The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden

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Abstract

This Article is intended to describe the constitutional impact of the 1995 enlargement upon the European Union. The first section situates the 1995 enlargement in its historical context. The second section sets forth the institutional changes produced by the 1994 Act of Accession and side arrangements. Next, the Article analyzes the principle of the acquis communautaire. A fourth section describes the steps in the procedure leading to the enlargement. A final section is more speculative in character, reviewing the prospects of likely candidates for accession in the future and raising some of the institutional issues further enlargement would pose for the Union.
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INTRODUCTION

At Corfu on June 24, 1994, the Treaties and Final Acts were signed to enable Austria, Finland, Norway, and Sweden to join the European Union.¹ The people of Austria, Finland and Sweden endorsed in referenda the decision of their governments to become Member States (or “States”) of the Union, but unfortunately the Norwegian referendum proved adverse. Accordingly, on January 1, 1995, Austria, Finland and Sweden increased the European Union membership to fifteen States, instead of the “sweet sixteen” that had been popularly hoped for.

Thus occurred, in the words of the European Council²

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¹. E.U. BULL., no. 6, at 86 (1994). For an analysis of the procedure, especially the negotiations leading to the accession of these States, see Dierk Booss & John Forman, Enlargement: Legal and Procedural Aspects, 32 COMMON MKT. L. REV. 95 (1995).

². The European Council is composed of the Heads of State and Government of each of the Member States, together with the President of the Commission. In 1969, an initial summit meeting of these leaders at the Hague proved so successful that the meet-
meeting at Corfu, "an important new landmark in the history of European integration." The European Council welcomed the new States' participation in "a European Union faced with rapid development after the entry into force of the Treaty on European Union." Particularly appreciated was "the additional impetus coming from [the new States] which are in the vanguard of the efforts to promote environmental and social protection, transparency and open government."

The initial European Economic Community, created by the Treaty of Rome on March 25, 1957, consisted of six states: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Although invited, the United Kingdom chose not to join the new venture. Since the 1970's, the political dynamism and economic success of the Community, formally restructured as the European Union in 1993 by the Treaty of Maastricht, has incited its bordering nations to seek to join the club.

In three "enlargements," the Community (now the Union) has added each time three new Member States, each enlargement marking a new stage of constitutional, political and economic growth quite visible in a historical perspective, rather like


4. Id.
5. Id.

the successive rings in the growth of a tree. In the first enlargement in 1973, Denmark, Ireland and the United Kingdom increased the number of Member States by 50%, with a comparably large augmentation of the Community's political authority, economic force and scope of practical operations. The second "Mediterranean enlargement," adding Greece in 1981 and Portugal and Spain in 1986, a one-third increase in numbers, did not have quite so large an impact, but nonetheless contributed substantially to the Community's continuing success.

In the current enlargement, which we will call the "1995 enlargement" to distinguish it from the prior ones, the political authority and economic scope of the European Union has increased once again, although naturally not to the same degree as in the earlier accessions. The addition of Austria, Finland and Sweden represents only a 25% increase in Member States. (If Norway had decided to join, this would have meant a one-third increase.) The Union population has grown by 6.2%, from 349 to 370 million, and the Gross Domestic Production has increased by about 7%. Only the land area of the Union has expanded significantly, by about one-third, due to the enormous sparsely-populated northern region of Finland and Sweden — an interesting but hardly very important factor.

Ever since the first enlargement, all accessions of new States have been governed by a basic principle, the "acquis communautaire." This French term has become, as we shall see, a vital concept of Community, and now Union, law: it figures as a fundamental principle in Article B of the Maastricht Treaty, which describes as one of the Union objectives: "to maintain in full the acquis communautaire and build on it." The term is quite difficult to translate into English. "Acquis communautaire" essentially conveys the idea that the institutional structure, scope, policies and rules of the Community (now Union) are to be treated as "given" ("acquis"), not to be called into question or substantially modified by new States at the time they enter.

The acquis communautaire concept entered Community law when Denmark, Ireland and the United Kingdom joined in

9. TEU, supra note 7, art. A.
the first enlargement. After the Hague Summit of Heads of State and Government on December 1-2, 1969 endorsed the concept, the acquis communautaire principle became the basis of the accession negotiations. The 1972 Act of Accession spelled out the new states’ acceptance of the original Treaties, the legislative acts and the declarations or resolutions of the Council, and any international agreements or conventions entered into at that time. The acquis communautaire principle also governed the negotiations with Greece, Portugal and Spain in the Mediterranean enlargement, and the respective Acts of Accession replicate the terms of the 1972 Act.

In its 1992 Report, “Europe and the Challenge of Enlargement,” meant to cover both the 1995 enlargement and any future ones, the Commission significantly expanded the sense of the acquis communautaire. The Commission described it as encompassing “the contents, principles and political objectives of the Treaties, including the Maastricht Treaty.” The Commission stressed that this now included acceptance of the Economic and Monetary Union and the Common Foreign and Security Policy, both vital (but hardly non-controversial) features of the Maastricht Treaty. The Commission also included “the jurisprudence of the Court” in tandem with legislation, declarations, resolution and international agreements to date. The Commission’s broader approach to the acquis communautaire was, as we shall see, accepted in the negotiations and figures in the terms of the 1994 Act of Accession.


14. Id. at 12.
15. Id. at 11-12.
16. Id. at 12.
EUROPEAN UNION GROWS

Considering that the 1995 enlargement represents a lesser increase in Member States, as well as population and economic capacity, than the earlier enlargements, one might be tempted to consider it to be of only moderate importance. It could be argued that, because the new States did accept all the elements of the acquis communautaire, their addition to the Union merely constitutes "more of the same."

That is definitely not the case. The 1995 enlargement, just as the earlier ones, has already profoundly marked the history of the European Union. The accession of Austria, Finland and Sweden is bound to influence significantly the future evolution of the European Union, its policies and its political character. Each new State will add its own particular contribution to the total Union structure and to the resolution of the internal debates over its future that will occur during the next intergovernmental conference, scheduled for 1996.\footnote{TEU, supra note 7, art. N. Article N of the Maastricht Treaty mandates the convening in 1996 of an intergovernmental conference to consider further amendments to the Treaty. Id.}

This Article is intended to describe the constitutional impact of the 1995 enlargement upon the European Union. The first section situates the 1995 enlargement in its historical context. (Readers already familiar with this context may wish to move rapidly to the later, more analytical sections.) The second section sets forth the institutional changes produced by the 1994 Act of Accession and side arrangements. Next, the Article analyzes the principle of the acquis communautaire. A fourth section describes the steps in the procedure leading to the enlargement. A final section is more speculative in character, reviewing the prospects of likely candidates for accession in the future and raising some of the institutional issues further enlargement would pose for the Union.

I. THE 1995 ENLARGEMENT IN HISTORICAL PERSPECTIVE

A. Priority Attention to the Unification of Germany

When Austria submitted its formal application for accession on July 17, 1989,\footnote{22 E.C. BULL., no. 7/8, at 70 (1989).} the European Community was not yet ready to give serious consideration to its request. The Soviet Union, then led by President Gorbachev, was still concerned with the

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17. TEU, supra note 7, art. N. Article N of the Maastricht Treaty mandates the convening in 1996 of an intergovernmental conference to consider further amendments to the Treaty. Id.
balance of power in Central Europe, so that Austria's need to take a neutralist posture in international affairs had not yet ceased to be a live factor. Although the Council responded favorably to Austria's interest and authorized the Commission to begin in July 1989 its mandatory review of the political and economic viability of Austria's request, matters were bound to proceed slowly.

Indeed, in 1990 the attention of the Community was centered on a far more imperative issue: how to facilitate the unification of Germany. Events moved rapidly that year. By early 1990, as the East German government's control was crumbling, and the Soviet Union in a spirit of detente (and manifestly in return for Western financial aid) no longer was barring the way, Chancellor Kohl and the West German government were feverishly preparing the political and economic measures to attain unification.

On April 28, 1990, an extraordinary meeting of the European Council in Dublin took a critical step by declaring its strong support for the West German initiatives, at a time when some political figures and media leaders were unconvinced of the need for speed (and perhaps somewhat concerned over the power potential of a united Germany). In addition to its moral support, the European Council unanimously "agreed that, subject to the necessary transitional provisions, the integration of the territory of the German Democratic Republic would take effect without any revision of the Treaties." German unification would thus take place "under a European roof."

The European Council accepted the West German approach of integration of the five East German Länder into the Federal Republic structure. The unification was accordingly treated largely as an internal German affair, instead of as a quasi-accession procedure. Within the Community's own institutional structure, neither the Commission, Council, Parliament nor Court of Justice was to be modified. This was somewhat surprising. Although Germany's population grew by seventeen million through the unification, and its economic power also signifi-

cantly increased, so that it became for the first time clearly a larger State than France, Italy and the United Kingdom, neither its weighted vote in the Council nor its number of members of Parliament increased. Recently, the December 1992 Edinburgh European Council authorized an increase in Parliament's total size, formally carried out in time for the June 1994 parliamentary elections by Council Decision 93/81, so that Germany now has ninety-nine MEPs, twelve more than the eighty-seven each allotted to France, Italy and the United Kingdom. Germany, however, has never asked for a larger weighted vote in the Council than the ten votes that it has traditionally been allocated, the same number as France, Italy and the United Kingdom.

Thus, after a frenzied summer of preparation, the unification of Germany occurred on October 3, 1990, facilitated to some degree by a series of transitional regulations adopted by the Community institutions to enable the phase-in of Community agricultural, internal market and environmental rules in East Germany. Moreover, in 1989-91, the Soviet Union became increasingly preoccupied with its own domestic economic problems, reinforcing its policy of détente. This led to the rapid transformation of central Europe, as one Marxist regime after another toppled, to be replaced by more or less democratic, free market-oriented governments.

B. The Internal Market Program: Magnet for the Applicant States

It was, then, in this global political context that Sweden filed its formal accession application on July 1, 1991, and that Finland followed suit on March 18, 1992. Norway's application came a bit later, on November 25, 1992. Although Norway had always been an active member of NATO, Finland and Sweden, like Austria, had traditionally followed a neutralist foreign policy. Prior to the fatal weakening of the Soviet Union and the

27. Id. at 270, ¶ 797.
total collapse of Marxism in central Europe, Austria, Finland and Sweden could never have seriously entertained the idea of joining such a fundamentally western bloc as the European Community — nor, doubtlessly, could the Community have seriously considered taking the risk of Soviet displeasure by allowing either Austria or Finland to join.

What was the magnet that drew the four applicants? That is quite clear. The desire to form part of a larger supra-sovereign body that might perhaps provide a certain security shelter was never the fundamental motivating force (although this partially influenced Finland, constantly wary of its powerful Russian neighbor). No, the magnet was the economic success of the European Community, in particular the widely perceived value of becoming a part of the integrated internal market.

To look back a bit in time, the early 1980’s in the European Community were not a particularly happy or optimistic period. Frequent strife between the Council and the Parliament over budgetary and institutional issues, bitter conflicts over finances and the agricultural policy at the level of the Council and of the European Council itself, and a sense that national barriers to intra-EC trade were multiplying, rather than diminishing, all contributed to what was frequently characterized as “Europessimism” or “Eurostagnation.”

The European Council meeting at Dublin in December 1984, concerned by this state of affairs, decided that the Community “should take steps to complete the Internal Market.” By a fortunate coincidence in timing, a new Commission took office in 1985, led by the dynamic, far-sighted and politically adroit President Jacques Delors. Working in close collaboration with another politically astute commissioner in charge of internal affairs, Lord Cockfield, and supported by the entire Commission, they produced the famous 1985 White Paper on Completing the Internal Market, at the specific request of the European Coun-

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The White Paper proved an almost instant success, securing the immediate backing of the Milan European Council in June 1985, which instructed the Council to act upon the Commission White Paper proposals. Thereafter, the White Paper program captured the imagination first of industrial and financial leaders, then the media, and ultimately the public at large.

The White Paper has proved to be an extraordinarily precise and persuasive program for legislative action. It contained a list of 279 proposals for legislation, together with a time-table for action. Within less than seven years, by the target date of December 31, 1992 set in the White Paper, over 95% of the complex legislative program to complete the internal market had been adopted by the Community institutions, and the Member States were well along in the process of enacting implementing measures. The internal market program has not ceased either; there are on-going efforts to adopt new measures seen as desirable ancillary or "flanking" supplements to the key ones.

C. The Single European Act: First Stage on the Road to Union

Equally significant, the internal market program became inextricably linked with the Community’s evolution toward greater political and constitutional union. It would take too long to trace here the developmental threads of the late 1970’s and early 1980’s, but the definite historical landmark from which the Community has moved forward is the Solemn Declaration on European adoption by the European Council at Stuttgart in June 1983. This declaration affirms the desire “to achieve a comprehensive and coherent common political approach” to the goal of European Union.

The first constitutional fruit of the Solemn Declaration was
the 1987 Single European Act\textsuperscript{37} ("SEA"), which made a number of major changes in the institutional structure and sphere of operations of the Community. Most relevant here are the enhanced role of Parliament in the legislative process, the facilitation of harmonized legislation to achieve the internal market by permitting the Council of Ministers to act by a qualified majority vote, and the setting of the target date of December 31, 1992, to achieve the internal market, defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."\textsuperscript{38}

In operation, the Single European Act has proved itself to be an almost unqualified success. It is true that initially Parliament was not happy with the SEA, which many members regarded as only a half-way house on the road to Parliament's more far-reaching aspirations, and serious criticisms of the compromises embodied in the SEA were voiced by authoritative commentators.\textsuperscript{39} But the record of operations in applying the SEA's various institutional modifications has been extraordinarily successful. Setting the internal market goal in Article 8a undoubtedly gave it greater political force (whatever its legal effect may be).\textsuperscript{40} The larger legislative role accorded to Parliament in the

\textsuperscript{37} SEA, supra note 2.

\textsuperscript{38} EEC Treaty, supra note 2, art. 8a, added by SEA, supra note 2, art. 13. The Maastricht Treaty has (confusingly) renumbered this well-known article as 7a.


\textsuperscript{40} A Declaration on Article 8a of the EEC Treaty was annexed to the SEA by the Luxembourg Intergovernmental Conference that prepared it. The Declaration affirms the "firm political will" of the Member States to implement the Commission White Paper, but disclaims any "automatic legal effect" for Article 8a. This has occasioned an important debate, Messrs. Ehlermann and Glaesner in their articles, supra note 39, argue that Article 8a can give rise to an action for enforcement by an institution or Member State, even if it has no direct effect as such. Professor A.G. Toth, however, maintains that the Declaration in no way binds the Court of Justice, which may well find that Article 8a has direct legal effect. A.G. Toth, The Legal Status of the Declarations Annexed to the Single European Act, 23 COMMON MKT. L. REV. 803 (1986). Interestingly, Parliament has recently sued the Commission under EC Treaty Article 175 because of its alleged
cooperation process has not produced delay and deadlock, but rather definite signs of improved drafting and a better end product.\footnote{The Commission affirmed that "the inclusion of Parliament in the decision-making process has certainly improved the texts." TWENTY-FIFTH REPORT, supra note 25, at 364, ¶ 1149. In accord are the Commission's comments in TWENTY-SIXTH REPORT, supra note 26, at 372-73, ¶ 1088.}

Consequently, when at the start of the 1990's, Austria, Finland, Norway and Sweden began to solicit closer ties with the European Community, they were not only attracted by the success of the internal market program, but also reasonably perceived the institutional and constitutional structure of the Community to be functional and effective.

D. The European Economic Area: Half-Way House to Accession

All four applicant States, along with Iceland, Switzerland and Liechtenstein (linked in a customs union with Switzerland), had long been associated in the European Free Trade Association. The EFTA Stockholm Agreement\footnote{The text of the EFTA Agreement immediately prior to the European Economic Area Agreement is contained in EFTA SECRETARIAT, THE EUROPEAN FREE TRADE ASSOCIATION 118 (3d ed. 1987).} was originally entered into in 1960 as a trade bloc counter-weight to then young European Community. Indeed, the United Kingdom, which later joined the Community in the first enlargement in 1973, was initially the leading nation in EFTA. Denmark and Portugal also belonged to EFTA before joining the Community.

Throughout its history, EFTA has only been a free-trade bloc, quite successful in trade liberalization among its members, but never aspiring to the sort of institutional supra-national character that the Community has developed. The Community and EFTA, after some early difficulties (giving rise to the famous phrase, "Europe at sixes and sevens," playing upon the fact that the Community initially consisted of six and EFTA of seven states), have always enjoyed close trade relations. These were intensified by new agreements for free trade in industrial products after Denmark and the United Kingdom joined the Community.\footnote{For a description of relations between the Community and EFTA from the
On April 9, 1984, EC-EFTA relations began a new phase at a conference in Luxembourg of the foreign ministers of all the Community Member States and of the EFTA states. The Luxembourg Declaration, proclaimed at the close of the conference, called for increased cooperation, with joint ministerial meetings to be held annually, and set a goal: the creation of "a dynamic European economic space." Note the timing of the Luxembourg Declaration, which came soon after the 1983 Stuttgart Declaration on European Union, and shortly before the 1985 White Paper on Completing the Internal Market.

The European Council and the 1985-89 Commission led by President Delors certainly supported the aspirations of the EFTA states, but not unnaturally gave precedence to the Community's own internal market goal and to the modifications of the Single European Act. It was not until April 28, 1990, that the European Council in Dublin took the policy decision to authorize movement toward a European Economic Area, as the European economic space was renamed. Accordingly, on June 18, 1990, the Council authorized the Commission to commence negotiations with the EFTA States. (Note, in terms of timing, that the arrangements for German unification in the fall of 1990 had to take priority.)

Negotiations were long and arduous, throughout all of 1991. Towards their conclusion, the Commission submitted the initial draft European Economic Area ("EEA") Agreement for prior review to the Court of Justice, giving rise to the famous EEA Opinion 1/91, in which the Court required amendments to the proposed arrangements in order to insure the primacy of its own precedents, and affirmed its view that the European Economic Community Treaty "constitutes the constitutional charter of a Community based on the rule of law." After rapid revisions in early 1992 to meet the Court's objections, the EEA
Agreement was signed on May 2, 1992, in Oporto, Portugal.\textsuperscript{50} The European Parliament gave its assent, as required by EEC Treaty Article 238 after the Single European Act, on October 28, 1992.\textsuperscript{51}

A disconcerting surprise occurred during the ratification process. The Swiss referendum of December 6, 1992, resulted in a narrow negative majority of 50.3\%.\textsuperscript{52} Switzerland accordingly could not participate in the EEA Agreement. (Indeed, Switzerland had also filed an application for accession on May 20, 1992,\textsuperscript{53} which was naturally side-tracked by the referendum.) Switzerland's failure to ratify the EEA Agreement required the parties to draft quickly a Protocol to make modifications in the financial and institutional provisions of the Agreement, which necessarily delayed its entry into force.\textsuperscript{54} The process of ratification by all the other EFTA states and the Community Member States took most of 1993.

The EEA Agreement accordingly came into force on January 1, 1994.\textsuperscript{55} Its economic importance for the Community, and even more for the EFTA states, cannot be overestimated. In 1990, the Community was EFTA's main trading partner, taking about 58\% of all EFTA exports and providing over 61\% of the imports of the EFTA states. EFTA was also the Community's main trading partner, providing the Community in 1990 with


\textsuperscript{52} Alan Riding, Swiss Reject Tie to Wider Europe, N.Y. TIMES, Dec. 7, 1992, at A7. In the almost dead-heat vote, the German-speaking cantons provided the margin for defeat. The principal motives for the adverse vote appeared to be a fear of large-scale immigration, concern for the Alpine environmental protection rules, and a desire to retain the traditional cantonal form of democracy.


\textsuperscript{55} E.U. BULL., no. 1/2, at 69-70 (1994).
23% of its imports (compared with 18% from the United States and 11% from Japan), and taking 26.5% of the Community's exports (compared with 18% to the United States and 5% to Japan).  

At the time of the signing of the EEA Agreement in Oporto, a press release described the EEA as "the largest and most important integrated economic area in the world" and called it "a particularly important element in the new architecture of Europe." Both are accurate statements. In essential terms, the extremely complicated EEA Agreement constitutes the absorption of the EFTA states (other than Switzerland) into the Community's internal market. On EFTA's side, the states must align their rules to those of the Community, without any derogation or deviation except as permitted by the Agreement. The EFTA states agreed to adopt over 1500 separate legal measures, annexed to the EEA Agreement. Sven Norberg, the Director for Legal Affairs of the EFTA Secretariat, has pithily described the result as "a common European legal system."

Attaining a single integrated internal market means the elimination of barriers to the free movement of goods, workers, services, and capital, with the concomitant right of establishment. With limited exceptions, the EEA Agreement obligates the Community and the EFTA states to remove such barriers among themselves. Moreover, outside of the internal market program itself, the EFTA nations agreed to accept most of the Community's legislation in the areas of consumer rights, environmental protection, and social policy (employee rights). Finally, the EFTA states had to adopt a system of competition rules, together with administrative and judicial enforcement of those rules, which essentially parallels the Community competition law.

