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The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt

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Roger J. Goebel

Abstract

This Article is intended to provide an overview of this transitional moment in the history of the European Union. Initially, the Article will briefly review the background of the Treaty of Nice, and the institutional structure modifications for which it provides, which paves the way for enlargement. Next it will describe the final stages of the enlargement process. Finally, the Article will set out the principal institutional innovations and certain other key aspects of the draft Constitution, the most important issues concerning them, and the current impasse.

THE EUROPEAN UNION IN TRANSITION: THE TREATY OF NICE IN EFFECT; ENLARGEMENT IN SIGHT; A CONSTITUTION IN DOUBT

*Roger J. Goebel**

INTRODUCTION

Once again the European Union¹ (the “EU” or the “Union”) is in a stage of radical evolution. Since the early 1990’s, the EU has anticipated an extraordinary increase in its constituent Member States² through the absorption of a large number of Central European and Mediterranean nations. Since the late 1990’s, the Union has been negotiating the precise terms for their entry with a dozen applicant nations and has been providing cooperative assistance to them to prepare for their accession to the Union and in particular, its principal constituent part, the European Community.³ As this enlargement of the Union came more clearly in sight, the political leadership and the present Member States, joined by the Commission, con-

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1. The European Union (the “EU”) was established by the Treaty on European Union, adopted as part of the Treaty of Maastricht (signed Feb. 7, 1992; effective Nov. 1, 1993), O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The European Community constitutes the largest constituent part of the European Union, but the EU also comprises the inter-governmental structures of the Common Foreign and Security Policy and Cooperation in Justice and Home Affairs. The three component parts are commonly called the three “pillars” of the EU. The current consolidated text of the TEU as amended appears in O.J. C 325/5 (Dec. 12, 2002).

2. The EU currently consists of fifteen Member States, the initial six that created the European Economic Community in 1958 — Belgium, France, Germany, Italy, Luxembourg, and the Netherlands — and the nine that have joined at later dates: Denmark, Ireland, and the U.K. in 1973, Greece in 1981, Portugal and Spain in 1986, and Austria, Finland, and Sweden in 1995.

3. The European Community (or “EC”), originally designated as the European Economic Community, was created by the Treaty of Rome, 298 U.N.T.S. 11 (signed March 25, 1957; effective January 1, 1958). With a structure of four institutions — the European Parliament, the Council of Ministers, the Commission, and the Court of Justice — the European Community’s original goal was to establish a common market, but its sphere of operations has steadily expanded over its history. Article 3 of the Treaty Establishing the European Community (“EC Treaty”) sets forth its current sphere of activities. The current consolidated text of the EC Treaty as amended appears in O.J. C 325/33 (Dec. 12, 2002).

cluded that it was highly desirable, perhaps indispensable, to improve the operational efficacy of its institutions.

In December 2000, the Member States agreed upon the terms of the Treaty of Nice,⁴ which has just entered into force on February 1, 2003, to make the modifications in the structure of the Union's political and judicial institutions necessary to enable the entry of the new States. The perception that the Nice Treaty did not go far enough led Member States to the designation of a special Convention in February 2002 to carry out a fundamental re-examination of the basic concepts, structure, fields of action, and procedures of the Union.⁵ In June 2003, the Convention submitted to the European Council in Thessalonica a new formal text, a long and complex draft Constitution,⁶ to replace the present Treaty on European Union and the Treaty establishing the European Community.

Now, at the start of 2004, the enlargement of the EU will soon become a reality, as ten new Member States join on May 1st, an event certain to alter profoundly the operational structure of the EU. The fate of the draft Constitution, however, is very much in doubt, due to bitter disagreement among the Member States' leadership over a key issue concerning the power relationship between the largest and the smaller States in the legislative and the decision-making process.⁷ While we may hope that in 2004 the political leaders can continue their debate in a sufficiently conciliatory manner to reach a satisfactory con-

4. The Treaty of Nice contains the most recent amendments to the TEU, *supra* note 1, and the EC Treaty, *supra* note 3. Its text is at O.J. C 80/1 (Mar. 10, 2001). The Treaty of Nice was signed on February 6, 2001, and became effective on February 1, 2003.

5. The European Council meeting at Laeken on December 14-15, 2001, decided to convene the Convention, determined its basic membership, and assigned the principal topics for consideration. See EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION — 2001, at 12-14 (2002) [hereinafter COMMISSION GENERAL REPORT — 2001]. For a description of the European Council and its policy leadership in the Union, see *infra* notes 13-16 and accompanying text.

6. See Draft Treaty establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (not yet ratified) [hereinafter Draft Treaty].

7. The European Council meeting at Brussels on December 13-14, 2003 was unable to reach agreement upon the issue of the mode of voting in the Council of Ministers, an issue concerning the relative power of the largest versus the other States. See George Parker, *Muscle in Brussels: As Europe Meets to Agree a Constitution, Disputes Over the Distribution of Power Loom Large*, FIN. TIMES, Dec. 10, 2003, at 11; George Parker, *Atmosphere of Resignation as Leaders Walk Away*, FIN. TIMES, Dec. 15, 2003, at 4. For further discussion, see *infra* Part III.

clusion and thus enable the adoption of the draft Constitution, this optimistic scenario is far from certain.

This Article is intended to provide an overview of this transitional moment in the history of the European Union. Initially, the Article will briefly review the background of the Treaty of Nice, and the institutional structure modifications for which it provides, which paves the way for enlargement. Next it will describe the final stages of the enlargement process. Finally, the Article will set out the principal institutional innovations and certain other key aspects of the draft Constitution, the most important issues concerning them, and the current impasse.

I. THE TREATY OF NICE IN HISTORICAL PERSPECTIVE

A. Constitutional Evolution Preceding the Treaty of Nice

In less than twenty years, four successive treaties have marked the progressive constitutional and institutional evolution of the European Union and its principal operational component, the European Community. In order, these are the Single European Act (or the "SEA"), signed on February 17, 1986 and effective July 1, 1987;⁸ the Treaty of Maastricht, which created the European Union and substantially modified the European Community, signed on February 7, 1992, and effective November 1, 1993;⁹ the Treaty of Amsterdam, signed on October 2, 1997, and effective May 1, 1999;¹⁰ and the Treaty of Nice, signed on February 26, 2001, and effective February 1, 2003.¹¹ Each treaty represents the results of difficult negotiations among the then Member States, meeting in an Intergovernmental Conference of their authorized representatives, in accord with the amendment process set out in the successive treaties.¹² Each

8. O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

9. See *supra* note 1. The Treaty of Maastricht was also published by the Commission Office for Official Publications, Treaty on European Union (1992).

10. The Treaty of Amsterdam amended both the TEU and the EC Treaty. The text of each consolidated form after the Treaty of Amsterdam is in O.J. C 340/1 (Nov. 10 1997). See Roger Goebel, *The Treaty of Amsterdam in Historical Perspective: Introduction to the Symposium*, 22 *FORDHAM INT'L L.J.* 7 (1999) (commencing a symposium issue devoted to Articles analyzing aspects of the Treaty of Amsterdam).

11. See *supra* note 4.

12. Article 236 of the initial EC Treaty, *supra* note 3, provided that the Council could call a "conference of the representatives of the Member States . . . for the purpose of determining by common accord the amendments to be made to the Treaty." *Id.* The Treaty of Maastricht, *supra* note 1, moved this text from the EC Treaty to Article N of

treaty marks a substantial step forward toward greater union, operational efficiency and democratic legitimacy, as well as a significant expansion of the fields of action. However, each treaty has left unresolved significant issues, setting the stage for a subsequent re-examination in another treaty revision.

The definite historical landmark launching this process is the Solemn Declaration on European Union adopted by the European Council at Stuttgart in June 1983.¹³ As is well known, the European Council is the body composed of the Heads of State or government of each Member State which has met three or four times a year since the early 1970s in order to provide the "general political guidelines" for the European Community (and since 1993 for the European Union).¹⁴ The Stuttgart Declaration expresses the leaders' commitment "to achieve a comprehensive and coherent common political approach" to the goal of "European Union."¹⁵ Virtually at the same time, in February 1984, the Parliament endorsed the text of a Draft Treaty Establishing the European Union, intended to launch a public debate on the future constitutional evolution of the European Community.¹⁶

It would take too long to trace the developmental threads of the 1980s and 1990s that produced the successive treaty changes, but certainly three should be noted: the success of the internal market program, the impetus to achieve greater democratic legitimacy, and the on-going process of addition of new Member States.

the TEU, substituting "Treaty on which the Union is founded" for "Treaty." The Amsterdam Treaty, *supra* note 10, renumbered N as Article 48.

13. 16 E.C. BULL., no. 6, at 18-29 (1983).

14. A summit meeting of the then Member State leaders at Paris in December 1974 decided to hold regular meetings designated as the European Council three times annually (more recently, four times). The SEA, *supra* note 8, introduced the status and role of the European Council in Treaty language. The Treaty of Maastricht inserted Article D (now 4) into the TEU, *supra* note 1, declaring that the European Council shall "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." *Id.* Historically, the European Council has taken the most important decisions of policy and principle for the European Union and the European Community, but technically it cannot adopt legally binding measures. (In Part III, we discuss Article I-20 of the draft Constitution which would give the European Council that power). See DESMOND DINAN, *EVER CLOSER UNION* 248-54 (2d ed. 1999) (describing the origin and present role of the European Council). See also GEORGE BERMAN ET AL., *EUROPEAN UNION LAW* 40-42 (2d ed. 2002).

15. See 16 E.C. BULL., *supra* note 13, at 24.

16. O.J. C 77/33 (Feb. 14, 1984).

The internal market program, launched by the Commission's famous White Paper on Completing the Internal Market in June 1985,¹⁷ and endorsed by the European Council at Milan that month,¹⁸ proved an enormous success. The White Paper called for the removal of barriers to the free movement of goods, persons, services, and capital through the enactment of legislation harmonizing Member State regulations in order to achieve a Community wide marketplace. The desire to achieve the internal market program undoubtedly catalyzed the decision of the political leaders of the Member States to call the first Intergovernmental Conference ("IGC") in Luxembourg in fall 1985.¹⁹ This IGC drafted the Single European Act, whose adoption in 1987 gave treaty force to the goal of completing the internal market program by December 31, 1992.²⁰ The SEA greatly facilitated the legislative procedures for enacting internal market legislation, substituting the Qualified Majority Voting (or "QMV") system in the Council for the prior requirement of unanimous Council action,²¹ and requiring the active participation of the Parliament through the so-called legislative cooperation procedure.²² Under the dynamic leadership of Commission President Jacques Delors, and the Internal Market Commissioner, Lord Cockfield, and with the enthusiastic support of the Council and the Parliament, the legislative program set out in the White

17. See Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985). The Commission Office of Official Publications also published the White Paper in 1985.

18. 18 E.C. BULL., no. 6, at 14-15 (1985).

19. See EUROPEAN COMMISSION, NINETEENTH GENERAL REPORT TO THE ACTIVITIES OF THE EUROPEAN COMMUNITIES — 1985, at 29-34 (1986). See also DINAN, *supra* note 14, at 116-20 (describing the work of the Luxembourg IGC).

20. Introduced as EC Treaty Article 8a by the SEA, this provision is now EC Treaty Article 14, *supra* note 3. The then-head of the Commission Legal Service, Claus-Dieter Ehlermann, analyzes the SEA in *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987); the then-head of the Council Legal Service, Hans-Joachim Glaesner does so in *The Single European Act: Attempt at an Appraisal*, 10 FORDHAM INT'L L.J. 446 (1987).

21. Introduced as EC Treaty Article 100a by the SEA, this Provision is now EC Treaty Article 95, *supra* note 3.

22. The cooperation procedure, initially in EC Treaty Article 149, survives in the current EC Treaty Article 252, *supra* note 3, but is now only employed occasionally for some decisions in the Economic and Monetary Union. Essentially, the procedure enabled the Parliament to propose amendments which the Council could accept by a Qualified Majority Vote, but could only reject by unanimous action. See BERMANN, *supra* note 14, at 86-87.

Paper was almost entirely attained by its scheduled deadline of December 31, 1992.²³

The legislative and economic success of the internal market program then inspired the political leadership of the Member States to move forward at the start of the 1990s in a second Intergovernmental Conference²⁴ which produced the Maastricht Treaty, comprising the new Treaty on European Union and a radically revised European Community Treaty. The Treaty of Maastricht provided the European Community with major new initiatives²⁵ (most notably, creating the Economic and Monetary Union,²⁶ but also inspiring further action in the fields of social policy, environmental protection, and transportation). Subsequently, the later Treaties of Amsterdam and Nice have each augmented the fields of action of the Community.

The natural desire to facilitate the easier adoption of legislative measures led to a steady increase, treaty by treaty, in the legislative fields in which the traditional Community system of majority voting (the Qualified Majority Voting) could be used by the Council of Ministers, instead of requiring unanimous action.²⁷ Moreover, ever since the mid-1980's, steady pressure

23. See LORD COCKFIELD, *THE EUROPEAN UNION: CREATING THE SINGLE MARKET* (1994) (describing the background and the success of the internal market program). See also BERMANN, *supra* note 14, at 544-47 (describing the program's success).

