* note 43 and accompanying text.

55. *See* E.U. BULL., *supra* note 49, at 16–17 (Annex 3).

change, where the result of a first referendum has been the rejection of a proposed EU treaty, remains a controversial and troubling practice. The root cause of the imposition of such pressure on Member States in the position of Denmark and Ireland, whose populations have refused the proposed ratification of an EU treaty, is the distinctive and demanding EU mechanism for treaty amendment. The most obviously onerous dimension of this mechanism is the double-unanimity requirement of unanimous Member State consent and domestic ratification, but it is the combination of this requirement of unanimous consent and domestic ratification with a number of other distinctive features of the EU constitutional process that renders the problem particularly acute. The first of these is the fact that the constitutions or legal systems of several Member States provide that a popular referendum is necessary to ratify certain kinds of fundamental EU treaty change.⁵⁶ The second is the fact that several of the flexible options which are available under international law are not permitted within the more tightly integrated EU legal system. More specifically, there is no possibility for the provisional application of an EU amending treaty following its ratification by a specified majority of Member States,⁵⁷ and the international law regime of unilateral state reservations to treaties has not been applied within the EU context.⁵⁸ Ultimately, this means that a Member State's objection to certain parts of a new EU treaty cannot be accommodated other than by means of an ex-ante negotiated opt-out, or by the convoluted and legally unsatisfactory means of an interpretative declaration or decision of the heads of state and governments.

Are there possible solutions to this apparent dilemma, or is the EU likely to continue the use of this dubious practice again in the future? It is certainly the case that, following the failed constitutional treaty and the enactment of the Lisbon Treaty, there is no political appetite for further EU treaty reform for

56. See, e.g., Simon Hug & Pascale Sciarini, *Referendums on European Integration: Do Institutions Matter in the Voter's Decision?*, 33 *COMP. POL. STUD.* 3, 13–21 (2000); Patricia Roberts-Thompson, *EU Treaty Referendums and the European Union*, 23 *J. OF EUR. INTEGRATION* 105, 113–16 (2001).

57. See de Witte, *supra* note 12, at 71–82.

58. See discussion *supra* Part II.B.

quite some time.⁵⁹ On the other hand, when the time for another EU treaty change does arise, even if it concerns only a treaty governing accession of a new Member State, the risks of the multiple veto points are likely to arise and move to center stage again. A first and perhaps most obvious solution would be to amend the procedure for EU treaty revision and, in particular, to abandon the requirement for unanimous Member State consent. This is a highly politically controversial issue, but one which has nonetheless recently been mooted as a consequence of the repeated experience of no-votes in popular referenda. First, the EU treaty, as amended following the Lisbon Treaty, contains a somewhat open-ended provision—similar to that which was contained in the Treaty Establishing a Constitution for Europe—in article 48(5), which stipulates that “if, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”⁶⁰ While this does not amount to a relaxation of the requirement of unanimous consent, it at least opens up the possibility of a scenario in which a majority of the Member States can seek a political way of moving ahead with the ratification of a treaty which has not been approved by all Member States.

Second, the prospect of formally amending the process for EU treaty ratification and removing the unanimity requirement has recently been mooted and analyzed in legal and policy circles.⁶¹ But there is clearly no immediate political energy to

59. In their communiqué in December 2007, following the signing of the Lisbon Treaty, the EU heads of state and government declared that “[t]he Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead . . .” Brussels European Council, Presidency Conclusions, E.U. BULL., no. 12, at 10 (2007).

60. TEU post-Lisbon, *supra* note 13, art. 48(5), 2008 O.J. C 115, at 42. It is unclear, however, what legal consequences would flow from such a referral or whether a treaty amendment could come into force when only four-fifths of the Member States had ratified.

61. See Bribosia, *supra* note 21, at 7–14; see also EUR. UNIV. INSTIT., ROBERT SCHUMAN CTR. FOR ADVANCED STUDIES, REFORMING THE TREATIES’ AMENDMENT PROCEDURES: SECOND REPORT ON THE REORGANIZATION OF THE EUROPEAN UNION TREATIES 11–14 (2000), available at http://www.eui.eu/RSCAS/Research/Institutions/2ndrapport_UK.pdf (describing the earlier proposal for improving amendment procedures).

undertake such a major and controversial reform, and it is difficult to imagine EU Member States agreeing to it. The second option would be for all of the Member States to abandon the requirement of a popular referendum for the ratification of EU treaties, regardless of the possible impact of any such treaty on the national constitutional systems. This, however, is not something that can be stipulated as a matter of EU law, and it is for each Member State to decide for itself what its domestic ratification process for EU treaties should be, which makes it a difficult target for Europe-wide reform. Furthermore, the various domestic referenda concerning ratification of EU Treaties have provided some of the few occasions for real public engagement and debate on EU matters, countering the normal voter apathy and disinterest in EU affairs that has been such an intractable part of the democratic deficit.⁶² One innovative proposal for reform, which was put forward by a group of members of the Convention charged with drafting a constitutional treaty for the EU in 2004, was to substitute the system of individual national ratification procedures with a European-wide popular referendum.⁶³ Unfortunately, this proposal—which would have retained the valuable element of democratic and popular legitimacy provided by domestic referenda, but simultaneously avoided some of the pitfalls of second-order voting that takes place during domestic referenda on EU issues⁶⁴—was not acted upon by the Convention presidency, which meant that this interesting and promising reform proposal fell by the wayside.⁶⁵

The requirement of double-unanimity—unanimous state consent and unanimous national ratification—before an EU

62. See Nick Clark & John Hulsey, *The Salience of EU Issues: Explaining Political Behavior in European Parliament Elections*, 10th Biennial Meeting of the European Union Studies Association, at 2 (2007), available at <http://aei.pitt.edu/7786/01/clark-n-02h.pdf> (noting that average EU voter turnout has been declining but that the Irish and Dutch referendums produced a much higher turnout than normal); see also Thomas Risse & Mareike Kleine, *Assessing the Legitimacy of the EU's Treaty Revision Methods*, 45 J. OF COMMON MKT. STUD. 69, 70–79 (2007).

63. See *Referendum on the European Constitution: Adoption, Ratification and Entry into Force Procedure*, Secretariat, European Convention, Contribution Submitted by Several Members, Alternate Members and Observers, Annex, No. CONV 658/03 (Mar. 31, 2003), available at <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00658.en03.pdf>.

64. See John Garry et al., 'Second-order' Versus 'Issue-voting' Effects in EU Referendums, 6 EUR. UNION POL. 201, 203–05, 215–16 (2005).

65. See de Witte, *supra* note 12, at 76–80.

treaty can come into force has been a central part of the consensus-building as well as the trust- and community-building that has been an essential aspect of the development of the EU's uniquely densely integrated political and legal system. Yet it seems clear that the decision to consider and confront the possibility of relaxing the absolute nature of the double-unanimity requirement is one which can only be postponed, but cannot ultimately be avoided, given how unsatisfactory and unsustainable the second-referendum practice has been to date.