The EEA Agreement thus represented a program for legislative action by the EFTA states even more ambitious than that

58. Norberg, supra note 50, at 1172.
59. For a summary, see Press Release, supra note 57, at 130-33. For articles describing the EEA Agreement, see supra note 50.
60. Press Release, supra note 57, at 131.
61. Id.
assumed by the Community in 1987 when it committed itself to attaining a completed internal market by the end of 1992. This is because the Community had already in place a substantial body of harmonized legislation in 1987 to serve as the starting point, while the EFTA countries had in large measure to begin the process (unless, like Austria, they had opted in recent years to adapt some of their legislation to conform with Community directives).

The institutional structure created by the EEA Agreement, particularly those elements designed directly for the EFTA states, is not of direct concern in the present review. It is worth noting, however, that the EFTA states agreed to contribute substantial amounts to a Community cohesion fund, which was intended to help lesser-developed regions of the Community to confront the challenge posed by the greater competitive pressures of a completed internal market.

Because the EFTA states were, generally speaking, well-advanced industrial and commercial economies, these contributions were required to balance the benefits they were thought to receive through the integration of their economies into the Community market.

Under the EEA Agreement itself, the wholesale acceptance of Community internal market and related legislation was scheduled to cover measures adopted through July 31, 1991, a date close to the end of the negotiation period. This has been updated. By EEA Joint Committee Decision 7/94, the EFTA states (other than Switzerland) agreed to accept also the pertinent Community measures adopted between August 1, 1991 and December 31, 1993, or over two more years of substantial legislative activity.

Arguably, the EEA Agreement comes close to making the EFTA states non-voting members of the Community. Indeed, the obligation imposed on the EFTA states to align so much of their legislation with the Community's would seem to be an acceptable burden only in view of the fact that most of the EFTA states (Austria, Finland, Norway, Sweden and even Switzerland) were applicants for Community membership.

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62. Press Release, supra note 57, at 131-32. Over the initial five years of the EEA Agreement, the EFTA nations participating were to contribute 1.5 billion ECU in soft loans and 500 million ECU in direct grants to the cohesion fund.

If Austria, Finland and Sweden had been content to keep their status as members of the European Economic Area (as have Iceland, and now Norway), they would already have accepted a major reduction in their independent decision-making capacity in the economic sphere in return for their inclusion in the vastly larger integrated free market economy of the Community. But these three States, together with the Norwegian government of Prime Minister Bruntland, wanted more - they sought full Community membership. However, within the Community the process of major constitutional revision required that their applications be held in abeyance.

E. The Ambitious Modifications of the Maastricht Treaty and the Unpleasant Surprises During Its Ratification

When Austria applied in July 1989, the Commission, Parliament, France, Germany, Italy, Spain and most of the other Member States were pressing for further steps toward European union, building on the perceived success of the Single European Act. In their view, an integrated internal market appeared a truncated success without the cap of a European Economic and Monetary Union ("EMU"). The continued stability of the European Monetary System appeared to show that the time was ripe for further initiatives. At its June 1988 meeting in Hanover, the European Council "confirmed the objective of progressive realization of economic and monetary union."64 Pursuant to the European Council’s request, the April 1989 Delors Report,65 authored by the Commission President and representatives of the central banks of several Member States, outlined the proposed features of an EMU and set forth concrete stages of action to attain it.

Moreover, with significant support from the Commission, Parliament had long sought to gain a greater share in the legislative process and to obtain other powers to remedy the "democratic deficit." President Mitterand, Chancellor Kohl, Prime Minister Gonzales, Prime Minister Lubbers and other Member

64. 21 E.C. BULL., no. 6, at 165 (1988).
State leaders had also become convinced that the time had come for political revisions.

Accordingly, by the time Sweden applied in July 1991, and still more when Finland and Norway applied in 1992, the Community was well-launched in a constitutional reorganization. Although Denmark and the United Kingdom may well have preferred to negotiate and bring in the applicant states before the restructuring occurred, this was not the view of the majority. The Community, preoccupied with the process of adopting the Maastricht Treaty, preferred to retard negotiations. In a popular phrase, "deepening" the Community took precedence over "widening" the Community.

The June 1990 Dublin European Council meeting decided that the time was ripe for two intergovernmental conferences, composed of Member State representatives, to be held in Rome beginning in December 1990, one to work on political modifications, the other to develop a framework for an eventual economic and monetary union. The two conferences worked intensively for one full year, reporting back to and receiving instructions and proposals from the Member State governments, as well as receiving proposals and comments from the Commission and the Parliament. When the conferences were unable to attain agreement on certain key questions, the Maastricht European Council in December 1991 somewhat surprisingly managed to work out acceptable compromises to most of the unsettled issues.

Although often misunderstood as creating a European Union, Article A of the Maastricht Treaty makes clear that the Treaty is really still on the road, constituting "a new stage in the process of creating an ever closer union among the peoples of Europe." Even so, the Maastricht Treaty represents the most important restructuring of the institutions and expansion of the constitutional dimensions of the Community since its incep-

66. 23 E.C. BULL., no. 6, at 7-10 (1990). The principal agenda items for the two Rome Intergovernmental Conferences were laid down by the European Council at its Rome meeting on December 14-15, 1990. 23 E.C. BULL., no. 12, at 7-11 (1990).


68. TEU, supra note 7, art. A. The first Resolved of the TEU's Preamble also refers to the TEU as "a new stage in the process of European integration undertaken with the establishment of the European Communities." Id. pmbl., ¶ 1.
Indeed, the Maastricht Treaty has given a new name to the over-all structure, the European Union, and has replaced the traditional term, European Economic Community, by the pithier one, European Community. In fact, the European Community, often called the "first pillar," represents virtually all of the institutional structure and scope of operations, including the new Economic and Monetary Union. The parts of the European Union which remain outside of the Community are comprised of the other two "pillars," Article J, the Common Foreign and Security Policy, and Article K, Cooperation in Justice and Home Affairs, which have their own scope and decision-making procedures.

Undoubtedly to the great surprise of the leaders of the Member States and of the Community institutions, the ratification of the Maastricht Treaty proved neither quick nor easy. It is true that ratification proved relatively rapid and overwhelmingly favorable in most Member States, e.g., in Benelux, Greece, Italy, Portugal and Spain. In Ireland, constitutional modifications

69. The achievements, compromises and complexity of the Maastricht Treaty has provoked a voluminous literature, too numerous for citation here. All major texts describing the European Community (now European Union) legal system published since 1993 encompass the provisions of the TEU. See, e.g., BERMANN, GOEBEL, DAVEY & FOX, supra note 28; STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW (1993). Two fine constitutional law studies are INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION (Deirdre Curtin et al. eds., 1994); LEGAL ISSUES OF THE MAASTRICHT TREATY (David O'Keeffe & Patrick M. Twomey eds., 1994).

70. TEU, supra note 7, art. G(A)(1).

71. The Maastricht EMU provisions are contained in arts. 102a-109m of the EC Treaty. For a helpful analysis, see Jørn Pipkorn, Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union, 31 COMMON MKT. L. REV. 263 (1994).

72. Under Article J, the European Council provides guidelines on foreign and security policy, which the Council then carries out in a specific manner, usually voting by unanimity, but occasionally by qualified majority vote. Article K essentially calls only for coordination and cooperation in justice affairs, acting through the Council by unanimous vote, unless the Council decides unanimously to adopt implementing measures by a qualified majority vote. Under Article L, the Court of Justice does not have jurisdiction (with one exception) over issues arising in the scope of Articles J and K.

73. The principal stages in the ratification of the Maastricht Treaty by each Member State are outlined in 26 E.C. BULL., no. 10, at 121-22 (1993). Some notable examples of easy ratification occurred in Belgium, where the two chambers of Parliament approved the TEU by an over 80% majority; in Greece, where the Greek Parliament vote was 286 to 8; in Italy, where the Chamber and Senate votes were around 90% favorable; in The Netherlands, where the Chamber voted 90% in favor and the Senate was unanimous; in Portugal, where the Treaty and requisite constitutional amendments were adopted by the Assembly with a near-90% majority; and in Spain, where both
demanded a popular referendum, but the popular vote yielded nearly a two-third margin of support. In Germany too, the margin of parliamentary approval was overwhelming, although media reports indicated a considerable level of skepticism about the Maastricht Treaty in the population at large.

In a few Member States, however, instead of a triumphant endorsement by legislatures and popular votes, the ratification process became mired in bitter debates, often centered on Community issues quite irrelevant to the merits of the Maastricht Treaty (such as the reduction of agricultural subsidies in order to achieve agreement in the GATT Uruguay Round, or unpopular Court of Justice judgments on issues of equal economic rights of women or on fishing rights). Perhaps even more, the ratification process was adversely affected by the unpopularity of particular Member State governments themselves. Thus, the narrow adverse vote (51-49%) in the first Danish referendum in June 1992, followed by only a close 51% margin of victory in the French referendum in September 1992, created a sense of malaise not only in the leadership of these two Member States, but in others as well, and in the Community institutions.

Although media commentary often treated the ratification difficulties as evidence of popular disenchantment with the Union (disregarding the contrary evidence of easy approval in most States), the Member State and Community leadership regarded the setbacks more as a failure to communicate the successes of the Union to the public and as a sign that Brussels had become the center of excessively detailed regulation. The Euro-

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74. The Irish referendum, held on June 18, 1992, proved overwhelmingly favorable: 69% yes to 31% no. 25 E.C. Bull., no. 6, at 29 (1992); 26 E.C. Bull., no. 10, at 121 (1993). The Irish vote proved to be the brightest spot in the popular tests of the Treaty during the ratification process.

75. The German Bundestag vote on December 2, 1992, was 543 to 17, while the Bundesrat voted unanimously in favor on December 18, 1992. 25 E.C. Bull., no. 12, at 47-48 (1992). The German parliamentary majority was all the more impressive because the votes occurred after the setback in the June 1992 Danish referendum and the disappointing majority in the September 1992 French referendum.

76. 25 E.C. Bull., no. 6, at 29 (1992); 26 E.C. Bull., no. 10, at 121 (1993). The Danish Parliament had strongly endorsed the Maastricht Treaty in a vote, 130 to 25, on May 12, 1992, but the Danish population was obviously not impressed by the vote, nor by the strong support of the government and most political parties.

pean Council’s reaction came in the form of the Declaration on a Community Close to Its Citizens, adopted at the Birmingham meeting in October 1992, and the famous Declaration on the Application of the Subsidiarity Principle, issued in Edinburgh on December 12, 1992. Commission President Jacques Delors, commenting on the narrow French margin of approval, said notably: “By voting ‘no,’ many French citizens have expressed anxiety. It is our duty to respond . . . by consolidating the democratic process and . . . adapting the institutions through which the aspirations of our citizens can be expressed and translated into policy and action.” He called this “one of the greatest challenges we have yet had to face.”

The sense of malaise only deepened during the long and laborious debates in the United Kingdom Parliament, culminating in a narrow margin of approval in July 1993. Only after the European Council in Edinburgh in December 1992 granted certain face-saving concessions to Denmark was it possible to achieve an affirmative vote of 57% in the June 1993 Danish referendum. Finally, after the German Constitutional Court rejected various challenges, some of them quite serious, to Germany’s ratification in October 1993, the Maastricht Treaty’s arduous birth could finally occur.

On this occasion, the October 1993 Brussels European

79. 25 E.C. BULL., no. 12, at 9-10, 12-16 (1992). Even more important than this Declaration is the Interinstitutional Declaration on Democracy, Transparency and Subsidiarity, 26 E.C. BULL., no. 10, at 118-20 (1993), which sets out the guidelines agreed to by the Commission, Council and Parliament for future institutional efforts to respect these principles.
81. Id.
82. 26 E.C. BULL., no. 10, at 122 (1993). Prime Minister Major had to make approval a vote of confidence in order to secure support from right-wing Tories. Philip Stephens, Major Left Hanging on by Pyrrhic Victory, FIN. TIMES, July 24, 1993, at 4.
83. The Edinburgh European Council adopted a Decision on Denmark and the Treaty on European Union, which notably recognized that Denmark would not participate in Stage III of the Economic and Monetary Union (i.e., would not accept the European currency nor the authority of the European Central Bank) and would not participate in the defense aspects of the Common Foreign and Security Policy. 25 E.C. BULL., no. 12, at 9, 24-26 (1992); Denmark and the Treaty on European Union, O.J. C 348/1 (1992).
Council issued a statement noting that "ratification has been the occasion for a true public debate" which proved "salutary" even though it revealed "weaknesses."\textsuperscript{85} The European Council pledged greater efforts "to introduce greater transparency, openness and decentralization in our procedures . . . [to achieve] a Europe close to the citizen."\textsuperscript{86} It is beyond the scope of this Article to describe the impact of the application by the Council, Commission and Parliament of the major new and related doctrines of subsidiarity and democratic transparency, but it is certain that the exigencies of the ratification have sharply modified future Union operational policies and procedures.

\textbf{F. The Time Comes for the 1995 Enlargement}

By the time the Maastricht Treaty entered into effect on November 1, 1993, Austria had been waiting four and Sweden two years respectively. At least, as we shall see in Section IV(A) below, the Commission had provided a favorable opinion on Austria's application on July 31, 1991,\textsuperscript{87} and on Sweden's application on July 31, 1992.\textsuperscript{88} The Commission's favorable opinion on Finland followed shortly thereafter on November 4, 1992,\textsuperscript{89} and that on Norway (whose application was only filed on November 25, 1992) came expeditiously on March 24, 1993.\textsuperscript{90}

It fell to the European Lisbon Council to conclude in June 1992 that the adoption of the European Economic Agreement (which had occurred the month before in Oporto) "paved the way" for negotiations with the EFTA applicants, which could begin after ratification of the Maastricht Treaty.\textsuperscript{91} The Lisbon European Council also stated a crucial condition: accession could only take place on the basis of acceptance by the applicants of the Maastricht Treaty.\textsuperscript{92}

This condition implicitly meant that Austria, Finland, Norway and Sweden would not be allowed to reject or modify the Economic and Monetary Union provisions (even though the

\textsuperscript{86} Id.
\textsuperscript{89} 25 E.C. Bull., no. 11, at 76 (1992).
\textsuperscript{90} 26 E.C. Bull., no. 3, at 56 (1993).
\textsuperscript{91} 25 E.C. Bull., no. 6, at 10 (1992).
\textsuperscript{92} Id.
United Kingdom and Denmark had, by separate Protocols,\footnote{The right of Denmark and of the United Kingdom to opt out of participation in the Economic and Monetary Union is contained in two Protocols bearing each one's name. Protocol on Denmark, O.J. C 224/122 (1992); Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, O.J. C 224/123 (1992); see supra note 83 and accompanying text (noting that Denmark exercised its opt-out right in order to facilitate favorable vote in June 1993 referendum).} been granted the right to opt out of the third stage of the EMU), and none of the applicants could claim their traditional neutralist principles to opt out of the Common Foreign and Security Policy.

Six months after the Lisbon meeting, in December 1992 the Edinburgh European Council was preoccupied by efforts to bring the Maastricht ratification process to a successful conclusion. The Edinburgh European Council wanted also to hasten the start of negotiations with the applicant states, yet not to undermine the principle that the applicants must accept the Maastricht Treaty. Hence it authorized informal negotiations with the applicant countries to begin in early 1993, with formal ones to open only after the Treaty entered into force.\footnote{25 E.C. BULL., no. 12, at 10 (1992).} This was accordingly the ultimate approach: informal negotiations started on February 1, 1993, converted into formal ones after November 1, 1993.

Because so much of the negotiating terrain had already been covered in the elaboration of the substantive provisions of the European Economic Area Agreement, the negotiations with Austria, Finland, Norway and Sweden proved remarkably quick, especially in comparison to the six year long period required for the accession negotiations with Portugal and Spain. A final deal-making session of ministerial negotiations in late February and early March 1994\footnote{26 E.C. BULL., no. 3, at 64 (1993).} paved the way for the signing of the Act of Accession at Corfu on June 24, 1994.

The preceding description of the historical evolution leading to the January 1, 1995 accession of Austria, Finland and Sweden is in part intended to situate the accession within two contexts, that of the success of the internal market program, and that of the transformation of the Community into the European Union. It also is intended to facilitate understanding of some of
the issues raised, and their resolution, in later sections of this Article.

Before ending, a final point. The arduous process of ratification of the Maastricht Treaty, coupled with the clear disenchantment of large sections of the population in some Community States, certainly created a major sense of malaise in 1992-93. This malaise was deepened by two economic factors, both occurring despite the success of the internal market legislative program: 1) the monetary turmoil in September 1992,\textsuperscript{96} in part incited by concern over the outcome of the French referendum, and the even more serious turmoil in August 1993, leading to the partial breakdown of the European Rate Mechanism ("ERM") of the European Monetary System\textsuperscript{97} ("EMS"), and 2) the persistent high levels of unemployment virtually throughout Western Europe.\textsuperscript{98}

By the middle of 1994, the realization that the governments of Austria, Finland and Sweden were ready, willing and eager to join the Union began to have a beneficial calming effect on the psychological state of Community officials and Member State leaders. Not surprisingly, the somewhat temporary sense of pessimism in Community (or Union) affairs produced by the setbacks in the Maastricht ratification process has already begun to dissipate. Instead, there is a growing climate of confidence that the Union will progress still further, with its addition of three politically strong and economically stable new States.

Thus the 1995 enlargement can be seen to have already produced an initial beneficial effect, by no means trivial in character. The Union leadership has regained in large measure its

\textsuperscript{96} Attacks on their currencies forced Italy and Spain to devalue, and the United Kingdom withdrew from the European Rate Mechanism, a serious blow to the operations of the European Monetary System. 25 E.C. BULL., no. 9, at 12-13 (1992).

\textsuperscript{97} A severe attack on the French Franc in favor of the German Mark obliged the EMS authorities to broaden enormously the band within which currencies could float, from 2.25% to 15% above or below the pegged central rate of exchange. 26 E.C. BULL., no. 7/8, at 21-22 (1993). This has seriously reduced the effectiveness of the European Monetary System and set back progress to the EMU.

\textsuperscript{98} Unemployment levels have hovered around 8-12% in most Member States and risen as high as 15-20%. See Commission of the European Communities, White Paper on Growth, Competitiveness, and Employment, COM (93) 700 Final (Dec. 1993) (analyzing structural conditions of unemployment and possible future efforts to combat it). The White Paper was requested by the European Council, whose December 10-11, 1993, Brussels session devoted considerable attention to an action plan based upon it. 26 E.C. BULL., no. 12, at 7-11 (1993).
confidence, and is turning its attention in a more positive and optimistic manner to the future, to the development of the Economic and Monetary Union, to the challenges of the 1996 intergovernmental conference, and to the prospect of further enlargement later in this century, as the central European states knock on the Union door.

Moreover, although their precise contributions are variable and uncertain, Austria, Finland and Sweden are bound to promote significantly Union operations and policies. All three are keenly interested in the on-going success of the internal market and may be expected to support legislation to achieve its final aspects. The depth of Finland's severe 1991-93 recession may hinder its attainment of the convergence criteria for the third stage of the EMU, but Austria and Sweden are likely to be among the States which can ultimately qualify.

Probably more notable will be the three States' contribution to "environmental and social protection, transparency and open government," cited by the Corfu European Council last June when it welcomed their accession. As we shall see in late sections of this Article, the three States have accepted the Maastricht Social Protocol as part of the acquis communautaire, and their strong traditions of social protection make them likely leaders, and not merely supporters, in shaping future employee rights and especially women's rights legislation. In the environmental field, the accession negotiations revealed that their present standards were usually higher than those of the Community. In order to preserve the transitional derogation for their present rules, the three States are apt to lobby for new and higher Community environmental protection rules.

Austria, Finland and Sweden are all justly renowned for their strong democratic traditions, with a particular emphasis on transparency and human rights protection. The three States may be expected to contribute initiatives as well as support for more openness in Union decision-making, for efforts to make European citizenship rights more tangible, and for functional

99. See supra note 5; see also COMMISSION OF THE EUROPEAN COMMUNITIES, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION 1994, at 246 (1995) [hereinafter 1994 REPORT] ("The Union (may) step up its activities in the social and environmental fields, drawing on the experience of its new members in these areas.").
cooperation in justice affairs in order to remove barriers to movement by people.

In the final section of this Article, we will consider the prospects for further enlargement, particularly through the accession of central European states. Once in the Union club, Austria, Finland and Sweden can be expected to join those Member States that desire such enlargement to come early rather than late. Austria is bound to urge strongly the candidacies of central European states with which it has historic cultural as well as commercial ties. Finland and Sweden have traditional links with the three Baltic states and are apt to work toward their accession. Thus, the 1995 enlargement may serve as a stepping-stone to future enlargement.

At this point, however, it is time to turn in this Article to an extremely important subject: what changes in the institutional structure of the Union occurred because of the 1995 enlargement?

