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International Law Review

From the Executive Board

This issue marks a rebirth of Loyola University Chicago's International Law Review (the "Review"). Formerly known as the Forum of International Law, the name change is only one of many changes to the Review, evidenced in its revised mission, format, and editorial innovation.

The Review's renewal is an important part of Loyola's expanding opportunities to learn about the law from a global perspective. Loyola offers a certificate program in International Law and Practice; opportunities for students to participate in domestic and international moot court competitions that address international legal issues; and unique internships abroad.

As Loyola responds to the expanded needs of a global student population, the Review provides insight into the legal impact of globalization and is dedicated to reflecting the diversity it brings. This is evident in every aspect of the Review—from the scholarship of the articles to the unique editorial choices of the Review. For example, rather than choosing the spelling conventions of either American English or British English, the Review has used the English spelling convention chosen by each author; therefore, readers will notice variations in spelling among articles. While the Oxford Style Manual notes that, "maintaining or transforming linguistic differences is of diminishing. . .concern in many quarters," the Review was concerned with this choice.[1] Choosing American spelling might be perceived as disregard for our international colleagues, while choosing British spelling might seem pretentious. Therefore, the Review heeded the words of the Oxford Style Manual by maintaining the differences of our authors, in a small, but considered way.

That consideration and commitment is reflected throughout this entire issue and beyond. In addition to this semi-annual publication, the Review also holds an annual symposium that addresses current international legal issues. This issue includes articles from the Review's first symposium in 2003—"European Union Enlargement Eastward: Welcoming Prosperity and Change." The topic of the Review's second annual symposium was the "Free Trade Area of the Americas: The Implications of a Hemispheric Marketplace." Articles related to the second annual symposium will be included in the upcoming issue of the Review.

The Executive Board welcomes your feedback and encourages submissions. For more information on submissions, visit the Review's web site at http://www.luc.edu/law/activities/publications/international.shtml or contact the Review via e-mail at International-LawReview@luc.edu.

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[1] The Oxford Style Manual, ed. R.M. Ritter 237 (Oxford University Press, 2003).

THE ROAD TO A UNIFIED PEACEFUL EUROPE: KEYNOTE ADDRESS

by Ambassador John B. Richardson,†
Delivered at Loyola University Chicago School of Law
on March 27, 2003

Today, I want to suggest to you that when ten countries sign their treaties of accession to the European Union ("EU" or "Union") on April 16, 2003, they will not just be the latest members of a club.[1] They will be part of a historic process of the first peaceful unification of Europe in human history, a process not only of elimination of frontiers, but also of the spread and deepening of a set of values—values which you, as Americans—can recognize and relate to.[2]

But let me begin with a word about Iraq, a country in which these values do not prevail. I will then say a few words about transatlantic relations before arriving at enlargement. Iraq is a country governed by a despotic regime, which has a history of human rights abuses, has resorted to the use of weapons banned by the consensus of the world community, and has tried to engage in territorial conquest by invading its neighbor. It is situated in a region which is largely undemocratic, in which the rule of law is a concept with limited relevance to the lives of most people, and which has largely failed to participate in the tremendous growth of gross domestic product per head that the world has experienced over the last half century. Let us stop for a moment and realize that this description of a country out of step with its times is only true because we have come to see the rule of law, democracy and human rights, prosperity brought about by a market economy, and the inviolability of frontiers as normal.

But what a remarkable transformation that is of the world, which emerged from the debris of the Second World War. At that time it seemed normal for neighbors to go to war with each other. Democracy was largely restricted to Europe and North America. There were few international norms of behavior. An ideological struggle was emerging between the values embraced by the Atlantic community and the autocratic regimes and planned economies of

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[1] The Treaty of Accession was signed in Athens on April 16, 2003 by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and existing member states of the EU, *available at* http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003 (last visited Oct. 1, 2003).

[2] *See* John Richardson, *The European Union in the World – A Community of Values*, 26 FORDHAM INT'L L.J. 12 (2002).

communism with its declared aim of world dominion. There followed four decades of the struggle we call the Cold War, a power struggle, but also a struggle for the minds and hearts of men and women. Four interrelated stories unfolded.

First, the military strength of the Soviet Union was contained by the Atlantic Alliance. The illusions of communism were shown to be inferior to the operation of open societies with market economies. The weaker model eventually collapsed under the strain; the Wall fell; the Soviet Union imploded. The values of the West had triumphed.

The second great story of the last part of the twentieth century is how those values of democracy, rule of law, and the market economy have swept around the world. They have helped to transform the countries of the Pacific Rim and allowed an economic miracle to take place. They have brought down one dictatorship after another in Latin America and replaced them with democratic governments. And even in Africa, the world's most troubled continent, those values—given the label of "good governance" —are now largely accepted as the only solid basis for development.

The third story is how the world has given itself the capacity to develop and to promulgate rules of behavior for individuals, for companies, for governments. The dense network of rules and norms emanating from the multilateral system based on the United Nations—but also including organizations as diverse as the World Trade Organization, the International Maritime Organization and the International Atomic Energy Agency—represents the creation of a world order undreamt of a century ago. The Universal Declaration of Human Rights and the many conventions to which it has given birth are a part of this same system. All this gives international expression to the concept of the rule of law. How has this come about? It is the product of a common vision and a common project, which united the two sides of the Atlantic throughout this period. The transatlantic partnership, in many areas under American leadership, was the driving force.[3]

I participated in the drafting of the Transatlantic Declaration of 1990, which defined the challenges facing the EU and the United States, and explicitly recognized that such challenges could be dealt with together because of a common will and because of the shared values of the two sides.[4] Despite the recent transatlantic disagreements over Iraq and the sometimes acrimonious exchanges that have taken place, I continue to believe that this bedrock of

[3] The transatlantic partnership is an informal alliance between the US and Europe dating back to the formation of the EU. The partnership has developed from a US led consultative role to one of joint action that was formalized in the 1995 New Transatlantic Agenda. *See* Romano Prodi, The New Europe in Transatlantic Partnership, (May 9, 2001), *available at* http://europa.eu.int/comm/external_relations/news/prodi/speech_01_204.htm (last visited Oct. 1, 2003).

[4] Transatlantic Declaration, Nov. 22, 1990, U.S.-EU, *available at* http://www.eurunion.org/../partner/transatldec.htm. (last visited Oct. 1, 2003).

common challenges, common purpose, and common values remains a valid basis for transatlantic partnership.

We face a world which seems full of new dangers. Since the terrorist attacks perpetrated against the United States on September 11, 2001, we are all conscious of the vulnerability of the civilization we have built. It is vulnerable to terrorism; it is vulnerable to the proliferation of weapons of mass destruction; it is vulnerable to the destruction of the computer systems upon which it increasingly relies; it is vulnerable to the erosion of the liberties we value in the name of reducing these vulnerabilities.

And around the world, peace and security are threatened in so many ways. The AIDS pandemic has the potential to decimate the earth's population in the decades to come. Ethnic hatreds produce conflict all over Africa, within the Middle East, in many parts of Asia, in the Balkans, in Northern Ireland. This fractured world is in desperate need of governance. But what sort of governance? I believe the answer is clear. We need governance based on the values that have served us so well for the last half century. Of course, we must insist that human behavior is governed by a set of rules worked out by the world community that the rule of law prevails. Of course, we must continue to refine our economic governance to ensure that competition can provide the motor for increasing prosperity across the globe. Of course, we must insist that governments are subject to the will of their citizens in what we call democracy.

But in doing so, let us not commit the error of thinking that we know all the answers. Just as the price of liberty is eternal vigilance, so we should practice a degree of humility in looking at our own societies and being ready to adapt the way we implement our values in practice. It is the continued vitality of our own systems that will be our strongest argument for others to adopt them. We have much work to do within the transatlantic community in this task of renewal. And we will do it better if we ensure that the transatlantic dialogue continues to be as vibrant as it traditionally has been.

These common values are also the basis of the fourth great story of those fifty years, which is the transformation of Europe from the cockpit and the source of wars engulfing the world to a continent of peace and prosperity under the banner of what has become the European Union. For anyone who has read the great literature of the First World War and its poets, who has struggled to understand the evil of Nazi Germany, who has listened to the stories of family members marked for life by the horrors and the grief of the Second World War, this must seem like a wondrous change.

To create a system of governance that could make war between European nations unthinkable is surely one of the greatest achievements of the human spirit since the American Constitution. And as you are aware, we are now about to extend that system to another ten countries of Europe. The dream of a Europe "whole and free," peaceful and prosperous, is within our grasp at last.

It has been a long and winding road, which began when Belgium, France, Germany, Italy, Luxembourg and the Netherlands signed the Treaty of Rome on March 25, 1957—almost exactly forty-six years ago today.[5] At that time the key political priority was seen as constructing a system within which it would be unthinkable for France and Germany ever again to go to war against each other.

When the United Kingdom, Ireland and Denmark joined in 1973—and I began my career at the European Commission—I can remember that one of the arguments used for accepting Britain as a member was that it would be good for what we then called the European Community to bring in the long and deep tradition of democracy of my home country. As a Brit, I will leave others to judge whether this has happened.

Greece joined in 1981, and Portugal and Spain in 1986. In each case they had to wait—until the Colonels had been thrown out in Greece and the dictators Franco and Salazar had gone in Spain and Portugal. The original Treaty of Rome did not specify that members had to be democracies, but this implicit condition had by 1991 become explicit with the Maastricht Treaty.[6] It provided no obstacle to the next enlargement when Austria, Finland and Sweden joined in 1995 and, indeed, the Scandinavian countries were seen as bringing with them a tradition of openness and transparency in government from which all could learn—and this has turned out to be correct.

But this was already the post-Cold War period and it was clear that the next wave of enlargement would consist largely of countries from the former Soviet Empire, whose experience of democracy was, at best, fragmentary and, in any case, long ago. So in Copenhagen in June 1993, the European Council laid down, for the first time, the criteria it would apply to decide on the acceptability of candidates for membership. It specified that:

"[M]embership requires that the candidate country has achieved the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."[7]

Since the fall of the Berlin Wall we have been helping the candidate countries

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[5] *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, *available at* http://www.eurotreaties.com/rometreaty.pdf (last visited Oct. 1, 2003) [hereinafter "EEC Treaty"]. The EEC Treaty is also known as the Treaty of Rome.

[6] *See* Treaty on European Union, Title I, Article F(1), *available at* http://europa.eu.int/abc/obj/treaties/en/entr2b.htm#Article_F (last visited Oct. 1, 2003) [hereinafter "TEU"]. The TEU is also known as the Maastricht Treaty.

[7] Conclusions of the Presidency, European Council in Copenhagen, June 21-22, 1993, *available at* http://www.europarl.eu.int/summits/copenhagen/co_en.pdf (last visited Oct. 1, 2003).

prepare themselves to fulfill these criteria. In the decade of the nineties, we spent more than eighty-five billion dollars on so-called pre-accession aid to the countries of Central and Eastern Europe—about as much in real terms as the American Marshall Plan in the immediate aftermath of World War II.[8]

This was not just to put the economies of these countries "back on their feet." It was also to help them build up democratic institutions; to encourage the development of civil society; to train administrations so the concept of public service is strong enough to overcome the temptation of corruption; to help to build judicial systems, which citizens believe are independent and able to ensure that the rule of law holds sway in practice and not just in theory.

Institutions had to be rebuilt brick by brick and habits of mind had to be revolutionized. And in this way the values, which underpin a peaceful, stable, and prosperous society, spread out like a pool of ink across the map of Europe. We have thirteen countries that are officially recognized as candidates for membership, and have been negotiating with twelve of them. Ten are ready to join and will be signing up on April 16, 2003.[9] The treaties will then need to be ratified by all fifteen current members and by the ten applicants, which will join a year later in 2004. We will then be welcoming the three Baltic states of Estonia, Latvia, and Lithuania; the Central European states of Poland, Hungary, the Czech Republic, Slovakia, and Slovenia; and the two Mediterranean islands, Cyprus and Malta. Our population will go up by twenty percent to 450 million citizens and our land area by twenty-three percent. The number of official languages will increase from eleven to twenty. And these countries will have passed into law and implemented 90,000 pages of European Union legislation.[10]

If this sounds legalistic, it is; we attach great importance to the rule of law. But it has another aspect too, to which I attach great importance. It will reunite the great Hanse cities, which surround the Baltic Sea and which have so much history, so much architecture, so much culture in common. Riga, Tallinn, Vilnius, Rostock, Gdansk, Kiel, Lübeck, Hamburg, and others will all be able to reclaim this shared heritage. And the great Central European culture, largely a product of the Habsburg Empire and Baroque architecture, and which makes the cities of Prague, Budapest, Vienna, Salzburg, Cracow, and Ljubljana so similar in appearance, is already experiencing a great revival. The differences, which once gave rise to nationalistic wars, can now be celebrated as contributions to the cultural diversity that is the glory of European civilization.

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[8] Aid from the EU to Central and Eastern Europe totaled 85 billion euros from 1990 to 1999 which is approximately equivalent, in today's value, to $13.2 billion provided under the US Marshall Plan to reconstruct Europe after World War II. Enlargement of the European Union, (2003), *available at* http://europa.eu.int/comm/external_relations/us/sum06_03/elarg.pdf (last visited Oct. 1, 2003).

[9] *See supra* text accompanying note 1.

[10] *Europa - Enlargement*, Europa Weekly Newsletter Sept. 4, 2001, available at http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_040901.htm (last visited Oct. 1, 2003).

Three candidate countries remain. Bulgaria and Romania have made slower progress than the others in fulfilling the Copenhagen criteria. But we have now set a target date of 2007 for them to join the Union and they will be given increased aid to help them achieve this.

There remains Turkey—the biggest of all the candidates, the bridge between Europe and the Middle East, of enormous geopolitical significance. We are not yet engaged in negotiations with Turkey because Turkey does not yet measure up to our criteria. Let me give you some examples. We cannot accept as a member a country in which democratic decisions can be overturned by the will of the military. We cannot accept as a member a country that still allows torture within its legal system and has yet to abolish the death penalty. And we cannot accept as a member a country that does not ensure equal rights for a large minority of its citizens, the Kurds. The Turks are conscious of this and have been engaged in a series of reforms, which we hope will allow us to welcome them into accession negotiations at the end of next year.

And then, perhaps, we can heave a sigh of relief? Well, not quite. In the Western Balkans, emerging from the turmoil of the breakup of Yugoslavia, we have another five states: Croatia; Bosnia-Herzegovina; Albania; the Former Yugoslav Republic of Macedonia; and Serbia and Montenegro. They are all involved in the so-called Stabilisation and Association Process with the Union, which provides for their transition to candidate status, through enlargement negotiations, to eventual membership.[11]

In Old Europe all roads led to Rome. In the new Europe all roads lead to Brussels.

The most advanced of these countries is Croatia. It has already applied for membership and it could well catch up rapidly enough to join together with Bulgaria and Romania in 2007.

Gaps remain. Norway has negotiated membership twice and stepped back from the brink each time. Switzerland is an enclave in the middle of our territory, which retains its proud separateness. Iceland has always remained apart. All are stable, prosperous democracies. The door will remain open to them. But in a sense it does not matter. As I have explained, the EU is a community of values and all three share our values.

Each enlargement changes the boundaries of the Union. After the process I have described is finished, our new neighbors in the East will include Russia, Belarus, Moldova, and Ukraine. Beyond Turkey, we have Georgia, Armenia, Iran, Iraq, Lebanon and Syria. Where do we stop? Where do we draw the line? Article 49 of the Treaty of Amsterdam provides that any European state that

[11] *See* The Stabilisation & Association Process: Overview, *at* http://europa.eu.int/comm/external_relations/see/actions/index.htm (last visited Nov. 25, 2003).

respects the fundamental principles of the Union can apply for membership.[12] On the other hand, there is currently little appetite within Europe for extending the enlargement process even further. Indeed, there is a serious danger of indigestion.

But membership is not the only way to export the values in which we believe. As we have seen, these can be gradually adopted by countries without yet joining the Union and there is no reason why we cannot pursue this process by other means. This is what we call our proximity policy. President Prodi has called for a policy that gives us a "ring of friends" around the Union—from Eastern Europe through the Caucasus and the Middle East and right around the Mediterranean.[13] He describes this idea as follows:

> "We have to be prepared to offer more than partnership and less than membership, without precluding the latter. So what would a proximity policy for our old and new neighbours look like? It must be attractive. It must unlock new prospects and create an open and dynamic framework. If you embark on fundamental transformations of your country's society and economy, you want to know what the rewards will be.
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> - It must motivate our partners to cooperate more closely with the EU. The closer this cooperation, the better it will be for the EU and its neighbours in terms of stability, security and prosperity, and the greater the mutual benefits will be.
> - It must be dynamic and process-oriented. It should therefore be based on a structured, step-by-step approach. Progress is possible only on the basis of mutual obligations and the ability of each partner to carry out its commitments.
> - We need to set benchmarks to measure what we expect our neighbours to do in order to advance from one stage to another. We might even consider some kind of 'Copenhagen proximity criteria.' Progress cannot be made unless the countries concerned take adequate measures to adopt the relevant *acquis*. The benefits would be directly felt. As would absence of any progress.
> - A proximity policy would not start with the promise of membership and it would not exclude eventual membership.
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> On other occasions I have already referred to this concept, which I have described as 'sharing everything with the Union but institutions.' The aim is to extend to this neighbouring region a set of principles, values and standards, which define the very essence of the European Union"[14]

I have already explained what some of these values are; democracy, the rule of law, and the market economy are your values too. But the process of working out what our values are has continued beyond that in Europe. In particular, we attach importance to three more principles; solidarity, sustainability, and cultural

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[12] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0145010077 (last visited Nov. 25, 2003).

[13] Romano Prodi has served as President of the European Commission since 1999. *See* The European Commission: The Driving Force for Union, *at* http://www.europa.eu.int/abc/index3_en.htm (last visited Oct. 13, 2003).

[14] Romano Prodi, A Wider Europe – A Proximity Policy as the Key to Stability, (Dec. 5-6, 2002) *available at* http://europa.eu.int/comm/external_relations/news/prodi/sp02_619.htm (last visited Oct. 13, 2003).

diversity. The political development of Europe has been dominated since World War II by the ideas of Social and Christian Democratic parties. Their enduring legacy is surely the principle of the social safety net, the idea that society will look after all its citizens by ensuring that they can live lives of reasonable comfort and dignity, even if they are unable to earn the income necessary to this end. In this sense, Europe has espoused the model of a Social Market Economy, regarded by many as fundamentally different in concept from the United States model.

The same principle of solidarity is codified in Title XVII of the Treaty Establishing the European Community ("EC Treaty"), where Article 158 commits the Union to "aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas."[15] In practice, this has meant a systematic transfer of financial resources from richer to poorer member states. The system can be seen, not only as an expression of political solidarity, but also as a necessary complement to the free play of market forces, which could otherwise lead to increasing disparities.

The emphasis on minority rights within the human rights policies of the EU and in the Copenhagen criteria can also be seen as an expression of solidarity with minority groups that might otherwise feel disadvantaged by the operation of democratic decision-making at a national level. It is currently playing an important role in ensuring that problems of minorities do not lead to unrest within some candidate countries.

The Single European Act[16] added, for the first time, the area of environmental policy to the areas of first pillar activity, thereby formalizing a long-standing de facto practice, and the Treaty on European Union developed this further. It was, however, the Rio Conference on Sustainable Development of 1992 that really began to focus attention on the global dimension of this issue, followed by the Kyoto Protocol on Global Climate Change. The concept was first incorporated into the EEC Treaty with the Treaty of Amsterdam, and Article 2 of the EC Treaty now defines the aim of the Union's economic policies as promoting "a harmonious, balanced and sustainable development. . . ."[17] The adoption by the European Council at Gothenburg in June 2001 of the Strategy for Sustainable Development has begun to turn this into practical policy.[18] This is one of very few examples of an international discussion then being reflected in internal

[15] Consolidated Version of the Treaty Establishing the European Community (2002), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf [hereinafter "Consolidated EC Treaty"].

[16] Single European Act (1987), *available at* http://europa.eu.int/abc/obj/treaties/en/entr14a.htm#C___Single_European_Act (last visited Jan. 7, 2004).

[17] Consolidated EC Treaty, *supra* note 15.

[18] A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM (2001) 264 final.

changes within the Union. The driving force behind it was the consciousness of global environmental interdependence—we are all citizens of "Spaceship Earth"—and the need for international solidarity in dealing with it.

Nevertheless, the discussion has triggered the realization that EU policies have an obligation to ensure that our children and children's children are afforded the same opportunities for a good life as are we, and thus the need to ensure that economic development preserves, and does not diminish, the resources—natural and otherwise—on which it is based.

And now multiculturalism. It has been apparent since the beginning of the European integration process that any attempt to apply a melting-pot approach to Europe, with the aim of creating a European national identity replacing national identities, was doomed to failure. There is, however, no doubt that it remained the secret dream of many of those involved in the construction of Europe. Over time it has, however, given ground to a quite different conception of integration, which accepts that the aim is to give the EU the capacity for effective action in pursuit of its goals by sharing sovereignty, but also while preserving those elements of national, regional or ethnic identity, which are so essential to the well-being of our citizens.

These considerations have led the EU to develop positive policies designed to maintain and even promote national and regional identities and cultures. These are not seen as something to be simply accepted as a constraint while pursuing integration, but rather as an essential ingredient in the European model and a prerequisite for its whole-hearted acceptance by its citizens.

We believe that a society based on democracy and human rights for all; on the rule of law; on the market economy, complemented by solidarity between citizens and on the sustainability of development; and the respect for, and active promotion of, the diverse identities of our citizens, will be peaceful and prosperous. This is the vision that the enlargement of the European Union is bringing to the whole of Europe.

I was asked to provide you today with a roadmap for EU enlargement. I hope I have been able to illustrate for you not only where this journey is going, but also where it came from, why it is worth undertaking, and how we have continued to refine our compass and our vehicle as we move forward. I hope also that I have been able to communicate to you something of that sense of excitement, which has always driven the great project of European integration forward. I regard it as the greatest experiment in governance since the American Constitution and proof, I think, that there is life in Old Europe yet.

JOINING THE EUROPEAN UNION: THE ACCESSION PROCEDURE FOR THE CENTRAL EUROPEAN AND MEDITERRANEAN STATES

Roger J. Goebel†

On May 1, 2004, the European Union ("EU or "Union")[1] will undergo the most dramatic change in membership in its history. Ten new member states—Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia–will join the present fifteen EU members: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. This is by far the largest and most complex enlargement of the European Union to date.

The process by which a nation joins, or accedes to the European Union is a relatively long and complex one. 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, as we shall see, it has been a basic principle of the European Community ("EC"),[2] and now of the European Union, commonly termed the "*acquis communautaire*,"[3] 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.

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[1] The European Union (or EU) was established by the Treaty on European Union ("TEU"), adopted as part of the Treaty of Maastricht (signed Feb. 7, 1992; effective Nov. 1, 1993), O.J. C 224/1 (1992). 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 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 Jan. 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 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).

[3] The French term, "*acquis communautaire*," never translated into English, now figures as a key concept in Articles 2 and 3 of the Treaty on European Union, *supra* note 1. The term is briefly described in section III B *infra*.