24. The European Council session at Dublin in June 1990 called for two IGCs, one to work on political aspects, the other to prepare for an economic and monetary union, to be held from December 1990 to December 1991. See 23 E.C. BULL., no. 6, at 7-10 (1990). See also DINAN, *supra* note 14, at 127-48 (describing the background and the difficult debates during the IGC).

25. The literature on the Treaty of Maastricht is voluminous. Excellent surveys are: INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION (Deidre Curtin et al. eds., 1994); LEGAL ISSUES OF THE MAASTRICHT TREATY (David O'Keeffe & Patrick Twomey eds., 1994).

26. The EC Treaty provisions governing Economic and Monetary Union ("EMU") are set out in Articles 98-130 (initially numbered as 102a-109s by the Treaty of Maastricht). For a detailed analysis of these provisions and the evolution to EMU, see RENE SMITS, *THE EUROPEAN CENTRAL BANK: INSTITUTIONAL ASPECTS* (1997); Roger Goebel, *European Economic and Monetary Union — Will the EMU Ever Fly*, 4 COLUM. J. EUR. L. 249 (1998).

27. The Council's Qualified Majority Voting system gives each Member State a weighted vote somewhat proportionate to its population and economic importance, and then sets a figure roughly corresponding to 70% of the total weighted votes for the adoption of measures. The system set in EC Treaty Article 205 prior to the Nice Treaty gave Luxembourg two votes, while France, Germany, Italy, and the U.K. each received ten votes, and the other States had weighted votes in between. QMV voting was only occasionally used until the SEA enabled the Council to enact most internal market legislation through this mode.

from the Parliament, joined by popular support for an enhanced degree of democratic legitimacy for Community legislation, has produced a radically augmented participation of the Parliament in the legislative process. Prior to the Single European Act, the Parliament was only "consulted" by the Council in the legislative process, and the Parliament's proposed amendments could be ignored (although as a matter of fact they often influenced the Council to amend the draft text). The Single European Act gave the Parliament a mechanism for pressuring the Council to adopt legislative amendments in the legislative cooperation procedure, applicable for most internal market legislation.²⁸ The Maastricht Treaty substantially upgraded this to co-decision,²⁹ a legislative procedure in which the Parliament achieved virtual equality with the Council in the adoption of internal market legislation.³⁰ The Treaty of Amsterdam then modified the co-decision procedure to give Parliament a complete veto power, and thus an equal role with the Council in the legislative process,³¹ as well as expanding the fields in which co-decision was to be used.

Moreover, the treaties, beginning with that of Maastricht, have steadily augmented the participation of the Parliament in the designation of the Commission and its President. Thus, by virtue of the Treaty of Amsterdam, the Parliament must first approve the Member States' nominee for the Commission Presi-

28. See *supra* note 22.

29. The Treaty of Maastricht introduced the co-decision procedure in EC Treaty Article 189b. In its initial form, both the Council and the Parliament review legislative proposals twice, in a complex interplay of review of proposed amendments. If the two institutions are unable to agree on a text, they can resort to a Conciliation Committee composed of representatives from each body. Usually, both institutions must approve any compromise text suggested by a Conciliation Committee, but if this does not happen, then the Council has a final opportunity to adopt the version it prefers by a Qualified Majority Vote, unless the Parliament is able to reject the Council text by an unusually high vote, an absolute majority of all of the MEPs. For a discussion of legislative procedures after the Treaty of Maastricht, see Alan Dashwood, *Community Legislative Procedures in the Era of the Treaty on European Union*, 19 EUR. L. REV. 343 (1994).

30. The Treaty of Maastricht amended EC Treaty Article 100a (now numbered as Article 95) to enable most internal market legislation to be adopted by the co-decision procedure.

31. See EC Treaty Article 252 following the Treaty of Amsterdam, which eliminates the prior possibility for the Council to adopt a proposal following the rejection by either body of a compromise text endorsed by a Conciliation Committee. For a current description of the co-decision procedure, see BERMAN, *supra* note 14, at 97-100. See also Jean-Claude Piris & Giorgio Maganza, *The Amsterdam Treaty: Overview and Institutional Aspects*, 22 FORDHAM INT'L L.J. 532, 543 (1999).

dent, and then collectively approve the nominees for all the members of the Commission.³² Additionally, the Parliament has in recent years significantly increased its monitoring and supervision of the Commission's conduct of its affairs.

The success of the internal market program has worked as a magnet, drawing neighboring nations to seek to join the Union. This in turn meant that the political leadership of the Union, both in the Commission and in the Member States, was keenly aware that the Union's institutional structure and operations needed to be revised before feeling the strain produced by the admission of new Member States. Already some of the restructuring in the Maastricht Treaty was due to the then Member States' desire to achieve a more functional operational structure and to expand the fields of action in a "deepening" process before the "widening" to add Austria, Finland, Sweden, and ultimately the Central European applicants.³³ Thus, the Maastricht Treaty notably added Economic and Monetary Union as an integral component of the European Community, and created the over-arching structure of the European Union in order to accommodate intensified inter-governmental cooperation and joint action in the sectors of Common Foreign and Security Policy ("CFSP") and Cooperation in Justice and Home Affairs ("CJHA").³⁴ When in the late 1990's, the Member States felt that the partial success of the initial policies and joint actions in the field of CJHA merited an intensification of its operating procedures, the Treaty of Amsterdam shifted the sectors of visas, asylum rights, and immigration from inter-governmental cooperative measures to the Community's legislative procedures, albeit with some limiting provisions.³⁵

32. See EC Treaty, *supra* note 3, art. 214. The Treaty of Maastricht had already required that Parliament must approve the nominees for the Commission as a whole, starting with the 1995-99 Commission. *Id.* art. 158 (now renumbered as 214).

33. See Roger Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, at 1108-09 (1995) [hereinafter *The European Union Grows*].

34. The TEU provisions on CFSP are in Articles 11-28 (initially designated as J.1 to J.18). The original provisions on CJHA were in Articles K.1 to K.9. The current, substantially modified provisions are in Articles 29-42.

35. EC Treaty Articles 61-69, introduced by the Treaty of Amsterdam. For an analysis of these complex procedures, see Sally Langrish, *The Treaty of Amsterdam: Selected Highlights*, 23 EUR. L. REV. 3, 7-12 (1998).

B. *The Treaty of Nice*

The prospect of the largest enlargement to date, that of ten (and ultimately more) Central European and Mediterranean nations, virtually dictated the holding of another Intergovernmental Conference in 2000 and the adoption of the Treaty of Nice.³⁶ Although the Treaty of Nice does have some provisions relating to substantive fields of action, its *raison d'être* is essentially to modify the institutional framework of the Union in order to accommodate the numerous new Member States. In particular, the Union's political leadership sought to maintain, and perhaps even to augment, the operational efficiency of its political and judicial institutions. The process of reaching agreement on the more controversial issues proved arduous indeed during the Intergovernmental Conference, which was obliged to submit several of the most difficult issues to the European Council at Nice on December 7-8, 2000.³⁷ Media accounts indicate that the discussion among the assembled Heads of State or Government proved unusually acrimonious. Although compromises were reached to permit the Treaty's signature on February 26, 2001, it was felt that the Treaty of Nice would only be a stop-gap solution — a more far reaching re-examination of the Union and its institutions would be necessary. Indeed, a Declaration on the Future of the Union, annexed to the Treaty of Nice, called for "a deeper and wider debate about the future of the European Union" to commence in 2001, leading ultimately to a new IGC.

The entry into effect of the Treaty of Nice was unfortunately delayed. Although easily ratified by the parliaments of all the other Member States,³⁸ Ireland was constrained by its constitu-

36. Annexed to the Treaty of Amsterdam is a Protocol on the Institutions with the Prospect of Enlargement of the EU, O.J. C 340/11 (1997), which mandates another IGC at least one year before the next enlargement and sets as topics the size and membership of the Commission and the voting system in the Council. See Piris & Manganza, *supra* note 31, at S41-S42. The European Council held at Helsinki on December 10-11, 1999, decided to call an IGC in February 2000 for this purpose.

37. During the IGC, the Commission issued several reports and the Parliament adopted several resolutions intended to influence the discussions. See EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION — 2000, at 7-11 (2001), available at <http://www.europa.eu.int/abc/doc/off/rg/en/2000/index.htm> [hereinafter COMMISSION GENERAL REPORT — 2000]. The Commission specifically referred to "10 months of intense negotiations." *Id.* at 11. The General Report also summarizes the Nice Treaty institutional provisions. *Id.* at 12-13.

38. See COMMISSION GENERAL REPORT — 2001, *supra* note 5, at 8.

tion to hold a referendum. In its initial referendum in June 2001, a narrow 54% majority of the votes were negative, a result probably due largely to a general sense of dissatisfaction with the European Union and with the current Irish government, rather than a specific disapproval of the Treaty text. Fortunately a vigorous effort by Prime Minister Ahern and almost all Irish political groups achieved a highly satisfactory 63% affirmative vote in the second referendum on October 19, 2002.³⁹ In accordance with its provisions, the Treaty of Nice entered into effect two months later, on February 1, 2003.

Annexed to the Treaty of Nice is a Protocol on the Enlargement of the European Union,⁴⁰ which has binding force, and a Declaration on the Enlargement of the European Union,⁴¹ which is effectively a statement of intent concerning the probable number of weighted votes in the Council and of Members of the European Parliament assigned to each applicant nation. The most important provisions of the Treaty of Nice and the Protocol on Enlargement modified the Union's political and judicial institutions in a fashion to enable the integration of a dozen or more applicant nations into the structure of the European Union. Some of these provisions became effective on February 1, 2003, while others will enter into effect in 2004 or on January 1, 2005 after the new Member States join, in accordance with the specific terms of the Nice Protocol on the Enlargement.

Obviously, the principal issue raised by the admission of so many new States at one time is how to increase the membership of each of the institutions without a concomitant sacrifice of efficiency. An important secondary issue is that of democratic legitimacy — to what proportion of each institution's membership should each new Member State be entitled in light of its population and the size of its economy. Although parallel concerns arose in prior enlargements, in each the increase in membership was much more incremental in character — Denmark, Ireland, and the U.K. in 1973, Greece in 1981, Portugal and Spain in 1986, and Austria, Finland, and Sweden in 1995. This time the membership of the Commission, the Council of Ministers, and

39. See EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION — 2002, at 9 (2003), available at <http://www.europa.eu.int/abc/doc/off/rg/en/2002/index.htm> [hereinafter COMMISSION GENERAL REPORT—2002].

40. O.J. C 80/1, at 49 (Mar. 3, 2001).

41. O.J.C 80/1, at 80 (Mar. 3, 2001).

the Courts might conceivably nearly double in size, while the Parliament's membership would certainly increase substantially unless the delegations of the present Member States decrease in number. The challenge for the 2000 Intergovernmental Conference was how to provide functional solutions, compatible with operational efficiency and democratic legitimacy, to the adaptation of each institution to the enlargement of the Union. With this in mind, we turn now to the institutional provisions of the Treaty of Nice and its Protocol on Enlargement.

Determining the maximum size of an already large Parliament did not in fact prove so divisive an issue. Although each Member State is allocated a number of Members ("MEPs") in some proportion to its population, the larger States have always rather generously claimed fewer MEPs than a strict census calculation would warrant. National membership in the Parliament is by no means calculated as closely in function of population as is State representation in the U.S. House of Representatives.

After the accession of Austria, Finland, and Sweden on January 1, 1995, Parliament's size was increased to a total of 626 MEPs.⁴² Germany presently has ninety-nine MEPs, France, Italy, and the U.K. eighty-seven each, Spain sixty-four, with the other Member States having lesser numbers down to fifteen for Ireland, and six for Luxembourg. The Treaty of Nice's new formula for the Parliament's composition will apply when the next European Parliament is elected in June 2004. Its membership will increase to 732.⁴³ The delegations of the current Member States will decrease in size in order to make room for the ten applicant nations that will enter the Union on May 1, 2004. Because Bulgaria and Romania will not join this year, the seats of the fifty MEPs initially foreseen in the Declaration on Enlargement for those nations have been allocated among the present Member States and the applicants in order to fill up to the Parliament's ceiling of 732 MEPs. The precise numbers are now fixed in the Treaty of Athens of April 16, 2003,⁴⁴ whose Act of Accession governs the admission of the new States.⁴⁵ Thus, Ger-

42. See EC Treaty, *supra* note 3, art. 190 (before the Treaty of Nice; renumbered from Article 138 by the Treaty of Amsterdam).

43. EC Treaty, *supra* note 3, art. 189 (after the Treaty of Nice; the Treaty of Amsterdam had set a ceiling of 700 MEPs, but this was never operational).