II. INSTITUTIONAL STRUCTURE OF THE EUROPEAN UNION AFTER THE 1995 ENLARGEMENT

A. The European Council Sets the Post-Enlargement Institutional Structure

In June 1990, when the European Council decided in Dublin to convene the Rome Intergovernmental Conference to make political modifications in the Community structure, the debate opened on how to make the institutions more democratic and more efficient. At its meeting in Rome on December 14-15, 1990, immediately before the opening of the Rome IGC, the European Council set out the outline for an agenda, which expressly included as goals the adoption of Treaty changes to achieve “Democratic legitimacy,” i.e., give more powers to Parliament, and greater “Effectiveness and efficiency,” especially the increased use of majority voting at the Council level in order to make the decision-making process more efficient.¹⁰⁰

When the Maastricht Treaty was ultimately adopted, after the cliff-hanging compromise agreements reached in the December 1991 Maastricht European Council, Parliament did receive a number of additional powers, the most important being a

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larger legislative role in the form of the new co-decision procedure which now applies to most internal market legislation.\(^{101}\) However, in many other vital spheres of Community action, such as agriculture, competition, tax and social policy, Parliament’s role is still limited to giving opinions in the consultation process,\(^{102}\) and Parliament is not even consulted on most measures leading to an Economic and Monetary Union.\(^{103}\) Moreover, although the Maastricht Treaty added new fields in which qualified voting is used when the Council acts upon proposed legislation,\(^{104}\) the mode of calculating the majority was not changed, so that a relatively small blocking minority of States can still prevent the Council from adopting a proposal.

Furthermore, the Maastricht European Council was not able to resolve the issues which had deadlocked the Rome IGC when it tried to decide upon the appropriate size and composition of the Commission and of the Parliament. With seventeen members (one nominated by each State, with France, Italy, Germany, Spain and the United Kingdom allowed to nominate a second commissioner), the Commission is frequently criticized as having become unwieldy, too much of a committee and too little of a functional executive body. As for the Parliament, at the time the system of popular direct election of its members was

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101. The co-decision procedure is set out in EC Treaty, supra note 7, art. 189b. Its most important field of use is for most internal market harmonization measures under EC Treaty, supra note 7, art. 100a. For a description of this complex procedure, see Alan Dashwood, Community Legislative Procedures in the Era of the Treaty on European Union, 19 European L. Rev. 343 (1994).

102. The EC Treaty, as amended by the TEU, accords Parliament only a right of prior consultation in Article 43 (common agricultural policy), Article 87 (competition policy), Article 99 (indirect taxes), and Article 100a(2) (fiscal provisions and employee rights).

103. For example, Article 103 requires the Council to inform the Parliament about its guidelines on economic policies, and Article 109 requires the President of the Council to inform the Parliament about exchange rate decisions, but Parliament is not consulted. Parliament, however, is to be consulted when the Member States nominate the members of the European Monetary Institute (Article 109f(1)), and when the Council recommends that certain States qualify for entry into the European currency system, (Article 109j(2)).

104. Important new fields in which the Council now takes action by a qualified majority vote are the harmonization of visa policies (Article 100c), movement to third stage of the Economic and Monetary Union (Article 109j), education (Article 126), health (Article 129), consumer protection (Article 129a) and most environmental protection measures (Article 130s).
introduced in 1979, it became a very large body, totalling 518 members after the accession of Portugal and Spain.

A Declaration annexed to the Maastricht Treaty stated that the Member States would, before the end of 1992, examine the question of the number of members both of the Parliament and the Commission, notably to consider the needs of "an enlarged Community." To this date, no action has been taken with regard to the Commission. However, the December 1992 Edinburgh European Council worked out a compromise solution to the question of how to take into account Germany's much larger population after unification in 1990, giving Germany ninety-nine MEPs, but also augmenting the French, Italian and U.K. delegations from eighty-one to eighty-seven and adding to the delegations of several other States. Council Decision 93/81 formally enacted this compromise. Thus, for the June 1994 elections, Parliament totalled 567 members.

Once it became clear in 1992 that three or four new States would join the Union, obviously the issue of structural modification to the institutions became a burning one. The Commission in its 1992 report on "Europe and the Challenge of Enlargement" emphasized the need to address the issue of efficiency for each institution, but made no specific proposals. The Commission noted in particular the issue of the proper level for determining the qualified majority in Council voting. In a resolution of July 15, 1993, the Parliament also urged that the issues of the democratic character and efficiency of the institutions be addressed in arranging the terms of the next enlargement.

Not surprisingly, it was the European Council which set the terms to adjust the structure of the Union institutions in order to include the additional States. As we have seen before, since the practice of regular summit meetings began at the Hague in 1969, the Heads of State and Government have invariably taken the most important policy and political decisions, cracking the hard nuts when major issues have arisen. Article D of the Maastricht Treaty expressly formalized in Treaty language the prior

105. Declaration on the Number of Members of the Commission and of the European Parliament, annexed to the TEU, supra note 7.
106. 25 E.C. BULL., no. 12, at 12 (1992); see supra note 22 and accompanying text.
operational reality when it declared that the European Council should “define the general political guidelines” of the Union. The Twenty-Seventh General Report observes that when deciding upon the modification of the institutions, the European Council’s Brussels meeting in December 1993 formally exercised for the first time this power set out in Article D.

As we shall see, the European Council eschewed any radical structural changes. In effect, it merely stretched the prior composition of each body, probably to the maximum size possible without too serious a sacrifice in operational efficiency. Neither the Commission nor the Parliament were particularly enthusiastic about the European Council conclusions - indeed, as described in Section IV(D), the dissatisfaction of many MEPs briefly imperiled the favorable parliamentary vote on accession. For its part, the Commission in its final accession opinion of April 19, 1994 bluntly described the institutional changes as only “acceptable" temporarily, until the 1996 Intergovernmental Conference might have the occasion to make further modifications.

Manifestly, one of the most difficult agenda items for the 1996 IGC will be the nature of further structural revisions for each institution in order to accommodate the possible addition of another five, ten or fifteen states in the next enlargement, a topic to which we will briefly return at the end of this Article.

At this point, let us analyze the changes in the structure or operation of each institution produced by the 1995 enlargement.

B. The Council: Calculation of the Majority When Action Requires a Qualified Majority Vote

Virtually all Council actions are taken either unanimously or on the basis of a qualified majority vote. Apart from adopting its own rules of procedure, or requesting the Commission to present a proposal for legislation, the Council almost never acts by a simple majority vote. Nor has there been any serious at-

110. TEU, supra note 7, art. D.
111. TWENTY-SEVENTH REPORT, supra note 34, at 362, ¶ 1020.
113. Article 151 of the EC Treaty does not prescribe a majority when the Council sets its rules of procedure, nor does Article 152 when the Council requests the Commis-
tempt to add new instances of simple majority voting. The efforts in recent years to improve the Council's efficiency or its democratic character have never centered on developing the approach of simple majority voting, but rather on transferring particular types of legislative action or other decision-making from unanimous decisions to qualified majority voting.

As the number of Member States has grown, it has obviously become more difficult to attain unanimity. With fifteen States, there is clearly a greater risk that one will object to a proposal than if there are only twelve, or nine, or six. The Commission raised this point in its 1992 report on "Europe and the Challenge of Enlargement," but it is unlikely that anyone seriously thought the 1995 enlargement would be the occasion to shift some legislative measures out of the unanimous vote category. The question is, of course, apt to become more prominent if a large number of applicants come forward in the next enlargement.

Successive amendments in the Single European Act and the Maastricht Treaty have set qualified majority voting as the mode to adopt most legislation to attain the internal market, protect consumers or the environment, move to the third stage of the EMU, etc. Fortunately, the famous (or infamous) 1965 Luxembourg Compromise, by whose rather ambiguous terms any large State could claim an effective veto on proposed measures, appears to have become extinct. In several annual reports since

114. Challenge of Enlargement, supra note 13, at 15.
115. See supra note 104.
116. In mid-1965, President De Gaulle of France, infuriated at certain Commission proposals that he felt would transfer too much authority to the Community (but which were all adopted after his death), ordered French representatives to cease participating in Council meetings. This so-called "empty chair" policy paralyzed all important decision-making. At a special session in Luxembourg in January 1965, the Member States issued a declaration intended to defuse the crisis. This "Luxembourg Compromise" stated that when a State felt that important interests were at stake in a proposal that could be adopted by qualified majority voting, the Council would try, at least for a reasonable time, to reach a solution acceptable to all. Although quite ambiguously worded and only a political accord, not an amendment to the Treaty, most observers believe that the Luxembourg Compromise enabled the larger States to exercise an effective veto on legislation they opposed until the early 1980's. See BERMANN, GOEBEL, DAVEY & FOX, supra note 28, at 54-55; P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 247-51 (Laurence W. Gormley ed., 2d ed. 1989).
the adoption of the SEA, the Commission has observed that the States respect the use of qualified majority voting by the Council, and that in debates on proposals Council members increasingly strive to attain compromises instead of trying to block proposals altogether.¹⁷

The qualified voting system is a bit arcane. From the inception of the EEC Treaty, the Member States have set a number of weighted votes for each of them, to be used when qualified majority voting is the prescribed Treaty mechanism. France, Germany, Italy, and the United Kingdom have always held the maximum weighted figure, ten votes each.¹⁸ As the next largest state, Spain has eight votes, while the medium-sized states, Belgium, Greece, the Netherlands and Portugal, have five each.¹⁹ As for the smaller states, Denmark and Ireland have three votes, and Luxembourg two.²⁰ These numbers were set in an attempt to take into account each state’s population and economic power, but only in part. The system obviously gives the smaller and medium-sized states a disproportionate vote in comparison with the five largest states. If population alone were decisive, Germany should have over 200 weighted votes to Luxembourg’s one. Still, while not perfectly democratic, the system is manifestly far more sensible and fair than the United States’ constitutionally mandated parity in two Senate seats each for both very large and very small states. (It would be interesting to spec-

¹¹⁷. As noted before, the Single European Act introduced Article 100a of the EEC Treaty, which enabled most internal market legislation to be adopted by a qualified majority vote in the Council. For the Commission’s expression of satisfaction with the operational success of qualified majority voting after the SEA, see COMMISSION OF THE EUROPEAN COMMUNITIES, XXIInd GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1988 32, ¶ 4 (1989) [hereinafter TWENTY-SECOND REPORT]; TWENTY-FOURTH REPORT, supra note 20, at 359, ¶ 911; TWENTY-FIFTH REPORT, supra note 25, at 363, ¶ 1147.

¹¹⁸. The initial EEC Treaty, March 25, 1957, set forth the qualified majority voting system in Article 148(2), which allocated France, Germany and Italy the maximum figure of 10 votes each. When the United Kingdom joined in 1973, it was allocated 10 votes. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1972 20, ¶ 13 (1973) [hereinafter Sixth Report].

¹¹⁹. Spain received eight votes when it joined in 1986, and Greece and Portugal five votes each when they joined, respectively in 1981 and 1986. EC Treaty, supra note 7, art. 148(2); see 12 E.C. BULL., no. 5, at 14-15 (1979) (Greece); 19 E.C. BULL., no. 1, at 8 (1986) (Portugal and Spain).

¹²⁰. Denmark and Ireland were allotted three votes each when they joined in 1973. Sixth Report, supra note 118, at 20, ¶ 15.
ulate how the U.S. legislative process would change if we used weighted voting in the Senate, e.g., giving California and New York senators five votes each, with lesser votes of four, three or two for medium-sized states, and only one vote per senator from the half-dozen smallest states.)

The easy part in handling the applications of Austria, Finland, Norway and Sweden was the determination of the weighted votes to be allotted to each. The Brussels European Council allocated four each to Austria and Sweden, the larger applicants in population and economic power, and three each to Finland and Norway. Because Norway ultimately declined to join the Union, this has meant the addition of three more States with low weighted votes, altogether eleven votes for all three. The total number of weighted votes in the Council has accordingly risen from seventy-six to eighty-seven. However, speaking in terms of their weighted votes, instead of five larger states, four medium-sized, and three smaller ones, after the 1995 enlargement, there are five larger states (eight to ten votes), six medium-sized (four to five votes), and four smaller ones (two to three votes).

Manifestly, if Council voting were based on a simple majority of weighted votes, before the 1995 enlargement the four largest States, with forty votes among them, would have been able to constitute a majority of the seventy-six total. Even after the 1995 enlargement, these four together with Spain could constitute forty-eight votes, or together with any one of the six States possessing four or five votes, could constitute forty-four or forty-five, a simple majority of the new eighty-seven vote total.

It is easy to see that the Heads of State and Government regard it as essential to set a qualified voting majority at somewhere around the two thirds mark, in order to ensure that a sufficiently large number of States back a measure before it can be adopted. On the other hand, the larger States clearly do not relish being outvoted. Consequently, they have wanted the requisite qualified majority vote to be set at a level at which it is unlikely that too many large States can be outvoted. The key issue is, of course: how many is too many?

After the first enlargement in 1973, the then nine States all were allocated their current number of weighted votes, totalling

fifty-eight. The qualified majority vote was set at forty-one. Thus, seventeen negative votes could not bar legislation; while eighteen represented a blocking minority. In effect, this meant that one large State (ten votes) and one medium-sized State (five votes) could be outvoted, or even a large State and two small States (two or three votes) could be outvoted — but never two large States.

After the second enlargement in 1986, the votes of the Community of Twelve totalled seventy-six. The qualified majority was set at fifty-four. States cumulating twenty-two votes could be outvoted, while twenty-three votes now became the blocking minority. Thus, since 1986, two large States (twenty votes) could be outvoted — obviously a serious concession made by the large States. However, if two large States were joined by any State other than Luxembourg (two votes), they would hit the magic number of twenty-three and could not be outvoted.

Although it agreed on the number of weighted votes to be allocated to the new states, the Brussels European Council was unable to determine the second part of the equation used in the qualified majority voting process, namely the requisite majority of the new eighty-seven vote total. (At the time they considered the issue, the projected total was ninety, including three votes for Norway.) Discussion on this continued into 1994. The bone of contention was the Major Government’s insistence that the blocking minority of negative votes should remain at twenty-three. Chancellor Kohl, President Mitterand and almost all the other Member State leaders felt that the blocking minority figure should rise proportionately to twenty-seven.

The Member State leaders remained deadlocked until the end of March, largely because Prime Minister Gonzalez of Spain lent some support to Prime Minister Major’s position, perhaps in part as a tactical maneuver to win concessions sought by Spain in the hard-fought accession negotiations with Norway over fishing rights (see Section IV(C) below). Finally, at a Council meeting at Joanina in Greece on March 26-27, 1994, the Greek presidency devised a face-saving solution.

123. EU-Kohl Infuriated by ‘Incomprehensible’ UK Moves to Deny Admission to Four New Countries, Manchester Guardian, Mar. 10, 1994, at 12; Stephens, supra note 82, at 4.
At Joanina, the Council set the new requisite qualified majority vote at sixty-four out of ninety, so that the blocking minority would be twenty-seven, the figure preferred by all the States but the United Kingdom. Subsequently, after Norway's negative referendum, in January 1995 the Council slightly altered the figure so that the majority became sixty-two out of eighty-seven votes, and the blocking minority thus went down one to twenty-six votes. The new system has the effect that two large States (twenty votes) plus two small States (three + two votes) can be outvoted. Alternatively, one large State (ten votes), plus as many as five smaller States (four + three + three + three + two) can be outvoted. (After all the debate, this hardly seems a very dramatic shift from the present system.)

The Council then added a resolution, the so-called Joanina Compromise. If a negative vote on any proposal were to hit the current blocking minority figure of twenty-three, but would be less than the new blocking minority of twenty-seven, than "the Council will do all in its power to reach, within a reasonable time . . . a satisfactory solution that could be adopted by at least sixty-eight votes." After Norway abandoned its application, removing three votes from the calculation of a qualified majority, the Joanina Compromise language was likewise adjusted to set sixty-five votes as the desired minimum level for a "satisfactory solution."

The language recalls that used in the Luxembourg Compromise, which effectively prevailed in Council voting until the early 1980's. The Joanina Compromise, like the Luxembourg Compromise, represents a calculated ambiguity. No one

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125. Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union is Founded, art. 15, O.J. C 241/21, at 24 (1994) [hereinafter 1994 Act of Accession] (amending EC Treaty, supra note 7, art. 148(2)).


129. See supra note 116.
can predict what "a reasonable time" should be, nor when the Council has done "all within its power to reach . . . a satisfactory solution."

The Commission was clearly unhappy with the Joanina Compromise. In an unusually critical statement on March 30, 1994, the Commission called the Compromise "a political declaration," meaning implicitly that it has no legally binding force.\(^{180}\) The Commission further warned that these "transitional arrangements . . . should not set a precedent which would influence the 1996 Intergovernmental Conference."\(^{181}\) As described in Section IV(D) later, many MEPs were also highly dissatisfied with the Joanina Compromise, and threatened to vote against approval of the accession of new states because of it.

The future operation of the Council will tell us whether the Joanina Compromise will be essentially ignored in close votes after the 1995 enlargement, or whether the United Kingdom or other States will insist on making the Joanina Compromise a genuine limitation on Council action in close votes.

C. The Rotation of the Presidency of the Council and the European Council

Formally, the accession arrangements made no change in the operations of the European Council. But in fact, with no fanfare and little attention, the Brussels European Council significantly changed the mode of selection of the presidency of the European Council, as well as that of the Council. Article D of the Maastricht Treaty states that the presidency shall be held for six months by the Head of State or Government whose Member State is president of the Council.\(^{182}\)

From the inception of the European Community, the presidency of the Council has rotated in alphabetical order among the States, each holding it for six months. The presidency is not simply a ceremonial role. The Council President calls and chairs all meetings,\(^{183}\) controlling in large measure the pace of discussions, the order of recognition of speakers, and the timing of

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181. Id. Joint Declaration No. 8, annexed to the 1994 Act of Accession, supra note 125, states that qualified majority voting will be examined during the 1996 IGC. O.J. C 241/21, at 383 (1994).
182. TEU, supra note 7, art. D.
183. EC Treaty, supra note 7, art. 147.
votes. Moreover, the Council President also determines to a substantial degree the agenda of meetings, setting the priority among possible topics, accelerating the review of some proposals and postponing action on others.

The influential role of the presidency is likewise evident in the European Council's bi-annual or special meetings, whose agenda is also in some measure set by the President. Indeed, since the mid-1980's, the government of the State holding the presidency of the Council and the European Council has made a point of announcing the agenda of matters to which it proposes to devote special or urgent attention during its presidency. Either the President of the European Council, or the Foreign Minister of the President's State now also customarily addresses the Parliament at the outset of its presidency to outline this agenda and express views on current issues confronting the Union. The President likewise supervises the formulation of the lengthy European Council conclusions, policy statements, and press releases, and customarily reports to the Parliament at the conclusion of each European Council meeting.

Six months is obviously an extremely short term for a functional presidency. In order to promote continuity in the legislative process and in general decision-making, whether in Council or European Council meetings, since the late 1980's a "troika" system has operated — the current President's office is supplemented by representatives from the immediate past and the next President's staff. Only the current President has the prerogatives of the chair and spokesperson, but his or her staff can operate more efficiently due to the coordination with these representatives of the past and next presidency.

As noted above, the rotation of the presidency has always been alphabetical (based on each State's spelling of its name), although a slight modification was introduced at the time of the second enlargement. The Member States wanted to avoid a rotation in which each State always returned to take over the presidency in the same first or second six month period — this was

135. The January and July-August EC Bulletins usually summarize these addresses in the review of Parliament's activities.
felt to be undesirable, because the second six month presidency has the critically important but also extremely arduous task of supervising the process of the adoption of the annual Community budget. Accordingly, in the current six year cycle which began in 1993, Article 146 of the EEC Treaty prescribed an inverted order for the two States taking the presidency in each year.\textsuperscript{137} To make this understandable, take the current years as examples. In 1993, Denmark held the presidency in the first six months, while Belgium held it in the second six months, in inverted alphabetical order. Similarly, in 1994 Greece preceded Germany, and in 1995 France precedes Spain (España in Spanish).

This rotation system was significantly modified by the Brussels European Council. Instead of simply adding Austria, Finland, Norway and Sweden to the alphabetical cycle, the European Council accelerated the timing of the presidency of the five largest States: France, Germany, Italy, Spain and the United Kingdom.\textsuperscript{138} The new system dictates that a large State assume the presidency at least once in every third six-month period. Thus, after the United Kingdom holds the presidency in the first six months of 1998 as originally scheduled, Germany is accelerated to take the presidency in the first half of 1999, France in the second half of 2000, etc.\textsuperscript{139} Presumably, the motive for this modification is not only to ensure that the five largest States hold the presidency more often, but also to guarantee that one of them

\textsuperscript{137} The second cycle set forth in Article 146 of the EEC Treaty (not modified by the Maastricht Treaty) is as follows: Denmark, Belgium, Greece, Germany, France, Spain, Italy, Ireland, Netherlands, Luxembourg, United Kingdom, Portugal.

\textsuperscript{138} The Brussels European Council directed the Council to set the precise order of the rotating presidency from 1995 to 2003. 26 E.C. BULL., no. 12, at 18 (1993). The list had to be altered to delete Norway after its people declined to join the Union. The list of rotation, commencing in 1995, is as follows: France, Spain, Italy, Ireland, Netherlands, Luxembourg, United Kingdom, Austria, Germany, Finland, Portugal, France, Sweden, Belgium, Spain, Denmark, Greece, which covers the period until the first half of 2003. Council Decision of 1 January 1995, art. 1(1), O.J. L 1/220 (1995) (determining order in which office of President of Council shall be held). This means that the former second cycle of Article 146 was kept until the second half of 1998, when Austria assumes the presidency for the first time.