This article is intended to serve as a sort of road map describing the process by which ten Central European and Mediterranean nations are joining the European Union on May 1, 2004. This increase in the size of the European Union, commonly called an enlargement, will have dramatic effects both for the EU and the applicant nations. In its meeting at Madrid on December 15 and 16, 1995, the European Council declared with regard to the then pre-accession strategy for the countries of Central Europe:

> "Enlargement is both a political necessity and a historic opportunity for Europe. It will ensure the stability and security of the continent and will thus offer both the applicant States and the current members of the Union new prospects for economic growth and general well-being. Enlargement must serve to strengthen the building of Europe in observance of the *acquis communautaire* which includes the common policies."[4]

The current enlargement is the fourth in the series. In the initial one in 1972, Denmark, Ireland and the United Kingdom ("UK") joined the European Economic Community ("EEC"), as it was then called, in a process which set the pattern for subsequent enlargements.[5] At this time, the then six member states of the EEC insisted, and the three applicant nations agreed, that the applicants would accept and respect the "*acquis communautaire*" i.e., the core of the EEC's legal and political structure, together with its policies, principles and fundamental judicial doctrines. In 1981, Greece joined the EEC, as did Portugal and Spain in 1986, in what is often called the Mediterranean enlargement.[6] By the third in 1995, Austria, Finland and Sweden acceded both to the European Union (created by the Treaty of Maastricht on November 1, 1993)[7] and to the European Community (the word "Economic" having been deleted by the Maastricht Treaty).[8] Although, as we shall soon see, the Treaty on European Union ("TEU") describes the basic procedural steps in accession, these past enlargements provide the precedents for the mode of negotiations and the nature of the accession treaty.

This, the fourth enlargement, is certainly the most difficult to execute. One reason for this is the unusually large number of nations presently joining—ten, as compared to three in each of the prior enlargements. Moreover, only Poland,

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[4] EU Bull. 12/95, at 18 (1995).

[5] GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, EUROPEAN UNION LAW (2d ed. 2002) contains, in Chapter 1, a brief description of the historical evolution of the European Community. The first enlargement is described at pp. 10-11. For a more detailed treatment, *see* DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 64-67 (2d ed. 1999).

[6] BERMANN ET AL., . at 11.

[7] TREATY OF MAASTRICHT, *supra* note 1.

[8] BERMANN, ET AL., *supra* note 5, at 18-19. For a detailed coverage, *see* Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 Fordham Int'l L.J. 1092 (1995) (hereinafter cited as Goebel, *The European Union Grows*).

with over thirty-eight million people, has a large population.[9] Most of the current applicant states have relatively small populations. Cyprus, Estonia, Latvia, Lithuania, Malta and Slovenia have fewer people than Ireland, currently the second smallest EU state in terms of population, and Malta has fewer people than Luxembourg.[10] Further, all of the current applicant nations have relatively weak economies. In 2001, their average gross domestic product ("GDP") per person was only thirty-nine percent of that of the current member states of the European Union.[11] Finally, the Central European applicants have been recreating their democratic structures only since 1989, and Cyprus is divided between hostile Greek and Turkish communities.

This article will initially describe the process of accession set in the Treaty on European Union in Part I. Part II will cover the preparations for accession during the 1990s. Part III will review the progress of negotiations for accession. Finally, Part IV will briefly describe the Athens Treaty of Accession and the final stage of the process.

Because so many new nations are joining the European Union at the same time, its present political leadership decided that it was necessary to modify its political and judicial institutions significantly in order to keep their functional efficiency. The Treaty of Nice, which entered into effect on February 1, 2003,[12] and its Protocol on Enlargement, which becomes effective in 2004, revise the composition of the Parliament in order to make room for Members of the European Parliament ("MEPs") from the new member states. The Protocol on Enlargement also modifies the system of weighted votes through which the Council adopts most legislation in order to accommodate the new states, and modifies the composition of the European Commission ("Commission") to eliminate the second Commissioner currently allocated to France, Germany,

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[9] Eurostat population data figures for 2003 estimate Poland's population at 38,214,000, slightly less than Spain's 40,683,000. Eurostat statistics are *available at* http://europa.eu.int/comm/eurostat.

[10] Eurostat estimated Ireland's population for 2003 as approximately 3,961,000 and Luxembourg's population as 448,000. Malta's population is slightly under 400,000, Cyprus has around 804,000 people (including the Turkish community), Estonia, Latvia, and Slovenia have between 1,300,000 and 2,300,000 people, and Lithuania around 3,460,000. With over 10 million people each, Hungary and the Czech Republic are close in population to Belgium and Greece, while Slovakia's 5 million population approximates that of Denmark and Finland. Eurostat statistics are *available at* http://europa.eu.int/comm/eurostat.

[11] The Commission Strategy Paper, Towards the Enlarged Union, COM(2002)700 final, at 14 (Oct. 9, 2002), indicated that the GDP per capita of the ten candidate nations represented 39.3% of the average of the EU Member States in 2001.

[12] The Treaty of Nice contains the most recent amendments to the Treaty on European Union, *supra* note 1, and the European Community Treaty, *supra* note 2. Its text is at O.J. C 80/1 (Mar. 10, 2001). The Treaty of Nice was signed on Feb. 26, 2001 and became effective on Feb. 1, 2003. For a brief description, *see* BERMANN ET AL., *supra* note 5, at 24-26, 37-38, 43-44, 52 and 60-61. Roger J. Goebel, *The European Union in Transition: The Treaty of Nice in Effect, Enlargement in Sight, a Constitution in Doubt*, 27 FORDHAM INT'L L.J. 455 (2004) provides a detailed analysis of the Nice Treaty [hereinafter Goebel, *The European Union in Transition*].

Italy, Spain and the United Kingdom.[13] However, other conference papers deal with these revisions, which are accordingly not covered in this article.

The Treaty's Accession Procedure

Article 49 of the Treaty on European Union[14] outlines the basic procedural steps in the process by which a new nation can join the European Union (and thus the European Community, which is the most important structural component of the European Union). The text of Article 49 traces back to the initial text of Article 237 of the European Economic Community Treaty,[15] adopted as the Treaty of Rome on March 25, 1957. The Treaty of Maastricht, effective November 1, 1993, converted the text of Article 237, with some modifications, into Article O of the Treaty on European Union.[16] Later the Treaty of Amsterdam, effective May 1, 1999,[17] further amended the text and renumbered it as Article 49.

Article 49 begins with a limitation: "Any European State . . . may apply to become a member of the Union."[18] On what basis is a nation determined to be "European?" If a strict geographic criterion were to be deemed decisive, the accession application of Turkey would pose an interesting question. Although Istanbul and Thrace are part of Europe geographically, the majority of Turkey's population live in Asia Minor, which also constitutes the bulk of its territory. However, the European Economic Community's early 1964 Association Agreement with Turkey[19] recognized the possibility that Turkey could at some point join the European Economic Community. Given this treaty language, no one contested Turkey's claim to become an applicant state at the time of Turkey's formal application in 1987. Moreover, from the point of view of geography, Cyprus is an Asian nation, because the closest coasts to Cyprus are those of Asia Minor and Syria, both parts of Asia. However, in its 1993 opinion

[13] The Protocol on the Enlargement of the European Union, annexed to the Treaty of Nice, *supra* note 12. The Protocol also provides for a system of rotation of Commissioners among all Member States as soon as the European Union has 27 member states (presumably after Bulgaria and Romania accede around 2007).

[14] *See* the current text of the TEU, *supra* note 1.

[15] *See* the initial text of the European Economic Community Treaty, *supra* note 2.

[16] Article O supplanted the prior EEC Treaty Article 237 so that any new Member State must simultaneously become a member of the European Union and the European Community. Article O's text is in the Treaty on European Union as effective on Nov. 1, 1993, *supra* note 1.

[17] The Treaty of Amsterdam amended both the Treaty on European Union and the European Community Treaty. The text of each in consolidated form after the Treaty of Amsterdam is in O.J. C 340/173 (Nov. 10, 1997). The Treaty of Amsterdam is briefly described in BERMANN, ET. AL., *supra* note 5, at 23-24. Roger J. Goebel, *The Treaty of Amsterdam in Historical Perspective*, 22 FORDHAM INT'L L.J. 57 (1999) commences a symposium issue devoted to articles analyzing aspects of the Treaty of Amsterdam.

[18] TEU art. 49, *supra* note 1.

[19] Association Agreement between the European Economic Community and Turkey, O.J. P 217/3687 (Dec 28, 1964).

on Cyprus' application for accession, the Commission finessed the issue by concluding that Cyprus should be considered to be "culturally" European, possessing the kind of "European identity and character" that suits it to membership.[20] Accordingly, strict geographic considerations have not blocked Cyprus' prospective accession, nor Turkey's pending application.

Article 49 sets another limitation in its first sentence through a cross-reference to the principles contained in Article 6(1): any applicant nation must be a democracy and abide by the principles of the rule of law and "respect for human rights and fundamental freedoms."[21] This cross-reference to Article 6(1) was added by the Treaty of Amsterdam in 1999. The obligation upon all present member states to be democracies, with respect for the rule of law and human rights, was introduced by the Treaty on European Union in 1993, but this fundamental principle had in fact been articulated earlier by the political leaders of the European Community in the Declaration on Democracy made at Copenhagen on April 8, 1978.[22]

The Declaration on Democracy specifically proclaimed that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership . . . ."[23] That the political leaders of the EC should proclaim this Declaration precisely at the time that Greece, Portugal and Spain were applying to join the Community was plainly not a coincidence. The three nations had only recently ended totalitarian dictatorships and returned to democratic rule. The Declaration effectively put them on notice that their new commitment to democracy must be irrevocable. Similarly, the 1999 amendment to Article 49, which inserted the cross reference to Article 6(1) giving treaty force to the prior policy commitment contained in the Declaration on Democracy, served to put the Central European applicant states on notice that they must be functional democracies in order to join the Union.

Article 49 then requires two key procedural steps: the Council of Ministers ("Council") must approve an application unanimously, after consulting the Commission. That the Council should be the body approving the application is natural, because the Council represents the governments of the member states whenever legislation is adopted or formal decisions made. The requirement for an unanimous decision is only logical, because all current member states must later ratify a treaty of accession.

As for the Commission, by tradition its consultation comes in the form of two opinions, the first evaluating an initial application request, and the second at the

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[20] EU Bull. 6/93, at 100-01 (1993).

[21] TEU art. 49, *supra* note 1.

[22] The Declaration on Democracy is included in the conclusions of the European Council session in Copenhagen on April 7, 1978, 11 EC Bull. 3/78, at 5-6 (1978). For the background of the Declaration on Democracy, *see* Goebel, *The European Union Grows*, *supra* note 8 at 1145-47.

[23] 11 EC Bull. 3/78, at 6 (1978).

end of negotiations with the applicant nation, asserting that the applicant is ready for accession and recommending the Council's endorsement of the applicant. From a pragmatic point of view, the Council needs both opinions before it can make the initial political decision to open the accession negotiations, and the second political decision to conclude the negotiations.

Article 49 makes no reference to the European Council, but inevitably the real political policy decision in each case is made at a European Council meeting, followed by formal action by the Council. The European Council evolved out of summit meetings of the Heads of State or Government held since the early 1970s. Article 4 of the Treaty on European Union provides that the European Council, which now meets four times a year, is a body comprised of the Heads of State or Government of the member states, together with the President of the Commission.[24] Although the European Council has no power to adopt legislation or make a formally binding legal act, Article 4 assigns to the European Council the task of making major policy decisions and providing "the general political guidelines" for subsequent action.[25] Decisions relating to the accession of new member states—the initiation of negotiations, setting of essential terms and conditions, and final acceptance—are naturally the province of the European Council.

The 1993 Maastricht Treaty amended Article 49 to add a role for the European Parliament ("Parliament"), which now has a right of assent, or veto power, before an applicant can join. Parliament must vote in favor by an absolute majority of its members. Parliament first exercised this power on May 5, 1994 when it endorsed the accession of Austria, Finland and Sweden by a substantial majority exceeding eighty-five percent in each case.[26] As seen on April 9, 2003, Parliament has also endorsed the membership of the current ten applicant nations.[27]

Article 49 then prescribes that the "conditions of admission and the adjustments to the Treaties" are to be set out in a complex accession treaty.[28] Because each enlargement has presented complicated and detailed issues which need to be resolved in treaty provisions or in protocols and annexes to the treaty, each successive treaty has become more lengthy. The accession treaty invariably provides for temporary derogations or transitional periods before the full entry into force of particular EU or EC Treaty provisions, or certain

[24] The composition and role of the European Council is specified in Article 4 (initially Article D) of the Treaty on European Union, *supra* note 1, in a provision originally inserted by the Single European Act, effective July 1, 1987. For a description of the historical evolution of the role of the European Council, *see* DINAN, *supra* note 5, at 237-43.

[25] TEU, art. 4, *supra* note 1.

[26] EU Bull. 5/94, at 85. Goebel, *The European Union Grows*, *supra* note 8, describes the circumstances of the Parliament's vote of assent at 1169-72.

[27] *See infra* note 210 and accompanying text.

[28] TEU art. 49, *supra* note 1.

secondary legislation.

Finally, Article 49 prescribes that the accession agreement must be "ratified by all the contracting states in accordance with their constitutional requirements."[29] An act of the national parliament customarily suffices for ratification by an existing member state. At the time of the first enlargement in 1973, Denmark and Ireland chose to have their citizens vote on their prospective accession in a referendum[30] (as did Norway, which failed to join in 1973 and again in 1995 due to a narrow adverse majority in its referenda).[31] Subsequently, Austria, Finland and Sweden held referenda prior to their accession in 1995.[32] All of the present ten applicant states, except for Cyprus, have also decided to hold a referendum. As we shall see, all of the referenda have proved to be strongly in favor of accession.

Preparations For Accession

The Europe Agreements

Although the European Community (and later, the European Union) has long had close trade relations with Cyprus and Malta, cordial relations with the Central European nations could only begin after their escape from Soviet hegemony and return to democratic self-rule in the 1989-92 period. During this initial period, the European Community entered into trade agreements with nine Central European states to reduce tariffs, reduce or eliminate quotas on agricultural and commercial products, and otherwise promote trade.[33]

Given the poor economic conditions in all the Central European countries, conditions which tended to worsen perceptibly during the initial efforts to convert from a state-controlled to a market economy, large amounts of financial

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[29] *Id.*

[30] European Commission, Sixth General Report on the Activities of the European Communities 18 (1973) [hereinafter Sixth General Report]. The majority in favor in Denmark was 63.3%, while in Ireland it was 83%.

[31] The adverse Norwegian referendum vote in 1972 is reported in the Sixth General Report, *supra* note 30, at 17, while that in 1994 is noted in EU Bull. 11/94, at 75 (1994).

[32] For a description of the 1994 referenda in Austria, Finland and Sweden, see Goebel, *The European Union Grows, supra* note 8, at 1172-74. The referenda in Austria and Finland produced large favorable majorities, while that in Sweden resulted in only a narrow 52% favorable majority. European Commission, General Report on the Activities of the European Union 1994, at 252 (1995).

[33] The nine Central European states were the current applicants, except for Slovenia, as well as Albania. *See* Roger J. Goebel, *The European Community and Eastern Europe: "Deepening" and "Widening" the Community Brand of Economic Federalism*, 1 NEW EUROPE L. REV. 163, at 215 (1998) [hereinafter Goebel, *The European Community and Eastern Europe*]. For a review of the trade and economic relations between the EC and Central Europe during this period, see Dan Horovitz, *EC-Central/East European Relations: New Principles for a New Era*, 27 COMMON MKT. L. REV. 259 (1990); Susan Nello, *Some Recent Developments in EC-East European Economic Relations*, 24 J. WORLD TRADE 5 (1990).

aid to them became imperative. The famous Phare program of the Commission commenced in 1989, providing substantial financial and technical assistance initially to Hungary and Poland, and by 1991, to the other Central European nations.[34] The Phare program has provided three billion euros in aid per year since 2000. In addition, in 1990 the European Bank for Reconstruction and Development ("EBRD") was founded in London, with the European Community and the member states together holding the majority of its capital.[35] The task of EBRD is to provide capital for investments in infrastructure and development projects, as well as funds to support training and technological assistance programs.

Very quickly the European Community moved to a heightened level of cooperation with all the Central European countries outside the Balkans. In 1991, the EC devised a standard form for the arrangements, called a Europe Agreement.[36] Europe Agreements were negotiated between 1991 and 1996, and then entered progressively into force between 1994 and 1997 with all of the current Central European applicants (not only the ten presently joining, but also Bulgaria and Romania).[37] The Commission described the Europe Agreements as intended to "enable those countries to take part in the process of European integration and . . .progress toward [becoming] full members of the Community."[38]

Each Europe Agreement notably includes a specific declaration in its Preamble to the effect that the Central European state may look forward to ultimate accession.[39] With some variations in scope country by country, the Europe Agreements provide for a substantial liberalization in trade in products, although agricultural products are only partially covered. The Europe Agreements also provide for reciprocal rights to provide services and rights of establishment in many (but not all) sectors. These agreements do not, however, enable free movement of workers from the Central European nations into the existing EU, although they protect the rights of their migrant workers who have legally entered EU states. The Europe Agreements also require the Central European nations to commence the process of harmonizing their legislation to

[34] For a description of the early Phare program, *see* Goebel, *The European Community and Eastern Europe*, *supra* note 33 at 215-16.

[35] For a description of the legal structure and initial operations of EBRD, *see* D.R.R. Dunnett, *The European Bank for Reconstruction and Development*, 28 COMMON MKT. L. REV. 571 (1991).

[36] The Commission's General Outline for the form, purpose and role of Europe Agreements appears in Agence Europe, Eur. Docts. No. 1646/47 (Sept. 7, 1990).

[37] Goebel, *The European Community and Eastern Europe*, *supra* note 33, at 218-23, describes the basic features of the Europe Agreements as signed in 1991-92 with Czechoslovakia (before the break-up into the Czech and Slovak Republics), Hungary, Poland, Bulgaria and Romania.

[38] European Commission, Twenty-Fifth General Report on the Activities of the European Communities ¶ 810 (1992) [hereinafter Twenty-Fifth General Report].

[39] *See, e.g.*, The Europe Agreement with the Czech Republic, Preamble, O.J. L 360/1 (1994): The "final objective . . . to become a member of the Community."

that of the European Community in a variety of fields, including internal market, social, environmental protection and consumer rights fields. Additionally, the Central European nations must establish and protect intellectual property rights and adopt competition rules modeled on those in the EC. Overall, the Europe Agreements provide for a ten year transitional period within which to achieve the various obligations placed upon the Central European states. Finally, the Europe Agreements provide for "Association Councils" representing the European Community and the Central European nation involved. These Association Councils meet regularly, both at the ministerial level and at lower operational levels, to coordinate and to deal with issues in the application of the agreements.

Manifestly, the Europe Agreements significantly helped prepare the Central European nations for eventual accession. They considerably facilitated the negotiations, as well as reduced the number of issues that needed resolution. Finally, they also helped the applicant nations in their movement toward becoming functional free market economies.

It is worth noting that the Court of Justice ("Court") has already had occasion to interpret and apply the provisions in Europe Agreements that govern migrant workers and persons claiming the right of establishment in a series of five judgments. The Court has interpreted the Central European migrants' rights in a liberal fashion, while recognizing the legitimacy of the current member states' concern with preventing abusive entry of migrants. Thus in *Barkoci*,[40] the Court held that Polish and Czech migrants who sought respectively to establish themselves in the UK as self-employed household cleaners and gardeners had the right to do so without discrimination on the basis of nationality. The Court added, however, that the UK could impose proportionate conditions in order to be assured that a migrant had the qualifications and reasonable expectation of economic self-sufficiency in carrying out his trade. In *Jany*,[41] the Court held that Polish women could establish themselves in the Netherlands as self-employed prostitutes, provided that they could satisfy conditions intended to ensure that they had reasonable expectations of self-sufficiency, would follow police and health regulations, and would not pay over all or part of their earnings to other persons. Viewed as a whole, the Court judgments in these and the other cases interpreting the extent of rights arising under provisions of the Europe Agreements[42] suggest that the Court regards the Europe Agreements as pre-accession agreements, to be interpreted liberally in looking forward to the

[40] Queen v. Secretary of State for the Home Department, ex parte Barkoci & Malik, Case C-257/99, [2001] ECR I-6557.

[41] Jany v. Staatssecretaris van Justitie, Case C-286/99, [2001] ECR I-8615.

[42] *E.g.*, Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer, Case C-162/00, [2002] ECR (Jan. 29, 2002) (Polish nationals cannot be obliged to accept only a fixed-term contract for employment as a foreign language assistant at a German university when German nationals may obtain indefinite term contracts).

ultimate accession of the applicant nations.

Standards for Applicants: The Copenhagen Criteria

The now famous European Council meeting in Copenhagen on June 21 and 22, 1993 agreed that "the associated countries in Central and Eastern Europe" could become member states when they ultimately satisfied "the economic and political conditions required."[43] The European Council then set a list of key conditions for accession, now known as the "Copenhagen criteria."[44] The European Council thus determined for the first time that at least some of the fledgling democracies in Central Europe could ultimately join the EU.

The Copenhagen criteria are commonly categorized as three criteria: the first political; the second economic; and the third relating to the necessary policies and infrastructure. The precise language is often cited. The political criterion is the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities."[45] To satisfy the economic criterion, a state must have a "functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union."[46] The European Council's third condition is that the candidate must possess the "ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."[47] As we shall see, the Council and the Commission have insisted that each applicant must satisfy the political criterion before opening accession negotiations, and must essentially satisfy the other two criteria by the end of the negotiations.

The Copenhagen European Council also approved an interesting mode of enhancing ties between the Union and the Central European nations that had entered into Europe Agreements in the form of a structured system of high-level political meetings. The European Council declared that these should be held, usually at the ministerial level, "on matters of common interest,"[48] including not only internal market matters, but also common foreign and security policy and cooperation in justice and home affairs.

These "structured meetings" soon began and are perceived to have been an important mode of dialogue and planning for further assistance to the Central European states that have Europe Agreements. A Council report to the December 1994 Essen European Council proposed that the "structured relationship" should also include semi-annual meetings of the justice and home

[43] 26 EC Bull 6/93, at 13 (1993).

[44] *Id.*

[45] *Id.*

[46] *Id*

[47] *Id*

[48] *Id.* at 14.

affairs ministers (because, in addition to drug control and illegal immigration, stolen cars have become a serious problem), and annual meetings of ministers responsible for economics and finance, agriculture, environment, transport, research and development, telecommunications, cultural affairs, and education.[49] Thus, since the mid-1990s representatives of both the member states and all the applicant nations have been engaging in useful dialogues at the ministerial level in a wide variety of fields.

The Applications and the Commission's Initial Opinions

As previously indicated, before the Council can authorize the opening of negotiations with an applicant nation, the Commission must provide an opinion evaluating the suitability of the applicant for membership in the Union.

In June 1993, the Commission issued generally favorable opinions on the applications of Cyprus and Malta. However, the opinion on Malta cautioned that, because of its small population (then around 350,000 people), the mode of Malta's participation in the institutions of the Community would require consideration by the political leadership of the member states.[50] With regard to Cyprus, although the Commission concluded that it possessed a stable economy and "the kind of European identity that suits it to membership," "a peaceful, balanced and lasting settlement of the conflict" between the Greek majority and Turkish minority communities must occur before accession could be possible.[51] In June 1994, the European Council meeting at Corfu under the presidency of the Greek government promised that the "next phase of enlargement of the Union will involve Cyprus and Malta,"[52] referring to the next enlargement after the 1995 accession of Austria, Finland and Sweden.

Already in 1994, the Central European states began to knock on the door. On March 31 and April 5, 1994 respectively, Prime Minister Boross of Hungary and Prime Minister Pawlak of Poland formally applied for membership.[53] In the next two years, eight other Central European nations applied.

During 1994, the EU leadership was preoccupied with the final preparations for the accession of Austria, Finland and Sweden, which occurred on January 1,

[49] Report from the Council to the European Council on a strategy to prepare the accession of the associated CCEE states, Annex to the European Council Conclusions, EU Bull. 12/94, at 20-26 (1994).

[50] The Commission opinion on Malta, published in 26 EC Bull. Suppl. 4/93 (1993), is summarized in 26 EC Bull. 6/93, at 100-01 (1993). On Oct. 4, 1993, the Council approved the Commission conclusions. 26 EC Bull. 10/93, at 69 (1993). The European Commission, Twenty-Seventh General Report on the Activities of the European Communities 233 (1994) [hereinafter Twenty-Seventh General Report] states the Commission's conclusions on Malta.

[51] The Commission opinion on Cyprus, published in 26 EC Bull. Suppl. 5/93 (1993), is summarized in 26 EC Bull. 6/93, at 100 (1993).