44. O.J. C 236/17 (Sept. 23, 2003).

45. O.J. C 236/33 (Sept. 23, 2003).

many will elect ninety-nine MEPs, France, Italy, and the U.K. seventy-eight each, Poland and Spain fifty-four each, the Netherlands twenty-seven, Belgium, the Czech Republic, and Hungary twenty-four each, and so on down to six for Luxembourg and five for Malta.⁴⁶ This allocation of MEP seats among the States has not provoked any significant dissention or controversy. As we shall see, the draft Constitution would not immediately change this, although it calls for the European Council to reexamine later the allocation formula.

The future size of the Commission has provoked considerable and ongoing debate. The Protocol on the Enlargement provides that the first Commission taking office after January 1, 2005 will have "one national of each of the Member States."⁴⁷ Although not expressly stated, the intention is to eliminate the second Commissioner traditionally accorded to the five largest Member States — France, Italy, Germany, Spain, and the U.K.⁴⁸ The Protocol further indicates that when the Union shall consist of twenty-seven Member States (presumably when Bulgaria and Romania join), then the Council shall reduce the size of the Commission, instituting a system of equal rotation of Commissioners among the then Member States. The Protocol has the effect of permitting the Commission membership to increase to twenty-five or more in the short-term, which may somewhat reduce its collegiate operational efficiency, but looks long-term to a smaller Commission. The Treaty of Athens' Act of Accession follows through on this approach by specifying that the ten new States are each allocated a transitional Commissioner for May 1 – October 31, 2004, and that the new Commission commencing on November 1, 2004 is to consist of one national of each Member State, i.e., twenty-five in all.⁴⁹ As we shall see, the draft Constitution provides for a Commission of fifteen members, selected

46. Act of Accession, *supra* note 45, art. 11.

47. Protocol on Enlargement, *supra* note 40, art. 4, O.J. C 80/49, at 51. The Protocol also states that the Council may fix the total number of Commission members by unanimous action. *Id.*

48. In the Commission of the initial European Economic Community, France, Germany, and Italy received two Commissioners. When the U.K. and Spain subsequently acceded to the Community, they also received two Commissioners. However, this has never been expressly stated in the Treaty. The present EC Treaty Article 213 merely states that the "Commission shall consist of 20 members."

49. Act of Accession, *supra* note 45, art. 45.

through an equal rotation system — one of its most controversial provisions.

The Treaty of Nice inserts a new Article 217 into the EC Treaty, substantially augmenting the powers of the Commission President. The Treaty of Amsterdam had already declared that the Commission works “under the political guidance of its President.”⁵⁰ The Nice Treaty empowers the President to unilaterally determine the “internal organization” of the Commission, allocating and reshuffling portfolios and tasks among the Commissioners.⁵¹ Indeed, the President may even demand the resignation of a Commissioner, provided the entire Commission gives its assent.⁵² There has been a growing consensus among the Member States that the President of the Commission should have enhanced authority over the other Commissioners and the entire civil service of the Commission. The Nice Treaty reflects this view and the draft Constitution text goes even further in augmenting the power of the Commission President.

The Nice Treaty makes a final useful change in the process of selecting a Commission. Until now, the Member State governments have selected the President and Commission members by common accord (with the approval of the Parliament since the Treaty of Amsterdam, as noted above). The Nice Treaty’s revised EC Treaty Article 214 provides that the Council shall select the President and the Commission members by a Qualified Majority Vote, thus ending the risk of any State’s veto of a prospective nominee.⁵³

50. EC Treaty, *supra* note 3, art. 219 (introduced by the Treaty of Amsterdam, moved to Article 217 by the Treaty of Nice).

51. EC Treaty Article 217 (1) and (2), as amended by the Treaty of Nice. The Treaty of Amsterdam had annexed a Declaration on the Organization of the Commission which made the same statement, but a Declaration does not have binding legal effect.

52. *Id.* at (4). Commission President Santer may well have wished that he had this power when dealing with evidence of mal-administration and favoritism on the part of other Commissioners in late 1998 and early 1999. See René Barents, *Some Observations on the Treaty of Nice*, 8 MAASTRICHT J. EUR. L. 121, at 124-25 (2001).

53. EC Treaty Article 214 (2), as amended by the Treaty of Nice. For the nomination of the Commission President, the Council must act by a Qualified Majority Vote of the Heads of State or Government, reflecting the weight given to the office. In 1994, before the Luxembourg Prime Minister Santer was ultimately nominated to become Commission President, media reports suggested that Prime Minister Dehaene of Belgium and Prime Minister Lubbers of the Netherlands had each been vetoed as candidates by certain Member States.

Perhaps the most controversial aspect of the Treaty of Nice is its modification of the system of Qualified Majority Voting in the Council, which is used for most internal market legislation and in many other fields as well. The Protocol on the Enlargement modifies the number of weighted votes given to each State in order to take account of those being allocated to those joining, as indicated in the Declaration on Enlargement. Notably, the four largest States — Germany, France, Italy, and the U.K. — are each assigned twenty-nine votes out of a total number of 321 weighted votes,⁵⁴ i.e., about 9% each. Spain receives twenty-seven, as does Poland by virtue of the Declaration,⁵⁵ despite the fact that their population is less than half that of Germany, and only two-thirds that of France, Italy, and the U.K. . The Protocol requires that a majority of Member States must support a proposed legislative measure or decision, and then sets the requisite number of weighted votes needed to adopt it. The Treaty of Athens' Act of Accession slightly modified this requisite number, because Bulgaria and Romania are not joining. The number required for approval of a proposed measure is 232 weighted votes, approximately 72% of the 321 total weighted votes.⁵⁶ Both the Protocol and the Act of Accession then add the so-called triple majority provision: upon request for a verification from any Member State, a proposed measure will not be considered adopted if those States voting in favor do not represent at least 62% of the total population of the Union. This final qualification, which obviously serves to protect the interests of the more populous States, was one of the critical compromises that enabled the Member States to agree upon the Treaty of Nice.

The Protocol system of Qualified Majority Voting in the Council goes into effect on January 1, 2005. (The Treaty of Athens sets out a transitional regime for QMV between May 1 and December 31, 2004).⁵⁷ Although the calculations of voting in the Council under this new QMV system appear at first glance to

54. Protocol on Enlargement, *supra* note 40, art. 3.

55. Declaration on Enlargement, *supra* note 41. It is worth noting that Cyprus, Estonia, Latvia, and Slovenia each receive the same four weighted votes as does Luxembourg, while Malta obtains three. The other Member States' votes range from thirteen for the Netherlands down to seven for Denmark, Finland, Ireland, Lithuania, and Slovakia.

56. Act of Accession, *supra* note 45, art. 12.

57. *Id.* art. 26.

be quite complicated, a realistic appraisal is that the system is apt to work quite well in practice, even if it does somewhat enhance the voting power of medium-sized and smaller States at the expense of Germany, France, Italy, and the U.K. As the eminent political scientist, Wolfgang Wessels accurately has observed: "Legal provisions do not determine voting behavior . . . Countries are not always in the same coalition of outvoted minorities."⁵⁸ Generally speaking, the Council strives to reach a consensus or a near consensus. When split votes in the Council do occur, one rarely finds a division of large States versus small States — close divisions more often occur on somewhat of a political basis (e.g., conservative governments versus socialist or liberal ones), on an economic basis (e.g., States with substantial agricultural production versus States with relatively minor agricultural sectors), or on a geographical basis (e.g., North-South divisions on environmental protection proposals).

The Treaty of Nice makes relatively uncontroversial but extremely helpful modifications to the structure and operations of the Court of Justice and the Court of First Instance. Both courts will continue to consist of one judge per Member State, a customary approach that now has been given Treaty force in EC Treaty Articles 221 and 224.⁵⁹ On May 1, 2004, the two courts will increase in size from fifteen to twenty-five judges (with the likely addition of several more judges in the medium term, as additional States join the EU), potentially posing a risk of reduced efficiency in decision-making. (Nonetheless, there was never any serious question in the IGC of the principle that a State should be represented by a judge on each court). The Treaty of Nice does not however increase the number of Advocates General in the Court of Justice beyond the present eight, although EC Treaty Article 222 authorizes the Council to do so

58. Wolfgang Wessels, *Nice Results: The Millennium IGC in the EU's Evolution*, 39 J. COMMON MKT. STUD. 197, 206 (2001).

59. The Nice Treaty amended EC Treaty Article 221 to state that the "Court of Justice shall consist of one judge per Member State," replacing text calling for "15 Judges" without expressly requiring one judge per State. The Nice Treaty likewise amended EC Treaty Article 224 (ex Article 225) to state that the "Council of First Instance shall comprise at least one judge per Member State" — the prior text made no express reference to the number of judges or their selection from each State. The "at least" qualification will enable the CFI to have additional judges should its caseload warrant this.

by unanimous action.⁶⁰

The modifications produced by the Nice Treaty are intended to promote the functional efficiency of the two courts despite their much larger membership. The Nice Treaty amendments are largely based on recommendations emanating from a working group chaired by former Court of Justice President, Ole Due, which presented to the Commission in February 2000 an influential report, "The Future of the Judicial System of the European Union."⁶¹ The two Courts largely endorsed these recommendations in a "document de reflexion" presented to the IGC.⁶²

Perhaps the single most functional modification made by the Nice Treaty is that both courts may refer virtually any case for decision to a Grand Chamber, initially composed of eleven judges.⁶³ This Grand Chamber is far larger and more representative than the present chambers or panels of three or five judges, yet smaller than the full court. A Grand Chamber is apt to be used frequently, because a Member State or an institution which is a party to a proceeding may require its use in the proceeding, and the Court itself may resort to a Grand Chamber for important cases.⁶⁴ Plenary, or full Court, proceedings may become relatively rare, because they are now only mandated by the Treaty in exceptional cases⁶⁵ and because they may be regarded as cum-

60. EC Treaty, *supra* note 3, art. 222, as amended by the Treaty of Nice.

61. The former Danish Judge, Ole Due, served on the Court of Justice between 1978 and 1994 the last six years as its President. The working group report was apparently not published. The Commission largely followed its suggestions in its own recommendations concerning the judicial system to the IGC on March 1, 2000. See COMMISSION GENERAL REPORT — 2000, *supra* note 37, at 9.

62. See Bo Vesterdorf, *The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities*, 28 EUR. L. REV. 303, at 311 (2003). Judge Vesterdorf, current President of the CFI, provides an excellent description of the operational evolution of the two Courts, the effects of the Treaty of Nice, and future challenges.

63. EC Treaty Article 221, as amended by the Treaty of Nice, authorizes the Court of Justice to sit in a Grand Chamber, whose membership shall be fixed by the Court's Statute. In the Nice Protocol which sets out the current Statute, Article 16 makes the Grand Chamber consist of eleven Judges, chaired by the President. EC Treaty Article 224, as amended by the Treaty of Nice, enables the CFI also to make use of Grand Chamber.

64. Article 16 of the Nice Protocol on the Statute of the Court of Justice.

65. *Id.* In view of this, the eminent Dutch former Judge Paul Kapteyn worries that the Grand Chamber may not be sufficiently representative of a 25 (or more) member Court, and that Judges not sitting in the Grand Chamber may become "second-class judges." He suggests a larger Grand Chamber of fifteen judges, rotated regularly. Paul Kapteyn, *Reflections on the Future of the Judicial System of the European Union after Nice*, in 20

bersome in practice.

Another very practical change is that each Court can now set its Rules of Procedure, subject to approval by a Council qualified majority vote,⁶⁶ instead of by the prior requirement of unanimous Council action, which thus promotes flexibility in future Court innovations in operations.

Through an amendment to EC Treaty Article 225, the Nice Treaty empowers the Council to amend the Courts' Statutes to transfer some of the fields of law giving rise to preliminary references or questions from the Court of Justice to the Court of First Instance.⁶⁷ Although such a transfer would certainly reduce the heavy caseload of the Court of Justice (especially if the new Member States' courts frequently refer questions), it creates the risk of a variation between the judicial rulings of the two courts. To reduce this risk, Article 225 permits the Court of First Instance to transfer a preliminary reference to the Court of Justice if the answer might require "a decision of principle likely to affect the unity or consistency of Community law," and further authorizes appeals of CFI reference decisions "exceptionally . . . where there is a serious risk [to] the unity or consistency of Community law." CFI President Vesterdorf endorses the transfer of some references to the CFI, citing the present burden on the Court of Justice produced by "essentially technical cases" and hopes that it will be decided upon soon by the Council.⁶⁸ The Council is currently reviewing the subject. Presumably if the Council decides to exercise its power to transfer references in certain fields to the Court of First Instance, the Council will try to devise more precise procedures to reduce any risk of divergence in important doctrines between the two Courts.

The Nice Treaty also introduces a new EC Treaty Article 225a to improve the efficiency of the Court of First Instance by granting the Council the power to create judicial panels

Y.B. OF EUR. L., at 187-88 (Piet Eeckhout & Takis Tridimas, eds., 2001). Angus Johnston, *Judicial Reform and the Treaty of Nice*, 38 COMMON MKT. L. REV. 499, 512 (2001) offers a contrasting view: the Grand Chamber approach increases "the Court's capacity to handle its case load, while maintaining as much collegiality in discussions and deliberation as possible."