\textsuperscript{139} If strict alphabetical order had been respected, Portugal would have completed the second cycle with the second half of 1998 presidency, Belgium and Denmark would have preceded Germany (Deutschland), Spain (España) would have preceded France, etc. Booss & Forman, \textit{supra} note 1, at 113, observe that the European Council did not want an unbroken sequence of seven presidencies provided by small and medium sized-countries."
always participates in the “troika” continuity system described above.

It is quite possible that this approach is intended to serve as a precedent in the event that further States join the Union, thus adding to the long alphabetical list. It may well be that after a further enlargement the five largest States will continue to take the presidency once in every three bi-annual periods.

Furthermore, the Brussels European Council also decided that the Council should, by unanimous vote, set the order in which States should hold the presidency.\textsuperscript{140} Article 146 of the EC Treaty was amended by the Act of Accession to achieve this result.\textsuperscript{141} This might enable action to permit a larger Member State to be accelerated to hold the presidency in time of emergency.

Austria, Finland and Sweden were, of course, put into the alphabetical sequence among the medium-sized and smaller Member States (in accordance with their own spelling of their names). Austria (Oesterreich) will hold the presidency in the second six months of 1998, Finland (Suomi) the second half of 1999, and Sweden (Sverige) in the first half of 2002.\textsuperscript{142} Undoubtedly, the Brussels European Council felt it more prudent to virtually complete the current cycle of rotation, which lasts until 1998, before starting to include Austria, Finland and Sweden in a new cycle, thus ensuring that the new States gain experience in the Council and European Council before assuming the important role of the presidency.

D. The Commission

The Brussels European Council quite readily decided that each applicant should be entitled to nominate one member of the Commission.\textsuperscript{143} Because Austria, Finland and Sweden joined in January 1995, their nominees simply joined those designated by the other States for the 1995-99 Commission headed by Presi-

\textsuperscript{140} 26 E.C. BULL., no. 12, at 18 (1993). This will eliminate any need to amend the Treaty to set a new cycle when the current one runs out in 2003.

\textsuperscript{141} 1994 Act of Accession, supra note 125, art. 12, O.J. C 241/21, at 23 (1994).

\textsuperscript{142} For the current list, see supra note 138.

dent Jacques Santer. The Commission thus now consists of twenty members.

Because there are twenty-three Directorates-General, this means that each Commissioner is responsible for at least one Directorate-General, his or her portfolio. This certainly contributes to a rational system of authoritative administrative supervision of the Commission's civil service bureaucracy by members of the Commission.

On the other hand, as already noted, a Commission of twenty members is a very large body to be involved in collective decision-making. Indeed, much of the most important work of the Commission is collective in character — the taking of policy decisions on the launching or modification of legislative proposals, on budgetary matters, on agricultural, competition or trade issues.

It is certain that at the 1996 Intergovernmental Conference the size of the Commission will have to be examined, particularly in view of the potential for future enlargement of the Union, bringing additional requests for commissioners from perhaps five, ten or even fifteen new states.

E. The Parliament

The December 1993 Brussels European Council attributed twenty-one MEPs to Sweden, twenty to Austria and sixteen to Finland. This brings Parliament's total membership to 624. Article 31 of the Act of Accession provides that the new States' national parliaments shall initially select representatives who will serve starting January 1, 1995 in the Parliament elected in June 1994. During 1995 or 1996, Austria, Finland and Sweden must hold direct elections to replace these interim representatives. The same transitional approach of permitting representatives of the national parliaments for a two-year maximum period, pending direct election of permanent MEPs, was used when

144. Austria nominated Mr. Fischler, Finland Mr. Likaneu, and Sweden Mrs. Gradin, and they were duly designated members of the Commission starting January 1, 1995. Decision of the Representatives of the Governments of the Member States of the European Communities of 1 January 1995, O.J. L 1/222 (1995).
Greece, Portugal and Spain joined during the term, respectively, of the 1979-84 and 1984-89 Parliaments.\footnote{Act of Accession for Greece, supra note 12, O.J. L 291/17 (1979); Act of Accession for Spain and Portugal, supra note 12, O.J. L 302/23 (1985).}

The 1989-94 Parliament consisted of 518 members. With the combined effect of Council Decision 93/81 and the 1995 enlargement, Parliament has grown by over 100, to 624. Although there are national parliaments of comparable size, this is clearly a large number. With the prospect of further enlargement, it may well prove necessary to fix a ceiling for Parliament’s maximum size, to avoid the inefficiencies which spring from excessive numbers. The increase of over 100 MEPs within a short time has already strained Parliament’s building and staff facilities both in Brussels and Strasbourg, occasioning further administrative costs in an already tight budgetary climate.\footnote{Battle Over Parliament’s Home Threatens European Elections, EUROWATCH, Mar. 7, 1994, at 6-7, available in LEXIS, Europe Library, Eurwch File.}

F. The Court of Justice

The Court of Justice has always consisted of one judge nominated by each Member State. This practice continued with the 1995 enlargement. This brings the total number of judges to fifteen,\footnote{Council Decision of 1 January 1995, supra note 126, art. 10(1), O.J. L 1/1, at 4 (1995).} which, as we shall see, facilitates Court operations in two ways.

After the accession of Greece in 1981, a system of one judge per State would have resulted in ten judges. In order to avoid tie votes in adjudication, the Member States set the membership of the Court of Justice at eleven judges, the eleventh judge rotating by lot among the larger Member States.\footnote{Commission of the European Communities, Fifteenth General Report on the Activities of the European Communities 1981, at 92, ¶ 34 (1982); see Kaptyn & Verloren van Themaat, supra note 145, at 147.} When Portugal and Spain joined in 1986, the number of judges increased from eleven to thirteen.\footnote{Commission of the European Communities, Twentieth General Report on the Activities of the European Communities 1986, at 40-41, ¶ 849 (1987) [hereinafter Twentieth Report].} After enlargement in 1995, the total number of judges rises to fifteen, already an odd figure. The added judge, to avoid tie votes, can therefore disappear. This is
the first way in which the 1995 enlargement has facilitated Court operations.

Because Norway's accession had been anticipated, which would have meant a Court of sixteen judges, a seventeenth judge had been scheduled. Under the past arrangements, in the October 1994 cycle of nominations to the Court (half the Court is nominated every three years for a six-year term), Spain lost its second judge and Italy gained one. Judge La Pergola, thus named by Italy, served as judge during the Fall 1994 term. Now, by virtue of the Brussels European Council decision, as reflected in a January 1995 amendment to the Act of Accession, Judge La Pergola will become an advocate-general for the remainder of his six-year term, thus ensuring that the number of judges should stay fifteen.158

Prior to the 1995 enlargement, the Court of Justice included six advocates-general,154 one each named by the four largest States (France, Germany, Italy and the United Kingdom) and two rotating by lot among the other States. The Act of Accession increased the number of advocates-general to eight (but, as noted above, Advocate-General La Pergola will make nine until 2000).155 The addition of two (and temporarily three) advocates-general should help the Court of Justice to expedite the handling of its case load. The Brussels European Council decided that Spain should receive its own advocate-general, and that three advocates-general should rotate among the smaller States.156 A Council Declaration of January 1, 1995 embodies this approach, stating that Denmark, Greece and Ireland should each nominate an advocate-general initially.157 The right to nominate advocates-general will then move in sequence, starting in 1997 with Luxembourg, Portugal, then in 2000 going to the

153. Decision of the Representatives of the Governments of the Member States of the European Communities of 1 January 1995, art. 4, O.J. L 1/223 (1995) (appointing judges and advocates-general). This approach was foreseen by the European Council as a contingency measure if one applicant should not join the Union. 26 E.C. BULL., no. 12, at 17 n.1 (1993).
154. EEC Treaty, supra note 2, art. 166.
156. 26 E.C. BULL., no. 12, at 17 (1993).
Netherlands and Austria, and so on to Finland and Sweden.\textsuperscript{158} The Court of Justice’s increase to fifteen judges necessarily affects the quorum required for a plenary or full court vote, which will now be nine judges.\textsuperscript{159} What will be particularly appreciated at the Court, however, is the greater ability to work in chambers, or panels of judges. The Act of Accession enables chambers of three, five, or seven judges.\textsuperscript{160} Because a chamber of five judges will usually be considered a sufficiently representative panel, the Court will be able to assign a large percentage of its docket to three different chambers of five judges each. It may be hoped that greater work in chambers will expedite the Court’s handling of its cases, and reduce its high backlog. This facilitation of Court operations through chambers represents the second major benefit provided by the increase to fifteen judges, along with the elimination of the rotating additional judge.

The Court of First Instance’s membership will now increase from twelve to fifteen judges.\textsuperscript{161} This will also facilitate its operation through more chambers. There are no designated advocates-general at the Court of First Instance — the Court itself names one of its members to serve in the role of advocate-general for any case where that would be useful.\textsuperscript{162} The 1995 enlargement did not affect that practice, which is generally believed to be a successful mode of operations. An interesting side point, however, is that Finland and Sweden each named women as their initial Court of First Instance judges — there are at present no women judges or advocates-general at the Court of Justice.

A transitional provision, Article 157(6) of the Act of Accession, governs the handling of cases pending before the Court of

\textsuperscript{158} \textit{Id.}
\textsuperscript{160} \textit{Id.} art. 18.
\textsuperscript{162} Henry G. Schermers & Denis F. Waelbroeck, \textsc{Judicial Protection in the European Communities} 511 (5th ed. 1992).
\textsuperscript{163} They are, respectively, Mrs. Tilli and Mrs. Lindh. Decision of the Representatives of the Governments of the Member States of the European Communities, O.J. L 1/224 (1995) (appointing members of Court of First Instance).
Justice at the time of the 1995 enlargement. If oral proceedings were commenced before January 1, 1995, then the full Court or chamber, as the case may be, will continue adjudicating the matter without the participation of the judges named by Austria, Finland and Sweden. If oral proceedings are begun after January 1, 1995, then the new judges will be fully involved.

It is possible that further enlargement of the Union will not pose as serious a problem for the structure of the Court of Justice or the Court of First Instance, as it will for other institutions. By working increasingly in chambers, a court of nineteen, twenty-five or even twenty-nine judges might still be able to function efficiently. Many national supreme courts are in fact even larger in size than that.

Increasing adjudication by chambers does pose a certain risk, however, namely that chamber judgments may not always reflect the views of the full Court. It is true that at present a case preliminarily assigned to a chamber may be transferred to the full Court docket if the President of the Court becomes convinced that the issues are too vital for resolution by a chamber. However, the importance of particular issues or the likely mode of their resolution is not always apparent until after the chamber judgment has been rendered. Under the current Court procedure, it is then too late to bring the case to the full Court.

At some point the Court of Justice may want to consider adopting the procedure permitted by the U.S. Federal Judiciary Code to govern the handling of judgments by panels in federal circuit courts. This rule permits a losing party in a panel decision to request an en banc review of the panel judgment by the full circuit court membership. Any judge of the circuit court may make the same request. In each case, whether or not to review the panel decision is a discretionary determination made by the full circuit court. This procedure ensures that particularly important panel rulings, or rulings that may deviate from prior precedents or otherwise may perhaps not be representative of the full circuit court, can on occasion be reconsidered by that body. En banc reviews are used sparingly, but when used are

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generally endorsed as a desirable and effective means of ensuring authoritative judgments.

G. Official and Working Languages

Although the decision on which languages to use for which purposes within the European Union may be considered to raise primarily operational or functional issues, in fact it has a legal dimension that warrants reflection in this section.

Article 248, the final article in the original Treaty of Rome requires that the Treaty be “drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic.”166 As new Member States have joined the Community, and now the Union, their official languages have been added to the list. Thus, Article 3 of the Treaty between the Union and the acceding states (as amended on January 1, 1995) prescribes a total of twelve equally authentic versions: Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish.167

Since the constituent Treaty (now the Treaty on European Union, as modified by the Act of Accession) is a public international law instrument, it is self-evident that it must exist in all the official languages of the signatories, each having equal authenticity (i.e., equal value and authority). But what should be the situation for lesser legal norms (legislation, international agreements, decisions) within the legal structure of the Union, or for information (proceedings, reports, studies), or for operations conducting orally (Council, Commission, Parliament and Court proceedings, staff meetings, conferences)? Article 217 of the EC Treaty grants the Council the power to decide, acting unanimously, “the rules governing the languages of the institutions.”168

The traditional answer to the question posed above has been that all written material that has a legally binding effect must be published in all the official languages of the Community (now the Union). Accordingly, the Official Journal, which must publish final legislation (regulations and directives, whether

166. EEC Treaty, supra note 2, art. 248.
168. EEC Treaty, supra note 2, art. 217 (not changed by TEU).
adopted by the Parliament and Council, the Council or the Commission), and Council and Commission decisions addressed to the Member States, is published in all the official languages, except for Irish.\textsuperscript{169} The Official Journal also customarily publishes the text of important international agreements, Commission decisions addressed to private parties (e.g., in competition proceedings), and Commission proposals for legislation. Similarly, the judgments and orders of the Court of Justice and the Court of First Instance are likewise published in all the official languages.\textsuperscript{170} Other material of an official character, although not legally binding, such as the resolutions and proceedings of Parliament or the Economic and Social Council or the Court of Auditors, are also customarily published in all official languages.

In addition, an enormous amount of material that has no legal effect as such, but constitutes a valuable source of information, is likewise published in the official languages. Starting at the highest level, this necessarily includes the Commission's annual general reports to the Parliament, the monthly Bulletin of the European Union, the Commission's annual sectoral reports on agriculture, competition, social policy, the environment, etc., and green papers and white papers on important fields of action. Moving downward in the scale of importance, the Commission publishes a positive flood of reports, studies and accessory documents in every area in which the Union is involved. The

\textsuperscript{169} Article 191 of the EEC Treaty only required regulations to be published in the Official Journal, but Article 191 of the TEU added the materials mentioned in the text, which in fact have long been published in the Official Journal. Note, however, that the Official Journal is not published in Irish, because the Republic of Ireland has graciously accepted that Irish need not be a working language, although still an official language.

\textsuperscript{170} Except, as noted in the prior footnote, in Irish. However, Article 31 of the Rules of Procedure of the Court of Justice prescribes that the authentic language of the judgment is the "language of the case," which Article 29 indicates to be usually the language of the applicant to the Court or the referring judge in an Article 177 proceeding. Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, arts. 29-30, O.J. L 176/7, at 13-14 (1991). Therefore, strictly speaking, all other language versions (even French, the working language of the Court) are only translations and should yield to the language of the case in the event of any inconsistency. A study in 1990 showed that in that year German was the most common language of the case (146 out of 384 actions), followed by French (79 out of 384), then Italian, English, Dutch, Greek, Portuguese and Danish. Schermers & Waelbroeck, supra note 162, at 466. It should also be noted that all pleadings and supporting documents must be submitted to the Court in the language of the case. \textit{Id.}
Council and the Parliament contribute their special reports and studies as well, but in lesser volume.

Turning to the spoken word, all sessions and meetings of bodies engaged in the production of legally-binding material, or in the taking of decisions of an important policy nature, are invariably translated simultaneously by interpreters into all of the official languages. Thus, all meetings of the Council of Ministers and its Committee of Permanent Representatives, all plenary sessions and committee meetings of the Parliament, and all oral arguments before the Court of First Instance are simultaneously translated. By tradition, however, when the Court of Justice and the Court of First Instance meet to deliberate on the outcome of a case, the judges work exclusively in French, without the presence of interpreters, in order to preserve judicial secrecy. 171

At lower levels, the picture is less clear-cut. Working groups of the Council of Ministers and conferences of Member State representatives, or representatives of industry, labor, the public, scientific and technical bodies, consumer groups, etc., convened to provide information and input to the Commission, the Council and Parliament customarily operate through simultaneous translation in order to gain a good level of mutual understanding, but on occasion may agree to work only in one language, or in two or three languages. Staff meetings and office conferences at the Commission or Council, especially if comprised of only a few people, usually work in English, French and occasionally German or another language, which everyone is presumed to speak and understand.

The cost of translation of written materials and oral proceedings into all official languages is simply enormous. The staff of interpreters and translators employed by the Commission, the Council, Parliament and the Court has constituted about twelve percent of total personnel, and hence of personnel costs, in recent years. 172 To this must be added the indirect cost produced

171. When the Court of Justice was first constituted as the Court of the Coal and Steel Community, it adopted French as its working language, apparently as a matter of convenience. The tradition has persisted, though not required by its rules. Not only does the full Court deliberate in French, but chambers usually do so as well, and draft judgments are usually prepared and circulated for review in French. Kapteyn & Verloren van Themaat, supra note 116, at 65.

by delay in the translation of written materials, which invariably adds days, weeks, and even months before important material can be released. (The Court of Justice until recently had reached nearly a two-year delay in the publication of reports of its judgments.) Finally, there is the risk of imperfect, ambiguous or even totally erroneous translation, which can occur not only in the rapid pace of simultaneous interpretation, but even in the painstaking process of translation of legal texts.

These costs will be substantially increased by the addition of Finnish and Swedish as official languages. (This is the only context in which one can derive a grain of comfort from the Norwegian refusal to join the Union!) Hundreds of new interpreters and translators must be added to the present staff of each institution. The need to be sure of accurate translation into all the official languages before a text can be published will further retard final publication. The problems are perhaps even greater for simultaneous translation, because it is difficult to find qualified personnel for relatively rare combinations of languages (e.g., Finnish-Portuguese, or Greek-Swedish). This will probably mean an increased use of rapid double translation (e.g., Greek to English to Swedish, or Finnish to French to Portuguese), but this raises incrementally the risk of imperfect translation.

Ever since the Mediterranean enlargement added three new official languages there has been considerable concern about the cost, delays and difficulties in ensuring accurate translation and interpretation into so many language versions. This concern has been materially augmented by the addition of Finnish and Swedish. Still, there was never any serious question raised during the negotiations of any outcome other than the addition of new official languages.

cated that the Language Service constitutes 12% of its total staff, and that interpreters were used in 10,200 meetings, representing 115,000 interpreter days. Id. at 388, ¶ 1143.

173. In a new system introduced in January 1994, the Report of Cases before the Court of Justice (the ECR) no longer contain a Report of the Hearing in order to save translation time and are accordingly appearing only with a three-month delay. Unfortunately, most of the 1992 and 1993 judgment reports, to be issued under the prior system, have yet to appear.

174. Commissioner van Miert, in charge of staff, estimated in July 1994 that the Commission would need 300 new translators and 75 new interpreters to deal with Finnish, Norwegian and Swedish. Comm'n Press Rel. IP (94) 676 (July 19, 1994), summarized in Common Mkt. Rep. - New Dev. (CCH) ¶ 97504, at 53,528. Although these figures will be reduced, because Norwegian will not be used, the Council, Parliament and the Court of Justice will all have to augment their translation services as well.
The prospect of further enlargement in the near future will undoubtedly push this issue to the fore, perhaps even to formal consideration at the 1996 Intergovernmental Conference. The December 1993 Brussels European Council, which formally decided that Finnish and Swedish should be added to the official languages when it set most of the post-enlargement institutional structure, added that the 1996 Intergovernmental Conference should "consider any measures deemed necessary to facilitate the work of the institutions and guarantee their effective operation," perhaps an invitation to reconsider the use of all official languages. Each of the potential new candidate States has its own language, except for Greek-speaking Cyprus (but if Cyprus can be reunified, it might well be obligated to add Turkish as an official language because of its substantial Turkish minority). Is it conceivable that a Union of twenty-five States in 2010 could effectively function with, say, twenty-two official languages?

There can be no question but that legally-binding texts must be translated accurately into the official languages of all the Member States. In its 1992 report, "Europe and the Challenge of Enlargement," the Commission concluded that "for reasons of principle, legal acts and important documents should continue to be translated into the official languages of all Member States." Not only is it politically inconceivable that a State could accept the binding force of legislation, international agreements, court judgments, and administrative decisions written in a foreign language, but the Court of Justice most likely would consider it a matter of a fundamental right for states and individuals to be bound only by texts in their official languages. The Court of Justice may, of course, on occasion, have to deal with conflicting language versions of the same legislative texts, but it has precedents on how to confront this issue.

175. 26 E.C. BULL., no. 12, at 18 (1993).
177. Cf. Kapteyn & Verloren van Themaat, supra note 116, at 64.
178. The most famous example is Stauder v. City of Ulm, Case 29/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112, in which the German version of a Commission agricultural decision varied significantly from that of the decision in other languages. The Court espoused a teleological mode of resolving the difference: "the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in
The Union may, however, be obliged to take difficult decisions on the limitation of some written material, and some oral proceedings, to a limited number of languages in order to reduce costs and promote speed in operations. Although the most important secondary material — annual general reports, the monthly bulletin, and annual sectoral reports — merit translation in all languages, many of the other reports and studies could be reasonably limited to a few languages. The same is true of oral proceedings — while Council meetings and plenary sessions of Parliament merit simultaneous translation, cannot most other gatherings limit the use of working languages?

Of course, the choice of working languages is a delicate one. At least the United Nations’ system of six working languages provides a precedent.\(^\text{179}\) Could the Union limit itself to English and French, which would be certainly the cheapest and fastest mode of linguistic operations? Should the languages of the five largest States be mandated? Should the language of the State which holds the Council presidency be added as a working language during that presidency? Should perhaps the language of a couple of smaller states be added in rotation for a period of time, along the lines of the rotation in advocates-general? Creative, but pragmatic solutions, will certainly be in demand if the Union ever seriously grapples with this issue.