[52] EU Bull. 6/94, at 13 (1994).

[53] Twenty-Seventh General Report, *supra* note 50, at 254.

1995.[54] This accession proved to be by far the easiest enlargement, because all three nations were politically stable democracies with strong economies and because all three had already been closely associated with the EU through the European Economic Area.[55] Incidentally, all three new member states have been strong advocates of the admission of Central European nations. Finland and Sweden have particularly pressed for the accession of the three Baltic states, Estonia, Latvia and Lithuania, with whom they have traditionally had close trade and cultural relations.

In 1995, the Commission and the political leadership of the now fifteen member states could devote concentrated attention to the next enlargement—that of the Central European and Mediterranean nations. The European Council meeting in Madrid on December 15 and 16, 1995 confirmed its desire to further develop the pre-accession strategy for the applicants.[56] In particular, the European Council requested the Commission to prepare its opinions on the suitability of each of the applicants for accession.[57]

After working throughout 1996 and early 1997, the Commission issued its opinions on the ten Central European applicant nations in June 1997.[58] Each opinion comprises a detailed analysis of the political, economic and social situation in the applicant nation, the state of its administrative and judicial infrastructure, and the degree to which it has adopted legislation intended to harmonize its rules with those in the EU. Each opinion concludes with the Commission's assessment of the suitability of the applicant for an opening of accession negotiations.[59]

In June 1997 the Commission published an influential report, "Agenda 2000 – For a Stronger and Wider Union."[60] Agenda 2000 is composed of an important analytical review of the current status of EU policies and its financial framework for the 2000–06 period, but its relevance here lies in its section on "The

[54] The Act of Accession containing the amendments to the treaties for the accession of Austria, Finland and Sweden is at O.J. C 241/21 (1994). Due to the failure of Norway to join the EU, the Act was amended by Council Decision of January 1, 1995, O.J. L 1/1 (Jan. 1, 1995) to revise the institutional structure accordingly.

[55] Goebel, *The European Union Grows*, *supra* note 8, provides a detailed description of the background and the process of accession of Austria, Finland and Sweden, discussing the European Economic Area at 1103-08. D. Booss & J. Forman, *Enlargement: Legal and Procedural Aspects*, 32 COMMON MKT. L. REV. 95 (1995), describes the negotiation process.

[56] *See supra* text accompanying note 4.

[57] EU Bull. 12/95 at 18 (1995).

[58] The ten opinions appear as Supplements 6 to 15 to the EU Bulletin for 1997 in the following order (based on the date of application of each state): Hungary, Poland, Romania, Slovakia, Latvia, Estonia, Lithuania, Bulgaria, the Czech Republic and Slovenia.

[59] A summary of the Commission's conclusion concerning each applicant is provided in EC Commission, General Report on the Activities of the European Union 1997, at 299-303 (1998).

[60] EU Bull. Suppl. 5/97 (1997) (*hereinafter* cited as "Agenda 2000").

Challenge of Enlargement"[61] and the annexed impact study on the "Effect of the Union's Policies of Enlargement to the Applicant Countries."[62] Agenda 2000 summarizes the Commission's opinions on the applications of all ten Central European states, thus providing a valuable overview of the situation in all of the applicant states. Furthermore, Agenda 2000 indicates both the foreseeable difficulties and the likely benefits for both the EU and the applicants occasioned by their accession.

In its review of each applicant's political qualifications, the Commission observes that it "went beyond a formal description of political institutions . . . to assess how democracy actually works in practice,"[63] particularly with regard to the achievement of the rule of law, protection of human rights and respect for minority rights. In its overall assessment of whether each applicant satisfied the political criteria for accession, the Commission concluded that only Slovakia did not, due to a "gap between the letter of constitutional texts and political practice."[64] The Commission also observed that Bulgaria and Romania had lagged behind, only achieving essential democratic reforms in 1996.[65]

That in early 1997 the Commission could conclude that nine of the ten Central European applicants essentially satisfied the political condition for membership is quite a tribute to the extraordinarily rapid pace of the democratization in these nations. Consider what this meant. Each applicant had to draft a well-balanced modern constitution, create a governmental structure with a popularly elected and effective parliament and executive branch, develop political parties and responsible popular leadership, adopt essential legislation and administrative regulations appropriate for a functional democracy, create a functional and democratically inspired judiciary, and more—and all within the space of half a dozen years.[66]

In substantial measure, the goal of membership in the EU provided an inducement to these nations to further their efforts in democratization. Certainly throughout the 1990s the political leadership of the European Council, together with the Commission and the Council, provided not only administrative and technical guidance and assistance in developing aspects of democratic government, but also a definite and persistent pressure for the attainment of functional democratic structures.[67]

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[61] *Id.* at 39.

[62] *Id.* at 77.

[63] *Id.* at 40.

[64] *Id.*

[65] *Id.* With regard to Romania, the Commission observed that it had achieved essential democratic reforms only after an election brought a change of government in November 1996.

[66] For an overview of the democratization process, *see*; DEMOCRATIZATION IN CENTRAL AND EASTERN EUROPE (Mary Kalder & Ivan Vejvoda eds., 1999).

[67] For a recent critical analysis of the influence of EU on the democratization process, see

Satisfaction of the Copenhagen European Council's political pre-condition for membership included attaining a proper level of respect for human rights.[68] Not only had all of the applicants adopted modern formulations of basic rights in their constitutions, but all had acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and accepted the Protocol permitting their citizens to take cases to the Strasbourg Court of Human Rights.[69] In view of this, and after its specific evaluation of human rights issues in particular applicant states, the Commission concluded that they all had met the basic human rights criterion.

The final element of the Copenhagen European Council's political criterion is respect for minority rights. This is a novel element in two respects: 1) neither the EC nor the EU had ever previously been concerned with minority rights protection within the current member states, and 2) neither the articles of the treaties dealing with human rights nor the Court of Justice case law on the subject had ever dealt with minority rights.[70] However, in Central European nations, large national and ethnic minorities not only existed, but were actually or potentially subject to discrimination and mistreatment.

Agenda 2000 indicated that in the Baltic states, minorities constitute forty-four percent of the Latvian population (thirty-four percent being Russian), thirty-eight percent of the Estonian population (thirty percent being Russian), and twenty percent of the Lithuanian people (nine percent Russian, seven percent Polish).[71] Elsewhere there are substantial Hungarian minorities (eleven percent in Slovakia, and eight percent in Romania), and nine percent of the Bulgarian people are Turks.[72] Finally the Roma people (commonly called gypsies in Western Europe) are also numerous: five percent in Bulgaria and Slovakia, and four percent in Romania.[73]

Throughout the period prior to its Opinions, the Commission pressed the applicant nations to take legislative and administrative action to ensure protection of minority rights. As the Commission noted, "[m]inority problems, if unresolved, could affect democratic stability or lead to disputes with

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Geoffrey Pridham, *EU Enlargement and Consolidating Democracy in Post-Communist States – Formality and Reality*, 40 J. COMMON MKT. S. 953 (2002).

[68] For a review of the EU's insistence on human rights protection, especially the protection of minority rights, *see* Andrew Williams, *Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?*, 25 EUR. L. REV. 601 (2000).

[69] Agenda 2000, *supra* note 60, at 41.

[70] Williams, *supra* note 68, at 611. See also Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L.468 (1998), noting that the "emphasis on minority rights is not anchored in any long-standing EC law tradition," *id.* at 487.

[71] Agenda 2000, *supra* note 60, at 41.

[72] *Id.*

[73] *Id.*

neighboring countries."[74] In its Opinions and Agenda 2000, the Commission concluded that all the applicants concerned had made significant progress in promoting the welfare of minorities. However, the Commission expressed its concern about the low rate of naturalization of non-citizens (usually Russians) in Estonia and Latvia, the absence of recognition of the Hungarian minority's right to employ its own language in the Slovak Republic and other administrative issues there, and the inadequate treatment of the Roma minority throughout Central Europe.[75] These deficiencies did not lead the Commission to conclude that the applicants (other than Slovakia) failed to satisfy the political criterion, but the Commission called for further progress before accession.

The Copenhagen European Council's economic criterion has two constituent elements: the applicant must have a functional free market economy, and must be able to cope with competitive market forces within the entire EU. In its Agenda 2000 review, the Commission praised the substantial progress made by almost all the applicants in the transition to a market economy, including the privatization of state-owned enterprises, but noted that the average GDP per person was still only one-third that prevailing in the EU, and that many states had fragile economies, unfavorable trade balances and inadequate capital markets.[76] Overall, however, the Commission concluded that five Central European nations—the Czech Republic, Estonia, Hungary, Poland and Slovenia—could be considered to have achieved free market economies.[77] On the other hand, the Commission evaluated none of the applicants as capable as of 1997 to confront market forces within the EU for a variety of reasons (e.g., inadequate capital and financial markets, insufficient infrastructure, low wage levels, incomplete privatization, etc.)[78]

The third, or infrastructure criterion, set by the European Council at Copenhagen also has two components: an adequate administrative and judicial infrastructure and an ability to adopt the "*acquis communautaire*," notably to enact all the legislation required by harmonization measures adopted to date within the EU, not only to achieve the internal market, but also in the fields of agriculture, environment, transport, social policy, etc.[79] The Commission expressed considerable reservations concerning the quality of the administrative and judicial infrastructure in all the applicants, particularly with regard to their ability to properly enforce and apply Union law, and concluded that only the Czech Republic, Hungary and Poland could satisfy this criterion even in the

[74] *Id.* at 42.

[75] *Id.* at 41.

[76] *Id.* at 42.

[77] *Id.* at 43.

[78] *Id.* at 43-44.

[79] *Id.* at 44-46.

medium term.[80]

With regard to Cyprus, the Commission in Agenda 2000 easily concluded that it satisfied the Copenhagen criteria,[81] but expressed concern about the ongoing division between the Greek community and the Turkish one, which "threatens the stability of the island and the region."[82] However, it considered that negotiations could be opened with the government of the Greek Cypriots, as the "only authority recognized by international law."[83]

The Commission's Opinions and its review in Agenda 2000 enabled the political leadership of the EU to make the decision to commence negotiations on accession. At its meeting in Luxembourg on December 12 and 13, 1997, the European Council decided to begin negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia, setting March 30, 1998 as the date for the formal launching of negotiations.[84] The European Council also requested the Commission to make annual progress reports on the negotiations and to continue its analytical examination of progress in the other applicants.[85] The European Council also called for annual meetings of a European Conference composed of the Heads of State and Government of the member states and of all the applicants negotiating for accession, as well as Turkey, to address "questions of general concern," especially in foreign policy, justice cooperation, economic matters and regional policy.[86] The first European Conference meeting was held in London on March 12, 1998.[87]

The Commission's October 1999 progress report on the state of negotiations with the initial six applicants and on the preparations within the other applicants indicated that Bulgaria, Latvia, Lithuania, Romania and Slovakia had by that time satisfied the Copenhagen political criterion, although none as yet fully satisfied the economic and infrastructure criteria.[88] Nonetheless, the European Council at Helsinki on December 10 and 11, 1999 decided to open negotiations for accession with those five nations.[89] The European Council also authorized the commencement of accession negotiations with Malta, where the election of a

[80] *Id.* at 46-47.

[81] *Id.* at 54.

[82] *Id.* at 55.

[83] *Id.*

[84] EU Bull. 12/97, at 10 (1997).

[85] *Id.* at 11.

[86] *Id.* at 9.

[87] European Commission, General Report on the Activities of the European Union 1998, at 275 (1999) [hereinafter 1998 General Report].

[88] The Commission's Oct. 13, 1999 progress report is in COM (1999) 500. Its conclusions are summarized in EC Commission, General Report on the Activities of the European Union – 1999, at 205 (2000).

[89] EU Bull. 12/99, at 8 (1999).

nationalist government in 1999 resulted in a renewal of its accession application, which had been suspended by the prior Labor government.[90] Negotiations with these six nations began in February 2000.[91] The European Council noted that the states commencing negotiations should "have the possibility to catch up within a reasonable period of time with those already in negotiations" but warned that "[p]rogress in negotiations must go hand in hand with progress in incorporating the *acquis* into legislation and actually implementing and enforcing it."[92]

With regard to Cyprus, the European Council at Helsinki made a crucial decision favorable to its entry into the EU. While urging further negotiations with the Turkish community under UN auspices, the European Council concluded that even "if no settlement has been reached by the end of accession negotiations," a settlement would not be a "precondition" for accession.[93] Accordingly, the Greek Cypriot government would be able to join the EU on its own. It is frequently said that the membership of West Germany in the European Community prior to its reunification with East Germany serves as the precedent for the entry of only a part of Cyprus.

The Helsinki European Council also made a crucial policy statement concerning Turkey. Although not authorizing any negotiations for accession, the European Council declared that "Turkey is a candidate State destined to join the Union."[94] The European Council welcomed "recent positive developments" in Turkey and urged further political reforms, particularly with regard to respect for human rights.[95] Finally, the European Council authorized an accession partnership program in which the Commission would provide further assistance to Turkey, focusing on areas requiring priority attention.[96] Accordingly, since 1999 there appears to be a genuine prospect that Turkey will eventually become a member state, even though the time frame for entry is quite indefinite and depends heavily on substantial progress in political and economic reforms.

The Negotiation Phase

The Mode of Negotiations

Neither the current Article 49 of the Treaty on European Union,[97] nor the

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[90] *Id.*

[91] EC Commission, General Report on the Activities of the European Union – 2000, at 217 (2001).

[92] EU Bull. 12/99, at 8 (1999).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] TEU, *supra* note 1. See the analysis of Article 49 in section I, *supra*.

initial EEC Treaty Article 237,[98] specify who should carry out the negotiations with applicant nations. At the time of the commencement of negotiation for the first enlargement—the accession of Denmark, Ireland and the UK—this issue had to be confronted. Although the Commission had proposed that the Council should give it a mandate to negotiate the terms of accession with the then-applicant states,[99] a Council decision on June 8 and 9, 1970 declared that the Council itself would carry out the negotiations.[100] A representative of the Council President for each of the six-month terms of Council Presidency[101] would preside over the working team engaged in the negotiations. Naturally, the Commission would assist in the process—assistance that would always be substantial in view of the greater staff resources of the Commission.[102]

This precedent has been followed in all subsequent accession negotiations, and was employed again for the current enlargement. Negotiations were carried on with each candidate state largely on a separate basis, although a common pattern was followed. The ministers or deputy ministers of Foreign Affairs, sometimes joined by other cabinet ministers from the member states and the applicant states, met periodically, often monthly, to review the most important issues.[103] The Commission proposed the draft negotiating positions to the representatives of the member states at the level of working groups for specific topics, as well as at the ministerial or deputy ministerial level.[104] Frequent, often bi-weekly meetings, were held by working group experts from the Council, the Commission and individual applicant states, or groups of applicants. In all cases, the Minister of Foreign Affairs of the member state currently holding the presidency of the Council (which rotates every six months), or the Council staff member representing that state, formally chaired the session.[105] Not surprisingly, the Commission staff members participating in the process were highly active, due to their specialized expertise on particular topics. Since the fall of 1999, Commissioner Gunther Verheugen has been the Commissioner responsible for

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[98] EEC TREATY art. 237, *supra* note 2.

[99] The Commission made its request at the time of its Oct. 1, 1969 opinion favoring the initiation of negotiations with the then applicant nations (which included Norway, as well as Denmark, Ireland and the United Kingdom). See EC Commission, Fifth General Report on the Activities of the European Communities 17 (1972).

[100] *Id.* at 17-18.

[101] *Id.*

[102] *Id.* (The Commission would help in seeking "possible solutions to specific problems arising in the course of negotiations.")

[103] Eneko Landaburu, the Director General of the Directorate General for Enlargement, describes the negotiation process in Eneko Landaburu, *The Fifth Enlargement of the European Union: The Power of Example*, 26 FORDHAM INT'L L.J. 1 (2002). The ministerial level negotiations are described at 4. For a detailed description of the negotiation phase of the accession of Austria, Finland and Sweden, see Booss & Forman, *supra* note 55, and Goebel, *The European Union Grows*, *supra* note 8, at 1164-69.

[104] Landaburu, *supra* note 104, at 4.

[105] *Id.*

the accession negotiations. A special Commission Directorate General for Enlargement, headed by Eneko Landaburu, worked on the negotiations,[106] as well as provided continuing assistance to the applicants and monitored progress in each applicant. The Parliament was regularly informed of the state of progress of negotiations[107]—a vital step, because Article 49 requires that the Parliament ultimately give its assent to any accession.

Throughout the accession negotiations, the EU joined with each candidate in an Accession Partnership. As proposed by the Commission in Agenda 2000, an Accession Partnership was to serve as a structure for establishing a timetable of precise commitments of the candidate for political and economic modifications and for the adoption of specific legislation to accept elements of the "*acquis communautaire*".[108] On the EU side, the Commission would mobilize financial and technical resources to aid the applicant in progress toward membership. The Commission would also monitor progress of each applicant, preparing an annual overall progress report covering all the candidate countries.[109] The European Council at Luxembourg on December 12 and 13, 1997 authorized these Accession Partnerships.[110] On March 16, 1998, the Council adopted Regulation 622/98 to set up a structure for the financial and technical assistance to each of the Central European applicant states under the Accession Partnerships.[111] On March 30, 1998, the Council immediately created the Accession Partnerships with each of the ten Central European applicants.[112]

The Role of the "*Acquis Communautaire*" Principle

As indicated at the outset of this article, all accessions of new member states are governed by the principle of the "*acquis communautaire.*" This term, so hard to translate that the French is invariably used even in English texts, means essentially that the intrinsic core of the Community (and also now the Union) legal and political structure is a given ("*acquis*") which the new member state must accept, not challenge or call into question.[113]The "*acquis communautaire*"

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[106] *Id.*

[107] *Id.*

[108] Agenda 2000, *supra* note 60, at 53.

[109] Id.

[110] EU Bull. 12/97, at 9-10 (1997).

[111] O.J. L 85/1 (Mar. 20, 1998).

[112] 1998 General Report, *supra* note 87 at 279-80 (1999).

[113] For a detailed description of the evolution of the "*acquis communautaire*" concept in each successive enlargement, see Goebel, *The European Union Grows*, *supra* note 8, at 1140-57. Carlo Gialdino, *Some Reflections on the Acquis Communautaire*, 32 COMMON MKT. L. REV. 1089 (1995), analyzes the origin and meaning of the term. Christine Delcourt, *The Acquis Communautaire: Has the Concept Had Its Day?*, 38 COMMON MKT. L. REV. 829 (2001), also analyzes the meaning of the principle, expressing concern about its somewhat ambiguous character and variable content.

principle has a highly pragmatic origin. In 1969, the original six member states were confronted with the possible accession of four new ones: Denmark, Ireland and the United Kingdom, which ultimately joined in 1973, along with Norway, whose application ended after an adverse popular referendum. At the famous Hague Summit on December 1 and 2, 1969, the Heads of Government and State declared that "[i]n so far as the applicant States accept the Treaties and their political objective, the decisions taken since the entry into force of the Treaties," the negotiations could commence.[114] At the initial ministerial level negotiation session on June 30, 1974, Foreign Minister Harmel of Belgium, then President of the Council, told the applicant state representatives that they had to accept the Treaties and all Community decisions and policies to date.[115] He added that "any problems of adjustment . . .must be sought in . . .transitional measures and not in changes of existing rules."[116] Thus, the principle of the "*acquis communautaire*" became an authoritatively stated condition for the first enlargement and subsequently for any future accession.

At the time of the first enlargement in 1973, based upon the text of the 1972 Act of Accession, the "*acquis communautaire*" could be analyzed as comprising six constituent elements: 1) the Treaties; 2) the institutional structure under the Treaties; 3) the legislation and other acts of the Community; 4) international agreements entered into by the Community; 5) legislation and other acts adopted during the negotiations; and 6) the somewhat vague concept of the "political objective" of the Treaties.[117] In its Opinion issued on January 19, 1972, prior to the Act of Accession, the Commission added a seventh element—the "legal order" of the Community, which included the principles of the direct applicability both of certain treaty provisions and of certain legislation, of the primacy of Community law over any conflicting national provisions, and of the uniform interpretation of Community law—all major doctrines developed by the Court of Justice in the 1960s.[118]As previously noted, the European Council's famous Declaration on Democracy issued at its meeting in Copenhagen on April 7 and 8, 1978[119] added another essential aspect to the "*acquis communautaire.*"

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[114]Final Communique of the Conference of Heads of State or Government on 1-2 December 1969 at the Hague, in EC Commission, Third General Report on the Activities of the Communities – 1969, annex, at 189 (1970). The Commission had previously urged that the applicant states must accept "the Treaties plus the decisions taken since these came into force." *Id.* at 334.

[115]European Commission, Fourth General Report on the Activities of the Communities 1970, at 260 (1971).

[116]*Id.*

[117]These are the essential elements cited in the 1972 Act of Accession, arts. 2-4, J.O. L 73/1, at 14-15 (1972).

[118]Sixth recital, Opinion of the Commission of Jan. 19, 1972 on the Applications for Accession of Denmark, Ireland, the Kingdom of Norway and the United Kingdom, J.O. L 73/3 (1972). The Opinion's fifth recital declared that the applicants had accepted the Treaties, Community acts, and the Community's political objectives. For further discussion, see Goebel, *The European Union Grows*, *supra* note 8, at 1144-45.

[119]Declaration on Democracy, *supra* note 22.

Issued at the time that negotiations for accession with Greece, Spain and Portugal were commencing, the Declaration made absolutely clear that "the principles of democracy, of the rule of law, of social justice and of respect for human rights" were required for membership.[120] As noted before, when the Treaty of Maastricht introduced the Treaty on European Union on November 1, 1993, the TEU in Article 6 (ex Article F) declares that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedom, and the rule of law, principles which are common to the Member States."[121] Article 49 was then amended to cross-reference to Article 6, requiring these principles as an express condition for accession.[122]

When the Treaty of Maastricht introduced the Treaty on European Union, the concept of the "*acquis communautaire*" was emphasized in the text itself. Article 2 of the TEU states that one of the goals of the EU is to "maintain in full the *acquis communautaire* and build on it." Article 3 further states that the Union's institutions are to strive to "attain its objectives while respecting and building upon the *acquis communautaire.*"[123] The Maastricht Treaty added Economic and Monetary Union as a component of the European Community,[124] as well as the Union fields of a Common Foreign and Security Policy[125] and Cooperation in Justice and Home Affairs.[126] These accordingly became parts of the "*acquis communautaire*" accepted by Austria, Finland and Sweden when they joined in 1995,[127] and are aspects of the "*acquis communautaire*" for the current candidate nations.[128]

All of the elements of the "*acquis communautaire*" are certainly also required of the current Central European and Mediterranean applicant states. The Copenhagen criteria set out by the European Council in June 1993[129] add another element: "[t]he existence of a functioning market economy."[130] That this is now an element of the "*acquis communautaire*" is apparent from the fact that the Treaty of Maastricht amended the EC Treaty to include Article 4, which declares

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[120] *Id.* For a description of the link between the Declaration on Democracy and the applications of Greece, Portugal and Spain, see Goebel, *The European Union Grows*, *supra* note 8, at 1145-48.

[121] TEU, *supra* note 1.

[122] *Id. See supra* text accompanying note 21.

[123] TEU art. 3, *supra* note 1.

[124] EC TREATY arts. 98-124, *supra* note 2.

[125] TEU arts. 11-28, *supra* note 1.

[126] *Id.* at arts. 29-42 (these are the provisions on Police and Judicial Cooperation in Criminal Matters which have succeeded the initial articles on Cooperation in Justice and Home Affairs, most of which have been transferred to the sphere of European Community action by the Treaty of Amsterdam).

[127] For a more detailed discussion, see Goebel, *The European Union Grows*, at 1155-57.

[128] The Commission specifically stated this in Agenda 2000, *supra* note 60, at 39.

[129] *See supra* text accompanying notes 44-47.