66. EC Treaty Articles 223 and 224, as amended by the Treaty of Nice.

67. EC Treaty Article 225, as amended by the Treaty of Nice.

68. Vesterdorf, *supra* note 62, at 314. In contrast, former Judge Kapteyn expresses considerable concern about the mode and efficiency of a procedure for review by the Court of Justice of CFI reference decisions. See Kapteyn, *supra* note 65, at 180-82.

subordinate to the CFI, with a right of appeal.⁶⁹ A judicial panel to deal with civil servant staff cases appears to be quite likely, and one to deal with trademarks is also being discussed.

One issue not seriously examined by the IGC was that of selection of Judges, which by tradition is essentially left to the discretion of each Member State for its own Judges or Advocate General. Former Judge Kapteyn views this approach as unsatisfactory, not ensuring judicial quality or impartiality, and suggests a review of nominees' credentials by an advisory committee composed of national court judges.⁷⁰ As we shall see, the draft Constitution proposes a similar high-level review body.

In conclusion, the Treaty of Nice and its Protocol on Enlargement of the European Union have made at least the most essential modifications in the political and judicial institutions of the Union to enable the smooth entry of the ten new States on May 1, 2004. Even if the various innovations in institutional structure set out in the draft Constitution may be considered preferable in many respects (and that is a matter of some debate), it is undeniable that the Union can continue to function quite satisfactorily under the institutional structure provisions of the Treaty of Nice. It is important to underline this, because the acrimonious interchanges between leaders of some of the Member States during the course of the recent deliberations over the draft Constitution might give the impression that failure to adopt the Constitution would cripple the functional efficiency of the institutions.

II. ENLARGEMENT IN SIGHT

On May 1, 2004, the European Union will undergo the most dramatic change in membership in its history.⁷¹ Ten new Member States — Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slove-

69. EC Treaty, *supra* note 3, art. 225a. Although CFI President Vesterdorf urges the Council to create such judicial panels "in order to alleviate the workload of the CFI," *supra* note 62, at 318, former Judge Kapteyn contends that they might create risks of delay and excessive appeals, and urges instead "specialized courts" at the same level as the CFI, *supra* note 65, at 179.

70. Kapteyn, *supra* note 65, at 188-89. He even suggests that the Parliament be involved in the appointment procedure — an approach not taken in the draft Constitution.

71. Article 2(2) of the Treaty of Athens, *supra* note 44, sets May 1, 2004 as the accession date, provided all Member States and applicants have ratified by then.

nia — will join the present fifteen EU members.⁷² This is by far the largest and most complex enlargement of the European Union to date.⁷³

The process by which a nation joins, or accedes to the European Union is a relatively long and complex one.⁷⁴ Inevitably, serious legal, political, economic, and social issues must be confronted and resolved satisfactorily. On the one hand, the applicant nations must modify their legal, economic, and social structures to conform to the pattern set in the European Union. On the other hand, the institutional structures of the European Union must be altered to the degree necessary to include and satisfactorily integrate the representatives of the new States. However, it has been a basic principle of the European Community, and now of the European Union, commonly termed the “*acquis communautaire*,”⁷⁵ that the basic constitutional structure, laws, policies, and programs of the European Union and the European Community must be accepted by applicant nations in order to join.

Since their liberation from Communist regimes in 1989-91, most of the countries in Central Europe have sought ultimately

72. See Roger Goebel, *Joining the European Union: The Accession Procedures for the Central European and Mediterranean States*, 1 LOY. UNIV. CHI. INT'L L. REV. (forthcoming 2004) [hereinafter *Joining the European Union*] (providing a detailed description of the accession procedure, the negotiations, and the terms of the Treaty of Athens Act of Accession, by which the ten nations are acceding to the EU).

73. For a description of the circumstances of the first enlargement, when Denmark, Ireland, and the U.K. joined the European Economic Community in 1973, and the second enlargement, when Greece joined in 1981 and Portugal and Spain did in 1986, see DINAN, *supra* note 14 at 58, 83-84, 104-08. See also *The European Union Grows*, *supra* note 33 (providing a detailed analysis of the third enlargement, the accession of Austria, Finland, and Sweden in 1995); Dierk Booss & John Forman, *Enlargement: Legal and Procedural Aspects*, 32 COMMON MKT. L. REV. 95 (1995) (concentrating on the negotiations and the terms of accession in the third enlargement). For two recent compilations of excellent papers covering the current enlargement process until approximately early 2002, see THE ENLARGEMENT OF THE EUROPEAN UNION (Marise Cremona ed., 2003) [hereinafter THE ENLARGEMENT OF THE EUROPEAN UNION]; HANDBOOK ON EUROPEAN ENLARGEMENT — A COMMENTARY ON THE ENLARGEMENT PROCESS (Andrea Ott & Kirstyn Inglis eds., 2002) [hereinafter HANDBOOK ON EUROPEAN ENLARGEMENT].

74. Article 49 of the TEU, *supra* note 1, sets out the current constitutional procedures that must be followed in an accession. Article 49 is analyzed in *Joining the European Union*, *supra* note 72, at Part I.

75. For a discussion of the origin, meaning, and historical evolution of the “*acquis communautaire*” concept, see *The European Union Grows*, *supra* note 33, at 1140-57. See also Christophe Delcourt, *The Acquis Communautaire: Has the Concept Had its Day?*, 38 COMMON MKT. L. REV. 829 (2001) (stressing the importance of the concept, but noting a certain degree of ambiguity concerning its core meaning).

to join the European Union. Turkey, Cyprus, and Malta have had the same aspiration. The European Council in Copenhagen in June 1993 declared that all of the Central European nations that entered into Europe Agreements (see below) might ultimately join the European Union, provided that they satisfied three pre-conditions, which have become famous as the "Copenhagen criteria": 1) stable institutions guaranteeing democracy and the rule of law, with full respect for basic human rights and the protection of minorities; 2) a functional market economy, with free market competition, and the ability to "cope with competitive pressure and market forces within the Union;" and 3) the ability and the administrative infrastructure necessary to fulfill all of the obligations of membership, including that in the Economic and Monetary Union.⁷⁶

During the period 1995-1999, Europe Agreements⁷⁷ with the eight Central European nations currently joining entered into force, all with a Preamble declaration that foresaw accession to the European Union as the Agreement's ultimate goal. The Europe Agreements contain detailed provisions for the liberalization of trade and investment, the adoption of competition rules, and the adoption of many of the key legislative measures of the internal market, all over a transition period of ten years. The European Community has provided financial and technical assistance to each nation that has entered into a Europe Agreement.

In 1994-1996, all ten Central European nations which had signed Europe Agreements formally applied for accession (as Cyprus, Malta, and Turkey had done previously). Pursuant to Article 49 (formerly Article O) of the Treaty on European Union,⁷⁸ which now governs accession, the Commission made a detailed review of each applicant's political, economic, and administra-

76. The European Council at Copenhagen on June 21-22, 1993 stated these conditions, which are set out in 26 E.C. BULL., no.6, at 13 (1993).

77. The Commission coined the term, "Europe Agreement," in 1990 to designate the close association agreements with the Central European nations. For a discussion of the role and essential terms of Europe Agreements, see *The European Union Grows*, *supra* note 33, at 1106; Frank Hoffmeister, *General Principles of the Europe Agreements and the Association Agreement with Cyprus, Malta and Turkey*, in HANDBOOK ON EUROPEAN ENLARGEMENT, *supra* note 73, at 349; Marc Maresceau, *Pre-Accession*, in THE ENLARGEMENT OF THE EUROPEAN UNION, *supra* note 73.

78. See *supra* note 74.

tive condition. In June 1997, the Commission issued Opinions⁷⁹ on all the applicants, recommending that negotiations for accession be opened with Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia. The European Council in Luxembourg in December 1997 authorized the opening of negotiations for accessions with the nations that had received favorable Commission Opinions and set out a pre-accession strategy that included all applicant States.⁸⁰

Accession negotiations began in March 1998 with the six applicant States designated by the Luxembourg European Council. During the initial phase, the negotiators reviewed thirty-one chapters covering all aspects of membership obligations with a view to identifying the capacity of each applicant to comply with Community (or Union) rules and the need to negotiate on specific issues.⁸¹ With this process largely completed in fall 1999, the negotiations continued on serious substantive issues. Among the most difficult of these issues were: how to apply the Common Agricultural Policy, how to achieve the free movement of workers, how to attain the freedom to provide services and the right of establishment in certain sensitive sectors (e.g., financial institutions and telecommunications), and how to phase in the Community's environmental protection rules.⁸²

The European Council in Cologne in June 1999 encouraged continued momentum in the negotiations, and the European Council in Helsinki in December 1999 decided to open negotiations in February 2000 with Bulgaria, Latvia, Lithuania, Malta, Romania, and Slovakia.⁸³ With regard to Turkey, the Hel-

79. The ten opinions appear as Supplements 6 to 15 to the EU Bulletin for 1997 in the following order (based on the date of applications of each State): Hungary, Poland, Romania, Slovakia, Latvia, Estonia, Lithuania, Bulgaria, the Czech Republic, and Slovenia. A summary of the Commission's conclusions concerning each applicant is provided in EC COMMISSION, GENERAL REPORT ON THE ACTIVITIES ON THE EUROPEAN UNION — 1997, at 299-303 (1998).

80. E.U. BULL., no. 12, at 10 (1997).

81. Eneko Lanaburu, the Director General of the Directorate General for Enlargement, describes the negotiation process in Eneko Lanaburu, *The Fifth Enlargement of the European Union: The Powers of Example*, 26 FORDHAM INT'L L.J. 1 (2002). The ministerial level negotiations are described at page 4. For a detailed description of the negotiation phase of the accession of Austria, Finland, and Sweden, see Booss & Forman, *supra* note 73. See also *The European Union Grows*, *supra* note 33, at 1164-69.

82. *Joining the European Union*, *supra* note 72, at Part III "The Negotiating Phase" (providing a detailed description of the pace of negotiations).

83. E.U. BULL., no. 12, at 8 (1999).

sinki European Council in December 1999 declared that it was to be regarded as an applicant ultimately capable of joining the European Union, but that negotiations would not presently begin.⁸⁴ Pre-accession efforts would be undertaken, especially political efforts to support democratic developments and economic progress.

The final stages of negotiations with the twelve current candidate countries followed the "road map" set in the Commission's November 8, 2000 progress report⁸⁵ and endorsed by the Nice European Council in December 2000.⁸⁶ The majority of the thirty-one negotiation chapters, each on a different substantive topic, had been provisionally closed by the end of 2001 in the negotiations with each applicant. However, the most difficult issues, particularly concerning agriculture, had to be dealt with in 2002.

On October 9, 2002 the Commission's detailed progress report, *Towards the Enlarged Union*,⁸⁷ concluded that ten applicant nations satisfied the political criteria set by the Copenhagen European Council in June 1993, and that all ten would satisfy the economic and infrastructure criteria by May 2004. The Brussels European Council in October 2002 endorsed the Commission's findings, and the Copenhagen European Council on December 12-13, 2002 marked the conclusion of negotiations with the ten, and set May 1, 2004 for accession.⁸⁸ The new Member States will each designate a member of the Commission and a judge on the Court of Justice and the Court of First Instance on that date, commence their membership and voting in the Council meetings, and will join with the present Member States in the election

84. *Id.*

85. EC Commission, Enlargement Strategy Paper, COM (2000) 700, summarized in E.U. BULL., no. 11, at 67-69 (2000), and in COMMISSION GENERAL REPORT — 2000, *supra* note 37, at 215.

86. E.U. BULL., no. 12, at 9 (2000). The European Council expressed the hope that negotiations would conclude in time to permit the successful applicant nations to participate in the election for Parliament in June 2004.

87. COM (2002) 700, summarized in the COMMISSION GENERAL REPORT — 2002, *supra* note 39, at 260. The Commission's report concluded that Bulgaria and Romania did not yet satisfy either the Copenhagen economic or infrastructure criteria, and that Turkey did not yet even satisfy the political criterion, although it had made progress in that direction.