Having now completed our analytical review of the impact of the 1995 enlargement on the institutional structure and operational modalities of the Union, we turn to a major constitutional aspect, the application of the acquis communautaire principle.

III. THE PRINCIPLE OF THE ACQUIS COMMUNAUTAIRE

A. Origin of the Principle in the First Enlargement

As indicated at the outset of this Article, all accessions of particular of the versions in all four languages." Id. at 424, ¶ 3, [1970] C.M.L.R. at 118. In its famous judgment encouraging national courts to make frequent referrals under Article 177, Srl CILFIT v. Ministry of Health, Case 283/81, [1982] E.C.R. 3415, [1983] 1 C.M.L.R. 472, the Court observed that "Community legislation is drafted in several languages and... the different language versions are equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions." Id. at 3430, ¶ 18, [1983] 1 C.M.L.R. at 491.

179. The U.N. working languages are Arabic, Chinese, English, French, Russian, and Spanish.
new Member States are governed by the principle of the acquis communautaire. This term, so hard to translate that the French is invariably used even in English texts, means essentially that the intrinsic core of the Community (now the “Union”) legal and political structure is a given (“acquis”) which the new Member State must accept, not challenge or call into question.

The acquis communautaire principle has a highly pragmatic origin. In 1969, the original six Member States were confronted with the possible accession of four new ones (Norway had applied along with Denmark, Ireland and the United Kingdom, which ultimately joined in 1973). An increase of two-thirds in the voting membership of the Council and the Commission (at the time, the Parliament’s role was relatively unimportant) might conceivably have lead to radical revisions in structure, operations and policies. This the leaders of the initial six Member States and of the Community institutions definitely did not want to happen.

When in 1969 the Council asked the Commission to provide a fresh opinion on the applications of the four candidate states, the Commission responded on October 1, 1969. The Commission notably declared that the Community should not “allow its unity to be impaired” and that “[t]he enlargement of the Community... must not be a brake on... action” in progress in the agricultural, economic and monetary, social and

180. To understand the background of the first enlargement, one must remember that Denmark, Ireland, Norway and the United Kingdom had all applied during May-July 1967. Commission of the European Communities, Fifth General Report on the Activities of the Community 1971 8-9, ¶ 15 (1972) [hereinafter Fifth Report]. The Commission’s initial Opinion of September 26, 1967, summarized at ¶ 16 of that Report, was quite favorable. Id. at 9-10, ¶ 16. However, the Council meeting on December 18-19, 1967 could not reach agreement to open negotiations. Id. at 10-11, ¶ 17. Although the Fifth Report does not say why this happened, the well-known reason was the veto interposed by President De Gaulle. Later, when President De Gaulle resigned and was succeeded by a great European statesman, President Pompidou, the veto was lifted. Then, on July 22-23 1969, the Council asked the Commission to bring up to date its two-year old opinion. Id. at 11, ¶ 18. A fascinating summary of this history, as well as a description of President De Gaulle’s veto of the 1961-63 attempt of the United Kingdom, Denmark, Ireland and Norway to join at that time, is contained in Kapteyn & Verloren van Themaat, supra note 116, at 17-20.

other sectors. The Commission urged that

"[a]t the beginning of the negotiations . . . [the applicants] will have to state their agreement not only with the principle of accepting what has been attained by the Community — in other words, the Treaties plus the decisions taken since these came into force — but also in the full knowledge of the measures agreed on or in course of implementation . . . , with the principle of strengthening the Community."  

At the famous Hague Summit on December 1-2, 1969, the Heads of Government and State endorsed this principle in a more laconic form: "In so far as the applicant States accept the Treaties and their political objective, the decisions taken since the entry into force of the Treaties," the negotiations could commence. Thus, the principle of the acquis communautaire became an authoritatively stated condition for the first enlargement and subsequently for any future accession.

On June 30, 1970, when negotiations with the applicants at the ministerial level formally opened in Luxembourg, Foreign Minister Harmel of Belgium, then President of the Council, declared to the applicants that they must accept the Treaties, the internal Community acts, and also "the agreements concluded by the Community with third countries" (which meant notably trade and association agreements and the GATT). Moreover, he reviewed a number of on-going developments and proposals, including the development of a Community system for its own financial resources and the creation of an economic and monetary union (!), noting that any Community decisions reached during the negotiations must likewise be accepted by the applicant States. Finally, Mr. Harmel insisted that "the solution of any problems of adjustment . . . must be sought in . . . transitional measures and not in changes of existing rules."

To the satisfaction of the Commission and the Council, the
negotiations with the applicants were relatively rapid, nineteen months, and reflected the acquis communautaire. Although a significant number of transitional measures had to be laid down, they did not alter existing Community rules and were generally rather short in duration, usually not more than five years.\textsuperscript{188}

The 1972 Act of Accession for Denmark, Ireland and the United Kingdom began with Articles 2-4, by which the new States accepted the Treaties, all institutional acts, all decisions, agreements, declarations and resolutions of the Council and all agreements or conventions entered into by any of the Communities, at the date of accession, January 1, 1973.\textsuperscript{189} Under Article 9, the only exception was for derogations and transitional measures set out in the Act of Accession, which would usually terminate at the end of 1977.\textsuperscript{190}

Accordingly, the precedent then set for all future accessions involved the initial acceptance by the applicants of the elements of the acquis communautaire, followed by negotiations intended to cover all the practical issues involved in adapting the applicant states' legal regimes to that of the Community, and, finally, the insertion of a limited, precise list of transitional measures, with a definite time table for their lapse, into the act of accession.

Thus, at the time of the first enlargement in 1973, the acquis communautaire could be analyzed as comprising six constituent elements: 1) the Treaties, 2) the institutional structure under the Treaties, 3) the legislation and other acts of the Community, 4) international agreements entered into by the Community, 5) legislation and other acts adopted during the negotiations, and 6) the somewhat vague concept of the "political objective" of the Treaties.

Quite without fanfare, the Commission added a further element to the acquis communautaire (the seventh in terms of the prior analysis) in its requisite opinion of January 19, 1972, just

\textsuperscript{188} Fifth Report, supra note 180, at 20, ¶ 29 (1972).
\textsuperscript{189} 1972 Act of Accession, supra note 11, arts. 2-4, J.O. L 73/1, at 14-15 (1972).
\textsuperscript{190} Id. art. 9, J.O. L 73/1, at 15. The 1971 Fifth General Report set out the most important transitional measures. Fifth Report, supra note 180, at 23-30, ¶¶ 34-47. Probably the one with the greatest historical significance is paragraph 38 on fishing rights. Id. at 26-27, ¶ 38. Because of the vital fishing interests of the new States, it became imperative that the Community adopt a Common Fisheries Policy, scheduled for 1978 in the accession treaty, but only finally adopted in 1983.
before the Act of Accession was signed. This opinion first observed that the applicant states had accepted the Treaties and their political objectives, as well as all Community acts.\textsuperscript{191} Then, in a final recital, the Commission declared that the "legal order" of the Community included the principles of the direct applicability both of certain Treaty provisions and of certain legislation, of the primacy of Community law over any conflicting national provisions, and of the uniform interpretation of Community law\textsuperscript{192} — all major doctrines developed by the Court of Justice in the early years of Community law.\textsuperscript{193} The recital concluded with the assertion that "accession implies recognition of the binding nature of these rules, observance of which is indispensable to guarantee the effectiveness and unity of Community law."\textsuperscript{194}

Although this declaration does not figure in the 1972 Act of Accession, it may be regarded as an authentic further aspect of the acquis communautaire principle. In this connection, it is worthy of note that Article 3 of the U.K. European Communities Act of 1972 stated that issues arising in the interpretation of the Treaties or any Community act should be referred to the Court of Justice or determined in accordance with prior decisions of the Court.\textsuperscript{195}

In the famous \textit{Factortame} case,\textsuperscript{196} the Court of Justice declared that U.K. courts must regard themselves as possessing the
judicial power to restrain the effect of an Act of Parliament pending a final determination of whether the Act contravenes a principle of Community law. When the House of Lords abided by this guidance from the Court, Lord Bridge of Harwich remarked in his opinion:

"Some public comments on the [Court of Justice’s] decision [in Factortame] ... have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy ... of Community law over the national law of Member States was not always inherent in the EEC Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law." 197

Lord Bridge’s powerfully stated opinion substantiates the view that even at the time of the first enlargement, the acquis communautaire principle could be considered to include the fundamental doctrines of Community law articulated by the Court of Justice, in addition to the elements previously discussed. Inasmuch as the Court of Justice doctrines on these matters, as well as its case law on the interpretation and scope of the free movement of goods, persons, services and capital, 198 have profoundly shaped Community law, the inclusion of authoritative Court precedents in the acquis communautaire is no small matter.

B. The Mediterranean Enlargement: The Acquis Communautaire Principle Expands

In the mid-1970’s, as Greece, Portugal and Spain repudiated their prior totalitarian regimes and installed popularly-elected governments with democratic constitutions, they quite


198. A description of this rich case law is beyond the scope of this Article. For an analysis, see BERMANN, GOEBEL, DAVEY & Fox, supra note 28, chs. 9-17, at 317-625; Kapteyn & Verloren van Themaat, supra note 116, ch. VII, at 355-466.
naturally turned their eyes to the success of the European Community, both in political and economic terms. The fledgling democratic states were keen both to participate in the economic achievements of the common market and to become a part of the stable political club of its members. On June 12, 1975, President Karamanlis of Greece submitted its application for accession, followed on March 28, 1977, by that of Prime Minister Soares of Portugal, and on July 28, 1977 by the application of Prime Minister Suarez of Spain.\footnote{199. The respective applications are described in \textit{8 E.C. Bull.} no. 6, at 11-13 (1975) (Greece); \textit{10 E.C. Bull.}, no. 3, at 8-10 (1977) (Portugal); \textit{10 E.C. Bull.}, no. 7/8, at 6-7 (1977) (Spain).\footnote{200. 8 E.C. \textit{Bull.}, no. 6, at 11, ¶ 1203 (1975).\footnote{201. 9 E.C. \textit{Bull.}, no. 1, at 6 (1976). The full opinion is contained in \textit{9 E.C. Bull.}, no. 2, supp. (1976).\footnote{202. 11 E.C. \textit{Bull.}, no. 5, at 8 (1978). Prime Minister Soares stated that membership in the Community represented "the guarantee of Portugal's turn to democracy." \textit{Id.}}\footnote{203. 11 E.C. \textit{Bull.}, no. 11, at 7 (1978). The Commission seized the occasion of the Spanish application to produce three studies, called the General Considerations on the Problems of Enlargement ("Fresco"), published in \textit{11 E.C. Bull.}, nos. 1-3, supp. (1978).\footnote{204. 11 E.C. \textit{Bull.}, no. 3, at 5-6 (1978).}}}}

In each case, the Commission gave a favorable opinion, and each opinion stressed the political implications of accession. In applying for Greece, President Karamanlis had emphasized that "[w]e request is inspired primarily by political considerations . . . which focus on consolidating our democracy and the future of our country."\footnote{200} In response, the January 28, 1976 Commission opinion on Greece observed that "the consolidation of democracy in Greece, which is a fundamental concern not only of the Greek people but also of the Community" intimately related to the application.\footnote{201} The Commission's May 19, 1978 opinion on Portugal likewise linked accession to the firm reestablishment of democracy in that country,\footnote{202} and the subsequent November 29, 1978 opinion on Spain made the same point.\footnote{203}

This linkage of a firm adherence to democratic principles with membership in the Community has given rise to a new aspect of the acquis communautaire principle. The European Council, at its April 7-8 1978 meeting in Copenhagen issued one of its most powerful and compelling statements of basic policy, the Declaration on Democracy.\footnote{204} The European Council took the occasion of fixing the date (June 1979) for the first direct
election of Parliament to make the statement. The Declaration on Democracy expresses the following major principles:

The Heads of State and of Government confirm their will... to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.

The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions... and the procedures necessary for the protection of human rights....

They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership....

The issuance of this Declaration, with the express language on “representative democracy” as a condition of membership, precisely at the time of the applications of Greece, Portugal and Spain was plainly not a coincidence. The Member State leaders intended the applicant states to realize that their new commitment to democracy must be irrevocable if they were to become Member States.

That this condition now constituted a part of the acquis communautaire became clear in the final Commission opinion of May 23, 1979, endorsing the accession of Greece, and that of May 31, 1985, endorsing that of Portugal and Spain. In both, the Commission added a seventh recital, which had not figured in its opinion on the occasion of the first enlargement. This recital declared:

Whereas the principles of pluralist democracy and respect for human rights form part of the common heritage of the peoples... in the European Communities and are therefore essential elements of membership....

Not only does the acquis communautaire now include the respect for pluralist democracy and human rights, but the Mediterranean enlargement served to emphasis another aspect of the

205. Id. at 6.
acquis, already present in the first enlargement but become much more important in later years. This is the obligation which already figured in Article 3(3) of the 1972 Act of Accession\textsuperscript{207} and was likewise included in the same article in the Greek, Portuguese and Spanish Acts of Accession, namely the obligation to be bound by “declarations or resolutions . . . concerning the European Communities adopted by common agreement of the Member States,” to observe any “principles and guidelines” derived therefrom, and to “take such measures as may be necessary to ensure their implementation.”\textsuperscript{208}

This obligation manifestly refers to the policy declarations and decisions taken by the European Council, declarations and decisions which had not only multiplied greatly in number over the 1970’s and early 1980’s, but also represented some of the most important decisions on Community issues, e.g., on the establishment of a system of financial resources of the Community, or on the direct election of the Parliament.\textsuperscript{209} Presumably this reference also included the program of foreign policy coordination, begun by the European Council in the late 1970’s, and formalized through Title II of the Single European Act.\textsuperscript{210} Apart from the Declaration on Democracy, undoubtedly the most significant Declaration thus implicitly subscribed to by Portugal and Spain (Greece was already a member) was the Solemn Declaration on European Union adopted by the Stuttgart European Council on June 1983.\textsuperscript{211} This Declaration represented the most concrete commitment of Member State leaders to further steps toward a political union.

The negotiations with Greece took about two and a half years (July 27, 1976 to April 4, 1979), longer than those in the first enlargement, but not unusually protracted in view of the

\textsuperscript{207} 1972 Act of Accession, \textit{supra} note 11, art. 3(3), J.O. L 75/3, at 14 (1972).
\textsuperscript{208} Act of Accession for Greece, \textit{supra} note 12, art. 3(3), O.J. L 191/17, at 17 (1979); Act of Accession of Spain and Portugal, \textit{supra} note 12, art. 3(3), O.J. L 302/23, at 23 (1985).
\textsuperscript{209} For these and other important policy decisions taken by the European Council in the 1970’s and early 1980’s, see Bulmer & Wessels, \textit{supra} note 134, at 59-74.
\textsuperscript{210} See \textit{supra} note 2. In June 1977, the European Council’s London Declaration on the European Council stated that the meetings would also be used to provide a “concerted Community opinion on a topic of international concern.” 10 E.C. BULL., no. 6, at 88 (1977). For a description and analysis of such foreign policy coordination, see European Political Cooperation in the 1980s: A Common Foreign Policy for Western Europe? (A. Pijpers, E. Regelsberger & W. Wessels, eds. 1988).
\textsuperscript{211} See \textit{supra} note 35 and accompanying text.
many transitional arrangements required for Greece. In contrast, the negotiations with Portugal and Spain consumed six and a half years, ending on March 29, 1985. Toward the middle of the negotiations, the Commission prepared a new report, “Problems of Enlargement,” which concentrated on the heightened problems posed by a serious economic recession in both Portugal and Spain.²¹² Despite these new difficulties, the Commission urged that “the idea of considering adoption of only part of the acquis communautaire” should be rejected.²¹³ The Commission instead proposed longer transitional periods, the solution ultimately adopted.²¹⁴

Accordingly, the Act of Accession of Greece and the Act of Accession for Portugal and Spain both commenced with Articles 2-4, by which the new States formally accepted the Treaties, the institutional structure, the legislative and other acts to date, international agreements, and the declarations and decisions of the Council and European Council.²¹⁵ Added to this, as noted before, the Commission opinions included Court of Justice doctrines and a respect for pluralist democracy and human rights as ingredients of the acquis communautaire.

A final interesting note is that Portugal and Spain were implicitly deemed to accept the Single European Act amendments to the Treaties, even though not yet ratified by any existing State. The Act of Accession and related Treaties were signed on June 12, 1985, to become effective January 1, 1986,²¹⁶ while the Luxembourg Intergovernmental Conference which drafted the Single European Act worked in the Fall of 1985.²¹⁷ Although the

²¹³ Id. at 7.
²¹⁴ For example, Greece was allowed five years to phase in the Community exchange control rules for capital and seven years to adapt to some aspects of the Common Agricultural Policy, while Greek workers and their families would enjoy the full right of free movement throughout the Community only after seven years. See 12 E.C. BULL., no. 5, at 11-14 (1979) (summarizing transitional measures). With regard to Portugal and Spain, aspects of the phase-in of the Common Agricultural Policy and the Common Fisheries Policy were set for ten years, and Portuguese and Spanish workers and their families would enjoy complete freedom of movement only after seven years. See 18 E.C. BULL., no. 3, at 7-9 (1985) (summarizing these arrangements).
²¹⁵ See supra note 208 and accompanying text.
²¹⁶ 18 E.C. BULL., no. 6, at 7 (1985).
"rules of the game" for Community decision-making were thus significantly altered in the last few months before Spain and Portugal joined, neither State occasioned any difficulties in the process of ratification of the Single European Act, which eventually entered into effect on July 1, 1987.\(^{218}\)

Thus, the Mediterranean enlargement of the Community reveals a significant expansion of the basic principle of the acquis communautaire. Most important is the addition of the respect for pluralist democracy and human rights, expressed in the Copenhagen Declaration of Democracy. This enlargement reflects also a heightened degree of acceptance of declarations and decisions of the European Council, and of the acceptance of on-going decisions up to the date of accession, notably the modifications produced by the Single European Act.

C. The Acquis Communautaire Principle Assumes Legal and Constitutional Dimensions

At the time of the first enlargement and of the Mediterranean enlargement, the acquis communautaire may be said to have been essentially political in character. The existing Member State leadership together with the Community institutions demanded that applicant states agree that accession negotiations be based upon the full acceptance of the principle's constituent elements. Once the principle's aspects were inserted into Articles 2-4 of the Acts of Accession they became, of course, legally binding, with temporary exceptions permitted only if embodied in transitional derogations.

The Court of Justice has strictly applied the rule that the new Member States totally accept the institutional structure, operations and Community acts in a number of cases, tending to read somewhat narrowly the scope of transitional derogations.\(^{219}\)

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218. See supra note 2. Portugal and Spain both ratified the SEA in December 1986. Twentieth Report, supra note 152, at 34, ¶ 1. Ratification of the SEA was intended to end in time to allow the SEA to take effect on January 1, 1987, but was delayed by a referendum in Ireland in May 1987 in order to approve constitutional amendments, after the Irish Supreme Court required this action. Commission of the European Communities, XXIst General Report on the Activities of the European Communities 1987, at 29, ¶ 1 (1988).

Probably the best example of the Court's doctrinal approach is to be found in Spain v. Council, a 1988 judgment concerning Spain's challenge of a Council regulation modifying the dairy production quota allocated to Spain at the time of accession.\(^{220}\) The Council regulation was adopted on May 6, 1986, only five months after the accession treaty entered into force. Although the Act of Accession stated a number of derogations to the Common Agricultural Policy, it did not specifically guarantee that Spain's dairy production would not be adversely altered during any period of time. Spain nonetheless argued vigorously that the Council reduction of the Spanish dairy production quota was illegal.

Spain's initial contention was that the Council action had not been validly adopted because Spain had not voted in favor. Spain argued that the quotas constituted a condition of "an agreement between the Member States and the states seeking membership which could not be amended without the consent of all the contracting parties."\(^{221}\)

The Court rejected this view. Instead, the Court pointed to Article 8 in the general principles of the Act of Accession which noted that any amendment made by the Act to any Community measure (in this case, the regulation governing dairy quotas) would "have the same status in law as the provisions which they repeal or amend and shall be subject to the same rules as those provisions."\(^{222}\) In other words, the Court treated Article 8 as permitting the Council to amend the Act's quota provision by the same qualified majority vote as required for any other agricultural legislation.\(^{223}\) Spain was subject to the legislative rulemaking procedure in the EEC Treaty just as any other State was subject to that procedure, no more, no less. Presumably the Court


\(^{221}\) Id. at 4598, ¶ 4.


could have accepted Spain’s argument if the Act of Accession’s derogation had quite precisely stated that the Spanish dairy quota could not be altered for a stated period of time (say, five years) — but note that the derogation would have to be limited in time in order not to violate the acquis communautaire principle.