[130] *See supra* text accompanying note 46.

that "the activities of the Member States and the Community shall include . . . an economic policy which is . . . conducted in accordance with the principle of an open market economy with free competition."[131]

Finally, as the Commission noted in its June 1997 Agenda 2000 report, the current applicants are obligated to go beyond the "*acquis communautaire*" in some respects, due to the requirements of some of the Copenhagen criteria.[132] The Commission specifically cited the applicants' obligation to have an adequate administrative and judicial capacity,[133] but it might also have cited the need to have "the capacity to cope with competitive pressures and market forces within the Union," the second aspect of the Copenhagen economic criterion.[134] Moreover, in some respects one of the most difficult and time-consuming obligations of the applicants—yet one that is required in order for them to satisfy the third Copenhagen infrastructure or "*acquis*" criterion—is that of implementing into their own legislation all of the voluminous regulations and directives of the internal market program, together with those in the fields of social policy, environmental protection, consumer rights, transport, intellectual property, etc.[135]

The Initial Phase of Negotiations, 1998-99

As we have seen, the European Council at Luxembourg on December12 and 13, 1997[136] accepted the Commission's recommendation to begin negotiations in March 1998 with six applicants—Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia[137]—while urging that preparations for negotiations with the other applicants be accelerated.[138] The negotiations accordingly commenced on March 30, 1998.[139] Immediately prior to the start of negotiations, the European Conference, composed of the Heads of State or Government of all member states and the twelve candidate nations, met in London on March 12, 1998.[140] The Conference conclusions declared that it launched "the comprehensive, inclusive and ongoing process of European Union

[131] EC TREATY art. 4, *supra* note 2.

[132] Agenda 2000, *supra* note 60, at 39.

[133] *Id.*

[134] *See supra* text accompanying note 46.

[135] Delcourt describes this as the "[e]xhaustive adoption by the candidate countries of an extensive *acquis communautaire*," *supra* note 113, at 852-57.

[136] EU Bull. 12/97, at 8 (1997).

[137] *Id.* at 10.

[138] *Id.*

[139] 1998 General Report, *supra* note 87, at 275. The launch of negotiations was endorsed by Parliament in a resolution of Dec. 4, 1997, O.J. C 388 (Dec. 12, 1997).

[140] EU Bull. 3/98, at 81 (1998).

enlargement".[141]

In order to prepare the negotiations, the Commission created on January 21, 1998 a Task Force for the Accession Negotiations. (The Task Force was transformed in 1999 by the current Prodi Commission into the Directorate General for Enlargement.) Commissioner Van den Broek supervised the Commission's role in pre-accession planning and in the initial negotiations.[142] Because negotiations would have to cover all aspects of the "*acquis communautaire*," including the applicants' ultimate adoption of several thousand legislative measures in many different fields, the Commission and the Council structured the negotiations into thirty-one chapters.[143] These chapters covered all of the various substantive fields of Community activities (e.g., agriculture, competition policy, external commercial and trade relations, economic and monetary union, environmental protection, social policy, transport), as well as the fields of Union action (Common Foreign and Security Policy and Cooperation in Justice Affairs), and institutional structures and the budget. Each chapter could then be negotiated at the lower levels by groups of experts in the topic field, from the Commission and the Council on the EU side, and from each applicant state on the other side, with the more challenging issues raised to the level of ministerial or deputy ministerial negotiation.

At the initial stage in 1998, the Commission and the applicant state "screened" the latter's legislation to determine the degree of its compatibility with EU rules in each of the chapter fields.[144] Throughout the negotiation period, of course, applicant states continuously adopted new laws and regulations intended to parallel the harmonized rules of the EU. This process steadily removed issues from the negotiating table. By the end of 1998, a few easier chapters could be considered to be provisionally closed (to be revisited and brought up to date toward the end of negotiations) in the negotiations with each applicant.[145]

The first phase of negotiations with the initial six applicants continued throughout 1999, identifying certain key issues for later resolution, but also making substantive progress—the negotiations provisionally closed between nine and eleven chapters with each applicant.[146] The Commission began its procedure of issuing an annual report on the progress made by each applicant toward accession on November 4, 1998.[147] This report contains valuable

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[141] *Id.*

[142] 1998 General Report, *supra* note 87, at 275 and 441.

[143] *Id.* at 276.

[144] *Id.*; Landaburu, *supra* note 103, at 5-6.

[145] 1998 General Report, *supra* note 87, at 276.

[146] 1999 General Report, *supra* note 88, at 208.

[147] European Commission, Composite Paper - Reports on Progress towards Accession by Each of the Candidate Countries, COM(1998)700, summarized in EU Bull. 11/98, at 73-74 (1998)

summaries of the general progress of each applicant toward satisfaction of the Copenhagen political, economic and infrastructure criteria, noting briefly the results of the initial "screening" stage in negotiations. The report observes that all of the applicants made considerable economic progress, with annual GDP growth rates of between four to seven percent, "amongst the highest in the world."[148]The Commission's second progress report, issued on October 13, 1999,[149] marked another stage in the efforts of all the candidates to prepare for accession, and also summarized the achievements in the negotiations with the initial six states on the "fast track," as it was often called. With regard to the political criterion, the report concluded that the September 1998 elections in the Slovak Republic had produced a government which had made essential reforms, notably in ensuring the independence of the judiciary, so that now all Central European candidates could be said to satisfy the political criterion.[150] However, the report continued to express concern that Estonia and Latvia were not adequately protecting minority rights, and that the Roma people everywhere continued to experience social and economic discrimination.[151]

On the economic side, the Commission observed that growth in the annual GDP had markedly slowed in late 1998 and early 1999, with some countries in recession (e.g., the Czech Republic and Romania), but that growth was recovering in late 1999.[152] Overall, the Commission considered that Latvia was now a functioning market economy, while Lithuania and Slovakia were close to being ones.[153] However, only Cyprus and Malta were considered to be able to cope with competitive market forces in the EU.[154]

The October 13, 1999 Commission report contained a section on an "Accession Strategy," which recommended the start of negotiations with all of the candidates that met the political criterion (i.e., all except Turkey), in order to meet the "widely felt need for new momentum in the enlargement process."[155] The Commission observed that this would permit "each applicant country to progress through the negotiations as quickly as is warranted by its own efforts to prepare for accession."[156]

[hereinafter 1998 Composite Paper].

[148] 1998 Composite Paper, *supra* note 147, at 5.

[149] European Commission, Composite Paper - Reports on Progress towards Accession by Each of the Candidate Countries, COM(1999)500, summarized in EU Bull. 10/99, at 55-57 (1999) [hereinafter 1999 Composite Paper].

[150] 1999 Composite Paper, *supra* note 149, at 14.

[151] *Id.* at 15-16.

[152] *Id.* at 17.

[153] *Id.* at 22.

[154] *Id.*

[155] *Id.* at 29.

[156] *Id.* at 30.

Incidentally, on February 17, 1999, the Commission had updated its favorable opinion on the suitability of Malta for accession.[157] After an election in October 1996, the Maltese government froze its then-pending application, but new elections in September 1998 brought back into power a government desirous of renewing the application.

As we have previously noted, following the Commission's recommendation in its October 1999 progress report, the European Council at Helsinki on December 10 and 11, 1999 authorized the opening of negotiations with the second group of candidate nations, namely Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia.[158] This commenced a much more difficult and sustained period of negotiations with all the candidate nations except for Turkey.

The Final Negotiations, 2000-2002

Negotiations with the second group of applicants began on February 15, 2000 by an intergovernmental conference at the Foreign Ministers level.[159] The negotiations during 2000 moved fairly rapidly through most of the thirty-one chapters, provisionally closing from six to twelve for applicants in the second group, and from thirteen to seventeen for states that had begun negotiations in 1998.[160]

The Commission's third progress report, presented on November 8, 2000, not only summarized with some satisfaction the steady evolution of the applicants toward accession, but also set out a "road map" for the remaining negotiations.[161] On the political side, the Commission noted further progress, notably free and fair national or local elections in six applicants, together with efforts to modernize public administration and the judiciary.[162] Even with regard to minority rights, the Commission noted favorable action in Estonia, Latvia and Slovakia.[163]

With regard to the economic sector, the Commission observed that growth rates had risen substantially in Cyprus, Hungary, Malta, Poland and Slovenia, all over four percent, although the Baltic states and the Czech Republic were only ending recessions.[164] The Commission concluded that all the applicants except

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[157]EU Bull. 1-2/99, at 109 (1999).

[158]EU Bull. 12/99, at 8 (1999). *See supra* text accompanying notes 89-92.

[159]EU Bull. 1-2/00, at 78 (2000).

[160]2000 General Report, *supra* note 91, at 218.

[161]European Commission, Enlargement Strategy Paper, COM(2000)700 [hereinafter 2000 Enlargement Strategy Paper], summarized in EU Bull. 11/2000, at 67-69 (2000) and in 2000 General Report, *supra* note 91, at 215.

[162]2000 Enlargement Strategy Paper, *supra* note 161, at 15-16.

[163]*Id.* at 16.

[164]*Id.* at 18.

Bulgaria and Romania were functional market economies and anticipated that all could withstand market forces in the Union within a medium term period.[165] The Commission also observed that financial assistance was now being considerably increased to over three billion euros[166] a year, including approximately one billion for environment and transport infrastructure, and 500 million for agricultural aid and rural development.[167]

On the basis of this progress, the Commission decided to set out a "road map," a strategy for moving the negotiations to a relatively rapid conclusion. The Commission outlined a schedule for serious examination of nine chapters in the first half of 2001, and nine more in the last half of 2001, reserving until 2002 the most sensitive chapters on agriculture, regional policy, finance and the budget, and institutional structure.[168]

The European Council at Nice on December 7-9, 2000 endorsed the road map, expressing the hope that the new member states would be able to participate in the June 2004 Parliament elections.[169] The Council and Commission then put the "road map" into operation. Eneko Landaburu, Director General of the Directorate General for Enlargement, appraised the road map as working "extremely well," enabling the negotiating teams to become better integrated into the process over time, and permitting the resolution of difficult issues more easily.[170] Incidentally, prior to the Nice European Council session, another European Conference of the Heads of State or Government was held on December 7, 2000, reviewing the state of progress to date.[171]

The European Council closely followed the progress of the negotiations and pressed for acceleration of the pace. At its meeting in Goteburg on June 15 and 16 2001, the European Council urged that negotiations be concluded by the end of 2002 with the candidate states then deemed otherwise ready for accession.[172] On December 14 and 15, 2001, the European Council meeting at Laeken decided that negotiations should be concluded by the end of 2002 with the ten applicant nations that are, in fact, now joining.[173] The meeting also stated the firm goal of having the new member states participate in the June 2004 European Parliament elections. The European Council urged the candidates to continue energetic

[165] *Id.* at 21.

[166] *Id.* at 10.

[167] *Id.* at 25.

[168] *Id.* at 28-30.

[169] EU Bull. 12/00, at 9 (2000).

[170] Landaburu, *supra* note 103, at 6.

[171] 2000 General Report, *supra* note 91, at 214.

[172] European Commission, General Report on the Activities of the European Union 2001, at 1 (2002) [hereinafter 2001 General Report].

[173] EU Bull. 12/01 (2001).

efforts "in particular to bring their administrative and judicial capabilities up to the required level."[174]

The Commission's fourth report, "Making a Success of Enlargement," issued on November 13, 2001,[175] continued to indicate the progress made by the candidate states in meeting the Copenhagen political criteria,[176] but urged greater efforts in reforming the judiciary, particularly to ensure its independence.[177] The applicant states enjoyed notable economic growth rates, on average in excess of that in the EU, but with a worrisome average inflation rate of over fifteen percent.[178] The report emphasized the need for action to improve the administrative and judicial capacity of the applicants.[179]

The pace of negotiations in 2001 and early 2002 accelerated. By the end of 2001, between nineteen and twenty-five chapters were provisionally closed with all the applicants (except for Bulgaria and Romania, with whom negotiations moved slowly).[180] The European Council at Seville in June 2002 welcomed "the decisive progress made in the accession negotiations" and expressed a determination to conclude them by the end of 2002.[181]

On October 9, 2002, the Commission published an important strategy paper, "Towards the Enlarged Union," along with its fifth annual report on the candidate countries' progress toward accession.[182] The key conclusion of the report is that ten nations—Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia—satisfied the Copenhagen political criterion[183] and either satisfied the Copenhagen economic criterion or would do so prior to accession.[184] As for the third criterion, the Commission concluded that all ten had made sufficient progress toward "alignment with the *acquis*" and "adequate administrative and judicial capacity," so that with "further preparatory work" they could "assume the obligations of membership."[185]

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[174] *Id.*

[175] European Commission, Making a Success of Enlargement, COM(2001)700, summarized in 2001 General Report, *supra* note 172, at 235-36.

[176] European Commission, Making a Success of Enlargement, *supra* note 175, at 10-12.

[177] *Id.* at 10.

[178] *Id.* at 13-14.

[179] *Id.* at 22-23.

[180] 2001 General Report, *supra* note 172, at 238.

[181] EU Bull. 6/02, at 88 (2002).

[182] European Commission, Towards the Enlarged Union, COM (2002) 700.

[183] *Id.* at 14.

[184] *Id.* at 15-16.

[185] *Id.* at 20.

With regard to Bulgaria and Romania, the Commission considered that they both met the political criterion, that Bulgaria, but not Romania, could now be deemed to be a functioning market economy,[186] and that neither as yet satisfied the third criterion.[187] The two applicants proposed 2007 as the target date for their accession, and the Commission declared that it would strongly support their efforts to meet that goal.[188]

The Commission determined that Turkey did not meet any of the Copenhagen criteria. The report particularly addressed the political criterion, noting that Turkey had made considerable progress in this regard through reform measures adopted by its Parliament in August 2002 (imposition of the death penalty only in case of war, and permission for broadcasting and education in languages other than Turkish).[189] However, the Commission found that serious issues needed yet to be resolved, e.g., ensuring civilian control over the military, guaranteeing freedom of expression, and ensuring administrative and judicial protection of human rights.[190]

The October 2002 Brussels European Council endorsed the Commission's findings in its report, "Towards the Enlarged Union," and indicated that the final negotiations with the applicant nations should be concluded before its December meeting.[191] The Brussels European Council also approved the Commission's proposal to deliver a final monitoring report on the applicants' further progress in November 2003.[192] Moreover, the European Parliament on November 20, 2002, endorsed the Commission's report and the timetable for accession.[193] Although the final negotiations, especially on phasing in the Common Agricultural Policy, were extremely arduous, they were successfully concluded in December. The Copenhagen European Council on December 12 and 13, 2002 marked the conclusion of negotiations with the ten applicant states, and set May 1, 2004 as the accession date.[194] Accordingly, on May 1, 2004, 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, commence their membership and voting in the Council meetings, and will join with the present member states in the election of the Parliament in June 2004.[195] The Copenhagen European

[186] *Id.* at 16.

[187] *Id. at 20.*

[188] *Id.* at 29.

[189] Id. at 30.

[190] *Id.* at 30-31.

[191] EU Bull. 10/2002, at 7 (2002).

[192] *Id.* at 8-9.

[193] EU Bull. 11/2002, at 70 (2002).

[194] EU Bull. 12/2002, at 8 (2002).

[195] *See* the provisions concerning the Parliament, Council and Commission in the Protocol on the Enlargement of the European Union, annexed to the Treaty of Nice, *supra* note 12.

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 force for peace, democracy, stability and prosperity on our continent. As fully fledged members of a Union based on solidarity, these [new member] states will play a full role in shaping the further development of the European project."[196]

The Treaty of Accession and the Ratification Process

The Final Procedural Steps

At Athens on April 16, 2003, the formal Treaty of Accession ("Treaty") 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, Slovakia and Slovenia.[197] Other than setting May 1, 2004 as the date for accession, the Treaty has no substantive text. Instead, the Treaty is implemented through the Act Concerning the Conditions of Accession, composed of sixty-three articles which set out the amendments to the Treaty on European Union, the European Community Treaty and other fundamental treaties.[198] This Act of Accession is an extremely long document, accompanied by eighteen Annexes and various Protocols which contain the specific commitments of each applicant concerning each sector of the European Union, together with any exceptions to Community or Union rules and any transition periods before these rules are fully effective.

Naturally, the most vital provisions of the Act Concerning the Conditions of Accession are those that modify the institutional structure of the EU and the EC. Article 11 sets out the number of Members of the European Parliament ("MEPs") allocated to the present and the new member states. The figures are slightly changed from those foreseen at the time of the Declaration on Enlargement annexed to the Treaty of Nice.[199] Because Bulgaria and Romania are not presently joining, the fifty MEPs initially allocated to them have been distributed among other states in such fashion that the total of all MEPs meets the ceiling of 732 (e.g., Spain and Poland both received fifty-four instead of fifty MEPs, the Czech Republic and Hungary twenty-four instead of twenty, etc.).

Article 12 sets out the weighted votes in the Council for each new state in accordance with those indicated in the Nice Protocol on Enlargement (e.g.,

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[196] EU Bull. 12/02, at 8-9 (2002).

[197] TREATY OF ACCESSION TO THE EUROPEAN UNION 2003, Apr. 16, 2003, O.J. L 236/17 (Sept. 23, 2003) [hereinafter TREATY OF ACCESSION].

[198] ACT CONCERNING THE CONDITIONS OF ACCESSION, O.J. L 236/33 (Sept. 23, 2003). The Act is followed by eighteen Annexes and the total text is nearly one thousand pages.

[199] TREATY OF NICE, *supra* note 12. *See also* Goebel, *The European Union in Transition*, *supra* note 12, at *Part I, The Treaty of Nice in Effect.*

giving Poland twenty-seven weighted votes, the same number as Spain, while the Czech Republic and Hungary get twelve weighted votes, the same number as Belgium, and Cyprus, Estonia, Latvia and Slovenia join Luxembourg in having four weighted votes).[200]

Article 13 sets the number of judges for the Court of Justice and the Court of First Instance at twenty-five, so that each new member state will have a judge on both Courts. The Act does not add any new Advocates General to the present number of eight set by EC Treaty Article 222, as amended by the Treaty of Nice[201]—presumably the new states will participate in the present system of rotation of Advocates General among the states.[202]

Article 45 provides that the ten Commission members to be designated by the new member states on May 1, 2004, will serve a brief term until October 31, because the 2004-09 Commission will take office on November 1, 2004. These transitional Commissioners will be formally named by the Council, acting by qualified majority, with the choices being made in accord with Commission President Prodi. This is a novel mode of selection. Traditionally each member of the Commission has simply been designated by his or her member state government. In the summer of 1999, for the first time, the nominees had to receive the accord of the newly chosen President (Prodi) in accord with the then-text of EC Treaty Article 214.[203] The Treaty of Nice amended Article 214 to enable the Council to nominate prospective Commissioners by a qualified majority vote in accord with the President,[204] the mode that will be used for the first time in choosing the ten new Commissioners. As a practical matter, the Council is highly unlikely to decline anyone nominated by a new member state. However, President Prodi might conceivably attempt to block a nominee whom he considers to be unsuitable, just as he did in 1999 when the present 1999-2004 Commission was selected.[205] In analyzing TEU Article 49 on the mode of accession in Part I above, the final procedural steps before the signature of a Treaty of Accession were noted. The first is the opinion of the Commission. On. February 19, 2003, the Commission issued a composite opinion endorsing

[200] Because the system of weighted voting set out in Article 3 of the Treaty of Nice Protocol on Enlargement is only effective on Jan. 1, 2005, Article 26 of the Act Concerning the Conditions of Accession, *supra* note 198, provides for a transitional system of weighted votings from May 1 - Dec. 31, 2004.

[201] *Supra* note 12.

[202] Presently the five larger States each regularly name an Advocate General, while the other three Advocates General rotate among all the other States.

[203] EC Treaty art. 214, as amended by the Treaty of Amsterdam, effective May 1, 1999, *supra* note 17.

[204] EC Treaty art. 214, as amended by the Treaty of Nice, *supra* note 12, effective Feb. 1, 2003.

[205] In the summer of 1999, Commission President-designate Prodi urged the UK to withdraw an initially proposed Conservative Party candidate for one of the two UK Commissioners. The Blair government did so, choosing instead the highly qualified Chris Patten.

the accession of all ten applicants.[206] The Commission opinion contains the customary two recitals concerning the "*acquis communautaire*." Recital 9 states that "in joining the European Union, the applicant States accept, without reserve, the Treaty on European Union and all its objectives, all decisions taken since the entry into force of the Treaties establishing the European Communities and the Treaty on European Union and the options taken in respect of the development and strengthening of those Communities and of the Union." Recital 10 declares that "the legal order introduced by the Treaties" includes the primacy of Community law, the direct effect of certain Treaty provisions and legislation, and the "uniform interpretation of Community law," and concludes with the declaration that "accession to the European Union implies recognition of the binding nature of these rules."[207] Following the Commission opinion, the Council formally voted in favor of the accession of the new states on April 14, 2003.[208]

As previously indicated in Part I, the Treaty of Maastricht introduced into the TEU Treaty Article 49 governing accessions a requirement that the European Parliament give its assent before an accession can occur.[209] The assent must be manifested by a vote showing an affirmative majority of all MEPs in office. The Parliament accordingly voted separately on each candidate state's application for accession on April 9, 2003,[210] shortly before the formal signature of the Treaty of Accession. Although the numbers varied slightly, in each case the affirmative vote was over eighty-five percent. 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."[211]

The ratification process is now in progress. Each of the applicant countries except Cyprus decided to hold a referendum on accession, but it is expected that all present member states will ratify by parliamentary action. Malta's referendum on March 8, 2003, the first, provided only a narrow fifty-three

[206] O.J. L 236/3 (Sept. 23, 2003); COM (2003) 79 final.

[207] This recital parallels that in prior Commission opinions at the time of each successive accession. *See supra* text accompanying note 118.

[208] O.J. L 236/15 (Sept. 23, 2003).

[209] *See supra* text accompanying note 26.

[210] O.J. L 236/5 to 13 (Sept. 23, 2003).

[211] Parliament's resolution has not yet been published in the Official Journal. The text is available on the Parliament's website in the section on plenary sessions.

percent majority for accession,[212] but Slovenia's referendum, the second on March 23, 2003, produced a resounding ninety percent affirmative vote.[213] During successive referenda in May and June the people of Lithuania, Slovakia, Hungary, Poland and the Czech Republic also voted in favor by convincingly large majorities.[214] The final two referenda in Estonia and Latvia in September were expected to be fairly close, but in fact resulted in two-thirds majorities in favor of accession.[215]

As previously noted, the Helsinki European Council in December 1999 urged renewed negotiations between the divided Greek and Turkish communities in Cyprus, but asserted that unification was not a precondition for accession.[216] The Brussels European Council on October 24 and 25, 2002 reiterated "its preference for a reunited Cyprus to join the European Union on the basis of a comprehensive settlement."[217] Despite vigorous negotiations under UN auspices, no agreement has been reached,[218] so only Greek Cyprus is expected to join in 2004. The Copenhagen European Council on December 12 and 13, 2002 declared that "in the absence of a settlement, the application of the *acquis [communautaire]* to the northern part of the island shall be suspended."[219] At least tensions between the Greek and Turkish communities were 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. Indeed, an election in the Turkish community on December 14, 2003 resulted in an even split in its parliament between parties advocating negotiations in early 2004 to unify the island, and the former governing party led by President Denktash which prefers the status quo.[220]

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[212] T. Barber & G. Grima, *Island Melting Pot to Blend in EU Membership*, FIN. TIMES SPEC. REP. ON MALTA, Dec. 9, 2003, at 1.

[213] *See* P. Green, *Slovenia Votes for Membership in European Union and NATO*, N.Y. TIMES, Mar. 24, 2003, at A7 (90% vote in favor).