88. E.U. BULL., no. 12, at 8 (2002). The Parliament on November 20, 2002 had previously endorsed the Commission's conclusions and the time-table for accession. E.U. BULL., no. 11, at 70 (2002).

of the Parliament in June 2004. The Copenhagen European Council called this a “historic milestone” and declared that “[t]his achievement testifies to the common determination of the peoples of Europe to come together in a Union that has become the driving source for peace, democracy, stability and prosperity in our continent. As fully fledged members of a Union based on solidarity, these [new Member] [S]tates will play a full role in shaping the further development of the European project.”⁸⁹

At Athens on April 16, 2003, the formal Treaty of Accession was signed by the representatives of the present Member States and the ten applicant nations, namely Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia.⁹⁰ The Treaty and the Act of Accession together comprise an extremely long document, because the Annexes and Protocols contain the specific exceptions to Community or Union rules and any transition periods before these rules are fully effective with regard to each applicant. Prior to the Treaty’s signature, on April 9th the European Parliament overwhelmingly voted by over 85% in favor of each candidate nation’s application for accession.⁹¹ In its Resolution on the Conclusions of the Negotiations on Enlargement, the Parliament notably emphasized that

the accession of the ten new Member States will be an important step in building an even stronger and more effective European Union which will be needed to further stabilise the whole continent, consolidating democracy and peace, strengthening its economy and sustainable development and incorporating a cultural and human dimension based upon the shared values of liberty, respect for fundamental rights, good governance and the rule of law.⁹²

The ratification process is moving smoothly towards conclusion. Each of the applicant countries except Cyprus held a referendum on accession, but all present Member States are ratifying by parliamentary action. Malta’s referendum, the first, provided

89. E.U. BULL., no. 12, at 9-10 (2002).

90. See *supra* note 46.

91. O.J. L 236/5 to 13 (Sept. 23, 2003).

92. Conclusions of the Copenhagen Negotiations on Enlargement, Apr. 9, 2003, available at www.europarl.eu.int/meetdocs/delegations/esto/20030515/10.pdf (last visited Feb. 21, 2004).

only a narrow 54% majority for accession,⁹³ but Slovenia's referendum, the second, produced a resounding 90% affirmative vote,⁹⁴ as did the later referenda in Lithuania and the Slovak Republic.⁹⁵ The people of Hungary, Poland, Estonia, Latvia and the Czech Republic also voted in favor by convincingly large majorities.⁹⁶

With regard to Cyprus, the Helsinki European Council in December 1999 urged renewed negotiations between the divided Greek and Turkish communities, but asserted that unification was not a precondition for accession. The Brussels European Council on October 24-25, 2002 reiterated its "preference for a reunited Cyprus to join the European Union."⁹⁷ Despite vigorous negotiations under UN auspices, an agreement has not yet been reached. The Copenhagen European Council on December 12-13, 2002 concluded that Greek Cyprus could join alone, if no settlement is reached.⁹⁸

At least tensions between the Greek and Turkish communities have been considerably reduced in 2003, particularly by the opening of the border to enable people to make visits, so that a long-term solution is no longer so doubtful. Moreover, on December 14, 2003, elections in the Turkish sector of Cyprus produced a parliament evenly divided between parties favoring and a party opposing unification,⁹⁹ giving rise to at least some hope that a compromise solution on unification may yet be reached.

With their accession in May 2004, the applicant States will become subject to the Treaty rules and principles, notably the four freedoms, and to most of the internal market, agricultural, competition, social, environmental, transport, and other legislative rules.¹⁰⁰ Indeed, the applicant States have been in the pro-

93. E.U. BULL., no. 3, at 82 (2003).

94. *Id.*

95. E.U. BULL., no. 5, at 62-63 (2003).

96. Hungary's referendum resulted in an 84% affirmative vote, E.U. BULL., no. 4, at 48 (2003), while those in the Czech Republic and Poland each yielded a 77% affirmative vote, E.U. BULL., no. 6, at 91-92 (2003). *See also* Nicholas George, *Latvian 'Yes Vote Paves way for Latest Addition to EU*, FIN. TIMES, Sept. 22, 2003, at 2 (67% vote in favor); *All In to Europe*, ECONOMIST, Sept. 20, 2003, at 48 (Estonian vote two-thirds in favor, despite June opinion polls showing an almost equal split).

97. E.U. BULL., no. 10, at 8 (2002).

98. E.U. BULL., no. 12, at 9 (2002).

99. *See* Andreas Hadjipapas, *North Cyprus Poll Deals Blow to EU Hope*, FIN. TIMES, Dec. 16, 2003, at 4.

100. On July 2001, a Commission report to Parliament estimated that the appli-

cess of adopting national legislation to conform to many of the Community directives and regulations in accordance with their obligations under the Europe Agreements. Not only is the adoption of so much new legislation an onerous task, but the new Member States must substantially improve their administrative and judicial capacity to make the new rules operationally effective. Accordingly, on June 5, 2002, the Commission initiated an action plan to strengthen the administrative and judicial capabilities of each applicant.¹⁰¹ Special attention is being devoted to educating judges about the fundamental principles of Union and Community law and their appropriate mode of application and interpretation.

As in past accessions, the Athens Treaty's Act of Accession is supplemented by a series of Annexes that provide for a number of multi-year transition periods to phase in specific Treaty or legislative rules.¹⁰² Some periods are specific to individual applicant States, while others apply overall. Thus, total free movement of workers has been deferred for up to seven years, in particular to meet the concerns of Austria and Germany that they would otherwise be confronted with a flood of migrant labor from Central European nations with chronic high unemployment. The restrictions are stated in virtually identical terms in the Annexes covering the eight Central European applicants. (There are none in the Annexes for Cyprus and Malta, which have small populations and low unemployment rates). Thus, in Annex V for the Czech Republic, article 1(2) permits present Member States to continue their current national measures "regulating access to their labor markets by Czech nationals" until the end of a five year period following accessions.¹⁰³ Article 1(3) breaks the five years into an initial two year period, toward the

cant States would have to translate into their own language some 90,000 pages of legislative texts constituting the "*acquis communautaire*." Commission Press Release, IP/01/1145 (July 30, 2001).

101. See COMMISSION GENERAL REPORT — 2002, *supra* note 39, at 263.

102. The Act of Accession, *supra* note 45, states in Article 24 that transitional measures are listed in Annexes V to XIV. Each applicant thus has an Annex that lists all transitional measures applicable to that State. The sequence is as follows: Annex V Czech Republic; VI Estonia; VII Cyprus; VIII Latvia; IX Lithuania; X Hungary; XI Malta; XII Poland; XIII Slovenia; XIV Slovakia.

103. Act of Accession, *supra* note 45, ann. V, art. 1(2). The text does grant Czech nationals who have legally been employed for at least twelve consecutive months in a Member State full rights of "access to the labour market of that Member State but not to the labour markets of other Member States applying national measures."

end of which the Commission must make a report concerning migrant labor, and the Council must review the situation. Following this, each present Member State has the option of continuing its restrictive measures for another three years. Article 1(5) permits the possible extension of such restrictions for a final two year period if a State can demonstrate that it is experiencing "serious disturbances of its labour market."¹⁰⁴

In the environmental protection sector, most Central European nations must incur significant costs in cleaning up severe pollution and replacing dangerous nuclear reactors or reducing other environmental risks. Accordingly, substantial periods of time have been allotted to phase in particular rules or to remove certain hazards, e.g., the dismantling of old and potentially dangerous nuclear facilities in Lithuania and the Slovak Republic.

Some applicant countries feared extensive purchases of their real estate, especially farms and secondary residences, by buyers from Union States, so transitional regimes prohibiting land purchases by non-nationals were agreed. Thus, Malta received a right to retain indefinitely its present restrictions on foreign ownership of secondary residences,¹⁰⁵ while Cyprus, the Czech Republic, Hungary, and Poland may retain their restrictions for five years.¹⁰⁶ All the Central European States except Slovenia received a derogation to protect ownership by nationals of agricultural land and forests for seven years¹⁰⁷ (Poland for twelve years).¹⁰⁸

The most controversial transition period is with regard to the complete application of the Common Agricultural Policy

104. *Id.* art. 1(7). During this seven year period, a Member State may require Czech nationals to possess work permits "for monitoring purposes."

105. Treaty of Athens, *supra* note 44, Protocol No. 6 on the acquisition of secondary residences in Malta. The Protocol cites "the very limited number of residences in Malta and the very limited land available for construction." *Id.* It is worth noting that Denmark obtained a Protocol to the Treaty of Maastricht enabling it to retain indefinitely its restrictions on the foreign ownership of secondary residences.

106. *See* Act of Accession, *supra* note 45, ann. V for the Czech Republic, art. 2(1); ann. VII for Cyprus, art. 3; ann. X for Hungary, art. 3(1); ann. XII for Poland, art. 4(1).

107. *See, e.g.*, Act of Accession, *supra* note 45, ann. V for the Czech Republic, art. 3(2); ann. VIII for Latvia, art. 3. Indeed, the seven year transitional periods may in each case be extended for a further three years if the Commission accepts that the State concerned has provided sufficient evidence that this is necessary to avoid "serious disturbances or the threat of serious disturbances on the agricultural land market."

108. *Id.* ann. XII for Poland, art. 4(1). Poland does not, however, have the right to request the Commission for an extension.

(“CAP”). Because in Poland, Hungary, and several other applicants such a large percentage of the population is engaged in farming, and because the farms are usually small and often inefficient, the EU made clear at the outset of negotiations that its subsidies and support programs could only be phased in gradually.

After the Commission issued a strategy paper on enlargement and agriculture on January 30, 2002,¹⁰⁹ the Member States began a difficult debate on adopting a negotiation posture on agricultural aid, only concluding in late October 2002.¹¹⁰ Then the arduous negotiations with Poland, Hungary, and other applicants with large agricultural sectors began. A final session held at the time of the Copenhagen European Council meeting in December 2002 achieved a compromise that somewhat sweetened the result for the applicant States.¹¹¹

The final agricultural aid package is complex, easily understood only by specialists. The most important element is the phasing in of the direct subsidy payments to farmers, which will begin in 2004 at 25% of the level granted to farmers in current Member States, rising gradually in percentage increments annually until they hit 100% in 2013.¹¹² The applicants may increase (“top up”) the 25% amount by using their own funds to attain the level of 55% in 2004, and continue this “topping up” by 30% each year thereafter. In addition, the applicants will receive a special rural development aid package fixed at 5 billion Euros for 2004-2006.

In view of the fact that their farmers will receive substantially lower amounts of farm aid than those in current Member States, the applicant nations will undoubtedly exert efforts for the creation of alternative employment in rural areas and the encouragement of early retirement of farmers.

109. E.U. BULL., no. 1-2, at 107 (2002).

110. See, e.g., Elaine Sciolino, *A Fight over Farms Ends, Opening Way to Wider Europe*, N.Y. TIMES, Oct. 25, 2002, at A3 (Member States agreed to grant the applicants initially 25% of the customary farm aid level, phasing in the remainder in annual 5% increments).

111. See, e.g., Elaine Sciolino, *European Union Acts to Admit 10 Nations*, N.Y. TIMES, Dec. 14, 2002, at A20 (Poland succeeded in obtaining a further \$430 million in farm aid for the new States between 2004 and 2006).

112. The agricultural aid package is described in detail in Commission Press Release, IP/02/1882 (Dec. 13, 2002), summarized in THOMSON, EUROPEAN UNION LAW REPORTER, EU UPDATE ¶ 1170 (2003).

Indeed, already in 2002, the Community allocated 550 million Euros to the rural development program, principally in Poland, Hungary, Romania, and the Czech and Slovak Republics.¹¹³ Nonetheless, many farmers are dissatisfied with the accord, and many less efficient farmers on small farms are apt to cease farming.¹¹⁴

The Annexes to the Act of Accession contain numerous further transitional arrangements, but these are largely of concern only to specialists. Worth noting, however, are the emergency safeguard provisions in the Act of Accession itself. Under Article 37, during the initial three years after accession, either a present or a new Member State may request the Commission to authorize emergency protective measures to ameliorate "serious deterioration in the economic situation of a given area."¹¹⁵ Under Article 38, the Commission has the power to adopt "safeguard measures" to remedy any "serious breach of the functioning of the internal market due to a new Member State's violation of its commitments," again during an initial three years after accession.¹¹⁶ Experience after past accessions suggests that neither Article is apt to be frequently invoked, but these emergency safeguard provisions are manifestly a prudent precaution.

Pre-accession financial aid to the Central European nations has been substantial. In 2002, the Phare program for infrastructure and technical aid totaled 1.7 billion Euros, including, for example, 80 million Euros to Lithuania to phase out its out-of-date nuclear plants.¹¹⁷ In addition, the European Investment Bank provided 3.6 billion Euros in loans, chiefly for communications and telecommunication infrastructure development and for flood relief and control.¹¹⁸ It is evident that substantial amounts from the Community's structural and infrastructure aid funds will in the future have to be devoted to the needs of the applicant countries, a prospect which naturally concerns the

113. EC COMMISSION, GENERAL REPORT — 2002, *supra* note 39, at 271.

114. *See, e.g.*, Christopher Condon, *Small Farmers Face "Devastation,"* FIN. TIMES, May 2, 2003, at 4 (reporting concern that 250,000 small family farms in Hungary will become uncompetitive).

115. Act of Accession, *supra* note 45, art. 37.

116. *Id.* art. 38

117. E.C. COMMISSION, GENERAL REPORT — 2002, *supra* note 39, at 270.

118. *Id.* at 54

chief past recipients of such aid (notably Greece, Ireland, and Portugal).