Spain also argued that the Council’s action violated the principle of legitimate expectations, an administrative law principle with basic rights overtones which the Court of Justice has on occasion safeguarded. The Court in this case refused to apply the principle of legitimate expectations, observing that constant readjustments had to be made in view of “the variations of the economic situations in the various agricultural sectors.” The fact that Spain’s dairy quota was specifically set in the Act of Accession did not bring the principle of legitimate expectations into play, because once again, Article 8 of the Act clearly stated that Community institutions might amend again any Community act which was amended by the Act of Accession.

Although one may have a certain sympathy for Spain, which may well have felt that it had been somewhat misled by the insertion of a quota in the Act only to have it so swiftly reduced, the Court read strictly the derogation and broadly the inherent power of freedom of institutional action, a basic aspect of the acquis communautaire. In other cases, the Court has also insisted that new Member States are fully bound by the duty of loyalty expressed in Article 5 of the EC Treaty, so that they must honestly and carefully abide by the limits set in such derogations.

Potentially even more significant than the Court’s interpretation of acts of accession in the light of the acquis communautaire principle is the introduction of the principle itself into the “constitutional charter,” the Maastricht Treaty itself.

224. Id. at 4601, ¶ 19.
225. Id. at 4601, ¶ 20.
The term figures in two initial articles of Title I, the Common Provisions.

Article B sets forth the objectives of the Union, notably an internal market, an economic and monetary union, a common foreign and security policy, promotion of the rights of citizens of the Union, and cooperation on justice and home affairs. The final objective listed is:

to maintain in full the *acquis communautaire* and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.²²⁸

In addition, the first paragraph of Article C states:

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.²²⁹

Why are these two references made to the acquis communautaire and what is their constitutional impact? In neither case is the answer obvious, and the full sense of the provisions may only become clear over a period of time.

In setting the agenda of topics for the Intergovernmental Conferences at Rome, the December 1990 European Council had made clear that structural modifications or expansions in scope should build on the existing institutions and scope.²³⁰ The Luxembourg European Council, meeting in June 1991 at the mid-point of the Intergovernmental Conferences, gave the same guidance: “full maintenance of the acquis communautaire and development thereof, a single institutional framework with procedures appropriate to the requirements of the various spheres of action.”²³¹

It would seem reasonable to interpret the references to

²²⁸. *TEU*, supra note 7, art. B.
²²⁹. Id. art. C, ¶ 1.
maintaining in full, and to respecting and building upon the acquis communautaire, as a strong admonition that future changes should not be retrograde in character, should not, for example, reduce the role of the Parliament or increase the veto power of Member States in specific types of decision-making. Rather “building upon” probably implies an increase in the democratic character and modes of efficient operations, both major topics for action at the Rome Intergovernmental Conference.

The stress on the “single institutional structure” in Article C to be used in future “building upon” the acquis communautaire might well be linked with the suggested use of the Article N amendment procedure to revise “the policies and forms of cooperation” introduced by the Treaty. This is surely more than a hint that the second and third pillars, the Common Foreign and Security Policy and Cooperation in Justice and Home Affairs, should be integrated into the normal institutional structure in the future. This, of course, would mean a serious participation by the Commission and Parliament in decision-making, and a right of review by the Court of Justice (presently excluded by Article L of the TEU).

More speculatively, the references to the acquis communautaire in Articles B and C may have implications for future enlargements. As the Union grows to twenty, or twenty-five, or perhaps even thirty states, structural modifications in the institutions will have to be made in order to prevent debilitating inefficiency. It may be that the acquis communautaire concept will be invoked not only to support furtherance of democratic principles (lower voting majorities in the Council, increased powers for the Parliament, enhancement of the authority of the Court of Justice in challenges by national supreme courts), but also to frustrate proposals of two-tier or multiple-tier approaches to Union policies and programs, or to counter requests by States for new opt-out rights for specific fields of Union action.232

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232. See the reflections of Professor Paul Demaret on how far “opt-out provisions” and “variable geometry” may be compatible with the acquis communautaire in “The Treaty Framework,” the first chapter in LEGAL ISSUES OF THE MAASTRICHT TREATY 8-10 (David O’Keeffe & Patrick Twomey eds., 1994).
D. The Acquis Communautaire Principle Expands Further in the 1995 Enlargement

As it had before the earlier accessions, the Commission consistently insisted that the negotiations with and the admission of Austria, Finland, Norway and Sweden should be based upon the principle of the acquis communautaire. In its report, "Europe and the Challenge of Enlargement," the Commission proclaimed at once that "widening must not be at the expense of deepening. Enlargement must not be a dilution of the Community's achievements." 233

The European Council agreed with the basic premise that deepening came first — as observed earlier, the formal negotiations with the applicants were delayed by the Edinburgh European Council until after the entry into force of the Maastricht Treaty. 234 This is the major innovation in the scope of the acquis communautaire for the 1995 enlargement. The principle now includes the stages in progress toward an Economic and Monetary Union, Cooperation in Foreign and Security Policy, and Coordination in Justice and Home Affairs. The Commission stressed these new features of the acquis in its report, as well as the respect for democracy and basic human rights which is now a formal part of the TEU, expressed in Article F. 235

Moreover, the Commission added another novel criterion: "a functioning and competitive market economy, and an adequate legal and administrative framework in the public and private sectors." 236 This new feature, never before declared a part of the acquis, is a fairly natural consequence of a principle stated in the new Article 3a added to the EC Treaty by the Maastricht Treaty. Article 3a declares that the economic policies of Member States as well as those of the Community must be "conducted in accordance with the principle of an open market economy with free competition." 237

Although Finland and Sweden have traditionally had governments with strong socialist features and large scale public

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234. See supra note 94.
235. Challenge of Enlargement, supra note 13, at 11-13; see also Booss & Forman, supra note 1, at 100-02.
236. Id. at 11.
237. TEU, supra note 7, art. G; EC Treaty, supra note 7, art. 3a (added by TEU).
ownership in the private sector, the Commission’s opinions on each one’s application concluded fairly readily that each country satisfied the free market economy precondition. The Commission’s 1992 report on the challenge of enlargement actually focussed as much on the prospects of future accession requests from central European states as on those from Austria, Finland and Sweden. Satisfaction of the new condition of a “functioning and competitive market economy” may yet prove difficult for some of the central European aspirants to Union membership (see Section V(B)).

Although the Commission had expressed considerable concern that Austria, Finland and Sweden might not want to fully accept participation in the Common Foreign and Security Policy, especially any common defense aspects, because of their traditional neutralist foreign policy attitudes, in fact this never proved a serious issue in the negotiations. Likewise, Denmark’s opt-out of the third stage of the Economic and Monetary Union might have incited some resistance by the applicants to that new aspect of the acquis. Again, this did not occur. The Council noted with satisfaction in March 1994 that “the applicant countries undertook to accept the entire acquis communautaire, including the Treaty on European Union with no opt-outs, although technical adaptations were made or transitional periods were granted in some areas.”

The Act of Accession for Austria, Finland and Sweden contained the same general principles in Articles 2-10 in virtually identical language to that used in the Mediterranean enlargement act of accession, except for a new Article 3 on the acceptance of “conventions or instruments in the field of justice and home affairs.” The final Commission Opinion of April 19, 1994, reproduced in virtually identical terms the references to the basic Court of Justice doctrines and the respect for democracy and human rights as essential components of the acquis.

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239. See Challenge of Enlargement, supra note 13, at 13 (emphasizing that “binding assurances will be sought [from applicants] with regard to their political commitment and legal capacity to fulfil their obligations”).
240. 27 E.C. BULL., no. 3, at 64 (1994).
A rather interesting point is whether the acquis communautaire now includes the Maastricht Social Protocol and the annexed Agreement on Social Policy. Because the United Kingdom does not participate in the legislative machinery for adopting social legislation under the Protocol, nor is such legislation binding on the United Kingdom, it might be argued that this is outside a common and fully accepted acquis communautaire.

The applicant states are, however, long committed to strong social protection policies and had no objection to the Social Protocol or its machinery. By an indirect reference, it is apparent that the applicant states are bound by the Social Protocol. Article 15(4) of the Act of Accession (as modified by the January 1, 1995 Council Decision) revises the qualified majority vote figure set in the Social Protocol for all the Member States except for the United Kingdom, in order to take into account the weighted votes of the three new States.  

IV. THE PROCEDURE FOLLOWED IN THE 1995 ENLARGEMENT

Quite apart from knowing how the institutional structure of the European Union has been modified to include Austria, Finland and Sweden, the procedure through which they joined the Union is of considerable interest. Such a procedure represents an inherent mix of policy and political considerations, each of which is quite important.

The founders of the European Economic Community never intended it to be an exclusive club. Not only did they feel keen disappointment that the United Kingdom did not join in the venture, but they hoped and indeed anticipated that other European States would later decide to join the Community. For this purpose, Article 237 was introduced into the Treaty of Rome. This article governed the process involved in the first and second enlargements, but was replaced by Article 0 of the Maas-

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244. EEC Treaty, supra note 2, art. 237. This article was amended by the Single European Act in 1987 to require the assent of Parliament to the accession of a new state, but not otherwise modified. SEA, supra note 2, art. 8.
tricht Treaty for the 1995 enlargement. Article O reads as follows:

Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.\(^{245}\)

The only substantive difference between Article O and the prior Article 237 is that an applicant now accedes to the European Union, rather than the Community. This in turn means that the applicant must participate in the two unique features of the Union, which are not part of the Community structure, namely, Article J on the Common Foreign and Security Policy, and Article K on Cooperation in Justice and Home Affairs. As discussed in Section III(D), these two features of the Union are now fundamental aspects of the acquis communautaire. There is no suggestion in Article O that an applicant may be allowed to opt out of either Article J or Article K. Article O does not authorize any form of "two-tiered" Union.

Although we have mentioned in prior sections some of the stages of the procedure leading up to the 1995 enlargement, Section IV examines each phase in detail.

A. The Applications and the Commission Opinions

As noted before, Foreign Minister Mock of Austria filed its formal application to join the European Community on July 17, 1989, and Prime Minister Carlsson filed the Swedish application on July 1, 1991.\(^{246}\) In 1992, came those of Prime Minister Aho of

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\(^{245}\) TEU, supra note 7, art. O. Note that if any controversy should arise concerning the interpretation or application of Article O, Article L enables the issue to be resolved by the Court of Justice.

\(^{246}\) See supra note 18 and accompanying text (discussing Austria's filing); supra note 25 and accompanying text (discussing Sweden's filing).
Finland on March 18 and Prime Minister Brundtland of Norway on November 25.247 Although the applications of Austria, Finland and Sweden reflected a broad consensus of the government leaders and the political parties in parliament, this was not the case in Norway. Not only did polls indicate that the level of popular support for accession was low, but also both the Norwegian parliament and political leaders were divided on the advisability of joining the supranational structures of the Community.248 From the outset it appeared inevitable that accession would prove a difficult goal to achieve for Norway.

In all four cases, the Council received the applications and requested the Commission for its opinion. We have mentioned several times the Commission’s important report, “Europe and the Challenge of Enlargement,” which served as a general tour de horizon for the June 1992 Lisbon European Council. This report specified that future Member States must meet two important preconditions, namely, adherence to democratic principles and respect for human rights, and the possession of a “functioning and competitive market economy.”249 We have already noted in Section III(D) that the Commission concluded that all four applicants satisfied both of these indispensable conditions.

The Commission’s opinion on the application of the first candidate, Austria, was provided to the Council on July 31, 1991.250 At this juncture, the Rome Intergovernmental Conferences were still laboring to elaborate the drafts for the Maastricht Treaty, and the legislative program to complete the internal market by the end of 1992 was far from finished. The Commission accordingly urged that no negotiations be opened with Austria until 1993,251 a position subsequently endorsed by the Lisbon European Council.

On the merits of Austria’s bid, the Commission’s view was highly favorable. All Commission opinions on applications cover both political and economic factors. On the political side, Aus-

247. See supra note 26 and accompanying text (discussing Finland’s filing); supra note 27 and accompanying text (discussing Norway’s filing).
249. Challenge of Enlargement, supra note 13, at 11; see supra notes 235-38.
Austria’s democratic government structures were certainly stable, but its traditional neutral posture in foreign affairs posed a serious issue, particularly since Austria’s 1955 Constitution mandated such a neutral status. The Soviet Union, then governed by President Khrushchev, had made Austrian neutrality an indispensable condition for the withdrawal of its occupation forces and its consent to the unification of the country. However, the Commission foresaw a good possibility of devising arrangements to solve this issue, either by a “redefinition by Austria of its neutral status” (assuming that the Soviet Union, governed in 1991 by President Gorbachev, would accept the redefinition), or a derogation for Austria on this matter.

With regard to the economic factors, the Commission felt that after it joined, Austria would be among those states that are “the most stable and the strongest economically in the Community.” The Commission further observed that Austria had already manifested its willingness in the European Economic Area to modify much of its legislation to accord with that in the internal market program. The only topics likely to engender difficult negotiations would be agriculture and transport, the latter because of Austria’s strict environmental protection rules governing trans-alpine rail and road traffic.

By July 31, 1992, the date of the Commission’s favorable opinion on Sweden’s application, the June 1992 Lisbon European Council had authorized the start of the accession process, but only formally after the entry into force of the Maastricht Treaty. Accordingly, the Commission did not repeat the view expressed in the Austrian opinion that accession would have to be delayed. In its review of political aspects, the Commission emphasized Sweden’s “democratic traditions and human rights

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252. Id. at 15. For a historical presentation and pessimistic analysis of Austria’s neutral status as an issue in its application, see David Kennedy & Leo Specht, Austria and the European Communities, 26 COMMON Mkt. L. REV. 615 (1989). For a more optimistic analysis, see Paul Lansing & Paul Bye, New Membership and the Future of the European Community, 15 J. WORLD COMP. L. REV. 59, at 62-64 (1992).
253. Id. at 17.
254. Id. at 8.
255. Id. at 12-14.
257. See supra notes 91-94 and accompanying text.
The Commission believed Sweden would have no difficulty in participating fully in the Maastricht Treaty's Cooperation in Justice and Home Affairs. However, the Commission considered that Sweden's traditional neutralist posture in foreign affairs did constitute a potentially important issue. Although the Swedish government expressed a willingness to modify this policy, the Commission felt that "specific and binding assurances" might be needed to ensure Sweden's appropriate participation in the Common Foreign and Security Policy.

On the economic side, the Commission foresaw no serious difficulties. The Commission viewed Sweden's strong and healthy economy as capable of making a significant contribution to the Community, especially in movement towards an Economic and Monetary Union. The Commission did remark that the negotiations would have to confront serious issues in the areas of agriculture, fisheries, regional aid, and taxation.

The Commission's favorable opinion on Finland came on November 4, 1992. In reviewing political factors, the Commission observed that Finland's "geopolitical situation" (with Russia as its neighbor) had obliged it to follow a policy of neutrality throughout the Cold War era that only now could be modified. The Commission also noted that the Finnish government was motivated by "reasons . . . not solely of an economic nature" in making its application. The Commission concluded that Finland shared with Community states the requisite "values of democracy, human rights and market economy." With regard to Finnish participation in the Common Foreign and Security Policy, however, the Commission struck a cautious note. The Commission concluded that Finnish neutrality in foreign affairs had been determined by past geopolitical concerns and that its current government had genuinely moved to aban-

259. Id.
260. Id. at 21.
261. Id. at 8-11.
262. Id. at 11-16.
265. Id. at 8.
266. Id. at 25.
don this posture,267 but that, like Sweden, Finland might have to provide "specific and binding assurances" to this effect.268

On the economic side, the Commission's evaluation pointed to a number of serious problems, notably high levels of unemployment and public spending. The Commission warned that the Finnish government must energetically confront these problems, which would otherwise pose difficult issues in moving toward Finnish participation in the EMU.269 In addition, the Commission cited agriculture, fisheries, regional aid, taxation and competition as all raising issues that would have to be tackled in the negotiations.270 Nonetheless, on balance the Commission concluded that accession "should not pose insuperable problems of an economic nature."271

Norway's application came late, on November 25, 1992, so that the Commission had to work rapidly to provide its opinion on March 24, 1993.272 On the political side, Norway's stable democratic government made it easy for the Commission to find it an acceptable candidate. As a founding member of NATO, Norwegian participation in the Common Foreign and Security Policy appeared much easier to attain than would be the case for the other applicants.273

The Commission further found that "the Norwegian economy is one of the most prosperous in Europe."274 Nonetheless, the Commission foresaw (quite accurately) difficult negotiations concerning fisheries, agriculture, state monopolies and regional aid.275

B. The Decisions of the European Council

Although the European Council is not mentioned in Article O, it should surprise no one that the European Council takes the critical decisions on whether, when and how a prospective candidate State may be brought into the Union. This clearly falls

267. Id. at 21-23.
268. Id. at 23.
269. Id. at 8-10.
270. Id. at 11-16.
271. Id. at 25.
274. Id. at 10.
275. Id. at 15-18, 24-25, 28-29.
within its sphere in setting the "general political guidelines" of the Union.\textsuperscript{276}

In its meeting in Lisbon, June 26-27, 1992, the European Council took the crucial policy decision to permit negotiations for accession with any EFTA applicant states which wished to apply. At this point in time, the European Economic Area Agreement had just been signed, in Oporto in May,\textsuperscript{277} so that the EFTA states had already committed themselves to accept a large portion of the acquis communautaire. Considering that the EEA Agreement "paved the way for opening enlargement negotiations," the European Council declared that official negotiations with any EFTA state could begin after final ratification of the Maastricht Treaty and after agreement on the "Delors II package," a reference to the financial arrangements to provide aid to underdeveloped regions of the Community.\textsuperscript{278}

Because, as we have previously noted, the Maastricht ratification process took far longer than anticipated, this decision was modified by the December 1992 Edinburgh European Council, which permitted informal negotiations to start in early 1993, but only authorized their conversion into formal negotiations after the Treaty on European Union entered into force.\textsuperscript{279} Austria, Finland and Sweden would accordingly join not the European Community to which they had applied, but rather the European Union, which would include the Common Foreign and Security Policy, Cooperation in Justice and Home Affairs, and the Economic and Monetary Union as constituent elements of the acquis communautaire.

Although by the time of the Copenhagen European Council in June 1993, the Maastricht Treaty still had not entered into force, the end was in sight in view of the favorable result of the second Danish referendum earlier in the same month. The European Council could now set January 1, 1995, as the target date for admission of the new states.\textsuperscript{280} This target date effectively required the official negotiations to be completed by March 1994, a fast pace, but one necessary in order to permit Parliament to endorse the admission of new states before Parliament

\textsuperscript{276} TEU, supra note 7, art. D.
\textsuperscript{277} See supra note 50 and accompanying text.
\textsuperscript{278} 25 E.C. Bull., no. 6, at 10 (1992).
\textsuperscript{279} See supra note 94 and accompanying text.
\textsuperscript{280} 26 E.C. Bull., no. 6, at 7 (1993).
should end its current term and dissolve for the June 1994 elections.

As discussed in Section II(A), the December 1993 Brussels European Council set virtually all the terms for the changes in the institutional structure of the Union which were necessary in order to accommodate the new states. This was by far the most decisive intervention of the European Council in the accession process. How the Union institutions should be modified was far more important an issue than any substantive matter being threshed out in the negotiations.

C. The Negotiation Phase

Neither Article 237 of the EEC Treaty nor Article 0 of the Treaty of European Union discuss the mode of negotiations with applicant states. At the time of the applications of Denmark, Ireland and the United Kingdom, the Council set a crucial precedent on the conduct of accession negotiations. In its October 1, 1969 opinion, the Commission had proposed that the Council give it a mandate to negotiate, with the actual negotiations thereafter conducted under on-going guidelines from the Council, in a manner analogous to the accepted mode for the Commission's negotiations in trade matters, notably within GATT.281 The Council rejected this proposal.

A Council decision on June 8-9, 1970 declared that the Council would itself carry out negotiations with the applicant states.282 A representative of the Council President for each six-month term would preside over the Council team engaged in the negotiations. Naturally, the Council could request assistance from staff members of the Commission, and the Commission could also be asked to do studies or reports to aid in seeking "possible solutions to specific problems arising in the course of the negotiations." The Commission acquiesced in this approach. Although the Fifth General Report called it "somewhat cumbersome," the Report concluded that the negotiations represented a successful collaboration between the Council and the Commission.283 In the subsequent periods of negotiations with

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281. FIFTH REPORT, supra note 180, at 17, ¶ 26 (1972).
282. Id. at 17-18, ¶ 27.
283. Id.
Greece, Portugal and Spain, the Council continued to conduct the dealings with the assistance of Commission personnel.

In accordance with the wishes of the Edinburgh European Council, the Council opened the informal negotiation phase with Austria, Finland and Sweden on February 1, 1993. Norway began to participate after the Commission presented its favorable opinion on Norway's application on March 24, 1993. The Ministers of Foreign Affairs of the Member States and the applicant states, frequently joined by other cabinet ministers, engaged in periodic high-level negotiations, while more frequent meetings at a lower level were carried on by staff members. Commissioner van den Broek supervised the Commission personnel assisting in the negotiations.

Although all four of the applicant states were members of EFTA and prospectively were to join in the European Economic Area, the negotiations with each were kept separate. Mr. Petersen, the Danish President of the Council of Foreign Ministers in the first part of 1993, emphasized that the Council felt it advisable to keep the dealings separate, but, wherever possible, to treat issues in parallel. This approach undoubtedly reflected the pragmatic realization that resolution of similar issues might have to be different for each applicant.