[214] The May referenda resulted in a 91% vote in favor in Lithuania and a 92% vote in favor in Slovakia. EU Bull. 4/03, at 62-63 (2003). The June referenda in both Poland and the Czech Republic produced a 77% affirmative vote. EU Bull. 6/03 at 91-92 (2003). *See, e.g.*, R. Anderson, *Czechs Look Forward to Rejoining Western Europe*, FIN. TIMES, June 16, 2003, at 4; P. Green, *Poles Vote Yes to Joining European Union*, N.Y. TIMES, June 9, 2003, at A10.

[215] EU Bull. 9/03 at 59 (2003). *See* N. 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).

[216] *See supra* text accompanying note 93.

[217] EU Bull. 10/02, at 8 (2002).

[218] *See, e.g.*, L. Boulton, *Denktash Rejects UN Peace Plan for Cyprus*, FIN. TIMES, Mar. 7, 2003, at 7 (President Denktash rejected the UN plan on behalf of the Turkish community).

[219] EU Bull. 12/02, at 9 (2002).

[220] *See* A. Hadjipapas, *North Cyprus Poll Deals Blow to EU Hope*, FIN. TIMES, Dec. 16, 2003, at 4.

Transitional Arrangements and Safeguards

With their accession on May 1, 2004, the applicant states will become subject to the treaty rules and principles, notably the four freedoms, and to almost all of the internal market, agricultural, competition, social, environmental, transport and other legislative rules.[221] Fortunately, the applicant states have made substantial progress in adopting national legislation to conform to many of the Community directives and regulations in accordance with their obligations under the Europe Agreements and the programs set in the pre-accession partnerships. Indeed, the applicants' success in implementing so much of the "*acquis communautaire*" by the end of negotiations in 2002 has meant that there are remarkably few important derogations and transitional periods in the accession arrangements.

As is customary in accession treaties since the first enlargement in 1973, the Athens Treaty's Act of Accession provides, in detailed annexes, for a number of multi-year transition periods to phase in specific treaty or legislative rules.[222] Some periods are specific to individual applicant states, while others apply in identical terms to all or nearly all applicants. Occasionally the particular transitional arrangement is supplemented by a protocol which gives a binding permanent derogation with full treaty force, or by a declaration which serves as a statement of policy intention. It should be emphasized that in the absence of a transitional arrangement or a protocol, an applicant state is fully bound by the treaties and by all legislative and regulatory acts adopted pursuant to them (the full "*acquis communautaire*").

Undoubtedly the most fundamental treaty right limited by a transitional regime is that of free movement of workers, set out in EC Treaty Article 39, and of free movement of the self-employed, pursuant to Article 42. As noted above, the Europe Agreements did not contain any provisions enabling even partial free movement of persons.[223] Austria, Germany and some other current member states have always been concerned with the risk that they might experience a flood of migrant labor from Central European nations with chronic high unemployment. From the outset of negotiations, restrictions on free movement of persons were certain to be inserted into the Act of Accession.

In point of fact, the transitional arrangements are not as restrictive as many observers had feared. The restrictions are stated in virtually identical terms in the Annexes covering the eight Central European applicants. (There are none in

[221] On July 2001, a Commission report to Parliament estimated that the applicant 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).

[222] The Act of Accession, *supra* note 198, states in art. 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.

[223] *See supra* text accompanying notes 39-40.

the Annexes for Cyprus and Malta, which have small populations and low unemployment rates.[224]) 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 accession.[225] Article 1(3) breaks the five years into an initial two year period, toward the 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."[226] Germany and Austria, which presently have by far the largest number of legal migrant workers from Central Europe[227] and may well expect more, due to their geographic propinquity and much higher wage levels,[228] are expected to make use of the option to retain restrictive limits on migrant workers. Apparently only a few other states will permit free movement of workers from Central Europe virtually without restrictions.

Another fundamental treaty right that will be limited temporarily is that of free movement of capital in EC Treaty Article 56,[229] with respect to the purchase of land. In this case it is the majority of applicant states that fear extensive purchases of their real estate, especially farms and secondary residences, by buyers from current member states. Accordingly, the Act of Accession Annexes for most applicant states permits them to retain for several years their current restrictions on purchases of certain types of land by non-nationals. Thus, Cyprus, the Czech Republic, Hungary and Poland may continue in effect for five years their current rules restricting the foreign ownership of secondary residences.[230] Indeed, Malta obtained a treaty protocol enabling it to maintain its

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[224]Indeed, Malta has a possible reverse protection against migration of labor from current Member States. Its Annex XI provides in art. 2 that if "Malta undergoes or foreses disturbances on its labor market," it can request the Commission to permit it to suspend free movement of workers for a period necessary "to restore to normal the situation."

[225]Act of Accession, supra note 198, Annex V at art. 1(2). The text does grant Czech nationals who have legally been employed for at least 12 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."

[226]*Id.* at art. 1(6). During this seven year period a Member State may require Czech nationals to possess work permits "for monitoring purposes."

[227]*See, e.g., Moving Targets—Popular Fears about East Europeans Moving Westwards in Search of Work*, FIN. TIMES, June 16, 2000, at 14 (in 1998, Germany had 555,000 and Austria 103,000 migrants from Central Europe).

[228]*See, e.g.*, M. Smith, *EU Expansion May Trigger Labour Inflow*, FIN. TIMES, May 20-21, 2000, at 2 (citing a Commission study indicating that Germany could anticipate a disproportionate number of migrant workers).

[229]EC Treaty Article 56, supra note 2, as amended by the Treaty of Maastricht (initially Article 73b, renumbered as Article 56 by the Treaty of Amsterdam).

[230]*See*, Act of Accession, *supra* note 198, Annex V for the Czech Republic, art. 2(1); Annex VII

current restrictions on foreign ownership of secondary residences "for at least five years," i.e., perhaps indefinitely.[231] All the Central European states except Slovenia received a derogation to protect ownership by nationals of agricultural land and forests for seven years.[232] Because the issue of agricultural land ownership is more sensitive in Poland than elsewhere, Poland was able to negotiate, and obtain, a derogation for twelve years.[233]

The most controversial transition period is with regard to the complete application of the Common Agricultural Policy (CAP). Because in Poland, Hungary and several other applicant states 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.

Although negotiations on agriculture began in mid-2000, they centered principally on secondary issues, such as the phasing in of animal health and phyto-sanitary rules.[234] After the Commission issued a strategy paper on enlargement and agriculture on January 30, 2002,[235] the member states began a difficult debate on adopting a negotiation posture on agricultural aid, only concluding in late October 2002.[236] 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 Europe Council meeting in December 2002 achieved a compromise that somewhat sweetened the result for the applicant states.[237]

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for Cyprus, art. 3; Annex X for Hungary, art. 3(1); Annex XII for Poland, art. 4(1).

[231] Treaty of Accession, *supra* note 197, 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." 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.

[232] *See*, e.g., Act of Accession, *supra* note 198, Annex V for the Czech Republic, art. 3(2); Annex 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 accept 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."

[233] *Id.* at Annex XII for Poland, art. 4(1). Poland does not, however, have any expressly stated right to request the Commission for an extension.

[234] *See, e.g.*, the transitional provisions concerning various Community veterinary rules on meat, egg and dairy products and on minimum standards for the protection of laying hens in Annex V for the Czech Republic, art. 3, and in Annex XII for Poland, art. 6.

[235] EU Bull. 1-2/02, at 107 (2002).

[236] *See, e.g.*, E. Sciolino, *A Fight over Farms Ends, Opening Way to Wider Europe*, N.Y TIMES, Oct. 25, 2002, at A.3 (Member States agreed to grant the applicants initially 25% of the customary farm aid level, phasing in the remainder in annual 5% increments).

[237] *See, e.g.*, E. 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).

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 twenty-five percent of the level granted to farmers in current member states, rising gradually in percentage increments annually until they hit 100 percent in 2013.[238] The applicants may increase ("top up") the twenty-five percent amount by using their own funds to attain the level of fifty-five percent in 2004, and continue this "topping up" by thirty percent each year thereafter. In addition, the applicants will receive a special rural development aid package fixed at five billion euros for 2004-06.

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. Indeed, already in 2002, the Community allocated 550 million euros to the rural development program, principally in Poland, Hungary, Romania, the Czech Republic and Slovakia.[239] Nonetheless, many farmers are dissatisfied with the accord, and many less efficient farmers on small farms are apt to cease farming.[240]

The Annexes to the Act of Accession contain numerous additional 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."[241] 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 the initial three years after accession.[242] Experience after past accessions suggests that neither article is apt to be frequently invoked, but these emergency safeguard provisions are manifestly a prudent precaution.

Future Challenges

Although May 1, 2004 marks a milestone in the efforts of the Central European and Mediterranean states to achieve a successful integration into the EU, there are inevitably many serious obstacles that they must yet overcome. In

[238]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).

[239]EC Commission, General Report – 2002, at 271 (2003).

[240]*See, e.g.*, C. 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).

[241]Act of Accession, *supra* note 198, at art. 37.

[242]*Id.* at art. 38.

particular, all of the applicants must substantially upgrade their administrative and judicial infrastructure and significantly improve their economic capabilities.

In application of the third, or infrastructure, criteria enunciated by the 1993 Copenhagen European Council, the Commission regularly reviewed this topic in successive progress reports, urging the Central European applicant nations to steadily improve their administrative civil service and their judiciary.[243] On June 5, 2002, the Commission initiated an action plan to improve the administrative and judicial capabilities of each applicant.[244] 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. Article 34 of the Act of Accession states that the EU will provide further financial assistance to the new states to "strengthen their administrative capacity to implement and enforce Community legislation."[245] The Commission's final progress report, the Comprehensive Monitoring Report issued on November 5, 2003, expresses the concern that the applicants' administrative capacity continues to "need strengthening in terms of human resources, training (including language training) and budget," and notes the "perception . . . that the level of corruption in the acceding countries is still high."[246]

In this final period, 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, eighty million euros to Lithuania to phase out its out-of-date nuclear plants.[247] 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.[248] The Act of Accession provides that no new financial commitment will be made under the Phare or similar programs after December 31, 2003.[249] However, it is evident that in the future substantial amounts from the Community's usual structural and infrastructure aid funds will have to be devoted to the needs of the applicant countries, a prospect which naturally concerns the chief past recipients of such aid (notably Greece, Ireland, Spain and Portugal).

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[243] *See supra* text accompanying note 174. Landaburu, Director-General for Enlargement, has observed that a "modern, well-functioning public administration" and a "well-trained judiciary versed in Community law" are indispensable for membership. Landaburu, The Fifth Enlargement of the European Union, *supra* note 103, at 9.

[244] COM (2002) 256.

[245] Act of Accession, *supra* note 198, at art. 34.

[246] EC Commission, Comprehensive Monitoring Report on the State of Preparedness for EU Membership, at 8 (Nov. 5, 2003), *available at* http://www.europa.eu.int/comm/enlargement/report_2003/index.htm.

[247] EC Commission, General Report – 2002, at 270 (2003).

[248] *Id.* at 54.

[249] Act of Accession, *supra* note 198, at art. 32.

There is no question but that the greatest challenges for the new states lie 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. 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.

Although the Commission's Comprehensive Monitoring Report of November 5, 2003 concluded that "[m]acroeconomic stability has been preserved" in the acceding nations, it also noted that public finances have deteriorated in most applicant states, with annual deficits as high as nine percent, and persistent high unemployment.[250] In view of the fact that none of the Central European applicant states 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.

A final word with regard to the applicant nations that will not be joining next May. Even Bulgaria and Romania accept that their economic progress has lagged behind that of the other candidate states. In its October 2002 report, the Commission asserted that both fulfilled the Copenhagen political criterion but would require several years to fully meet the economic and infrastructure criteria.[251] The two countries proposed 2007 as the target date for accession. Although the December 12 and 13, 2002 Copenhagen European Council endorsed this target, it did so provided that each applicant makes sufficient progress by that time, and the European Council specifically underlined "the importance of judicial and administrative reform" in this context.[252] On November 5, 2003, the Commission issued a special progress report on the pre-accession status of Bulgaria and Romania.[253] While both continue to make political and economic progress, Romania lags behind economically.[254] Both also continue to have serious problems in upgrading their administrative and judicial infrastructure.[255] 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 the Commission indicated in March that it would start the application review

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[250] *Supra* note 246, at 7.

[251] *See supra* text accompanying notes 186-88.

[252] EU Bull. 12/02, at 10 (2002).

[253] EC 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.

[254] The Commission concluded that Romania was still not a functioning market economy, although close to being one. *Id.* at 10.

[255] *Id.* at 11.

process.[256] Croatia is considered to have a reasonable prospect of joining the EU before the end of the decade. No other European nation has any immediate prospects of applying for accession, although the Ukraine would certainly be interested in doing so at some point.[257]

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.[258] The December 12 and 13, 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, then the European Council meeting to be held in December 2004 would authorize the initiation of accession negotiations.[259] Although it expressed great disappointment over the delay,[260] 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 mid-2003, Turkey adopted legislation intended to place the military under stronger political control and permit the use of languages other than Turkish in the media.[261] However, 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.[262] The European Council at Thessaloniki on June 19 and 20, 2003 specifically supported Turkey's "efforts to fulfill the Copenhagen political criteria" but warned that "significant further efforts . . . are still required."[263]

Conclusion

This article has presented an overview of the complex legal and political process by which ten applicant nations from Central Europe and the

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[256]EU Bull. 3/03 at 102 (2003). The new Central European Member States are quite likely to support early and rapid negotiations with Croatia.

[257]*See, e.g.*, J. Dempsey & G. Parker, *EU Enlargement Chief Keeps an Eye on the Distant Horizon*, FIN. TIMES, Oct. 10, 2003, at 4 (Commissioner Verhergen reviews prospects of the Ukraine).

[258]*See supra* text accompanying notes 189-90.

[259]EU Bull. 12/02, at 10 (2002). *See also* E. Sciolino, *European Union Turns Down Turkey's Bid for Membership*, N.Y. TIMES, Dec. 13, 2002, at A16.

[260]D. Filkins, *Turks Denounce European Snub—But Then Soften Their Tone*, N.Y. TIMES, Dec. 14, 2002, at A10.

[261]D. 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).

[262]J. Dempsey, *'Cyprus Problem' Threatens Turkey's EU Aim*, FIN. TIMES, Nov. 5, 2003, at 4; J. Dempsey, *Turkey Told That Cyprus Deal Would Assist Its Bid to Join EU*, FIN. TIMES, Nov. 20, 2003, at 3.

[263]EU Bull. 6/03, at 13 (2003).

Mediterranean are joining the European Union. Within a matter of months, on May 1, 2004 the EU will be enlarged from fifteen to twenty-five member states, augmenting significantly its political and economic importance.

In view of the large number of candidate states, it is astonishing that the pre-accession process has been completed so quickly. Who could have foreseen in 1990 that within fifteen years so many fledgling Central European democracies would become an integral part of the EU?The rapidity with which the new democracies of Central Europe have carried through their evolution into free market economies capable of becoming member states is certainly remarkable. Also remarkable has been the role of the Commission as the working engine of the accession process. Finally, the political vision and leadership of the European Council is to be commended in its establishment of the Copenhagen criteria for membership and in its guidance of the successive phases of the accession process.

Although the candidate nations will certainly have transitional economic and social difficulties to overcome as they integrate their economies into the EU, in the long run this integration is bound to be highly beneficial to their people. Likewise, although the EU's institutional structure will undergo a period of adjustment in accommodating so many new member states, in the long run the European Union will benefit significantly from the political, social, cultural and economic contributions of the candidate nations.

ECONOMIC EFFECTS OF EU ENLARGEMENT: PROSPECTS AND CHALLENGES

Speech Delivered by Peter Primus†
at Loyola University Chicago School of Law,
March 27, 2003

Introduction

From the outset, opening up the borders was a striking symbol of the European Union ("EU"). The break-up of those barriers, which eventually led to the creation of the common market, remains a central characteristic of the EU.[1]

Today, on the verge of the most comprehensive enlargement in EU history, this hallmark of the dissolution of borders reaches a new dimension. With the accession of eight Central and Eastern European countries ("CEEC"), Cyprus, and Malta, the EU is transformed from a Western European post-war community to a union with a truly pan-European aspiration.[2]

No doubt, the enlarged EU will be more heterogeneous and diverse than the present EU of fifteen member states ("EU 15"). The new and the old member states will differ—at least in the short-term—in their living conditions and their needs, in their scope of political action, and in their administrative capacity. These differences constitute a major challenge to European policy makers, be it in the field of economy, where large discrepancies of income and wealth have to be overcome, or in the field of institutional reform, which is meant to ensure the smooth running of the political decision-making process in the EU.

The assessment of the economic effects of the eastward EU enlargement requires a holistic approach, not a mere fiscal calculation oriented only towards the implications on the EU budget. The enlargement process will lead to more economic growth, innovation, and employment, and will outweigh the fiscal costs substantially. The economic growth induced through the integration process in the accession countries contributes to the political stabilization in these countries, thereby minimizing the risk of potentially high costs due to

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[1] *See* Josef Janning, *Europe—The Future of the Union*, DEUTSCHLAND MAGAZINE 36-40 (December 2001/January 2002); *see also* www.cap.uni-muenchen.de, which contains a wide selection of papers on EU expansion.

[2] *See* European Union, *Enlargement - A Historic Opportunity*, *at* http://europa.eu.int/comm/enlargment/intro/index_en.htm (last visited Nov. 23, 2003) [hereinafter *Enlargement – A Historic Opportunity*].

instability and internal conflicts (as, for instance, in the Balkan region).[3] Through the enlargement, the increased political weight of the EU in international organizations such as the World Trade Organization or the United Nations will produce further positive economic effects.[4] The opening of new markets in the CEEC also constitutes a challenge to the economy in the EU 15. It entails an improved allocation of resources as a result of more trade, investment and labor migration. In the end, more wealth is created and the competitiveness of the EU in the global arena is strengthened as well.[5]

Effects on the Real Economy

Trade

Trade effects, with the exception of those to the agricultural sector, have already been anticipated, largely through the existing EU association agreements.[6] The past decade has seen a significant increase in trade volume.[7] EU 15 exports into the CEEC increased an average of fifteen percent annually between 1988 and 1999, and CEEC imports into the EU 15 increased by twelve percent annually.[8] Without the perspective of a future accession, this impressive trade upswing could not have been possible. At the same time, the composition of trade shifted from mainly agricultural products to manufactured goods like machinery and automobiles.[9] The share of the CEEC in overall EU foreign trade (so called extra-EU trade) amounts to roughly ten percent.[10] On the other hand, an average of sixty-eight percent of the CEEC exports and sixty-two percent of their imports go into or come from the EU.[11] This shows a radical reorientation away from the former trade among the Council for Mutual Economic Assistance members toward the EU.

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[3] *See* European Union, *Enlargement: Basic Arguments*, *at* http://europa.eu.int/comm/enlargement/arguments/index.htm (last visited Sept. 25, 2003) [hereinafter *Enlargement: Basic Arguments*].

[4] *See Id.*

[5] *Id.*

[6] *See* European Union, *Europa: The European Union On-Line*, *at* http://europa.en.int/comm/enlargment/pas/europe_agr.htm (last visited Sept. 26, 2003).

[7] Directorate Generale For Economic and Financial Affairs, European Commission, *Enlargement Papers: The Economic Impact of Enlargement* 5, *at* http://europa.eu.int/comm/economy_finance/publications/enlargement_papers/enlargementpapers04_en.htm (last visited Sept.26, 2003) (discussing investment in the CEEC) [hereinafter *Enlargement Papers*].

[8] *Id. at* 21.

[9] DRESDNER BANK AG, THE CHALLENGE OF EU ENLARGEMENT: SEIZING GROWTH OPPORTUNITIES, PUSHING AHEAD WITH REFORM 36 (July 2001).

[10] In contrast, the US share is twenty-two percent. *See Enlargement Papers, supra* note 6, at 23.

[11] *Enlargement Papers, supra* note 6, at 22.

Investment

Foreign Direct Investment ("FDI") has contributed decisively to the modernization and expansion of the outdated capital stock in the CEEC, thereby ensuring a sufficient capital inflow to counterbalance the high current account deficit.[12] In addition, this FDI flow implies a considerable transfer of know-how.[13] Globally, the CEEC attract the highest FDI in terms of percentage of gross domestic product ("GDP"), which from 1995 to 1999 averaged four percent, with an increase to five and one-half percent in 2000.[14] The EU contributed on average sixty percent to the FDI inflow. The highest rate was for the Czech Republic at ninety-five percent.[15]

The structure of FDI suggests that fifty percent is allocated to non-tradable goods or institutions, primarily infrastructure and banks; another big share goes to the improvement of market access in the CEEC.[16] A further increase of FDI will occur with the accessions in 2004 due to the ongoing convergence of law systems, economic structures, financial sectors, and administrations. This is of particular importance for small and medium-sized enterprises and for geographically more distant EU member states like Spain.

Migration and Labor Markets

In both the short and long-term, positive effects of accession will outweigh the costs of transition. The integration of a qualified work force into the EU market, especially in sectors where there is a need for additional labor such as the information technology sector, will have a stimulating effect and will ultimately trickle down to the demand for less qualified work. Indeed, the growth impetus from accession countries and trade surpluses vis-à-vis the CEEC are already creating new jobs in the EU 15.[17] In the short-term, regional and structural difficulties might affect labor markets, particularly in the member states close to the CEEC.[18] Generally speaking, there will be no drastic, comprehensive migration movements; rather, there will be a moderate flow of workers westward. It is forecast that sixty percent of migrant workers will move to Germany and about ten percent to Austria.[19] The average annual inflow of

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[12] *Id.* at 24.

[13] *Id.*

[14] Jaime Turrion & Carmela Martin, *Eastern Enlargement of the European Union And Foreign Investment Adjustments* 3-5, *at* http://ideas.repec.org/p/eeg/euroeg/24/html (last modified Oct. 3, 2003).

[15] *Enlargement Papers, supra* note 6, at 26.

[16] *Id.* at 24.

[17] *See Enlargement: Basic Arguments, supra* note 2.

[18] *Enlargement Papers, supra* note 6, at 26-27.

[19] *Id.* at 37.

workers into Germany and Austria is estimated at roughly 300,000 persons.[20] Therefore, a transitory arrangement has been negotiated to restrict the free movement of the labor force from the CEEC.[21] The arrangement envisages a phased transitional period of up to seven years, during which the member states will inform the European Commission whether they wish to continue applying their national arrangements or EU law.[22] The latter is to be generally applied five years after accession.[23] However, a member state may maintain its national arrangements for a maximum of two additional years should there be a major disruption to its national labor market or the threat of such a disruption.[24]

Repercussions on EU Policies

The enlargement process will increase reform pressure in vital, yet cost-intensive, fields of EU policy, particularly the Common Agricultural Policy ("CAP") and the structural policy, which together absorb around eighty percent of the EU budget.[25] Concerning CAP reform, an agreement was reached at the European Summit in Brussels in October 2002 fixing the ceiling for the 2007–2013 budget period for annual market regulation payments, as well as direct payments, at the level expected in real terms for 2006 (so-called containment), with a one percent annual fixed compensation for inflation.[26] In this way, financing the additional costs for the new member states will be offset by savings made by all.

Discrepancies in economic development among new and old members are substantial.[27] Most of the regions eligible for structural fund payments will be located in the new member states.[28] In order to finance the necessary structural

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[20] TITO BOERI, HERBERT BRÜCKER ET AL., EUROPEAN INTEGRATION CONSORTIUM (DIW, CEPR, FIEF, IAS, IGIER): THE IMPACT OF EASTERN ENLARGEMENT ON EMPLOYMENT AND WAGES IN THE EU MEMBER STATES (2000), *available at* europa.eu.int/comm/employment_social/employment_analysis/ report/ex_summary_en.pdf.

[21] *See* Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 236) 17, *available at* http://europa.eu.int/eur-lex/en/archive/2003/l_23620030923en.html.

[22] Europa, *Enlargement: Negotiations of the Chapter 2*, *at* http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/index.htm.

[23] *Id.*

[24] *Id.*

[25] Europa, *General Publications: EU at a Glance, at* http://europa.eu.int/comm/publications/archives/booklets/eu_glance/16/txt_en.htm#3.4.