In its October 2002 progress report, the Commission indicated that it would continue monitoring the progress of the applicant nations until accession. Accordingly, on November 5, 2003, the Commission provided a special Comprehensive Monitoring Report on the status of the ten applicants by mid-2003.¹¹⁹ The report indicated general satisfaction in the political sphere, but noted the necessity for on-going efforts to achieve the appropriate treatment of minorities, notably the Russians in the Baltic States, the Hungarians in the Slovak Republic, and the Roma people in Hungary, Romania and the Slovak Republic. The report also emphasized the need for significant improvement of the civil service and the judiciary in most States, and expressed particular concern about prevalent corruption in some States. In the economic sphere, although all of the ten applicants are considered to be market economies, several are relatively fragile economies that may find it difficult to meet the challenge of competition within the Union. In view of the fact that none of the Central European applicants have a GDP per person close to that of the lowest current Member State, Portugal, it is apparent that stable economic growth remains a critical imperative for them. None of the applicants is presently capable of joining the Monetary Union and adopting the Euro, although all would like to do so, and Cyprus and Malta may be capable of joining the Euro area in 2007 or 2008.

A final word concerning the applicant nations that will not be joining on May 1, 2004. Even Bulgaria and Romania accept that their economic progress has lagged behind that of the other candidate States. In its October 2002 and November 2003 reports, the Commission asserted that both fulfilled the Copenhagen political criterion but would require several years to meet fully the economic and infrastructure criteria. The two countries proposed 2007 as the target date for accession, which the Commission accepted. Although the December 12-13, 2002 Copenhagen European Council endorsed this target, it did so provided that each applicant makes sufficient progress by that time,

119. E.C. COMMISSION, COMPREHENSIVE MONITORING REPORT ON THE STATE OF PREPAREDNESS FOR E.U. MEMBERSHIP (Nov. 5, 2003), *available at* http://www.europa.eu.int/comm/enlargement/report_2003/index.htm.

and the European Council specifically underlined “the importance of judicial and administrative reform” in this context.¹²⁰ On November 5, 2003, the Commission issued a special progress report on the pre-accession status of Bulgaria and Romania.¹²¹ While both continue to make political and economic progress, Romania lags behind economically. Both also continue to have serious problems in upgrading their administrative and judicial infrastructure. It is certainly by no means sure that each will be able to meet the 2007 target date for accession.

Incidentally, Croatia formally applied for accession in February 2003, and is considered to be quite likely to join the EU before the end of the decade, provided that it cooperates in the prosecution of individuals accused of human right violations during the civil war in Bosnia. The Commission indicated in March that it would start reviewing Croatia’s qualifications for accession.¹²²

With regard to Turkey, the Commission’s October 2002 report concluded that it does not satisfy any of the Copenhagen criteria, although praising it for substantial headway in all three areas.¹²³ The Turkish government continues to press vigorously for political and human rights reforms, as well as for economic progress, and requests accession negotiations with increasing intensity. Thus, in July 2003, Turkey adopted legislation intended to place the military under stronger political control, and permitting use of languages other than Turkish in education and in the media.¹²⁴ The December 2002 Copenhagen European Council declined to set a target date for negotiations, but stated that if the Commission concluded that Turkey fulfilled the political criterion at the time of its December 2004 meeting, then the European Council would authorize the initiation of accession

120. E.U. BULL., no. 12, at 10 (2002).

121. E.C. COMMISSION, CONTINUING ENLARGEMENT — STRATEGY PAPER AND REPORT ON THE PROGRESS TOWARDS ACCESSION BY BULGARIA, ROMANIA AND TURKEY (Nov. 5, 2003), available at http://www.europa.eu.int/comm/enlargement/report_2003/index.htm.

122. E.U. BULL., no. 3, at 102 (2003).

123. E.C. Commission, Towards the Enlarged Union, COM (2002) 700 Final (Oct. 2002).

124. See, e.g., Dexter Filkins, *Turkey: Parliament Backs Reforms*, N.Y. TIMES, June 20, 2003, at A8 (Turkish legislation authorizes radio broadcasts in Kurdish); *Turkey Moves to Limit Military’s Clout*, INT’L HERALD TRIB., July 31, 2003, at 4 (powers of military’s National Security Council reduced).

negotiations.¹²⁵ Even if this should occur, however, such negotiations may prove to be quite lengthy in view of Turkey's relatively weak economy. Because Turkey is considered to have a fairly decisive influence over the Turkish community in Cyprus, a peaceful integration of the Greek and Turkish communities may well also prove to be an implicit pre-condition for Turkey's accession.¹²⁶

III. THE DRAFT CONSTITUTION

A. *The Convention*

By the end of 2001, the political leaders of the Member States and of the Commission were aware that accession negotiations were moving forward at a good pace and that the next enlargement was imminent. Although the Treaty of Nice provided an adequate modification in institutional structure to enable the new States to join the Union, many leaders did not consider it to be ideal. Moreover, a growing consensus was developing to the effect that other aspects of the Treaties needed to be reviewed to try to simplify and clarify the text, augment the role of the Parliament and democratic legitimacy generally, provide Treaty force to the new Nice Charter of Fundamental Rights, etc. Indeed, the Treaty of Nice itself annexed a Declaration on the Future of the Union which called for a "deeper and wider debate about the future of the European Union" to begin in 2001 and culminate in yet another Intergovernmental Conference.¹²⁷

The rapid and effective work of the Convention which drafted the Charter of Fundamental Rights in 2000¹²⁸ inspired

125. E.U. BULL., no. 12, at 10 (2002).

126. See, e.g., Judy Dempsey, 'Cyprus Problem' Threatens Turkey's EU Aim, FIN. TIMES, Nov. 5, 2003, at 4; Judy Dempsey, Turkey Told that Cyprus Deal Would Assist its Bid to Join EU, FIN. TIMES, Nov. 20, 2003, at 3.

127. Declaration on the Future of the Union, annexed to the Treaty of Nice, *supra* note 4, O.J.C. 80/1, at 85 (2001), at points 3 and 7. The IGC was there scheduled for 2004, but events moved more swiftly.

128. The now famous Charter of Fundamental Rights of the European Union was formally proclaimed on Dec. 7, 2000 by the Presidents of the three political institutions. See COMMISSION, GENERAL REPORT — 2000, *supra* note 37, at 15-17. The Charter was drafted by a special sixty-two member Convention, chaired by Roman Herzog, a leading German jurist and statesman, and composed of representatives of the Member State governments, national parliaments, the European Parliament, and the Commission. Although a prestigious source of principles, the Charter was not annexed to the Nice Treaty and has no binding legal effect. The European Council at Nice put off for later consideration "the question of the charter's force." E.U. BULL., no. 12, at 8 (2000). For

the idea that a similar body should be constituted to produce a more coherent and comprehensible Treaty structure for the European Union. Accordingly, the Laeken European Council on December 15, 2001 decided to convene a Convention for this purpose.¹²⁹ The Laeken European Council instructed the Convention to consider simplifying the treaties, perhaps reorganizing them into a constitutional text and incorporating the Charter of Rights, more clearly delineating the Union's spheres of competences, and boosting the democratic legitimacy and transparency of the institutions.¹³⁰ This Convention was rapidly designated and commenced work on February 28, 2002, with the charge of producing a new constitutional treaty before the June 2003 European Council session.

The Convention was chaired by Valéry Giscard d'Estaing, former President of France, with the former Prime Minister of Belgium, Mr. Dehaene, and the former Prime Minister of Italy, Mr. Amato, acting as Vice-Chairmen.¹³¹ Both the current and applicant States were represented in the 105 members of the Convention.¹³² The governments of the Member States and the applicants each designated one representative, totaling twenty-eight, and the Commission named two Commissioners. The European Parliament delegated sixteen MEPs and each Member State national parliament sent two representatives, while the applicant countries' parliaments sent one each. The Convention body was accordingly representative of far more diverse political views than would be a traditional Inter-governmental Conference, which represents only the Member State governments.

The Convention divided itself into eleven working groups, each to deal with a particular issue (e.g., subsidiarity, economic governance, the area of freedom, security and justice, external relations).¹³³ The Convention operated in three phases. In the first or "listening phase," from March to August 2002, the Convention commenced its analysis and gathered information, espe-

valuable and expert assessments, see Gráinne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 *EUR. L. REV.* 126 (2001); Koen Lenaerts, *Fundamental Rights in the European Union*, 25 *EUR. L. REV.* 575 (2000).

129. See COMMISSION GENERAL REPORT — 2001, *supra* note 5.

130. *Id.* at 12-13.

131. COMMISSION, GENERAL REPORT — 2002, *supra* note 39, at 11.

132. *Id.*

133. *Id.* at 12.

cially soliciting outside views (which literally poured in).¹³⁴ The second, or “deliberative phase,” lasted from September to December, and consisted of developing policy positions and drafting initial working texts.¹³⁵ Notably, on October 28-29, 2002, the twelve member Presidium, or steering committee, produced a preliminary draft treaty text.

The third, or “summarizing phase,” began in January 2003 and was concluded with the Convention’s presentation of a draft Constitution text to the European Council on June 20, 2003.¹³⁶ This was, of course, a massive undertaking. The draft Constitution is bound to have a great influence on the future structure of the European Union. It should, however, be immediately emphasized that the only manner of amending or replacing the present Treaty on European Union and the European Community Treaty is through an Intergovernmental Conference constituted by representatives of the Member State governments alone, in accordance with TEU Article 48. In such an IGC, each Member State has an effective veto. As we shall see, the IGC held in fall 2003 was unable to endorse entirely the draft Constitution.

On December 4, 2002, the Commission sought to influence the final deliberations of the Convention by a report, “For the European Union — Peace, Freedom, Solidarity”¹³⁷ together with a working draft text of a “Constitution of the European Union” (sometimes called the Prodi draft), which presented its views on key issues. The Commission urged that co-decision should essentially be the sole legislative mode and that the Council should virtually always act by a qualified majority vote. The Commission proposed that its President should be elected by the European Parliament and that the Commission should be politically accountable both to the Council and Parliament. The Commission also supported the present six month rotation for the Presidency of the European Council and the General Affairs Council (the Council of Ministers’ meetings of Foreign Affairs Ministers specifically to deal with most general European Community issues). With regard to foreign affairs, the Commission proposed

134. *Id.* at 13-14.

135. *Id.* at 14-15.

136. See Draft Treaty, *supra* note 6, O.J. C 169/1 (July 18, 2003).

137. COM (2002) 728 Final (Dec. 2002), summarized in COMMISSION, GENERAL REPORT — 2002, *supra* note 39, at 15-16.

the effective merging of the posts of the Council Secretary General (presently Javier Solano) and the Commissioner responsible for foreign affairs (presently Chris Patten), into a Secretary of the European Union, who would have the status of a Commissioner but report also to the Council.

Naturally, the European Parliament weighed into the debate with a number of resolutions on specific issues. Not surprisingly, it endorsed co-decision and Council qualified majority voting as virtually the sole legislative mode. The Parliament also urged the simplification and relabeling of legislative acts, a more precise delineation of competences of the Union and of the Member States, and the grant of legal personality to the European Union.¹³⁸

In a final rather frenzied series of sessions in May and June, the Convention largely completed its work on the text proposed by President Giscard d'Estaing and the Presidium. Although there had been a risk of minority dissenting reports, the Convention ultimately endorsed one text. The Convention report to the Thessalonica European Council on June 20-21, 2003 provided a complete Constitution text, but the Convention requested and received permission to make further "technical" changes to the Constitution Part III dealing with policies and activities.¹³⁹ Accordingly, the Convention actually completed its drafting on July 10th.¹⁴⁰ The Thessalonica European Council welcomed the draft Constitution "as a good basis for starting the intergovernmental conference" which it set to begin in October 2003.¹⁴¹

B. *The Draft Constitution: Institutional Provisions*

The Convention divided its text into four parts: a constitutional section that sets out basic principles and the nature and role of the institutions; a second section devoted to the Charter of Fundamental Rights; a third section on the structure of the institutions and the substantive fields of action; and a final section on essential accessory matters. Naturally, most attention

138. The resolutions are summarized in the COMMISSION, GENERAL REPORT — 2002, *supra* note 39, at 16.

139. E.U. BULL., no. 6, at 9 (2003).

140. E.U. BULL., no. 7-8, at 9 (2003).

141. E.U. BULL., no. 6, at 9 (2003).

and debate thus far has centered on Part I, whose title is "Definition and Objectives of the Union."

The draft Constitution is long, complex, and requires careful reading before evaluation.¹⁴² Certainly it is in many respects better structured and more comprehensible than the present TEU and EC Treaties (which, together with Euratom, will be unified in a single text). Nonetheless, it remains a lengthy, detailed and quite technical document, one which will not easily be understood by those who are not already relatively expert.

This brief summary can only provide a quick review of the most important changes that would be made by the Constitution, particularly with regard to institutional structure. But first, a few words on the title and the Preamble.