After the Maastricht Treaty entered into force on November 1, 1993, the negotiations were converted into formal ones for accession to the European Union under Article 0. The pace then quickened. Indeed, at parallel ministerial level meetings in Brussels on December 21, 1993, "negotiations on the common foreign and security policy and on justice and home affairs were concluded."

Nonetheless, a number of thorny issues remained to be resolved, especially on the topics of fisheries, agriculture, environmental rules, regional aid, state monopolies and contributions to the Community budget. A series of virtually round the clock bargaining sessions were held at the ministerial level in Brussels.

285. Dierk Booss, the Commission legal service representative on the negotiation team, describes in detail the negotiating procedure at the ministerial and lower levels in Booss & Forman, supra note 1, at 104-08.
from February 25 to March 1, 1994. This final series of meetings enabled the conclusion of the negotiations with Austria, Finland and Sweden, but not with Norway. Resolving the competing interests of Norway and Spain over fishing rights proved a real cliff-hanger. Arduous negotiations on the subject were pursued through mid-March, resulting in a compromise grudgingly accepted by Norway. The negotiations over fishing rights became linked with the last unresolved institutional structure question, namely the level of the qualified voting majority. For some time the United Kingdom received the support of Spain in its opposition to the proposed increase in the number of states that could be outvoted in a qualified majority vote. The Spanish support represented in part a tactical maneuver to win concessions in the fisheries dispute. When a fishing rights compromise was worked out to Spain's satisfaction, its support for the U.K. position weakened, and the Joanina Compromise (described in Section IIB above) could be adopted.

The negotiations formally closed on March 30, 1994. Counting the period of informal negotiations in 1993, they consumed only fourteen months. This is remarkably short, when compared to the nearly three years required in the Greek accession negotiations, and over six years devoted to the dealings with Portugal and Spain.

There are undoubtedly two reasons for this. The first is the fact that all four applicants had already spent over a year in the negotiations for the EEA Agreement, which resulted in their acceptance of key Treaty principles as well as a vast number of internal market and related legislative measures.

The second reason for the relative rapid pace of the negotiations is that on many issues, such as progress toward the EMU or a common foreign and security policy, the Union ministers were negotiating from a position of strength. The applicant state governments (apart, to some degree, from Norway) had powerful political as well as economic pressures to seek membership in the Union. The European Union had, quite simply, become so successful in so many spheres of economic activity, and represented such an added bulwark in foreign affairs (where a

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289. Id. The key derogations for Norway are summarized in Booss & Forman, supra note 1, at 125.
resurgent Russian threat could never be discounted), that it was difficult for the applicants to hold steadfast except on issues whose adverse resolution might jeopardize critical popular support in the subsequent popular referenda. On some delicate issues, transitional solutions of a compromise character had to be found, but on many points the firmness of the Council negotiators ultimately achieved acceptance of their position.

Although many of the issues raised during the negotiations were quite important, this Article can only give a very rapid survey of the transitional measures agreed upon to resolve them. An interesting initial note is that these transitional measures are almost always effective for only four years, relatively short in comparison to the periods of seven, eight or even ten years for transitional measures set in the accession treaties with Greece, Portugal and Spain. Clearly the arrangements already worked out for phasing in aspects of the internal market program in the EEA Agreement facilitated shorter periods in the 1994 Act of Accession.

The Commission summarized the most important transitional measures in an information memo on May 18, 1994. The most complicated ones relate to the most sensitive subjects, agriculture and fisheries. With regard to agriculture, Austria and Finland have higher levels of price supports and subsidies than those permitted by the Common Agricultural Policy. The applicant states were reluctant to reduce these protective measures, which were intended to promote farming in the difficult climactic conditions prevailing in the Alpine regions in Austria and the nordic regions of Finland and Sweden. The Union insisted that the new states introduce at once the price levels set in the CAP, but permitted a system of subsidies over the next five years.

Concerning fisheries, although the new states were obliged to accept the basic principles and approach of the Common Fisheries Policy, a transitional period was set to allow the development of new catch quotas, supervision of endangered fish spe-


cies, access to various territorial waters, etc. Because Norway did not ratify the accession treaty (in some measure because Norwegian fishing interests so vigorously opposed accession), some of the most difficult future issues in this sector have disappeared.

A third area of considerable negotiating difficulty related to the high standards of health and environmental protection in the applicant states, many of which were higher than Community standards. Austria, Finland and Sweden were allowed to keep their higher standards for petroleum products, pesticides, certain chemical products, waste control, etc., for four years, during which period the Community is supposed to reexamine its own levels of protection.293 As noted previously, the three new States may well contribute to the introduction of higher environmental protection levels in the Community.

For Austria, the most sensitive issue was linked to its strict rules on trans alpine road and rail transit, intended to protect its alpine regions. Austria had to accept the principle of Community control over transport, but the Austrian limits were left in place for three years, with possible extension for another three years.294

Regional aids and special protection for particular groups and regions was another sensitive topic. The Community agreed to review rapidly the application of certain nordic regions for Community structural fund aid.295 The preferential rights accorded by Finland and Sweden to the Sami people (often called Lapps) with regard to their settlements and reindeer herding


293. 1994 Act of Accession, supra note 125, art. 69, O.J. C 241/21, at 35 (1994) (Austria); id. art. 84, O.J. C 241/21, at 37 (1994) (Finland); id. art. 112, O.J. C 241/21, at 41 (1994) (Sweden). This topic is summarized in Common Mkt Rep. - New Dev. (CCH) ¶ 97,397, at 55,405, with the interesting note that no derogation was allowed for the hunting of polar bears and whales. If the Community standards are not raised, the new States might then try to obtain a derogation for their higher standards under EC Treaty, supra note 7, art. 100a(4). See Booss & Forman, supra note 1, at 117-18.


were preserved by a Protocol.296

Two rather curious derogations were also granted. Austria, Finland and Sweden all have limits on the rights of non-residents to buy secondary residences or holiday homes. They were permitted to keep these limits for five years.297 It is noteworthy that there is a special Protocol in the Maastricht Treaty298 permitting Denmark to keep its restrictions on the sale of holiday homes to non-residents. At some point, a Community-wide regime on this subject may have to be developed.

By the second curious derogation, Sweden was allowed to continue to permit the sale of “snus,” a moist snuff, even though Community rules elsewhere prohibit this tobacco product.299 Whatever its health consequences, snus is a traditionally popular product in Sweden and the negotiators presumably feared that banning it might antagonize a large bloc of Swedish voters in the referendum.

With the successful conclusion of the negotiations, on April 19, 1994, the Commission was able to provide the final opinion required by Article 0, finding the “provisions so agreed are fair and proper” and that the enlargement would preserve the European Union’s “internal cohesion and dynamism.”300 This opinion also concluded that the institutional structure set by the European Council was “acceptable,” at least until the next intergovernmental conference.301

D. The Assent of the Parliament

One of the important rights gained by the Parliament through the Single European Act’s 1987 amendment of Article 237 (now Article 0) of the EEC Treaty is that of “assent” to any accession.302 The term “assent” means that Parliament must give

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296. Id. Protocol No. 3 on the Sami people, O.J. C 241/21 (1994). This is a permanent derogation. See Booss & Forman, supra note 1, at 102 n.19.
297. Id. art. 70, O.J. C 241/21, at 35 (1994) (Austria); id. art. 87, O.J. C 241/21, at 38 (1994) (Finland); id. art. 114, O.J. C 241/21, at 41 (1994) (Sweden). The applicant states requested, but were refused, the same permanent derogation that Denmark enjoys. See Booss & Forman, supra note 1, at 118.
298. TEU, supra note 7, Protocol on the Acquisition of Property in Denmark.
301. Id. recital 5, O.J. C 241/3, at 3 (1994).
302. See supra note 244. Parliament gave its assent to the accession of Austria, Fin-
its consent, in this case by an affirmative vote of "an absolute majority of its component members." The 1995 enlargement marks the first time Parliament has exercised its right of assent. It was clear from the outset that many members of Parliament intended this stage of the accession process to be a serious review of the merits, not a pro forma blessing of the work of the Council and Commission.

Once negotiations with the applicants opened, in successive resolutions on February 10, July 15, and November 17, 1993, Parliament endorsed both the progress made and the ultimate goal. Nonetheless, Parliament also stressed that the applicants must accept the acquis communautaire in its entirety, including all the innovations of the Maastricht Treaty. Moreover, in its November 17th resolution, shortly before the Brussels European Council meeting on institutional structure, Parliament urged that the 1995 enlargement be the occasion for improvements in the legislative process and for an increase in the powers of Parliament.

The conclusion of the negotiations gave Parliament almost total satisfaction on the acceptance of the acquis communautaire. Indeed, in a resolution of March 24, 1994, Parliament expressed particular satisfaction with the applicants’ forthright acceptance of the Common Foreign and Security Policy, which it considered “would enhance the Union’s capacity for international action.” In its final series of four resolutions, endorsing each state’s application on May 5, 1994, Parliament repeated this point and added its hope that the new Member States would help advance efforts to achieve high levels of environmental protection.

Many Members of Parliament were, however, both dismayed and angered by the failure of the European Council to seize the occasion to make any reforms in institutional structure. They were particularly disappointed by the minor increase in the

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number of States that could be outvoted in a qualified majority vote in the Council, and frankly incensed by the Joanina Compromise language. The Commission's blunt assessment of the Joanina Compromise as only a "political agreement," purely transitional until the 1996 Intergovernmental Conference, placated some MEPs, but not all.

News reports suggested that Parliament's assent might well be at risk. Fears were expressed that Parliament might either adopt a motion to postpone action until the newly-elected Parliament in the Fall could consider the issue, or that so many MEPs would decline to vote that the requisite absolute majority of all members of Parliament might not be attained.

The governments of the applicant states were naturally dismayed, and lobbied energetically, arguing that the adverse effect of a delay might jeopardize the popular referenda in their countries. At a critical moment in early May, Chancellor Kohl promised that the "reflection committee," which the European Council had instructed to be constituted to study issues before the 1996 Intergovernmental Conference, would include representatives of the Parliament, which would also be more closely involved later in the review of issues during the IGC. These efforts undoubtedly played a considerable role in achieving a favorable vote.

Parliament's final votes on each applicant on May 5, 1994 proved overwhelmingly positive, ranging from 376 to 381 in favor out of a total absolute number of 567 MEPs. Moreover, there were only a few negative votes, ranging from fifty-seven to sixty-one. However, it should also be noted that an earlier motion to defer the issue until the newly elected Parliament did

307. See supra notes 130-31 and accompanying text.
308. See supra note 306.
309. See The Door Opens: European Enlargement, ECONOMIST, May 7, 1994, at 54.
garner one-third support, being defeated 305 to 150.\textsuperscript{311} Even seriously raising a motion to defer constituted a clear warning to the Member States that many MEPs continued to feel strongly that institutional revisions should move forward.

On May 16, 1994, the Council took the final requisite internal act under Article 0, adopting a decision to accept the applications.\textsuperscript{312} The stage could then shift to the popular referenda in each applicant.

E. The Ratification Process

Ratification of the accession of Austria, Finland, Norway, and Sweden proved both straight-forward and easy in the Member States, in vivid contrast to the ardor and perils of the ratification of the Maastricht Treaty. This is not surprising, because most of the parliaments considered that the addition of these states would result in a manifest strengthening of the political and economic force of the European Union. Although several of the Mediterranean States clearly experienced some concern that their particular interests and needs might be somewhat neglected by the increase in northern states, still their level of discomfort was not sufficiently high to jeopardize in any degree the ratification.

Regardless of whether its constitution required this, each of the applicant states' governments had decided that the decision to join the European Union would be so momentous as to make a popular referendum appropriate. The level of debate in each country prior to each referendum proved more intense than had been anticipated and, apart from Austria, the popular vote outcome proved also much closer than had been optimistically predicted by the government leaders.

The Austrian referendum came first, on June 12, 1994. The outcome provided a much needed shot in the arm for confidence in the European Union. With an impressive turnout of

\[^{311}\text{See Amid Record Turnout of MEPs, Parliament Overwhelmingly Approves EU Enlargement, EUROWATCH, May 16, 1994, at 1, available in LEXIS, Europe Library, Eurwch File.}\]

\[^{312}\text{Decision of the Council of the European Union of 16 May 1994, O.J. C 241/6 (1994). After the signature of the Act of Accession at Corfu on June 24, the applicant states were permitted to send representatives to Council meetings for the rest of the year to enable their consultation in decision-making, without, of course, any right to vote. See the Exchange of Letters on this procedure, 1994 Act of Accession, supra note 125, O.J. C 241/21, at 399-401 (1994).}\]
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81%, the vote was 66.6% in favor.\textsuperscript{313} Even in Tyrol, where concern was highest that accession might adversely impact the quality of agricultural life and the environment, 56% voted in favor. The vociferous criticism of the right-wing Freedom Party, claiming that the Union would imperil the Austrian identity and the quality of life ("square tomatoes" was a vivid illustration), was soundly rejected.\textsuperscript{314}

That the Finnish referendum should likewise prove favorable was not a surprise. At the time of its 1992 application, President Koivisto told Parliament that Finland had no realistic alternative to accession, which would enhance its ties with the West and provide it with essential access to markets.\textsuperscript{315} The Finnish government's support for accession was strong and steadfast.

On October 17, 1994, 57% of the Finnish voters approved the accession.\textsuperscript{316} Although certainly a decisive outcome, and helpful in the closer battles in Sweden and Norway, the affirmative vote was somewhat lower than had been hoped. Apparently many voters in the rural north of Finland were unhappy with the agricultural aspects of the accession arrangements.

From the time of its application in 1991, the successive Swedish governments and all the major parties had supported accession, with more or less fervor. It proved, however, extremely difficult to translate this into popular support. During the campaign, the polls consistently showed a narrow majority against accession, but always with about one-third undecided.\textsuperscript{317}

To the enormous relief of the Swedish government, the November 13, 1994 referendum produced a narrow, but adequate margin of support: 52.2% yes versus 47% no.\textsuperscript{318} Apparently the efforts of the political party leadership and business interests - universally in favor - ultimately won the day. The large opposition obviously reflected voter sentiment in favor of Sweden's

\textsuperscript{313} E.U. BULL., no. 6, at 86 (1994).
\textsuperscript{314} See Austria's Yes Clears Way for Expansion, GUARDIAN, June 13, 1994, at 7.
\textsuperscript{316} E.U. BULL., no. 10, at 52 (1994).
\textsuperscript{317} See Not There Yet: The EC's Nordic Applicants, ECONOMIST, Apr. 2, 1994, at 49.
\textsuperscript{318} E.U. BULL., no. 11, at 75 (1994); Swedes Vote in Referendum to Join European Union, N.Y. TIMES, Nov. 14, 1994, at A6.
traditional independence and concern for its agricultural interests.

No one ever doubted that persuading the people of Norway to join would be a very difficult task. After all, Norway had already been accepted along with Denmark, Iceland and the United Kingdom in the first enlargement, only to see popular opposition result in a narrowly adverse vote (53%) in a 1972 referendum.\textsuperscript{319} Although the popular government of Prime Minister Brundtland fought vigorously for accession, and most political parties likewise endorsed the goal, throughout 1994 the polls showed a majority in opposition.\textsuperscript{320} Support surged after the favorable Finnish and Swedish referenda, but not strongly enough.

The November 29, 1994 Norwegian vote proved almost a replay of the 1972 referendum. The negative vote represented only a narrow majority of 52.2%, but that was decisive.\textsuperscript{321} The Brundtland government obeyed the popular expression of will and withdrew the application. Although most businessmen, professionals and urban dwellers supported accession, the fishing and farming interests were adamantly opposed. Clearly, the traditional Norwegian desire for independence from large and remote government had a major impact — after all, Norway had gained its own independence laboriously after 400 years of Danish or Swedish hegemony.

Although the rest of the European Union was naturally keenly disappointed by the Norwegian outcome, it had been both anticipated and largely discounted in political circles.\textsuperscript{322} If Sweden had declined to join, the blow would have been both bitter and serious. Norway's adverse decision required the rapid revision of the institutional arrangements set in the Act of Accession, but only marginally reduced the 1995 enlargement's overwhelmingly positive impact on the European Union.

\textsuperscript{319} SIXTH REPORT, supra note 118, at 17, ¶ 6.
\textsuperscript{320} See supra note 317 and accompanying text.
\textsuperscript{321} E.U. BULL., no. 11, at 75; Vote in Norway Blocks Joining Europe's Union, N.Y. TIMES, Nov. 29, 1994, at A1.
\textsuperscript{322} Left at Altar by Norway, Europe Tries Stiff Upper Lip, N.Y. TIMES, Nov. 30, 1994, at A3.
V. ISSUES RAISED BY A FUTURE ENLARGEMENT OF THE EUROPEAN UNION

A. Speculation on Candidates for Accession: Norway, Switzerland and Iceland

There are two groups of nations with great interest in accession, some of which are likely candidates in the near-term future. These are the new democracies in central Europe and three Mediterranean basin states, Cyprus, Malta, and Turkey. Before discussing in some detail their prospects, we should more rapidly consider the chance that Norway, Switzerland or Iceland might apply.

The nation whose accession could no doubt be the easiest to arrange, if only its people could be convinced to agree to accession, is Norway. Unfortunately, it appears unlikely that the Norwegian government will want to make a third attempt in the near future, although it is always possible that the continued economic success of the Union will prove too strong a magnet over the long term. If a large group of countries apply and are likely to join around the turn of the century, a sufficient shift in Norwegian popular sentiment might occur in the polls, tempting the government to a renewed effort.

Switzerland's accession would also be relatively easy, if its people could be convinced to shift their views on the question. After all, the December 1992 referendum on the European Economic Area almost resulted in a tie, with the negative votes prevailing by a tiny 50.3% majority.\(^{323}\) The Swiss government and the financial and commercial leadership remain keenly interested in the prospect of accession.\(^{324}\) The successful integration of Austria, Finland and Sweden into the European Union, together with the on-going success of the internal market program, may well produce such a sufficiently large shift in popular opinion that the government will be encouraged to renew its application.

Moreover, Switzerland and the Union have been engaged in discussions for over a year on how to improve their relations

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323. See supra note 52.
324. See Swiss Leaders to Make New Bid to Join European Economic Area, EUROWATCH, Oct. 18, 1993, at 4, available in LEXIS, Europe Library, Eurwch File (indicating that Swiss government told Swiss Parliament on October 4-5, 1993 that it intended ultimately to try again to join Community).
even though Switzerland remains outside the European Economic Area.\textsuperscript{325} If these negotiations prove sufficiently productive so that the Swiss government can point to acceptable solutions to some of the issues that previously troubled the Swiss population, this may facilitate a change in sentiment. Indeed, totally surrounded by the Union in both geopolitical and economic terms, Switzerland would seem to be a likely candidate in the next wave of applicant countries, even though no signal has as yet come from the Swiss government to that effect.

Iceland, which is, along with Norway, one of the only two remaining members of the European Economic Area,\textsuperscript{326} does not appear to be a plausible candidate for accession. Neither the government nor the people of Iceland manifested much interest in the possibility when the Scandinavian states applied, and the Norwegian people's rejection of accession has undoubtedly confirmed the negative posture of Iceland. Iceland's control of its own fishing interests is so paramount a national concern that it is unlikely Iceland would want to apply.

\textbf{B. Central European Enlargement: The Candidates and Their Prospects}

This Article would become excessively long if we attempted to trace the evolution in trade relations between the European Community and central European states, which the author has in any event done elsewhere.\textsuperscript{327} At the present time, the European Union has its closest relations with the six central European nations with which it has signed Europe Agreements, namely, the Czech Republic, Bulgaria, Hungary, Poland, Romania, and the Slovak Republic.\textsuperscript{328} Negotiations for Europe

\textsuperscript{325} See the Council conclusion authorizing attempts to reach such arrangements with Switzerland in 26 E.C. BULL., no. 11, at 67 (1993); the Council conclusion on issues created by the February 20, 1994 Swiss referendum on limits of transalpine road traffic, E.U. BULL., no. 5, at 61 (1994); and the Council authorization for negotiations on free movement of persons, agriculture, public procurement and other subjects, E.U. BULL., no. 10, at 52 (1994). These negotiations opened on December 12, 1994. 1994 REPORT, supra note 99, at 273, ¶ 784.

\textsuperscript{326} See supra notes 42-63 and accompanying text.