[26] The European Union in Australia, *Results of the Brussels European Council, 24-25 October 2002, at* http://www.ecdel.org.au/pressandinformation/EurCouncil25Oct.htm.

[27] *See* Europa, *Regional Policy, at* http://europa.eu.int/comm/regional_policy/intro/regions8_en.htm.

[28] *Id.*

adjustments, foremost in the area of infrastructure, the "old" EU has to generate substantial savings. However, the absorptive capacity of the CEEC must also be taken into consideration. Structural adjustment aids above the level of four percent of GDP cannot be used appropriately and efficiently anymore.

Financial means for EU enlargement are sufficient, provided that direct payments to farmers in the CEEC will be restricted. The figures and shares for the 2007–2013 budget framework will be negotiated among old and new member states in 2006. The contributions of the accession countries to the EU budget will be rather moderate; the CEEC will presumably be net receivers of EU funds for a number of years.[29]

Economic Growth

The accession perspective induced in the CEEC a sustainable and stable growth rate in GDP, in contrast to stagnation or even real income losses during the beginning of the transformation process after 1989.[30] According to the European Commission, the eight CEEC will enjoy a growth rate between four and one-quarter to five percent annually from 2005–2010, whereas the growth rate without accession would be just three percent annually.[31] However, the adjustment process to the EU average per capita GDP will be a lengthy one. In 1999, the CEEC average per capita GDP was forty-three percent of the EU 15 average. It is estimated that the CEEC will reach a level of forty-nine percent of the EU 15 average in 2010, and only after twenty-two years will it reach seventy-five percent.[32]

For the EU 15, only very moderate effects on the growth of GDP are expected.[33] The cumulative effects from 2000–2009 will be in the range of an additional one-half to seven-tenths percent as a percentage of GDP.[34] Nevertheless, EU enlargement provides in the short and long-term:

- a stable domestic market (economies of scale);
- higher competitiveness of European companies in a global economy; and
- greater weight of the EU in determining the framework for the international economy.

What Next?

The signing of the Accession Treaty with the ten accession countries will take

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[29] *See* Europa, *Enlargement: Frequently Asked Questions, at* http://europa.eu.int/comm/enlargement/faq/faq2.htm#costs.

[30] *Id.*

[31] *Enlargement Papers, supra* note 6.

[32] DRESDNER BANK AG, THE CHALLENGE OF EU ENLARGEMENT: SEIZING GROWTH OPPORTUNITIES, PUSHING AHEAD WITH REFORM 50 (July 2001).

[33] *Enlargement Papers, supra* note 6.

[34] *Id.*

place in Athens on April 16, 2003.[35] This will be followed by a ratification process in the accession countries and the member states.[36] In the accession countries, with the exception of Cyprus, there will also be referenda.[37] Finally, on May 1, 2004, these ten countries will accede to the European Union in time to take part in the elections of the European Parliament in June 2004.[38]

[35] The Treaty of Accession was signed in Athens on April 16, 2003 by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia, and existing member states of the EU. *See* Treaty of Accession *at* http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003.htm (last visited Oct. 1, 2003).

[36] *Id.*

[37] *Id.*

[38] *See Enlargement- A Historic Opportunity*, *supra* note 1; *see also* Seville European Council, Presidency Conclusions, Sec.II para 18 (2002), *at* http://europa.int/council/off/conclu/.

THE INTRODUCTION OF EUROPEAN UNION COMPETITION LAW AND POLICY IN THE NEW MEMBER STATES

Andre Fiebig†

Introduction

The competition policy negotiations with the Eastern European candidate countries have been at times arduous but remarkably expedient. The accession negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia were formally opened after the Luxembourg Council meeting in December of 1997. These countries are sometimes referred to as the "Luxembourg Group." The other group of accession candidates, the "Helsinki Group," is comprised of Bulgaria, Latvia, Lithuania, Malta, Romania, and Slovakia. In order to facilitate the rapid advancement of negotiations, the negotiations were divided into thirty-one policy areas or "chapters." Negotiations with the Luxembourg Group over the competition "chapter" began in 1998 and with the Helsinki Group in 2000.[1] Negotiations were closed earlier this year with a target date of May 1, 2004 for accession. It is quite remarkable how much has been accomplished in such a short time, particularly when one considers that the European Union ("EU") negotiated the concerns of each of the candidate countries individually.[2] The introduction of competition law and policy in the candidate countries is characterized by a panoply of political, sociological and legal challenges. My presentation will attempt to identify the challenges that the EU has faced in the process leading up to the accession of the candidate countries and the challenges that an expanded EU will likely face in the near and long-term future. I will conclude my presentation with a few predictions on the future of competition law in the European Union comprised of twenty-five member states.

General Challenges

According to one of the Copenhagen criteria, membership in the EU requires

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[1] *Enlargement: Negotiations of the Chapter 6 Competition Policy, at* http://europa.eu.int/comm/enlargement/negotiations/chapters/chap6/index.htm (Dec. 2000) (Negotiations with Bulgaria on the competition chapter began in 2001).

[2] The Commission refers to this approach as the strategy of differentiation. Youri Devuyst, *EU Enlargement and Competition Policy: Where Are We Now?*, 2002 EC COMPETITION POLICY NEWSLETTER (Competition Directorate-Generale of the European Commission, Brussels, Belgium), Feb. 2002, at 3.

adoption by the candidate countries of the EU's *acquis communautaire*.[3] Moreover, as a prerequisite for closing the negotiations over the competition chapter, the EU required the candidate countries to maintain laws applicable to competition and state aid, adequate administration to enforce those laws and a credible enforcement record in the area of competition law.[4] For the accession countries, this may be characterized as representing a fundamental shift to greater reliance on the market for organization of the economy and the distribution of wealth. Adherence to the free movement principles means that member states must remove state-imposed obstacles to trade. The introduction of the competition rules means that private obstacles to trade are prohibited. In other words, membership in the EU means acceptance not only of the *acquis communautaire*, but also of the "economic constitution"[5] of the EU, which itself is based on notions of liberal democracy.

It is important to recognize that the candidate countries will be starting at a point that is different from that of the existing member states at the time of their accession. Most of the existing fifteen member states already were familiar with rules regulating competition prior to their entry into the European Community. Although the Europe Agreements with the accession countries already provided for mirror competition law, the experience in applying these rules has been limited.[6] Moreover, the "ramp-up" period for the new member states will be much shorter than that of the founding member states. Although the competition rules were part of the initial Treaty Establishing the European Community ("EC Treaty") signed in 1957,[7] their enforcement was not really possible until the adoption of Regulation 17 in 1962.[8] Even then, the competition rules codified in the EC Treaty were not immediately enforced. Their application was as flexible as needed in order to achieve the desired integration at the desired speed.[9] Now,

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[3] Copenhagen European Council, Presidency Conclusions, E.C. Bull., no. 6, at 7 (1993).

[4] *See* Youri Devuyst, *supra* note 2.

[5] *See* Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, COLUM J. EUR. L. 289 (2000); P. Behrens, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft*, in: BRÜGGEMEIER, G. (ed.), 73-90 (Verfassungen für ein Ziviles Europa) (1994).

[6] See Milan Banas, *The New Anti-Monopoly Law in Slovakia*, 16 EUR. COMPETITION L. REV. 16(7), 441-445 (1995); Mark A. Dutz and Maria Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44 EUR. ECON. REV. 762 (2000); Bernard Hoekman and Simeon Djankov, Competition Law in Post-Central-Planning Bulgaria, ANTITRUST BULLETIN 227 (2000); Ales Musil, *Protection of Economic Competition in the Czech Republic*, 17 EUR. COMPETITION L. REV. 1996, 17(8), 476-479; Tóth, Tihamér, *Competition Law in Hungary: Harmonisation Towards E.U. Membership*, 19 EUR. COMPETITION LAW REV. 1998, 19(6), 358-369; Virtanen, Dalia, *The New Competition Act in Lithuania*, 18 EUR. COMPETITION LAW REV. 2000, 21(1), 30-36.

[7] CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, (March 25, 1957), O.J. (C325) 13, *at* www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf.

[8] Council Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, (1962). 87 O.J. SPEC. ED., *at* http://europa.eu.int.

[9] DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING

however, the new member states will be assimilated into a system that has been in existence for several decades. Its flexibility will be limited by case law in existence and stated European Commission policy.

The introduction of competition law into the new member states has an aura of antitrust imperialism for many people. Professionals, in particular lawyers, are often captured by their training and the context in which they practice their profession. The application of the law to achieve fair results is not always appropriate in different societies. For example, an interpretation of what constitutes anti-competitive behavior may legitimately vary between societies; an aspect often overlooked by antitrust regulators, practitioners and economists. Moreover, antitrust lawyers are particularly vulnerable to making this mistake because many believe that the application of competition rules is based on objective economic principles. And, after all, economics is sometimes considered a science that can be supported by empirical evidence. As the history of antitrust law shows, there are very few objective rules of antitrust law that do not change over time.[10] As Professor Waller correctly observes, "Antitrust, like all law, is not universal, but specific to a time, place, and culture."[11]

The popularity of the term "competition culture" is a manifestation of the antitrust imperialism to which I refer. Officials in both the EU and the United States have used the term "competition culture" without precise definition.[12] The basic message is that the new member states need to adopt the EU and US understanding of competition in order for these states to join the developed world. This position not only ignores the possibility that the objectives of competition policy may be achieved by other means, but also the fact that neither the US, nor the EU, can claim to be entirely right when it comes to competition law. No jurisdiction in the world gives absolute deference to the protection of competition. There are always situations in which democratic societies, through their legislatures, decide that competition should not be the governing principle.[13] The question then becomes not whether a state protects competition, but rather how much competition to allow. In Germany, for example, the German Minister of Economics recently granted approval to a merger that the Bundeskartellamt had prohibited because of its negative effect on competition in

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PROMETHEUS (1998); Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMM. MKT. L. REV. 257 (1992).

[10] *See* Thomas J. Di Lorenzo & Jack C. High, *Antitrust and Competition, Historically Considered*, 26 ECON. INQUIRY 423 (1988); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992 (1996).

[11] Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 25 BROOK. J. INT'L L. 455, 463 (1997-1998).

[12] Speech by Mario Monte, *Enforcement of Competition Policy–Case for Accession Negotiations and for Developing a Real Competition Culture* Speech/01/294 (2001), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist.

[13] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 150-51 (1982) (*citing* United States as an example of such a democratic society).

Germany.[14] The decision was based on the nebulous concept of "public interest" rather than on a concern for preserving competition.

In addition to recognizing the absence of an objective model of antitrust, one needs to recognize the inherent vagueness of the term "competition." The dynamic character of the concept of competition means that identifying its restraint is relative.[15] The candidate countries will struggle with this. Reliance upon the methodology currently applied in the EU provides only minor relief because of the different stages of economic development of the candidate countries.[16] Moreover, the accession of the ten new member states means an increase of official languages from eleven to twenty-two.[17]

Finally, the introduction of competition law in the new member states will confront different social norms and expectations. The role of the state in economic activity, both as a participant and as a protector, differs between societies. Accession will require at least partial conformity to the western European understanding of the role of the state in protecting competition. This adjustment is a challenge to the integration process.[18]

Specific Challenges

Now that I have identified several of the abstract challenges associated with the introduction of competition law in the candidate countries, I have fulfilled my academic obligations. As I am a legal practitioner, I would like to move away from the abstract and towards the concrete. In my view, the primary challenge of introducing competition law in the candidate countries will be to address the market dominance of privatized entities. The economies of the new member states are characterized by large state-owned enterprises. The

[14] *E.ON/Ruhrgas*, Verfügung vom 5. Juli 2002, 52 WIRTSCHAFT UND WETTBEWERB 751 (2002); *See* W. Möschel, Neue Rechtsfragen bei der Ministererlaubnis in der Fusionskontrolle, 2002 Betriebs-Berater 2077.

[15] Erich Hoppmann, Zum Problem einer Wirtschaftspolitisch Praktikablen Definition des Wettbewerbs, in: GRUNDLAGEN DER WETTBEWERBSPOLITIK (1968). Moreover, sociolinguistics illustrate that even the same term often is society-dependent.

[16] James Langenfeld & Marsha Blitzer, 1, *Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 AM. U.J. INT'L L. & POL'Y 347 (1991); A.E. Rodriguez & Mark Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Counties*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994).

[17] For a discussion of the myriad of issues raised by the use of a large number of different languages within one legal system see S. Moratinos Johnston, Multilingualism and EU Enlargement, 2000 Terminologie et Traduction 5; Gerd Toscani, *Translation and Law – The Multilingual Context of the European Union Institutions*, 30 INT'L J. LEGAL INFORMATION 288 (2002); R. Baerts, *Law and Language in the European Union*, 1997 EC TAX LAW 49; D. Martiny, *Babylon in Brüssel?* Das Recht und die europäische Sprachenvielfalt, 1998 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 227.

[18] William Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 455 (1997). Anne Forualczyk, *Competition Policy During Transformation of a Centrally Planned Economy*, 1992 FORDHAM CORP. L. 131 (1993).

introduction of competition law will mean the liberalization of these sectors of the economy. The process of transforming an enterprise from state ownership to private ownership is only half the battle. At least initially, the newly privatized firms will likely enjoy a dominant position in the sector of the economy in which they operate. As the European Commission can verify, the competition "policing" of such firms is often difficult and fraught by political barriers. Many of the formerly state-owned enterprises in the EU have attempted to employ different mechanisms by which to maintain their dominance.[19] The competition authorities in new member states will have a similar challenge except that they lack the stature in their countries that many competition authorities in the old member states enjoy.

In addition to the dominance of newly privatized companies, the competition authorities in the new member states will encounter industries to which the old member states have granted exclusive rights. Here again, this challenge is not foreign to the EU. The EU Community has struggled for years to draw a line between those industries that should be exposed to competition and those industries operating for the public good that should be shielded from competition. Article 86 of the EC Treaty prevents the member states from maintaining measures which facilitate violations of the competition rules by public undertakings to which the member states have granted exclusive rights. As illustrated by *Calì e Figli*, if a private undertaking has been granted the responsibility to fulfill public functions, then the competition rules do not apply.[20]

Predictions

I would like to conclude by offering some predictions for the near future. Allow me to begin by simply making the observation that, from an administrative perspective, the introduction of European competition law into the new member states could not have come at a worse time. The European Commission is currently in the process of "modernization" of its competition rules.[21] One legislative instrument that forms the basis of the modernization will coincidentally come into force on the same day as the accession of the new member states.[22] Because the modernization process involves fundamental

[19] *See e.g.* Commission of Dec. 5, 2002, *Decision Relating to a Proceeding Under Article 82 of the EC Treaty,* 2002 O.J. (L 61) 32; Commission Decision of Mar. 20, 2001, *Relating to a Proceeding Under Article 82 of the EC Treaty* 2001 O.J. (L 125) 27.

[20] Calì e Figli, Case C-343/95, 1997 E.C.R. I-1547; *see also* Fluggesellschaft v. Eurocontrol, Case C-364/92, 1994 E.C.R. I-43.

[21] Damien Geradin, *Competition Between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law*, 9 COLUM. J. EUR. L. 1, 1 (2002); Wouter P.J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 FORDHAM INT'L L.J. 1655 (2001).

[22] *Commission Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, 2003 O.J. (L 1) 1, *at*

changes to the substantive and procedural rules, legal uncertainty is an inevitable consequence of the modernization process. For example, it remains to be seen how the increased application of the European competition rules by the member states will play out. The European Commission will have enough difficulty ensuring consistent results between fifteen different competition authorities let alone twenty-five.

This legal uncertainty, which is the Achilles heel of businesses, will be exacerbated—and indeed has been exacerbated—by the lack of a consensus over an appropriate economic model. The application of competition law is guided primarily by economics.[23] In recognition of this fact, the European Commission recently announced the creation of a new position of Chief Economist within the Competition Directorate, with the staff necessary to provide both an independent economic viewpoint to decision-makers at all levels and to provide guidance throughout the investigation process.[24] However, there is no consensus within Europe, and certainly not the world, over the appropriate economic model and the role of non-economic concerns in the application of competition law.[25] Economic efficiency, the perceived purpose of US antitrust law,[26] is not the exclusive goal of EU competition law.

The current US antitrust jurisprudence tends to rely heavily on the concept of efficiency in determining which conduct should be prohibited. European competition law is situated in a much different legal, economic and social context. Although the EC Treaty importantly proclaims the protection of competition as one of its fundamental goals,[27] it is only one of many goals that share the same legal status. For example, the EC Treaty specifically provides

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http://europa.eu.int/abc/treaties_en.htm.

[23] *See e.g.* Di Lorenzo & High, *supra* note 10.

[24] Commission Press Release, Commission Reorganizes its Competition Department in Advancement of Enlargement, IP/03/603 (30 April 2003), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist; *see also* Speech by Mario Monti, Competition Enforcement Reforms in the EU : Some Comments by the Reformer, Georgetown University Washington, Apr. 4, 2003 Speech/03/200 *at* http://europe.eu.int/rapid/start/cgi/guesten.ksh?reslist.

[25] Eleanor Fox, *What is Harm to Competition? Antitrust, Exclusionary Practices and the Elusive Notion of Anticompetitive Effect, in* THE FUTURE OF TRANSNATIONAL ANTITRUST – FROM COMPARATIVE TO COMMON COMPETITION LAW (Josef Drexl ed., 2003).

[26] Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879 (1990) (explaining that in the US there has been significant debate over the goals of antitrust, and that, although it is difficult to identify a specific goal intended by the drafters of the legislation, the current consensus is that the antitrust laws are designed for the "protection of competition, not competitors"). *see, e.g.* Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Atlantic Richfield Co. v. U.S.A Petroleum Co.,495 U.S. 328 (1990); Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern., 256 F.3d 799 (2001); Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002); *see also* Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001) (stating that in the U.S. legal, economic and social system, competition is worthy of protection because it is used as a tool to allocate resources efficiently: "The goal is efficiency, not competition").

[27] EC TREATY art. 3(1)(g).

that "(e)nvironmental protection requirements must be integrated into the definition and implementation of the Community policies. . . ."[28] It is not surprising, therefore, to see non-economic considerations influencing the application of the competition rules.[29] Although this is not a critical assessment, one must concede that the potential for non-competition factors to influence the application of the competition rules will result in very different results in the ten new member states.[30]

The *German Book Publishers* case provides a cogent example of how competition law interacts with other social concerns in Europe. In contrast to the US, the protection or promotion of cultural and linguistic diversity is recognized by the European Commission as having an influence on the application of competition law. In Germany, book publishers have adopted a system ("Sammelrevers") to allow the publishers to fix the resale price of books. As long as retail book buying was primarily a local activity, this system did not draw the attention of the European Commission, and it was expressly exempted under German competition law.[31] The basic rationale behind allowing such activity was to preserve cultural heritage.[32] Once the Internet made the purchase of books easier, the issue arose whether the system infringed Article 81(1) of the EC Treaty. After the book publishers' association agreed not to fix the resale price of books for sale outside Germany, the European Commission took the position that there was no effect on trade between member states and hence no infringement of Article 81 of the EC Treaty.[33] As is generally recognized,[34] this case illustrated the readiness of the European Commission to take into account national claims of cultural and linguistic diversity. It is not necessarily consistent with the European Commission's otherwise broad interpretation of the interstate trade requirement.

The situation is not helped by the inadequate guidance from European courts. In the field of competition law, European courts have traditionally deferred to the discretion of the European Commission.[35] The qualification of vertical agreements establishing absolute territorial protection is but one example. For

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[28] EC TREATY aet. 6 EC.

[29] *See e.g.* DSD, Grüner Punkt, 1997 O.J. (C 100) 4; Eco-Emballages, 2001 O.J. (L 233) 45.

[30] The Commission is aware of this potential and has consequently established a network comprised of the competition authorities of the member states. The main objective of this network is to coordinate the application of the European competition rules by the individual member states.

[31] §15 GWB.

[32] BGH, GRUR 1979, 490ff.

[33] IP/02/461.

[34] Hanns Peter Nehl & Jan Nuijten, *Commission Ends Competition Proceedings regarding German Book Price Fixing*, 2002 (2) COMPETITION POLICY NEWSLETTER 35 (2002).

[35] *See e.g.* Case T-342/00, Petrolessence SA v. Commission, 2003 E.C.R. II-67. Only in the last several years have the Community courts started to devote greater scrutiny to the conclusions of the Commission.

many years, the European Commission and European courts have treated absolute territorial protection as a "hardcore" restraint that could not even qualify for an exemption under Article 81(3) of the EC Treaty.[36] However, in *Royal Philips Electronics NV v. Commission*, the Court of First Instance stated that "even an agreement imposing absolute territorial protection may escape the prohibition contained in Article 81(1) if it affects the market only significantly."[37]

Another example of the lack of guidance from the European courts is *Wouters v. Nederlandse Orde van Advocaten*.[38] For many years, the European Commission has equated a restraint of competition in the context of Article 81(1) of the EC Treaty with a limitation of the commercial freedom of a market actor.[39] Even the European Court of Justice ("ECJ") has confirmed this interpretation.[40] This approach was attractive, particularly in view of the open-ended rule of reason approach applied by US courts, because it facilitated easy application of the norm and avoided the necessity to engage in complicated economic analysis of the particular practice. Recently, however, the ECJ seemed to suggest that this is no longer the standard. The issue in *Wouters* was whether Dutch rules of professional responsibility for lawyers, which prevented lawyers from practicing in partnership with accountants, violated Article 81(1) of the EC Treaty. After recognizing that the prohibition is "liable to limit production and technical development within the meaning of Article 81(1)(b) of the Treaty,"[41] the Court stated that "not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) of the EC Treaty."[42] The Court of First Instance concluded that the restriction was somehow a justified restriction and did not infringe Article 81(1).

The expansion of the EU to the new member states will result in increased forum shopping, possibly involving the new member states. As discussed earlier, one consequence of the European Commission's modernization program is the devolution of responsibility for applying the European competition rules from the European Commission to the member states. In instances where the competition rules provide for *ex ante* clearance of business practices, there will be an incentive for businesses to find the most lenient competition authority with

[36] DeMinimis Notice, O.J. 2001 (C 368) 13.

[37] Case T-119/02, Royal Philips Electronics NV v. Commission, 2003 E.C.R. ¶218.

[38] Case C-309/99 Wouters v. Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577.

[39] BP/Kellogg, O.J. 1985 (L 369) 6 ¶15; UIP, O.J. 1989 (L 226) ¶40; Commission, 23rd Report on Competition Policy (1994) ¶160.

[40] Case 107/82, AEG v. Commission, 1983 E.C.R. 3151, 3201 ¶60.

[41] Wouters at ¶90.

[42] Wouters at ¶97.

jurisdiction from which to secure that clearance.

The final consequence of the enlargement process that I would like to predict is greater politicization of the application of the competition laws. As discussed above, the legal and social context of competition rules and the limited nature of economics as a prediction of human behavior make the application of competition laws vulnerable to political influence. Once one recognizes that economic principles are not the only source of guidance in applying the competition rules,[43] it becomes difficult to determine whether a particular decision applying the legal norm is correct. Moreover, the public in the new member states will put pressure on its politicians to apply the competition laws in a particular way so as to achieve results that may not have otherwise resulted from the application of the competition rules. This, however, may be an inevitable characteristic of any competition law regime in a democratic context.[44] Greater reliance on the market for organization of the economy and the distribution of wealth results in economic discontent. As accession will expose industry in the accession countries to increased competition, it will result in economic difficulties for those less competitive sectors of the economy. The ensuing loss of employment will be a difficult pill to swallow.

Conclusion

This presentation has focused on the competition law aspects of EU enlargement. There will no doubt be difficulties in the integration from a competition law perspective. Taken as a whole, however, accession will prove to be beneficial for the new and the old member states as it reduces the barriers to trade between these areas. Most of the predicted problems identified above will be short-term difficulties, which will no doubt be overcome. Many of the challenges are not new to the European Commission. There are a large number of European officials who experienced the assimilation of East Germany into the Community. Almost overnight, European competition law was applicable in the East.[45] This experience will no doubt prove useful in the assimilation of the candidate countries in the next several years.[46]

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[43] Schwartz, *Justice and other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

[44] *See generally* Roger Faith, Donald Leavens & Robert Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982).