Several hot debates concerned the title of the new Treaty and key references in the Preamble. The great "C" word debate ended with acceptance of the term "Constitution for Europe" as the title for the new Treaty. The U.K. had initially opposed this, but eventually yielded. The Court of Justice has famously referred to the European Community's constituent treaties as a "constitutional charter,"¹⁴³ and legal experts have increasingly accepted this concept.¹⁴⁴

On the other hand, with regard to the "F" word, the U.K. won the debate — the title, "federal union," will not appear in the Preamble text. A "G" word debate also developed as a result of Poland's suggestion that the word "God" be inserted in some manner in the Preamble, a proposal opposed by delegates from nations with a more secular tradition. The Preamble refers to the "cultural, religious and humanist inheritance of Europe," but not to "God" or to "Christian." Although Poland and several other States continued to press for express reference to a Christian heritage during the Intergovernmental Conference, no change was made. Incidentally, the Preamble text as a whole,

142. The current publication of the draft Constitution appears in O.J. C 169/1 (July 18, 2003).

143. Although the Court first used this nomenclature in 1986, its most famous reference came in Opinion 1/91 on the European Economic Area, [1991] ECR I-6084, at ¶ 21: "the EEC Treaty . . . constitutes the constitutional charter of a Community based on the rule of law."

144. The well-known Article by the present Director-General of the Legal Service of the Council, Jean-Claude Piris, *Does the European Union Have a Constitution? Does it Need One?*, 24 EUR. L. REV. 557 (1997), concludes that the Treaties have essential elements of a constitution, although certainly not creating a State as such.

largely drafted by Giscard d'Estaing himself, has been widely criticized as too verbose and rhetorical.

We turn now to review the most salient innovations in, or modifications to, institutional structure made by the draft Constitution. First, the European Council. Article I-20 will make the European Council formally one of the Union institutions, although its role will not change.¹⁴⁵ It will still primarily define the Union's "general political directions and priorities."¹⁴⁶ What is novel is that the European Council will now have the power to take legally binding decisions. The European Council will usually act by consensus, as in the past, but may use the new form of qualified majority vote (see below) for some specified decisions.

One of the most controversial innovations proposed by the Convention is the creation of the post of President of the European Council in Article I-21.¹⁴⁷ (The media has often termed this office "President of the Union" — an erroneous designation, but one that may yet become popular). This person's principal role would be to chair sessions of the European Council and "drive forward its work," assuring "proper preparation and continuity."¹⁴⁸ This suggests an active agenda-setting role, and not simply a ceremonial role as the chair for meetings. The President will also represent the Union in the Common Foreign and Security Policy sphere. The President of the European Council will serve a term of two and one-half years, renewable once.

Conceivably a dynamic President might assume a leadership role both in internal and global affairs. The large States, including the U.K., endorsed the proposed President, but initially the post was vigorously opposed by the Benelux and other smaller States. The Commission is also concerned that such a post might diminish the status and power of the Commission President,¹⁴⁹ which it prefers to enhance. The larger States won on this issue in the Convention, and it was not seriously reexamined in the Intergovernmental Conference.

145. O.J. C 169/1, at 12 (July 18, 2003).

146. *Id.*

147. *Id.*

148. Art. I-21(2), O.J. C 169/1, at 12 (July 18, 2003).

149. See COMMISSION OPINION ON THE DRAFT CONSTITUTION, COM (2003) 548 (Sept. 17, 2003), at 10, specifically urging that the status and role of the President of the European Council be spelled out more precisely.

The Constitution text which reworked the Nice Treaty compromise concerning the Commission is among the most controversial. As we have seen, the Nice Treaty Protocol on Enlargement provides that a system of equal rotation of Commissioners among all Member States should be adopted as soon as there are twenty-seven Member States (which is apt to occur in 2007 if Bulgaria and Romania join then).¹⁵⁰ Various proposals in the Convention suggested a division between voting and non-voting Commissioners, full and deputy commissioners, or rotation only of the Commissioners designated by smaller States. None of the proposals met with a consensus of support. Article I-25 of the Constitution provides that the Commission will have a ceiling of fifteen Commissioners, chosen in a system of equal rotation among the Member States.¹⁵¹ The Commission President will have the power to appoint "non-voting Commissioners" from Member States without a voting Commissioner. The issue remained a sensitive one in the IGC, and the present text is unlikely to survive if negotiations resume in 2004 (see below).

Article I-26 will enhance the powers of the President of the Commission over the rest of the Commission.¹⁵² Initially, the President will have a greater say in the selection process. Member States allotted a Commissioner will nominate three potential candidates, but the President will actually choose the Commissioner from among the three. The President may also require a Commissioner to resign without being obliged to obtain the consent of the entire Commission, as the Nice Treaty provides. Furthermore, the President shall set guidelines for the Commission's operations and determine its "internal organization." Obviously, this means that the President can allocate the Directorate-General portfolios among the Commissioners (presumably including non-voting Commissioners), and later reallocate them, or even restructure the Directorates-General. Consequently, on an inner operational basis, the Commission President will be more powerful than ever. In external relations

150. John Temple Lang, *How Much Do the Smaller States Need the European Commission? The Role of the Commission in a Changing Europe*, 39 COMMON MKT. L. REV. 315 (2002) strongly criticizes the rotation approach and argues that every State should be represented by a Commissioner.

151. O.J. C 169/1, at 14 (July 18, 2003).

152. O.J. C 169/1, at 14 (July 18, 2003).

however, the President's role and authority are apt to be diminished.

Another major and controversial innovation is the creation of the office of Union Minister for Foreign Affairs (Article I-27),¹⁵³ a post that will combine the roles of the current Secretary General, Javier Solano, who reports to the Council and the Commissioner responsible for non-commercial external relations, Chris Patten. The new Minister for Foreign affairs will thus have both enhanced power and prestige. This Minister will be appointed by the European Council, but acting by a Qualified Majority decision (as defined in article I-24),¹⁵⁴ and subject to the agreement of the President of the Commission. The Minister will exercise a dual function. Within the Common Foreign Policy sector, he or she will make proposals and act under the control of the Council. In general external relations, the Minister will be a member of the Commission and responsible for "handling external relations." An energetic Minister will obviously have a high profile and exercise considerable power, but critics of the proposed post worry about a conflict of interest arising through the Minister's dual responsibility to the Council and the Commission. The Constitution is also imprecise about the relationship between the Minister of Foreign Affairs and the President of the European Council on the one hand, and between the Minister and the President of the Commission on the other.

The Convention also reexamined the Nice Protocol compromise on weighted voting in the Council. President Giscard d'Estaing and the Presidium apparently felt that the weighted voting of medium-sized and smaller States is out of proportion to their population. As we have seen, Spain has (and Poland will have) twenty-seven weighted votes, as compared to twenty-nine for Germany, France, Italy, and the U.K., although the populations of Spain and Poland are only half that of Germany and about two-thirds that of the other three larger nations.

Article I-24 of the Constitution sweeps away the system of weighted votes.¹⁵⁵ The Qualified Majority Vote in the Council for legislation and most decisions will be satisfied by the affirmative vote of a simple majority of Member States, provided they

153. O.J. C 169/1, at 14 (July 18, 2003).

154. O.J. C 169/1, at 13 (July 18, 2003).

155. *Id.*

represent at least three fifths of the Union's population. The same vote system will be used by the European Council in taking decisions, unless a Constitution provision requires unanimity. Such a Qualified Majority Vote would be obviously easier to achieve than one under the current system, and would increase the importance of affirmative votes by the four largest States (Germany, France, Italy, and the U.K.). Vigorous opposition from some States, notably Spain, led to a decision to introduce the new voting system only on November 1, 2009. This has the effect that the next multi-year framework agreement on the EU budget and the cohesion fund will be set by the Council under the Nice qualified majority formula (under which Spain has a greater voice). As noted below, the voting formula text proved to be the most contentious issue during the IGC. The Brussels European Council's failure to resolve this issue has blocked approval of the draft Constitution.

Noteworthy also is that the system of rotating the presidencies of the Council in its meetings will be largely preserved (in contrast to the chairmanship of the European Council by its President). Under Article I-23, the European Council must take a European decision to set the rotation on an "equal" basis among the Member States, but for periods of one year, instead of the present six-month presidencies.¹⁵⁶ (Under Article I-32, a European decision is a binding non-legislative act).¹⁵⁷ The exception will be the Foreign Affairs Council, whose chair will be the Minister of Foreign Affairs.

The formula for the representation of Member States in the Parliament as set out in the Nice Treaty and the Protocol on Enlargement has the effect of over-representing smaller States at the expense of the four largest States, especially Germany, which would be entitled to around thirty more MEPs if the calculation were made strictly based on population. Article I-19 provides that the European Council, prior to the 2009 EP elections, must allocate the 736 MEPs among the States in a "digressively proportional" manner, with a minimum of four MEPs for a smaller State (e.g., Malta and Luxembourg).¹⁵⁸ However, the European Council must act unanimously, which makes it hard to predict

156. O.J. C 169/1, at 13 (July 18, 2003).

157. O.J. C 169/1, at 16 (July 18, 2003).

158. O.J. C 169/1, at 12 (July 18, 2003).

whether representation will be truly proportional (as it is in the US House of Representatives) or will continue to some degree to give excessive representation to smaller States.

Article I-28 on the Court of Justice somewhat confusingly uses that term as the composite reference (without a plural) for “the European Court of Justice, the High Court and specialised courts.”¹⁵⁹ The Court of First Instance is to receive a new name, the High Court, in its English language version. The ECJ will continue to consist of one judge from each State, and the High Court will have “at least one judge per Member State.”¹⁶⁰ The six year term of judges, renewable, is not altered. The Article does not govern the relationship between the courts or their respective jurisdictions, which will be governed by the Statute of the Court of Justice.

An innovation whose functional utility appears obvious is Article III-262’s creation of an advisory panel to review the suitability of nominees for Judges prior to their final designation.¹⁶¹ The seven member panel will be composed of former Judges of the two Courts, national supreme court judges, and “lawyers of recognised competence.”¹⁶²

C. The Draft Constitution: Non-Institutional Provisions

The goal of simplification led the Convention to unify the Union and the Community in the Constitution, granting the Union legal personality and absorbing all of the decision making of the second and third pillars into the normal Community procedures, but over transition periods and with unusual voting mechanisms, including opt-outs. The changes in the provisions concerning the Area of Freedom, Security and Justice are so complicated that they cannot be reviewed here, other than to say that qualified majority voting will usually be the normal mode for action, eliminating national vetoes even in sensitive sectors such as asylum, immigration policy, and external border controls.

As for the sector of the Common Foreign and Security Policy, efforts to obtain acceptance of qualified majority voting did

159. O.J. C 169/1, at 14-15 (July 18, 2003).

160. Art. I-28(2), O.J. C 169/1, at 15 (July 18, 2003).

161. O.J. C 169/1, at 78 (July 18, 2003).

162. *Id.*

not succeed. However, the role of the Minister of Foreign Affairs should promote coordination. Also, the European Council, under Article I-39, may by unanimity permit the Council of Ministers to act by qualified majority in certain fields or circumstances.¹⁶³ Under Article I-15, Member States are supposed to support the Union's CFSP in "a spirit of loyalty and mutual solidarity" and "refrain from action contrary to the Union's interests."¹⁶⁴ Finally, under Article I-40, in the field of Security Policy, the Union may take collective action toward a "common defence" goal.¹⁶⁵ The Union may use "civil and military" forces outside the Union "for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter."¹⁶⁶ Incidentally, the Constitution's attribution of legal personality to the Union in Article I-6 will enable the Union to enter into international agreements in the fields of Foreign and Security Policy.¹⁶⁷

The goal of clarity led the Convention to set out several Articles early in the Constitution on exclusive and shared competences. Relatively few exclusive Union competences are recognized, notably the customs union, the Common Commercial Policy, competition rules for the internal market, and monetary policy within the Eurozone States (Article I-12).¹⁶⁸ Article I-13 provides a fairly long list of shared competence fields. Traditional fields are listed — internal market, agriculture and fisheries, transport, social policy, environment, and consumer protection.¹⁶⁹ Interesting additions are the area of freedom, security and justice and common safety concerns in public health matters. In areas of exclusive competence of the Union, Member States may act only if "empowered by the Union" or in implementing Union acts (Article I-11).¹⁷⁰ In an area of shared competence, the priority is given to Union action: Member States may act only if the Union has not exercised its competence.

The Constitution sets out initially some other fundamental

163. O.J. C 169/1, at 17 (July 18, 2003).

164. O.J. C 169/1, at 11 (July 18, 2003).

165. O.J. C 169/1, at 18 (July 18, 2003).

166. *Id.*

167. O.J. C 169/1, at 9 (July 18, 2003).

168. O.J. C 169/1, at 10 (July 18, 2003).

169. O.J. C 169/1, at 11 (July 18, 2003).

170. O.J. C 169/1, at 10 (July 18, 2003).

principles. In Article I-9, it states that the “Union competences are governed by the principle of conferral,” i.e., an enumerated powers approach.¹⁷¹ Expressly stated is that “[c]ompetences not conferred upon the Union in the Constitution remain with the Member States.”¹⁷² The well-known principles of subsidiarity and proportionality are also set forth in Article I-9.