\textsuperscript{328} The Europe Agreements with Hungary, Poland, and Czechoslovakia were
Agreements have also been begun with the Baltic states, Estonia, Latvia, and Lithuania, and are soon expected with Slovenia. 929

If the European Economic Area can best be understood as a "halfway house" to membership in the European Union, so the Europe Agreements can perhaps best be described as a junior, somewhat watered-down, version of the European Economic Area arrangements. Europe Agreements are, technically speaking, an unusually high-grade form of association agreements, which are in turn agreements which encompass not only trade preferences, but also usually provide for investment right guarantees, technical aid, and political and social cooperation. 930 In September 1990, the Commission issued a report, "Association Agreements with the Countries of Central and Eastern Europe: A General Outline," describing the proposed structure of such agreements, and creating the term "Europe Agreements" as one which would mark "the importance of the political initiative which they represent." 931

The Europe Agreements are intended not only to achieve free trade (except for certain agricultural products) between the European Union and the respective central European states, but also to bring these states in large measure within the internal market. 932 Reciprocal rights of free movement of services and

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930. The Community power to enter into association agreements is set forth in Article 238 of the EC Treaty, supra note 7, which was amended by the Single European Act in 1987, supra note 2, to require that Parliament give its assent to such agreements. The first association agreements were with Greece in 1961 and Turkey in 1963. Over the years the Community has entered into such agreements with most neighboring states including, for example, Cyprus, Malta, Algeria, Egypt, Israel, Morocco, Syria, and Tunisia. See William Rowlinson, An Overview of EEC Trade with Non-Community Countries and the Law Governing those External Agreements, 13 Fordham Int'l L.J. 205 (1989-90).


932. See supra note 323 (for more detailed description of Europe Agreement provisions).
the right of establishment are phased in over five to ten year terms. The Europe Agreements do not, however, create any right of free movement of workers, because the European Union not unreasonably fears that a flood of unemployed workers from central Europe could enormously augment the problems of chronic high unemployment in western Europe. The central European states must develop and enforce rules of free-market competition. They must also, on a best efforts basis, model their new rules governing banking, company law, securities, intellectual property, employee rights, consumer rights and environmental protection on those laid down by Community directives. The Europe Agreements do not, however, provide for any form of institutional structure among the central European states themselves, or between the European Union and the states enjoying Europe Agreements, which represents a major difference when comparing such agreements with that for the European Economic Area.

That so many central European states would accept such far-reaching obligations was in large measure due to their hope ultimately to attain membership in the European Union, although naturally they were also enticed by the financial and technical aid offered by the Union, and the expectation of economic benefits through partial participation in the internal market. Although the Council and Commission initially opposed making any commitment to the eventual admission of central European states, they did agree that each Europe Agreement might begin with a Preamble clause foreseeing the possibility of membership.333

Reacting to a Commission study, "Towards a Closer Association with the Countries of Central and Eastern Europe,"334 the Copenhagen European Council meeting on June 21-22, 1993 agreed that "the associated countries in Central and Eastern Europe" could become Member States when they ultimately satis-

333. The Preamble of each Europe Agreement ends with an express reference to the "final objective . . . to become a member of the Community." See, e.g., Agreement with the Czech Republic, pmbl., O.J. L 360/1, at 1 (1994).

fied "the economic and political conditions required."³³⁵ (Note the timing: the Copenhagen European Council knew of the favorable outcome of the second Danish referendum, assuring the entry into force of the Maastricht Treaty, and was also encouraging rapid conclusion of the accession negotiations with Austria, Finland, Norway, and Sweden, so it could for the first time seriously consider the prospect of further enlargement.)

The European Council set a number of important conditions, effectively encompassing much of the acquis communautaire, which the central European states would have to fulfill:

stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and the protection of minorities, the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.³³⁶

The stress on two preconditions, a stable and effective democratic system and a functional free market economy, is not surprising, given the difficult struggles to attain each in the central European states, struggles which are not yet assured of achieving definitive success. This 1993 Copenhagen European Council declaration is somewhat reminiscent of the earlier 1978 Copenhagen European Council's "Declaration on Democracy,"³³⁷ in which the European Council was tacitly admonishing Greece, Portugal, and Spain that they must irrevocably retain their new democratic systems in order to qualify as Member States.

The Copenhagen European Council also approved an interesting mode of enhancing ties between the Union and the states with Europe Agreements, namely, a structured system of high-level political meetings. These should be held, usually at the ministerial level, "on matters of common interest," including not only internal market matters, but also common foreign and security policy and cooperation in justice and home affairs.³³⁸
These "structured meetings" have now begun and are perceived to be an important mode of dialogue and planning for further assistance to the six central European states presently enjoying Europe Agreements. On March 7, 1994 the Council agreed that the European Council should meet annually with the Heads of States or Government of the six states, and the Council should meet semi-annually with the ministerial-level representatives of these states.389 These meetings commenced with one of the Environment Ministers on October 6, 1994, followed by a session of the Foreign Ministers on October 31, 1994.340

A Council report to the recent December 1994 Essen European Council proposed that the "structured relationship" should now also include semi-annual meetings of the justice and home affairs ministers (in addition to drug control and illegal immigration, stolen cars has become a serious problem), and annual meetings of ministers responsible for economics and finance, agriculture, environment, transport, research and development, telecommunications, cultural affairs, and education.341 Manifestly such regular high-level meetings are bound to further cooperation and mutual understanding at least, and hopefully will also solve problems and promote progress when agreement at lower levels cannot be reached.

On April 1 and April 8, 1994 respectively, Prime Minister Boross of Hungary and Prime Minister Pawlak of Poland officially applied for membership in the European Union.342 The Council reacted favorably and requested the Commission to begin work on its opinion,343 the first important procedural step under Article O of the Maastricht Treaty. Because the Commission usually requires a year or more to evaluate the economic aspects of an applicant's suitability, these opinions are not expected in the near future.

The Czech and Slovak Republics are expected to file their official applications soon. Along with Hungary and Poland, these two nations form the Visegrad group, so-named because

343. Id.
they began cooperating in 1994 at a meeting in that city.\textsuperscript{344} The Visegrad group signed the first Europe Agreements with the Community on December 16, 1991, and have made the fastest progress in implementing these agreements. Because the certainty of their long-term democratic credentials is no longer in doubt and because they have made the broadest progress toward free-market economies, there exists a definite possibility that their accession applications will be considered at an earlier time than those of other interested central European states.

As noted before, Bulgaria and Romania signed their Europe Agreements in 1993, and these have just entered into force on February 1, 1995.\textsuperscript{345} Negotiations are presently underway for Europe Agreements with the Baltic states, Estonia, Latvia, Lithuania, and are expected soon with Slovenia.\textsuperscript{346} Signature is anticipated during the French Council presidency in early 1995, which would mean that the agreements could be ratified and enter into force sometime in 1996. Soon after, one may anticipate that all four states would be apt to apply formally for Union membership. They are presumably the last central European states which could be considered for membership in the near-term future. The relatively poor economic condition of Albania, and the involvement of Bosnia-Herzegovina, Croatia, Serbia, and the Former Yugoslav Republic of Macedonia directly or indirectly in the civil strife in that region excludes them as candidates for the foreseeable future.

Although the European Union has entered into close trade and assistance arrangements, called Partnership and Cooperation Agreements, with Russia and the Ukraine,\textsuperscript{347} and has re-


\textsuperscript{345} \textit{See supra} note 324.


\textsuperscript{347} The Partnership and Cooperation Agreement with Russia was signed in Corfu on June 24, 1994, during the European Council meeting, and with the Ukraine in Luxembourg on June 14, 1994. \textit{1994 Report, supra} note 99, at 282-83, ¶ 807. The purpose and provision of both agreements are briefly summarized in \textit{E.U. Bull., no. 6}, at 89-91 (1994). These agreements are not considered association agreements under Article
tained trade agreements with almost all the other countries in the Commonwealth of Independent States ("CIS") (the former Soviet Union), there is no present expectation that these will be promoted to the status of Europe Agreements in the near term future, if ever. Geopolitical considerations make it highly unlikely that any of these countries could become candidates for the European Union in this century or even very early in the next century. Indeed, whether Russia will look favorably on the addition of certain central European applicant states to the European Union is still very much a matter of doubt. For example, Russian concern for the protection of the large Russian minority in Estonia, Latvia, and Lithuania, together with the traditional Russian geopolitical interest in the Baltic region may impede movement by those states to membership in the Union. Likewise, whether Romania is willing to renounce irrevocably all hope of reunion with Moldova may be a weighty factor in Romania's progress toward accession.

In June 1994, while the European Council at Corfu was welcoming Austria, Finland, Norway and Sweden, it also refocused attention on the possible further enlargement of the Union. The European Council requested the Commission to make specific proposals for further progress in relations with interested central European states, but also set further institutional modifications at the 1996 inter-governmental conference as a precondition before further enlargement negotiations.

The Commission accordingly prepared a new report, "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession," issued on July 13, 1994. In turn, the Council prepared a similar report to the most recent European Council in Essen in December 1994. Both these reports analyzed the serious issues which

288, so they do not meet the precondition for an accession application set by the European Council meeting at Copenhagen in April 1993. See supra note 385.

348. All of the countries in the CIS except for Azerbaijan have succeeded to the provisions of the prior Trade and Cooperation Agreement entered into between the Community and the Soviet Union on December 18, 1989. 22 E.C. BULL., no. 12, at 110 (1989); see EBRD REPORT, supra note 344, at 110 (summarizing status of trade agreements with CIS nations).


351. See supra note 341.
would have to be resolved before accession could be seriously considered, stressed the need for deepened political cooperation with prospective applicants, and proposed greater efforts in accommodating the applicants to the internal market.

Reacting to these reports, the Essen European Council "decided to boost and improve the process of further preparing the associated States of Central and Eastern Europe for accession." The European Council endorsed the heightened use of structured relations at the ministerial level. Perhaps most important, the Essen European Council requested the Commission to prepare a White Paper with concrete proposals to facilitate the applicant states' introduction of internal market and related measures, with a timetable for action modeled upon the famous June 1985 White Paper on Completing the Internal Market. The Commission is currently at work on this work on this project, to be submitted to the Cannes European Council in June 1995.

Thus, the European Union is now committed to serious consideration of the accession of a number of Central and Eastern European states, presumably at least four (the Czech Republic, Hungary, Poland, and the Slovak Republic) and perhaps as many as ten (in addition, Bulgaria, Estonia, Latvia, Lithuania, Romania, and Slovenia). Besides these nations, there are however also prospective Mediterranean candidates.

C. The Mediterranean Applicants for Accession

The earliest applicant, Turkey, is not presently considered a serious candidate. In 1989, the Commission opinion on the Turkish application concluded that Turkey could not as yet fulfill Member States obligations, largely because of economic problems but also because of some concern for its democratic stability. The Commission did propose closer trade arrangements and political cooperation with Turkey. Successive Eu-

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353. Id. at 13.

354. COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIrd GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 1988, at 387-88, ¶ 801 (1989). In its 1992 Report, "Europe and the Challenge of Enlargement," the Commission referred to "Turkey's geopolitical importance" and the need to "anchor it firmly within the future architecture of Europe." CHALLENGE OF ENLARGEMENT, supra note 13, at 17. For a review of some of Turkey's economic problems (its GNP is proportionally only one-third as high as that of Portu-
European Council meetings have approved this approach. The Corfu European Council in June 1994, instructed new negotiations to achieve a free trade customs union with Turkey. After considerable efforts to obtain Greece's acquiescence finally succeeded, the Council agreed upon the customs union with Turkey in March 1995.

The other two Mediterranean candidates are Cyprus and Malta, which applied respectively on July 4 and 16, 1993. In each case, the Commission provided a favorable opinion in June, 1993. However, the opinion on Malta cautioned that because Malta has only 350,000 people, the mode of its participation in Union institutions must be set in the 1996 intergovernmental conference. With regard to Cyprus, although the Commission concluded that it possessed "the kind of European identity that suits it to membership" and has a stable and appropriate economic status, the obvious stumbling block is the continued political partition of the island. The Commission remarked that "a peaceful, balanced and lasting settlement of the conflict" between the Greek majority and the Turkish minority must be found before membership could be possible. Given the continued presence of Turkish armed forces on Cyprus, separated by a U.N. peace force and a no-man's land from the Greek Cyprus military, prospects for such a settlement might seem dim.

There has however, recently been some grounds for optimism. The June 1994 Corfu European Council, under the Greek presidency, specifically urged the Commission and Council to undertake further efforts to prepare for accession and promised that "the next phase of enlargement of the Union will

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357. 23 E.C. Bull., no. 7/8, at 98 (1990). Note that these two applications actually came before those of Sweden, Finland and Norway.
358. 26 E.C. Bull., no. 6, at 100-01 (1993). On October 4, 1993, the Council approved the Commission conclusions. 26 E.C. Bull., no. 10, at 69 (1993). Because Cyprus has only 700,000 people, its institutional representation may also pose a problem. See Booss & Forman, supra note 1, at 128; Lansing & Bye, supra note 252, at 70-72.
359. 26 E.C. Bull., no. 6, at 100 (1993).
360. Id. When the Council approved the Commission conclusions on October 4, 1998, it observed that if the continued efforts of the United Nations toward political settlement should not bear fruit by January 1995, the subject should be reexamined.
involves Cyprus and Malta.\textsuperscript{361} Moreover, in securing Greece’s acceptance of the new customs union with Turkey, the Council has promised that accession negotiations with Cyprus will open within six months after the end of the 1996 Intergovernmental Conference.\textsuperscript{362}

If this time-table can be adhered to (which assumes at least prior progress toward a firm settlement of the conflict between Cypriot Greeks and Turks), then it is likely that negotiations for accession will also be commenced with Malta and several central European states. It would certainly seem more efficient to have another large-scale enlargement than several piece-meal ones over a period of time. It is of course possible, however, that political or economic considerations will dictate an earlier accession for Cyprus, or Cyprus together with Malta, before the accession of any central European states, just as Greece’s accession preceded that of Portugal and Spain.

D. Institutional Issues Raised by Future Enlargement

Although it is conceivable that the European Union could add one or two small states through minor tinkering with its present institutional structure, any future large-scale enlargement would require major modifications. Because negotiations with several countries (the four Visegrad states, together with Cyprus and Malta) are quite likely to begin in 1997 or 1998, and another six or more states must be considered serious candidates as well in the next few years, the Union must create an institutional structure suitable for twenty-one, twenty-five or even twenty-seven states.

Not only will efficiency in operations become a critical concern, but the Union must heed the growing demands for increased democratic legitimacy. Parliament’s repealed requests for a greater share in the legislative process can no longer be ignored (especially after the German Constitutional Court’s emphasis on the need for further democratic evolution of the Union in its Maastricht opinion).\textsuperscript{363} As we have seen, Parliament’s pressure to have democratic modifications occur prior to the 1995 enlargement did not succeed. More recently, in a reso-

\textsuperscript{361} E.U. Bull., no. 6, at 13 (1994).
\textsuperscript{362} See supra note 356.
\textsuperscript{363} See supra note 84.
olution of November 30, 1994, Parliament’s endorsement of the Commission’s proposed strategy for central European enlargement was conditioned upon prior institutional revisions in the 1996 Intergovernmental Conference. This time it is likely that institutional modifications will be made, because both the Commission and the Council, in their 1994 reports on a strategy for further enlargement, agreed upon this, and the European Council took the policy decision “that the institutional conditions for ensuring the proper functioning of the Union must be created at the 1996 Intergovernmental Conference... before accession negotiations begin.”

At this point in time, the European Council has not yet started to debate seriously the types of proposals that should be considered at the 1996 Intergovernmental Conference, nor even to frame its agenda. That will probably be done at a meeting under the Spanish presidency later this year, although the June Cannes European Council may start the process. We do not even yet know the likely date for opening of the IGC, whether early or late in 1996. But one can be confident that, because of the sensitivity and difficulty of the issues, the IGC is apt to last at least a year, until sometime in 1997.

Therefore, all that can be intelligently done at present is to raise some of the key questions that will have to be addressed and to speculate, with considerable caution, on possible modes of approach to their answers.

Starting with the Council, the crucial question will not be the number of weighted votes to be given new states, but how to set the qualified majority vote — the thorny issue resulting in the current Joanina Compromise. With the exception of Poland, none of the likely applicants have large populations, and many have quite small ones — not only Cyprus and Malta, but also Estonia, Latvia and Slovenia. The Council is likely to acquire a number of members representing small or medium-sized states that will each have a low number of weighted votes.

Because adding five to ten, or even more, smaller states would create a risk that the five largest states (France, Germany, Italy, Spain and the United Kingdom) would lose their present majority of weighted votes, new solutions have to be considered.

365. Essen European Council Conclusions, supra note 352, at 12.
One might be to increase the weighted votes of the four largest to twenty, instead of ten, with perhaps fifteen weighted votes for Spain, but with minor increases for medium-sized States (from four or five votes to perhaps six to seven votes) and no increase for the smaller States that have two or three weighted votes. Another more commonly offered proposal is to require a double majority vote in the Council, setting a minimum population threshold for the States voting in favor on any issue, in addition to whatever qualified majority of weighted votes is set. However complex the solution, it must be relatively efficient in practice, and also relatively democratic, for the Council ultimately reflects the people of the Union, even though less directly than does the Parliament.

The number of issues on which the Council must act unanimously may well be reduced. As discussed previously, the more Council members there are, the greater is the risk of veto or deadlock provoked by the opposition of any one State. When so many additional smaller States become Council members, the veto power may no longer be acceptable.

Two major issues for both the European Council and the Council will be how to rotate the presidency and what should be the term of the presidency. One can speculate that in the future the rotation system will make permanent the new policy of placing one of the five largest States in the presidency at frequent intervals, at least once in every three terms and perhaps more often. It may also be time to increase the term of the presidency from six months to one year, enabling a greater degree of coherence and stability in leadership. A shift to more than a one-year term, however, would seem not very likely, because it would mean too long a rotation cycle.

That the Parliament's powers will be increased seems virtually certain. The co-decision, or Parliamentary veto procedure, appears to be working efficiently, so that it is likely to be extended to additional fields. It is quite possible that Parliament will also be given the right to initiate legislative proposals which it has long sought. Whether Parliament will be given greater authority in the designation of the Commission or the Court of Justice remains to be seen. Parliament would like to be able to vote on each individual nomination for Commissioner or judge, which would give it a far greater influence over the composition of both the Commission and the Court.
Creating a ceiling for the total number of members of Parliament is certain to be a serious issue. It is arguable that with 624 members, Parliament is already too large to be very efficient. Moreover, adding more offices, committee rooms, plenary halls, staff and facilities for an even larger Parliament would create such a significant budgetary burden that increasing its number would seem doubtful. A ceiling at the present level of total members would appear to be a more reasonable outcome. Downsizing the Parliament may be raised at the 1996 Intergovernmental Conference, but would seem less likely of acceptance.

The total size of the Commission is also certain to be a major but sensitive issue. The principle that every State should have one commissioner and that the large states should have two may have to be sacrificed in order to preserve some degree of operating efficiency. A likely solution would be to replicate the present mode of choosing advocates-general for the Court of Justice: the five larger states would each have a commissioner, and a group of commissioners would rotate by lot among the other states. The total Commission size might then be able to be reduced to perhaps eleven to fifteen Commissioners, each with greater operational authority, thereby creating a more compact body for collegial decision-making.

Whether the authority of the President of the Commission will be expressly increased, or remain the same, or even perhaps be diminished in favor of increased authority of the Council presidency is very much an open issue. President Jacques Delors greatly increased the customary authority of the Commission President, but whether the Member States will wish to formally create any specific powers for the Commission President is open to doubt.

Increasing the size of the Court of Justice by adding a judge to represent each new state may pose less of an issue. As previously observed, because the Court can operate with increasing use of chambers, it can conceivably even double in size. But certainly the larger the plenary Court, the less efficient it would be in the resolution of the most important cases. Also, the Court's composition should in some degree have a democratic character — for example, should Germany and Malta each be entitled to one judge? It may be time to rotate judges among smaller Member States in a fashion analogous to the rotation of advocates-general. On the other hand, it is perhaps hard to expect a Mem-
ber State to feel comfortable when it happens to become the subject of an Article 169 proceeding, or when an Article 177 reference has come from one of its courts, if there is no judge who represents that State's legal tradition.

Finally, although not an institutional issue as such, there must be serious consideration of the number of official and working languages. While it is probably a constitutional imperative that all legislation, international agreements and Court judgments must be translated in every State's official language(s), efficiency and cost concerns are virtually certain to limit the number of working languages for other purposes, as previously discussed in section II(G).

**CONCLUSION**

The European Union is very much a dynamic concept with an evolving structure. As previously stressed, the Maastricht Treaty on European Union did not represent the culmination of a movement toward a completed federal union, but rather only another step in the progressive evolution toward such a union.

The addition of Austria, Finland and Sweden as Member States, the subject of this Article, necessarily required some significant and not always easily understood modifications to the institutional structure of the Union. This Article has endeavored to depict clearly these changes and analyze some of the issues behind them. The Article has also tried to describe concisely yet adequately the procedural stages leading to the 1995 enlargement.

A major but often neglected Community (now Union) legal and constitutional concept is the principle of the acquis communautaire. The Article has traced its origin, its initial essential meaning and the later expansion of the concept through successive enlargements, to its present status as a formal Maastricht Treaty principle in Articles B and C. Debate over the extent of the acquis communautaire principle and whether it need be expanded, or even perhaps reduced, is bound to occur in future enlargements.

The outset of this Article tried to situate the 1995 enlargement in the context of other major Community developments in recent years, notably the single market program as a magnet for outside states and the evolution of the Community into the Eu-
European Union. Analogously, the final section has shifted the theme to the future - what states may yet join the Union and what institutional and other issues this might pose.

The 1995 enlargement represents a major addition to the European Union. The future will tell us how significantly Austria, Finland and Sweden will be able to contribute to all aspects of Union policy-making. The future will also reveal how the Union will evolve to meet the challenge of further enlargements.