[45] Andre Fiebig, *The German Federal Cartel Office and the Application of Competition Law in Reunified Germany*, 14 U. PENN. J. INT'L. BUS. L. 373 (1993).

[46] *See* Speech by Mario Monti on 27 Sept. 2001 to the Friedrich-Ebert-Stiftung.

WILL A CONSTITUTION FOR THE EUROPEAN UNION MAKE A DIFFERENCE?

Speaking Notes of Elizabeth Shaver Duquette†
March 27, 2003
Loyola University Chicago School of Law

Introduction

A process is underway to create a constitution for the European Union ("EU"). How this document evolves, and what effect it may have on the EU, is as yet unsettled. A constitution for the EU could mean many things; indeed, the possible impacts can be viewed on a spectrum. At one end of the spectrum, a real constitution could form the basis for a future federal European state. The idea of a "United States of Europe," a term coined by Winston Churchill after World War II, would mean a true political union. While the EU has achieved an economic union via the common market and a monetary union via the euro, it has yet to target political union as a goal. At the other end of the spectrum, with far less ambitious goals, is an EU constitution that merely provides a vehicle to give the EU more legitimacy in the eyes of its citizens and the world. This sort of constitution would not affect the sovereignty of the member states, but could make improvements to the existing structure of the EU.

The opposing ends of the spectrum largely center on a political debate—whether to have a federal Europe. Within the parameters of this debate, however, one must also address the equally important legal and institutional issues, such as how the EU can run more efficiently and democratically. No matter where one falls on the spectrum of debate, the common goal is some amount of increased integration for Europe. The degree of increased integration will become apparent only when the member states ratify the new constitution.

The Existing Treaties

The EU is a product of numerous treaties. The most important treaties for our discussions today are the Treaty Establishing the European Community,[1] most

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[1] Consolidated Version of the Treaty Establishing the European Community, 2002 O.J (C 325) 33, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf. [hereinafter E.C.

recently amended by the Treaty of Nice,[2] and the Treaty on European Union.[3] The European Court of Justice ("ECJ") has said many times that the EU treaties are more than just mere international agreements. The treaties create institutions—like the Commission, the Council, the European Parliament, and the ECJ—that have definitive legislative and executive powers. These powers can dramatically affect member state sovereignty. Because the treaties have this constitution-like function, the ECJ has characterized the treaties as a "constitutional charter" and a "new legal order."[4] The full effect of this "new legal order" can be seen through the application of the doctrines of supremacy,[5] direct effect,[6] and the preliminary reference procedure.[7]

Although the treaties are exceptional in many ways, they fall short of forming a constitutional state. A "new legal order" suggests that the treaties have created something that is separate from the member states. In reality, however, this legal order is dependent on the cooperation and blessing of the member states' governments. In effect, the EU derives its authority from the member states, not just from the treaties in the way that traditional states derive their authority from a constitution alone. Thus, the EU is clearly not an independent actor. Perhaps the major stumbling block is evidenced by the reality that the EU must rely on the member states to implement and enforce European Community ("EC") law. The ECJ may declare that a member state has violated EC law, but it has no real enforcement mechanism independent from the cooperation of the member states.

Does Europe Need Further Integration?

It has been suggested that the primary reason for a European constitution is to achieve further integration of Europe. Why is further integration desirable? First, given the current crisis in Iraq, many Europeans and non-Europeans believe that the EU should have the ability to respond with one voice to global issues. The broader hope is for a coordinated, uniform foreign policy, which the EU has largely lacked in its response to the American and United Nations' positions on Iraq.

A second justification for further integration addresses issues that will arise

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Treaty].

[2] Treaty of Nice, 2001 O.J. (C 80) 1, *available at* http://europa.eu.int/eurlex/en/treaties/dat/nice_treaty_en.pdf.

[3] Consolidated Version of the Treaty on European Union, 2002 O. J. (C 325) 5, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EU_consol.pdf [hereinafter E.U. Treaty].

[4] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Netherelands Inland Revenue Administration, [1963] E.C.R. 1, *See also* Case 294/83, Les Verts v. European Parliament, [1986] E.C.R. 1339.

[5] Case 6/64, Costa v. E.N.E.L, [1964] E.C.R. 585 *available at* http://www.europa.eu.int/eur-lex/en/.

[6] Van Gend en Loos, [1963] E.C.R. 1 *available at* http://www.europa.eu.int/eur-lex/en/.

[7] E.C Treaty, art. 234.

from the EU's imminent enlargement. Accusations of institutional inefficiency are likely to multiply once the EU incorporates the applicant member states.

Finally, further integration could magnify the perceived and real lack of the EU's democratic accountability. The democratic deficit of the EU has been a constant criticism since its inception, and the problem is likely to worsen as the EU expands. An EU constitution could assign more power to the European Parliament, increase the involvement of national parliaments and institute Europe-wide elections to choose key EU officials.[8] However, one must ask, from a practical perspective, whether it is realistic for the EU to be run democratically, especially after the number of member states grows to twenty-five or thirty.

Timing and Structure of the EU's Proposed Constitution

The European Convention on the Future of Europe ("Convention") is in the process of drafting the EU's constitution. The goal is to produce a working document as early as June 2003, with the hope that it may be adopted by December 2003.[9] This deadline is extremely ambitious, if not totally unrealistic, given the absence of many provisions—even in draft form—and the timing of the ongoing enlargement process. Before a new member can join the EU, the applicant member state, as well as all the current member states, must ratify the existing treaties according to their national constitutional traditions. Even if the Convention produced a final constitution before year-end, it is unlikely that the existing treaties could be ratified to include the applicant member states before then.

In structure, the draft constitution has three parts. Part One addresses the constitutional structure of the Union.[10] Part Two covers the EU's implementation of its substantive policies, including internal and external action, defense, and

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[8] *See* Stefanie Schmid-Lübbert & Hans-Bernd Schaefer, *The Constitution of the European Union*, 2002 German Working Papers in Law and Economics, Paper 3, *available at* http://www.bepress.com/gwp/.

[9] Preliminary Draft Constitutional Treaty, *presented* at Plenary session, October 28, 2002, CONV 369/02, *available at* http://www.eel.nl/treatie/00369en2.pdf, [hereinafter Preliminary Draft]; *See also* Draft Treaty Establishing a Constitution for Europe, *adopted* by the European Convention, June 13 & July 10, 2003, 2003 (C 169) 1, [hereinafter Adopted Constitution Treaty].

Editor's Note: At the time of this speech, the draft treaty was going through constant change and development. A preliminary draft of the constitution was presented in October 2002, and its purpose was to illustrate the possible articulation of a treaty. From February to June 2003, the drafting process of the articles took place, including the preliminary drafts of articles 1-16, and 24-33. Finally, in July 2003, the Convention presented the most recent version of the draft treaty. The July 2003 draft contains some notable additions when compared to the outline of the October 2002 draft. However, there were no major changes to the structure or content of the constitution itself. In regards to this presentation, none of the points given were affected by the new draft treaty. Accordingly, where both are applicable, citations will include the corresponding articles in both the October 2002 and July 2003 drafts.

[10] Preliminary Draft, *supra* note 9, pt. 1; Adopted Constitution Treaty, *supra* note 9, pt. 1. Both versions set forth the same objective of constitutional structure and implementation.

functioning of the EU.[11] Part Three contains general and final provisions. The constitution is being created through a debate process, much of which occurs online and is accessible to people through the EU's website.[12] This format is designed to increase democratic participation and transparency.

The Convention is composed of representatives from the parliament and government of each member state, sixteen members of the European Parliament, and two representatives of the European Commission. Representatives from the government and parliament of each applicant member state are also taking part in the proceedings, but they do not have veto power, as dictated by the Laeken Declaration.[13]

Highlights of the Constitutional Proposal as of January 2003

Creation of a Single Treaty

The first goal of the new constitution is to scrap the existing pillar structure of the EU, which is considered unnecessarily confusing, and replace it with a single treaty that is definitively constitutional in form. The single surviving entity will be the EU, which will have a newfound legal status and personality. Currently, the EU has no legal personality—meaning that it cannot enter into agreements—which negatively impacts its global image. Additionally, the doctrine of supremacy will become a constitutional dictate. Currently, EU law enjoys supremacy over national law only through judge-made law.[14]

Simplification of Legal Instruments

The new constitution also proposes to reduce the complexity and number of legal instruments in EU law. An established hierarchy will replace the interpretive hierarchy now attributed to various legal instruments. At the top of the hierarchy will be "European law," which will consist of all legislative acts with general application. European law will be directly applicable in member states. One notch down will be "European framework laws," which are legislative acts without direct applicability. Rather, they will function much like current EU directives. "European regulations" come next, which are non-legislative acts having direct applicability and general application. "European decisions" are the next to last hierarchically important legal instruments and are

[11] Preliminary Draft, *supra* note 9, pt *2; Adopted Constitution Treaty*, *supra* note 9, pt. 3. The July 2003 draft moves discussion of policy implementation to Part 3, and adds the following to Part 2: "the charter of Fundamental rights of the union."

[12] *See generally* http://www.europa.eu.int.

[13] *See* Laeken Declaration on the Future of the European Union *at* [13]*See* Laeken Declaration on the Future of the European Union *at* http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

[14] Costa, 1964 E.C.R. *supra* note 5, at 594.

non-legislative acts binding in their entirety only on those to whom they are addressed. Finally, at the bottom of the hierarchy are recommendations and opinions, which are not binding.

Individual Rights Established

The EU constitution also proposes to establish human rights as an area of law, which will be a step up from its current status as a general principle of law. The draft constitution states that the EU is founded on human dignity, liberty and democratic values[15] and addresses and develops the concept of fundamental human rights.[16] The EU's Charter of Fundamental Human Rights will become an integral part of the EU constitution, and the EU will finally be allowed to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Until now, accession has been prohibited due to the EU's lack of competence to legislate in the area of human rights. Nationals of member states shall also acquire citizenship of the European Union, a status that will entitle them to rights provided under the constitution. EU citizenship will be in addition to national citizenship. Lastly, the new constitution will create an area of "freedom, security and justice" to govern asylum issues, border control, immigration, judicial cooperation in criminal and civil matters, police cooperation and the creation of a European public prosecutor's office.

Subsidiarity and Proportionality Doctrines Clarified

In an effort to better balance the play between national and EU competence, the draft constitution opens with a statement that the EU shall respect the national identities of its member states. It flags as fundamental principles the doctrines of subsidiarity,[17] proportionality,[18] and loyal cooperation.[19, 20] While

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[15] Preliminary Draft, *supra* note 9, art. 2, *Adopted Constitution Treaty*, *supra* note 9, art 2. (both versions the same: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights.").

[16] Preliminary Draft, *supra* note 9, art. 5; *Adopted Constitution Treaty, supra* note 9, art. 8.

[17] "The doctrine of subsidiarity. . .holds that action should not be taken at a higher level unless it helps: unless individuals get more of what they want," *available at* http://www.jeanmonnet program.org/papers/97/97-01-4.html.

[18] The proportionality doctrine "holds that 'measures adopted by public authorities should not exceed the limits of what is appropriate and necessary in order to attain legitimate objectives in the public interest; when there is a choice between several appropriate measures recourse should be made to the least onerous, and the disadvantages caused (to the individual) should not be disproportionate to the aims pursued.'" Antitrust Remedies in the U.S. and E.U.: Advancing a Standard of Proportionality, E. Thomas Sullivan, quoting Nicholas Emiliou, *The Principal of Proportionality in European Law 2* (1996).

[19] "The principle of loyal cooperation requires that the Member States support the actions and policies of the Union actively and unreservedly in a spirit of loyalty and mutual solidarity, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union," Draft Constitutional Treaty of the European Union, *available at* http://www.euobserver.com/index.phtml?aid=7996.

these doctrines are not new to EU law, they are relatively untested by the member states or the ECJ. The constitution includes a draft protocol on the application of the subsidiarity and proportionality principles, as well as one on the role of national parliaments in the EU.[21] The effect of this protocol should be to (1) better define and reinforce ways that the EU institutions should apply subsidiarity in their daily functions, (2) provide a vehicle for the national parliaments' political control of subsidiarity activity in the EU and (3) increase the frequency of referrals to the ECJ on the failure of EU institutions to respect and apply subsidiarity as a method to curb EU involvement where member state activity is more appropriate.

Delineation of Competences

As a related issue, the draft constitution catalogues the competences of the EU and the member states.[22] Some of these competences are not new and others are determined by the application of the subsidiarity doctrine. However, a definitive catalogue of exclusive and shared competence will be helpful in future legislation. It is important to note that the doctrine of conferred powers is still a fundamental principle.[23] As under the current European Community and EU treaties, the EU may act only within the limits of the competence conferred on it by the constitution to attain the objectives of the constitution. And, as before, competences not conferred on the EU remain with the member states. For example, the draft constitution assigns the EU exclusive competence in the areas of free movement (of persons, goods, services, and capital), competition, internal market issues, customs union, common commercial policy, monetary policy (e.g., the euro) and common fisheries policy.[24] Additionally, the EU would have exclusive competence over international agreements with third-party countries where its conclusion is mandated by an EU legislative act, where it is necessary for the EU to exercise an internal competence or where the international agreement affects an internal EU act.[25] Areas of shared competence include internal market issues; freedom; security and justice; agriculture and fisheries; transport; trans-European networks; energy; social policy; economic and social cohesion; the environment; public health; consumer protection; cooperation and

[20] Adopted Constitution Treaty, *supra* note 9.

[21] Draft Protocols on the Application of the Principles of Subsidiarity and Proportionality and the Role of National Parliaments in the European Union, Presented at the European Convention, Brussels, Feb. 27, 2003, CONV 579/03, Annexes I & III (2003), *available at* http://www.jeanmonnetprogram.org/conference/convention.html [hereinafter Draft Protocols]; Adopted Constitution Treaty, Protocols Annexed (the protocols as adopted in July 2003 include information for implementation as well as goals of interparliamentary cooperation and subsidiarity and proportionality application success).

[22] Preliminary Draft, *supra* note 9, art. 1-16, art. 10-12; Adopted Constitution Treaty, *supra* note 9, art. 11-13.

[23] Preliminary Draft, *supra* note 9, art. 8; Adopted Constitution Treaty, *supra* note 9, art. 9.

[24] Preliminary Draft, *supra* note 9, art. 11; Adopted Constitution Treaty, *supra* note 9, art. 12.

[25] Draft Protocols, *supra* note 21, art. 13; Adopted Constitution Treaty, *supra* note 9, art. 12.

humanitarian aid; and research and technological development.[26]

Foreign Policy

Many of the proposals above are simply clarifications or codifications of current EU practice. The real controversy injected by the draft constitution is in the area of foreign policy. While all seem agreed that the EU needs to have a greater international presence, there are considerable, if not debilitating, differences of opinion as to how this can best be achieved.[27] The draft constitution will likely serve as a springboard for further debate.[28]

The draft constitution creates a Foreign Secretary for Europe who answers to the member states' governments.[29] This position is like the current office of the EU High Representative, but seems to have more power.[30] The EU is charged with defending Europe's interests and independence by advancing its values in the broader world. The Common Foreign and Security Policy demands that the member states "actively and unreservedly" support the Union's common foreign and security policy in a "spirit of loyalty and mutual solidarity."[31] In addition to these broad proclamations, the Convention has established working groups in many areas, including the specific areas of external policy and defense.[32]

The Working Group on External Policy focuses on the importance of collective action to exercise increased influence over international developments.[33] It calls on the constitution to define the EU's objectives and general principles in external affairs and to give the EU competence to conclude agreements externally on those issues that run parallel to its internal

[26] Draft Protocols, *supra* note 21, art. 12; Adopted Constitution Treaty, *supra* note 9, art. 13 (adopted with only slight changes from the draft).

[27] *See* Deutsche Welle, *The Labor Pains of an EU Constitution*, May 18, 2003, *at* http://www.dw-world.de/english/0,3367,1430_A_869577_1_A,00.html.

[28] See generally id.

[29] *See* Preliminary Draft, *supra* note 9, art. 41 (this draft describes plans to incorporate a "High Representative for Common Foreign and Security Policy"); Adopted Constitution Treaty, *supra* note 9, art. 27 (Union Minister of Foreign Affairs is detailed in the Adopted version as being answerable not to Member-State governments, but to the European Council and Council of Ministers).

[30] *See* Deutsche Welle, *The Labor Pains of an EU Constitution*, *supra* note 27.

[31] Preliminary Draft, *supra* note 9, art. 14; Adopted Constitution Treaty, *supra* note 9, art. 15 (a separate sub-point has been incorporated into the adopted version that concentrates on progressive action toward a common defense policy).

[32] *See* Final Report of Working Group VII on External Action, Presented at the European Convention, Brussels, Dec. 16, 2002, CONV 459/02, WG VII 17 (2002), *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf [hereinafter External Action Report]; and Final Report of Working Group VIII - Defense, Presented at the European Convention, Brussels, Dec. 16, 2002, CONV 461/02, WG VIII 22 (2002), *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00461en2.pdf [hereinafter Defense Report].

[33] *See* External Action Report, *supra* note 32, Part A.

competences. This Working Group strives for increased efficiency by advocating qualified majority voting on foreign policy issues; however, it would allow constructive abstention by a member state that did not support the EU action.

The Working Group on Defense targets three highly controversial areas: crisis management, responses to terrorist threats, and armaments.[34] Under crisis management, the EU would expand the context of the Petersburg Tasks, which govern crisis management in situations involving the use of military resources. Such expansion could include conflict prevention, joint disarmament operations, and military advice and assistance. Additionally, this Working Group could improve efficiency when access to financing is required to carry out joint operations that do not affect political control. Like the Working Group on External Policy, the Working Group on Defense supports the practice of member state constructive abstention as a way to allow supporting member states to foster even closer ties of cooperation. Concerning terrorist threats, the working group advocates a new solidarity clause that would allow any member state to employ full EU resources to protect its citizens and institutions. All this should enable willing member states to achieve closer defense cooperation. Lastly, in the area of armaments, the Working Group on Defense supports research on defense technology, including the development of military space systems.

In those areas gunning for increased European cooperation in foreign policy, member states are allowed to exercise constructive abstention or opt-out provisions. Essentially, no active cooperation is required of a member state. While abstention and opt-out provisions can be politically expedient, and can even increase decision-making efficiency, they also could weaken the perception of European-wide action in foreign policy. One could argue that constructive abstention or exercise of an opt-out provision would violate a member state's duty of loyalty and mutual solidarity. The success of the EU's foreign policy might hinge on this issue. Some member states might not agree to participate in a true common foreign security policy without the ability to promote and protect national interests.[35] However, it is unlikely that third-party countries will take seriously any position by the EU that does not reflect the positions of its member states.[36]

Conclusion

Because the draft constitution is still in nascent form, it is appropriate to ask what effect it can and should have on the European Union. As the debate

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[34] *See generally* Defense Report, *supra* note 32.

[35] *See* Summary of the meeting held on 15 October 2002 for Working Group VII on External Action, Presented at the European Convention, Brussels, Oct. 21, 2002, CONV 356/02, WG VII 8 (2002), *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00356en2.pdf.

[36] Statements by European Commission President Romano Prodi, *Growing and Thriving in a Knowledge Society*, SPEECH/03/70, Feb. 12, 2003, ¶ 10-12 (2003), *available at* http://www.europa.eu.int [hereinafter Prodi].

illustrates, the effect of the constitution will depend largely on whether the goal of the constitution is to establish a federal Europe, to simply create a vehicle for legitimacy, or to form something in between those two ends of the spectrum.

If one desires a federal-style Europe, the draft constitution will have to create a Europe that is more than an organized trading market.[37] Europe will need to speak with one voice on global issues and have one defined set of politics that allows it to defend itself on a global stage.[38] This goal, while somewhat attractive on paper, is unrealistic at this point in the EU's evolution, as illustrated by Europe's disjointed response to the United States and Iraqi war.[39] While some member states openly supported the United States' actions, others blatantly opposed it.[40] The EU was largely non-committal and regretted its inability to have a common position on Iraq.[41]

For a less ambitious goal, the draft constitution could strive to make improvements to the EU's existing structure. European integration clearly has not advanced to the point where Europeans want to be one super-state, so perhaps Europe does not require a traditional constitution.[42] Rather, it may be more important to have a constitution that curbs the growth of the EU's power, especially in areas where the EU's authority affects member states and their citizens.[43] Primarily, this middle ground on the spectrum would require EU institutions to be more transparent, efficient and democratically accountable.[44]

At a minimum, and at the opposite end of the spectrum, one could desire only that the new EU constitution have a symbolic effect.[45] Under this analysis, total European integration is both undesirable and unachievable.[46] Even if the new constitution fails to check the EU's assertion of power over its member states and citizens, an EU constitution could still be significant symbolically.[47] For

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[37] *See generally* Prodi, *supra* note 36.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* Schmid-Lübbert & Schaefer, *supra* note 8.

[43] See id.

[44] The Scottish Parliament, Minutes of Proceedings from the Meeting of the Parliament on June 12, 2003, vol. 1 no. 10 session 2 (2003), *available at* http://www.scottish.parliament.uk/plenary/mop-03/mop-06-12.htm (expression that Scotland believes that "the EU should seek to become more effective, efficient, democratic, transparent, accountable, and easier to understand" in amendment S2M-124.4 to motion S2M-124, supporting the EU as a confederation).

[45] Teameurope.Info, *The Convention on the Future of Europe*, July 11, 2002, *at* http://www.teameurope.info/guide/convention.htm (notes the constitution as a symbolic objective).

[46] *See* Schmid-Lübbert & Schaefer, *supra* note 8.

[47] *See generally* Teameurope.Info, *The EU State Constitution: a Further Erosion of Democracy*, Dec. 17, 2001, *at* http://www.teameurope.info/board/statement-constitution.htm (notes the constitution as a symbol and basis for further EU federalism).

example, symbolism has helped in the areas of human rights and foreign policy. Recent human rights clauses in the treaties and the Charter of Fundamental Human Rights are largely unenforceable against member states, but they have established criteria that applicant member states must adopt before joining the EU. In the foreign policy arena, Europe can be perceived as one body, even where differences surface. For example, France, Germany and Belgium defied NATO on the Iraqi war where their bond was defined by treaty, yet they stuck together as Europeans.[48]

In conclusion, the Union's exercise of drafting a constitution is healthy. No matter what legal effect the document has, or where on the spectrum it falls, it will positively affect the EU. At a maximum, it will more closely integrate the EU, making it more like a true federation.[49] Or it could provide the foundation for constitutional and institutional improvements that would increase efficiency and democracy in the EU, especially at this critical juncture of enlargement.[50] At a minimum, the constitution could provide yet another symbolic gesture on the part of the member states, which could later evolve into more permanent legal acts.[51] In a matter of months, Europe will choose its future.

[48] Times Online, *European Allies Unite Against US-Led War*, ¶ 5, Feb. 10, 2003, *at* http://www.timesonline.co.uk/article/0,1-572838,00.html.

[49] See Teameurope.Info, *The EU State Constitution: a Further Erosion of Democracy*, *supra* note 47.

[50] *See* Schmid-Lübbert & Schaefer, *supra* note 8.

[51] See Teameurope.Info, *The EU State Constitution: a Further Erosion of Democracy*, *supra* note 47.