One controversial addition in the Constitution is Article I-10’s statement that the Constitution and Union law within its competences have “primacy over the law of the Member States.”¹⁷³ In view of the long-standing Court of Justice doctrine to this effect, and the acceptance of the principle of primacy by new Member States every time each has joined, one would not consider this so controversial, but media reaction in the U.K. and elsewhere has often been aggressively hostile. The Article may become an issue in Germany and Italy in view of their Constitutional Courts’ long-standing concern with the primacy doctrine in the sector of basic rights and with regard to the federal structure of Germany.

The Constitution does not modify the current structure of legal acts, but Article I-32 does rename the legislative instruments: the term “law” will replace “regulation” and “framework law” will replace “directive.”¹⁷⁴ At least in English this brings greater clarity to the status of each type of legislation.

Article I-33 sets out the mode of co-decision,¹⁷⁵ defined in Article III-302,¹⁷⁶ as the customary form of adopting legislation. In Part III of the Constitution, which deals with policies and fields of action, a number of legislative fields will be converted from the consultation of Parliament to co-decision. Probably the most important of these is agriculture — under Article III-127, the market organization rules will be set by the usual co-decision procedure (although III-127(3) authorizes the Council acting alone, on a proposal from the Commission, to adopt the accessory regulations or decisions on “fixing prices, levies, aid and quantitative limitations”).¹⁷⁷ However, Article I-33 also permits

171. O.J. C 169/1, at 10 (July 18, 2003).

172. Art. I-9(2), O.J. C 169/1, at 10 (July 18, 2003).

173. O.J. C 169/1, at 10 (July 18, 2003).

174. O.J. C 169/1, at 16 (July 18, 2003).

175. O.J. C 169/1, at 16 (July 18, 2003).

176. O.J. C 169/1, at 84-85 (July 18, 2003).

177. O.J. C 169/1, at 52 (July 18, 2003).

“special legislative procedures” which will continue to apply in numerous still sensitive fields.¹⁷⁸ Thus, Parliament will still only be consulted in the setting of competition rules (Article III-52),¹⁷⁹ legislation and decisions concerning monetary affairs (e.g., in the selection of Central Bank Executive Board members, Article III-84),¹⁸⁰ and in the harmonization of internal taxation rules (Article III-62).¹⁸¹

The Constitution commences with the declaration that the Union will respect the fundamental values of “human dignity, liberty, democracy, equality, the rule of law and respect for human rights” (Article I-2).¹⁸² Later it indicates that the Union will “observe the principle of the equality of citizens” (Article I-44),¹⁸³ be “founded on the principle of representative democracy” (Article I-45),¹⁸⁴ as well as that of “participatory democracy” (Article I-46).¹⁸⁵ The Constitution continues the important obligation that all Member States be democracies respecting the values in Article I-2, and sets out mechanisms for penalties for a violation of this (Article I-58).¹⁸⁶ A novel addition is the power granted to a Member State in Article I-59 to withdraw voluntarily from the Union, under a framework procedure.¹⁸⁷

The Nice Charter of Fundamental Rights of the European Union has been incorporated into the Constitution as its Part II, receiving Treaty force and providing legally-enforceable rights, at least with regard to acts of the EU itself. The U.K. and several other States criticized the creation of legally enforceable rights during the Convention, but the approach was not seriously re-examined during the IGC. Although it is hard to conceive of a Constitution without a bill of rights, the incorporation of the Charter without any change has led to some anomalies, such as duplicate coverage of certain rights elsewhere in the Constitution. The courts may also have some difficulty in determining

178. O.J. C 169/1, at 16 (July 18, 2003).

179. O.J. C 169/1, at 36 (July 18, 2003).

180. O.J. C 169/1, at 43 (July 18, 2003).

181. O.J. C 169/1, at 38 (July 18, 2003).

182. O.J. C 169/1, at 8 (July 18, 2003).

183. O.J. C 169/1, at 19 (July 18, 2003).

184. O.J. C 169/1, at 19 (July 18, 2003).

185. O.J. C 169/1, at 19-20 (July 18, 2003).

186. O.J. C 169/1, at 21-22 (July 18, 2003).

187. O.J. C 169/1, at 22 (July 18, 2003).

which provisions of the Charter set out enforceable rights, and which merely state desirable policy aspirations.

D. *After the Draft Constitution*

The optimism with which the Convention commenced work was certainly greatly diminished by the slow progress in reaching full accord on key text, and even more by the bitter character of debates within and outside the Convention on central issues. The manifestly poor relations among leading Member State leaders as an unfortunate consequence of the division over the Iraq war also may well have made it more difficult to reach compromises or settle controversial issues during the fall of 2003. The media also indicated that Convention President Giscard d'Estaing and the Presidium were criticized for failure to consult adequately with the representatives of the parliaments and for yielding on key issues to the desires of larger Member States.¹⁸⁸

The publication of the Convention's draft Constitution launched an enlarged public debate about the nature and wisdom of its proposals. Its text has many influential admirers and supporters, but there are also many severe critics, not just governments concerned to protect their national interests. Thus some academic critics contend that the draft text eliminates terms with a substantive content provided by Court decisions in favor of new, ambiguous or potentially uncertain terms. Moreover, it is debatable whether the new Constitution is that much more comprehensible and acceptable to the public at large. Public opinion polls in July 2003 indicated that only a relatively small minority of the people in most States (usually around one-quarter) were even aware that a draft Constitution had been prepared.

The Intergovernmental Conference to review the draft Constitution commenced on October 2nd and reported to the Brussels European Council on December 12th. In view of the fact that the ten applicant States would also need to ratify the Constitution, the Thessalonica European Council decided that they should be represented in the IGC along with the current Mem-

188. See, e.g., Quentin Peel, *Don't Overlook the Small States*, FIN. TIMES, Oct. 9, 2003, at 15; Michael Prowse, *A Strongman is not the Kind of Leader that Europe Needs*, FIN. TIMES, May 16-17, 2003, at 13.

ber States.¹⁸⁹ The IGC devoted most of its time to a revision of the draft text with a view to producing greater clarity, precision, and legal certainty. The IGC's revised text, as presented to the European Council, makes "editorial and legal adjustments" to the language of many draft articles, occasionally even shifting the place of articles, but does not modify the substance of the draft Constitution.¹⁹⁰

Throughout the fall, the governments of the Member States and the applicants debated a number of the key innovations of the draft Constitution, gradually working toward a consensus on some, but not on the most divisive issues.¹⁹¹ The ministers of foreign affairs met at a so-called conclave in Naples at the end of November to examine some of the serious issues, making some progress, but leaving the most difficult ones for resolution by the Brussels European Council.¹⁹²

Unfortunately, the Brussels European Council of December 12-13, 2003 ended in a stalemate on the most bitterly debated issue, that of the nature of the qualified majority vote in the Council, as well as leaving certain other lesser issues unresolved.¹⁹³ As we have seen, the compromise text of the Treaty of Nice for Qualified Majority Voting gives Spain and Poland a voting power measured in their weighted votes that is out of line with their populations. (Each have twenty-seven weighted votes in comparison to the twenty-nine allotted to the four largest States, even though Germany's population is double that of Spain and Poland, and that of France, Italy, and the U.K. is about 50% greater). France and Germany insisted upon the draft Constitution's formula for QMV which is based on a double majority, i.e., a majority of all States plus a 60% majority of the Union's population represented in the States favoring a measure.¹⁹⁴ Spain and Poland, supported by several smaller

189. E.U. BULL., no. 6, at 9 (2003).

190. CIG 50/03, available at <http://ue.eu.int/igcpdf/en/03/cg00/cg00050-ad01co02.en03.pdf> (Dec. 8, 2003).

191. See George Parker, *Italy Confident of Progress on EU Constitution*, FIN. TIMES, Nov. 25, 2003, at 5.

192. See George Parker, *Hopes Rise for Deal on European Constitution* FIN. TIMES, Dec. 1, 2003, at 2.

193. See *supra* note 7 and accompanying text. See also John Tagliabue, *European Union Leaders Fail to Agree on a Constitution*, N.Y. TIMES, Dec. 14, 2003, at A1.

194. See, e.g., George Parker, *Leaders Know Size Does Matter as Another EU Summit Looms*, FIN. TIMES, Nov. 20, 2003, at 3.

States, firmly rejected the new text, demanding a retention of the Nice approach.¹⁹⁵ Prime Minister Berlusconi of Italy, chairing the session, sought to find a compromise solution, but in vain.

The second issue keenly debated all fall was whether all States should receive a voting member of the Commission. Led by Finland and Poland, virtually all the smaller nations opposed the draft Constitution's approach, which would introduce a system of equal rotation of membership, so that the Commission could be composed of only fifteen members.¹⁹⁶ The Commission itself, in its Opinion to the IGC, urged the retention of a larger Commission composed of one Commissioner from each Member State.¹⁹⁷ In September, President Prodi proposed a restructuring of Commission operations into departments, each to be headed by a senior Commissioner, with other Commissioners working in a "mini-cabinet."¹⁹⁸ The idea met with considerable support. Media reports indicated that during the fall the governments moved toward the idea of a Commission composed of one voting Commissioner for each State, even though this would mean a Commission of twenty-five or more Members. Indeed, some suggestions were voiced that the five largest States (or six, with Poland) might regain their second Commissioner.¹⁹⁹

Another unresolved issue concerned the draft Constitution's proposed shift to QMV voting in several key areas (tax legislation, immigration and asylum rules, and foreign affairs policy decisions). Prime Minister Blair, with some support from other governments, sought to retain the principle of unanimity. Apparently, the Brussels European Council in oral discussion moved toward that position, but no final decisions were reached.²⁰⁰

After the failure of the European Council to approve the

195. See, e.g., George Parker, *Poles say Planned EU Voting Rules may Create 'Unipolarity'*, *FIN. TIMES*, Nov. 19, 2003, at 4.

196. See, e.g., Nicholas George, *Finn gives Voice to the Fears of EU's Small States*, *FIN. TIMES*, Sept. 9, 2003, at 5.

197. *E.U. BULL.*, no. 9, at 8 (2003).

198. See George Parker, *Prodi Wins Praise for Plan to Streamline EU Government*, *FIN. TIMES*, Sept. 18, 2003, at 6.

199. See Bertrand Benoit, *Germany Hints at EU Constitution Compromise*, *FIN. TIMES*, Oct. 7, 2003, at 4.

200. See George Parker, *Ahern Keen to Revise EU Constitutional Talks*, *FIN. TIMES*, Jan. 9, 2004, at 2.

draft Constitution, the next step is uncertain. Prime Minister Ahern of Ireland declared that his Council presidency would attempt to use quiet diplomacy to try to resolve the open issues.²⁰¹

Unfortunately, this spring the political leadership of the Union must confront another difficult and divisive issue: the Union overall budget and revenue limits for the 2007-12 period. France, Germany, the U.K., Austria, the Netherlands and Sweden, all States that contribute more in revenues than they receive, declared in a joint statement on December 15, 2003 that they wanted the Union budget essentially frozen during the 2007-12 period to a revenue level of 1% of the Union gross national income.²⁰² The Commission naturally desires a substantial increase in Union revenues and expenditures. Also naturally, Poland and the other Central European applicants support a budget increase that would enable them to receive various types of financial assistance, a view supported by Spain, which has in the past received substantial Cohesion Fund and other assistance. The debate on this issue this spring promises to be extremely difficult.

Following this debate will come the June elections for Parliament and then the process of selecting the next Commission President and a new 2004-09 Commission. Most observers accordingly believe that serious discussion about the draft Constitution can only take place in the fall under the Dutch presidency, or that it may perhaps be deferred until the Luxembourg presidency in early 2005.

CONCLUSION

The history of the European Union (and previously that of the European Community) is continuously marked by dramatic advances, but often equally dramatic set-backs. The year 2003 exemplifies both.

The entry into force, a bit belatedly, of the Treaty of Nice is certainly a significant success for the future operational health of the Union. Critics may not consider the Nice Treaty institutional provisions to constitute a dramatic success, but many of them represent excellent approaches, notably those on the judi-

201. *Id.*

202. See George Parker, *Europe Big Six Call for Freeze on EU Budget*, FIN. TIMES, Dec. 16, 2003, at 4.

cial architecture of the Union. Even the provisions that are obvious compromises, such as the handling of Qualified Majority Voting in the Council, do permit the decision-making to go forward fairly well.

The conclusion of the enlargement process with the signing of the Treaty of Athens is a dramatic and long awaited development. Although no one can deny that the adjustment to living in the European Union will pose challenges and difficulties for the new States, this is still a dream come true, particularly for those who lived so long under Communist hegemony. The EU as a whole will gain immeasurably from the cultural and social contributions that the new States will provide, as well as benefiting economically over the long term.

Finally, the draft Constitution, if ever adopted, will radically change the Union in many ways. Not all aspects of the Constitution will meet universal favor, and some may even prove less than functionally desirable, but the very fact of the Constitution will promote the sense of common citizenship in a new Europe. In the current acrimonious debate between Member State leaders, predictions are hazardous — but it does seem likely that one way or another, the leaders of the Union will find a way to resolve their differences and achieve a Constitution for Europe.