THE EUROPEAN UNION ENLARGEMENT EASTWARD: A HISTORIC DEVELOPMENT

Alexander A. Jeglic†

History

The initial steps toward European integration started many years ago. On May 9, 1950, a plan was proposed to pool coal and steel production under one common authority within Europe.[1] The plan was formally announced by French Foreign Minister Robert Schuman and later became known as the "Schuman Declaration."[2] This declaration set in place the first concrete foundation of a European federation made up of six countries.[3] This union was named the European Coal and Steel Community ("ECSC").[4] The success of the ECSC led to the Treaty of Rome, establishing a six nation zone of commercial cooperation known as the European Economic Community ("EEC").[5] The EEC merged the six separate markets into one single market and abolished most trade quotas and duties.[6] The Treaty of Rome also led to the adoption of the Common Agricultural Policy ("CAP"); the creation of the European Court of Justice and the European Parliamentary Assembly; and established the European Atomic Energy Community ("Euratom").[7]

The European Single Act of 1987, in conjunction with the 1992 Treaty of

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Editor's Note: There was failure among member states to agree upon the text of the EU constitution at the December 2003 Intergovernmental Conference in Brussels. For additional updates on the current status of the EU constitution refer to Futurum, the European Union's official web site regarding the EU constitution *available at* http://europa.eu.int/futurum/analyse/contrib/acad/0006_c8_en.pdf.

[1] *A New Idea for Europe*, The Schuman Declaration 1950-2000 by Pascal Fontaine available at http://europa.eu.int/comm/publications/booklets/eu_documentation/04/txt_en.pdf (last visited Nov. 24, 2003).

[2] *The History of the European Union available at* http://europa.eu.int/abc/history/index_en.htm (last visited Nov. 24, 2003).

[3] France, Belgium, West Germany, Luxembourg, Italy and the Netherlands.

[4] *The History of the European Union available at* http://europa.eu.int/abc/history/index_en.htm (last visited Nov. 24, 2003).

[5] *Id.*

[6] *History of the European Union*, EU publications, Delegation of the European Commission.

[7] Intergovernmental Conferences: An Overview *available at* http://europa.eu.int/en/agenda/igc-home/general/overview.html (last visited Nov. 24, 2003).

Maastricht, established the phase-in process for full economic and monetary union.[8] The European Single Act also helped establish coordinated national economic policies; a centralized banking structure; and harmonized trade quotas and duties.[9] The Treaty of Maastricht also established the "Three Pillars,"[10] which at the time was seen as the blueprint of the future development of the European Union ("EU").[11]

In 1994, the EU and the seven member European Free Trade Association formed the European Economic Area, a single market of nineteen countries.[12] In 1997, the Amsterdam Treaty was signed to update and clarify the Maastricht Treaty and to start preparing the EU for enlargement.[13] The Nice Treaty was created in 2000 with the aim of further overhauling EU institutions to facilitate enlargement.[14] It offered few solutions to the existing problems facing EU enlargement.[15] However, the summit in Nice did launch the "Future of Europe" debate, which strengthened the push for a unifying document to replace all of the treaties currently governing the EU.[16]

Current Enlargement

With the fall of several communist governments in Central and Eastern European Countries ("CEEC") and the break-up of the Soviet Empire, came a new sense of opportunity. Communication and trade barriers that had previously existed between the CEEC and the EU were suddenly lifted.[17] Closer relations between the CEEC and their Western European counterparts resulted in the

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[8] Eid, Troy, *The European Union: A Brief Introduction* (Colorado Lawyer May, 2002).

[9] *Id.*

[10] The Maastricht Treaty implemented a new EU structure comprised of Pillar One, which "sets out the institutional requirements for [the European Monetary Union]"; Pillar Two, which "established the Common Foreign and Security Policy"; and Pillar Three, which "created the Justice and Home Affairs Policy." *Available at* http://www.xanthi.ilsp.gr/kemeseu/ch1/treaties.htm.

[11] *Introduction: From Paris via Rome to Maastricht & Amsterdam available at* http://europa.eu.int/eur-lex/en/about/abc/abc_02.html (last visited Nov. 24, 2003).

[12] *Short History of the European Union, available at* http://www.antenna.nl/~wise/493-4/eu.html (last visited Nov. 24, 2003).

[13] Aspects of European Integration by Dr. Algis Junevicius & Neringa Cepaitiene *available at* http://www.euroi.ktu.lt/PROMETHEUS/moduls/en/1b.doc (last visited Nov. 24, 2003).

[14] *"Unity in diversity - What political shape should Europe take?"*, Speech by Günter Verheugen Member of the European Commission with responsibility for enlargement, *available at* http://europa.eu.int/futurum/documents/offtext/doc161101_en.htm (last visited Nov. 24, 2003).

[15] *Id.*

[16] *The Debate on the Future of the European Union A Report on the Situation; Report for the President of the European Council*, December 2001, *available at* http://europa.eu.int/futurum/documents/contrib/cont011201_en.pdf (last visited Nov. 24, 2003).

[17] Europeanization in Central Eastern European Democratic Transition: a multi-level explanation approach, *available at* http://www.essex.ac.uk/ecpr/standinggroups/yen/paper_archive/1st_yen_meet_papers/milanese2001.pdf (last visited Nov. 24, 2003).

negotiation of association agreements.[18] These agreements formed bilateral relations between the CEEC and the EU and laid the foundation for the accession of the CEEC into the EU.[19] Serious accession negotiations between the EU and ten accession candidates were concluded at the European Council in December 2002.[20] After many months of negotiation, a deal was finally struck and the EU invited Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia to join the existing members of the EU in May 2004.[21]

Convention on the Future of Europe

The structure of the EU has undergone fundamental changes to allow enlargement. Within the last few years the pace of change has greatly increased, led by former French President Valery Giscard d'Estaing.[22] Giscard d'Estaing was the Chairman of the Convention on the Future of Europe ("European Convention") along with the former Prime Minister of Belgium, Jean-Luc Dehaene, and the former Prime Minister of Italy, Giuliano Amato, who served as Vice-Chairmen.[23] Giscard d'Estaing's vision for the new EU included the unification of all prior treaties into one formal document whose name became a topic of heated debate among current EU member states.[24] Their tireless efforts culminated in the submission of a draft constitution on June 13, 2003 ("Draft Constitution").[25] The Draft Constitution was then given to the EU Council for consideration at the EU Summit in Thessaloniki, Greece on June 20, 2003.[26] However, today the EU Constitution is set to replace all previous treaties that had collectively formed the EU structure.[27] The precise effects of the EU

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[18] *Globalization: Trends, Challenges and Opportunities for Countries in Transition* by Mojmir Mrak for the United Nations Industrial Development Organization *available at* http://www.unido.org/userfiles/PuffK/mrak.pdf (last visited Nov. 24, 2003).

[19] A chart containing each applicant country, the date it signed its Association Agreement, the date it went into force, the date each applicant officially applied for EU membership is available at http://www.Europa.eu.int (last visited Nov. 24, 2003).

[20] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia (Bulgaria, Romania and Turkey were excluded from accession talks for May 1, 2004).

[21] *A New Europe is Born*, *available at* http://www.dw-world.de/english/0,3367,1430_A_714277,00.html (last visited Nov. 24, 2003).

[22] *EU Convention Battles Against Time,* EU Business June 5, 2003, *available at* http://www.eubusiness.com/imported/2003/06/11164 (last visited Nov. 24, 2003).

[23] *Oral Report Presented to the European Council by V. Giscard d'Estaing available at* http://european-convention.eu.int/docs/speeches/9604.pdf (last visited Nov. 24, 2003).

[24] *Id.*

[25] *Draft Treaty establishing a Constitution for Europe, available at* http://europa.eu.int/futurum/constitution/index_en.htm (last visited Nov. 24, 2003).

[26] *Id.*

[27] *Summary of the Draft Constitutional Treaty for the European Union available at* http://www.forumoneurope.ie/pdf/forum_summary_draft_constitution.pdf (last visited Nov. 24,

Constitution and negotiation sticking points, such as migration and farm subsidies, must be closely examined to determine the possible success of the enlarged EU.

EU Constitution

The mandate given to Giscard d'Estaing and the rest of the European Convention was to simplify the European system of governance and to create new tools to meet the requirements of security, justice, and a common foreign policy.[28] The Draft Constitution has been created to stabilize the EU in the future by providing the sole legal basis for the EU, thus replacing and amending all prior treaties.[29] When the Draft Constitution was proposed for consideration, Giscard d'Estaing stated, "The result is not perfect but does surpass expectations."[30] The Draft Constitution will alter many current aspects of the EU. Some of the noteworthy changes are the creation of the President of the European Council and EU Minister for Foreign Affairs; reduction in the number of EU Commissioners; affirmation of a single legal identity for the EU; and the reaffirmation of the Charter of Fundamental Rights.[31]

The creation of the post of President of the European Council has been regarded as very controversial.[32] This post would replace the current rotation system by member states.[33] The President of the Council will be elected by a qualified majority of the heads of EU states and governments.[34] The President's term will be two and one-half years with the possibility of renewal for one additional term.[35] The President would assume a leadership role in both internal and global affairs for the EU.[36] Further, the Draft Constitution creates an EU Minister of Foreign Affairs.[37] The Minister of Foreign Affairs will serve a dual

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2003).

[28] *Id.*

[29] Alcoverro & Stenstrom, *Toward a Constitution for the EU* (ABA Int'l L. J. Vol. 32 No. 4, Fall 2003).

[30] *Id.*

[31] *Summary of the Draft Constitutional Treaty for the European Union available at* http://www.forumoneurope.ie/pdf/forum_summary_draft_constitution.pdf (last visited Nov. 24, 2003).

[32] *"The European Convention: Real Problems, Real Solutions"* speech by Mr. Brian Cowen T.D., Minister for Foreign Affairs for Ireland, April 3, 2003, *available at* http://europa.eu.int /futurum/documents/speech/sp030403_en.pdf (last visited Nov. 24, 2003).

[33] *Id.*

[34] Draft EU Constitution Article I-21, *available at* http://european-convention.eu.int (last visited Nov. 24, 2003).

[35] *Id.*

[36] *Summary of the Draft Constitutional Treaty for the European Union, available at* http://www.forumoneurope.ie/pdf/forum_summary_draft_constitution.pdf (last visited Nov. 24, 2003).

[37] Draft EU Constitution Article I-27, *available at* http://european-convention.eu.int (last visited

function. Within the EU, the Minister will chair meetings of the Foreign Affairs Council and supervise the execution of Council decisions. In foreign external relations, the Minister will be a member of the Commission and represent the views of the EU globally.[38]

The Draft Constitution also reduces the number of EU Commissioners from the current number of twenty to fifteen by the year 2009.[39] This will prevent the Commission from growing as the number of countries in the EU increases, thus ensuring the Commission maintains a functional size.[40] The Commission's decisions are always taken by consensus and under collective responsibility; and it has been proposed that achieving consensus among twenty-five members would be too difficult a task to undertake, thus making a fifteen member limit appropriate.[41]

The Draft Constitution granted legal personality upon the EU.[42] Up until this point, the three European Communities (EEC, ECSC, and Euratom) shared one legal identity, while the EU had none.[43] The Draft Constitution also reconfirmed the Charter of Fundamental Rights that was included in the Treaty of Nice.[44] Fundamental rights will again be legally enforceable under the purview of the EU.[45]

The Draft Constitution resolves several of the concerns expressed by current and accession states. Other concerns that have been addressed in recent years outside of the Draft Constitution are the free movement of people and agricultural subsidies.[46]

Free Movement of People

Migration concerns within the EU have been based on both economical and structural principles.[47] Germany and Austria in particular have concerns

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Nov. 24, 2003).

[38] Alcoverro & Stenstrom, *supra* note 29.

[39] Draft EU Constitution Article I-25 *available at* http://european-convention.eu.int (last visited Nov. 24, 2003).

[40] *Id.*

[41] *Information on The European Commission*, *available at* http://europa.eu.int/institutions/comm /index_en.htm (last visited Nov. 24, 2003).

[42] Draft EU Constitution, *available at* http://european-convention.eu.int (last visited Nov. 24, 2003).

[43] *Id.*

[44] Draft EU Constitution Part II, *available at* http://european-convention.eu.int (last visited Nov. 24, 2003).

[45] *Id.*

[46] *Id.*

[47] Matloob Piracha & Roger Vickerman, *Immigration, Labor Mobility & EU Enlargement* (Dept. of Economics, U. of Kent, UK, 2001).

regarding migration due to their proximity to poorer Eastern European countries. Eastern countries are concerned that a large outflow of highly skilled and able workers will diminish the growth potential of their economies.[48] Conversely, Western European countries fear an influx of migrants taking low skill jobs.[49] According to many economic experts, Austria and Germany and their Eastern neighbors need not worry because enlargement will allegedly constitute a "win-win" situation for both.[50] For instance, in Austria, economists have predicted that enlargement will create a substantial rise in gross domestic product over the next six years.[51] However, many studies conducted on the topic of migration have come to varying conclusions.[52] The range of results demonstrates the uncertainty as to the exact effect migration will have post-enlargement. Although the estimated number of prospective migrants varies from 40,000 to 680,000 in various studies, the studies have all concluded that the major share of migration will be to Austria and Germany.[53]

Predictions also appear more precise regarding the structure of migration.[54] Migrants from CEEC are usually highly educated and obtain positions in high-ranking professions, rather than as unskilled workers.[55] Contrary to the concerns of many Western European countries, migration can have very positive effects by filling a void in a particular industry that lacks sufficient numbers of workers to fill demand.[56] This would have the effect of widening the base of the economy, which could lead to increased growth and welfare.

Fear of migration should not cause the EU to waste an excellent opportunity to address future labor supply problems. It would be a shame if the EU delays the economic growth of its new members by heavily restricting the free movement of labor. While there is no doubt that the incoming member states' gross domestic product outputs are not equivalent to those of current EU

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[48] Parliamentary Assembly Report on Common policy on migration and asylum, *available at* http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9889.htm (last visited Nov. 24, 2003).

[49] Olivier Blanchard, *The EU Enlargement & Immigration from Eastern Europe*, 5 (Oct. 2001).

[50] *Business Hungary: And the Winner is Austria available at* http://www.amcham.hu/Business Hungary/16-01/articles/16-01_12.asp (last visited Nov. 24, 2003).

[51] *Id.*

[52] Heinz Fassmann & Rainer Munz, EU Enlargement & Future East-West Migration in Europe, *available at* http://www.demographie.de/info/epub/pdfdateien/EU%20Enlargement%20and%20 Future%20East-West%20Migration.pdf (last visited Nov. 24, 2003).

[53] Business Hungary: And the Winner is Austria *available at* http://www.amcham.hu/Business Hungary/16-01/articles/16-01_12.asp (last visited Nov. 24, 2003).

[54] Filip Abraham and Jozef Konings, *Does the Opening of Central and Eastern Europe Threaten Employment in the West, available at* http://www.econ.kuleuven.ac.be/licos/Joep/WEKonings Abraham.pdf (last visited Nov. 24, 2003).

[55] *Id.*

[56] *Political Economy of Migration in an Integrating Europe, available at* http://pemint.ces.uc.pt /Working%20Paper-6.pdf (last visited Nov. 24, 2003).

members, factors exist that will preclude the massive migration.[57] Cultural differences and strong national pride will likely prevent many potential migrants from actually making a move.[58] Additionally, as the economies of the new member countries slowly improve, migration will become less appealing to the citizens of these countries, thus diminishing the concerns that currently trouble Germany and Austria.

Agricultural Subsidies in the Enlargement Process

Agriculture also plays an important role in the EU enlargement process because of the political and economic factors that have shaped CAP.[59] CAP was designed to create a single market in farm products through common prices and free movement of agricultural goods within the EU; preference for agricultural goods of community members by other community members; and the sharing of farming costs.[60] However, CAP is often criticized because it uses EU funds to effect its agricultural goals by subsidizing farmers. Often these subsidies make crops too expensive for international purchasers.[61] CAP then provides a second subsidy to aid in the export of these products to purchasers abroad.[62] This system creates a double subsidy, thus artificially inflating food prices—not only in the EU—but also worldwide, without addressing the true concerns of EU farmers.[63] [64]

CAP has also unintentionally changed the structure of farms due to the methods used to distribute funds. Many farmers have found it advantageous to merge to form superfarms because it facilitates the receipt of CAP funds.[65] The EU has said on several occasions that CAP was never intended to promote the evolution of the superfarm.[66] Nonetheless, the majority of CAP funds have been

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[57] *Id.*

[58] *Migration, No Thank You*, Euroviews International News Magazine, *available at* http://manila.djh.dk/poland/stories/storyReader$16 (last visited Nov. 14, 2003).

[59] Brian Ardy, *EU Enlargement and Agriculture: Prospects and Problems* (South Bank European Papers 2000).

[60] EU Agriculture, *available at* http://www.europa.eu.int/comm/agriculture/capreform/index_en.htm (last visited Nov. 14, 2003).

[61] *Enlargement and reform of the EU Common agricultural policy: impacts on the Western Hemisphere Countries* Interim report by Inter-American Development Bank, *available at* http://www.sice.oas.org/geograph/mktacc/Bureau.pdf (last visited Nov. 24, 2003).

[62] *Id.*

[63] *Id.*

[64] Agriculture Outlook 2001, EU Enlargement: Negotiations give rise to New Issues (Feb. 2001).

[65] The European Union's Common Agricultural Policy: Pressures for Change: An Overview, *available at* http://www.ers.usda.gov/publications/Wrs992/Overview.pdf (last visited Nov. 24, 2003).

[66] *Id.*

directed to superfarms.[67] Smaller farms are thus being forced to merge with one another or cease to exist in an attempt to benefit from CAP distribution methods.[68]

Poland's entry into the EU may cause major agricultural concerns, especially with regard to livestock, for small and mid-sized farms because of competition from Western European member states.[69] Over nineteen percent of Poland's working population is employed in the agricultural industry, and labor productivity is only ten percent that of the EU.[70] Apart from a few large former state farms, ninety percent of production is in small holdings.[71]

Another concern with agricultural subsidies is that they are redistributed inconsistently with the countries' net contributions to the EU budget as a whole.[72] Germany is a strong supporter of CAP reform because it contributes the most money to the EU budget but receives less than its share of agricultural subsidies, while countries such as France contribute less to the EU budget but obtain significantly more of the agricultural subsidies.[73] EU agricultural ministers addressed this problem by adopting a fundamental CAP reform on June 26, 2003.[74] The reform will restructure the methods used by the EU to provide aid to the agricultural sector. The reforms will benefit the consumers and taxpayers, while allowing EU farmers the freedom to produce what the market wants.[75] Subsidies will no longer be based solely on productivity, thus lessening the need to form superfarms to obtain subsidies.[76] As a result of the CAP reforms, EU farmers will become more competitive and market oriented.[77] The two most important features of CAP reform are the making of a single farm

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[67] Agricultural Implications of CEEC Accession to the EU, *available at* http://wwwuser.gwdg.de/~uaao/projekt/mw/wye-wp05.pdf (last visited Nov. 24, 2003).

[68] *Id.*

[69] *Future Agricultural Policy in the European Union by Florence Jacquet*, February 2003 *available at* http://www.choicesmagazine.org/archives/2003/q1/2003-1-06.htm (last visited Jan. 9, 2004).

[70] European Commission Statistics, *available at* http://www.europa.eu.int (last visited Nov. 24, 2003).

[71] *Id.*

[72] *Id.*

[73] Enlargement and Agriculture: Successfully Integrating the New Member States into the CAP: Issues Paper from the Commission of the European Communities, SEC (2002) 95 *available at* http://europa.eu.int/comm/enlargement/docs/financialpackage/sec2002-95_en.pdf (last visited Nov. 24, 2003).

[74] CAP Reform - A Long-Term Perspective for Sustainable Agriculture, EUROPA, *available at* http://europa.eu.int/comm/agriculture/capreform/index_en.htm (last visited Nov. 24, 2003).

[75] Commission of the European Communities Proposal to Adapt the Regulations of the CAP Reform Package, COM (2003) 640 final, *available at* http://europa.eu.int./comm/agriculture/capreform/enlarge/640_en.pdf (last visited Nov. 24, 2003).

[76] *Id.*

[77] *Id.*

payment, independent of production, and a reduction in direct payments to bigger farms in favor of financing the new rural development policy.[78] CAP reforms take into account the concerns of both current and incoming states to the relief of countries such as Germany and Poland.

Conclusion

The unification of twenty-five European nations is a daunting task. Under the guidance of Convention Chairman Giscard d'Estaing, the EU has overcome many obstacles to put itself in position to flourish as an enlarged EU. The simplification of the treaty structure and the strengthening of the democratic process will lead to greater certainty in EU governance. The current concerns of agricultural subsidies and migration have been addressed in recent years and should not dampen the economic and social prospects for an enlarged Europe. So long as there is continued cooperation among the current and incoming states, enlargement will be a success.

[78] *Id.*

"AN OVERVIEW OF THE LEGAL AND SECURITY QUESTIONS CONCERNING TAIWANESE INDEPENDENCE"

Jason X. Hamilton†

Introduction

For over fifty years, the island of Taiwan has been home to the remnants and descendants of China's nationalist government, the losing party in a civil war.[1] Since the establishment of the "provisional" nationalist government in 1949, Taiwan has developed into a formidable capitalist power with a burgeoning democratic system of governance. However, although it has a functioning democratic government, is a member of international economic organizations, and has a permanent population of over twenty million people, the vast majority of the international community, including the United States ("US"), has not formally recognized Taiwan as a sovereign state.[2] In the past few years, the People's Republic of China ("PRC") has taken an increasingly belligerent stance against Taiwan through its diplomatic actions and military exercises off Taiwan's coast.[3] Because the threat to Taiwan's independence from the PRC is increasing, the survival of this fledgling democracy and its ability to safely declare its independence may depend on the US recognizing it as a formal sovereign state.[4]

A Concise History of Taiwanese and American Relations

Until its defeat in the Second World War, the Japanese Empire had ruled Taiwan in accordance with the 1895 Treaty of Shimoneski.[5] Thereafter, control

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[1] United States Dept. of State, Bureau of East Asian and Pacific Affairs, *at* http://www.state.gov/r/pa/ei/bgn/2813.htm (last visited October 11, 2003)[hereinafter United States Dept. of State].

[2] Taiwan, Online C.I.A. World FactBook, *at* http://www.cia.gov/cia/publications/factbook/geos/tw.html (last visited Sept. 28, 2002) [hereinafter FactBook Taiwan].

[3] *See* Kurt M. Campbell and Derek J. Mitchell, *Crisis in the Taiwan Strait?*, *in* FOREIGN AFFAIRS, 14 (Council on Foreign Relations, 2001).

[4] Such an action would have a monumental impact on Sino-American relations, however, the author wishes to address only the more narrow issue of what legal and diplomatic reasons compel recognizing Taiwanese statehood. Also, it is not the intent of this article to explore the dynamics of Taiwan's growing independence movement and the threat of war with the PRC that so far has prevented such a declaration.

[5] Treaty of Peace, Apr. 28, 1952, ROC-Japan, art. II, 138 UNTS 3, *noted in* Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan,* 94. AM.J. INT'L L. 453, 458-59 (2000).

of the island was returned to the Republic of China's Nationalist government ("ROC") under the Potsdam Proclamation of 1945.[6] After Mao Tse-Tung's Communist victory in 1949, the ROC government and nearly two million nationalists fled China to Taiwan and established a government in accordance with the Chinese Constitution of 1947.[7] This did not create a new state as much as it established a nationalist government in exile to challenge Mao's government in Beijing.[8] Thus, during the height of the Cold War there existed "two Chinas," as the majority of the world recognized the ROC in Taiwan, while the communist bloc supported the PRC on the mainland.[9] Even while in "exile," the ROC government in Taiwan continued to represent all of China at the United Nations.[10] Viewing the ROC as a strategic ally against Communism in Asia, the US entered into the Mutual Defense Treaty with Taiwan in 1954.[11] Under the treaty, the US stationed significant military forces in Taiwan and provided aid to the ROC when the PRC attempted to seize several contested islands in the Straits of Taiwan.[12]

However, in 1971, Taiwan's international status began to change. On October 25, 1971, the PRC replaced the ROC as representative of China at the United Nations ("UN"), marking the international community's recognition of the PRC as the sole, legitimate legal representative of China.[13] President Nixon instituted this radical shift in American foreign policy as a "power move" designed to introducing a new geopolitical counterweight to Soviet power.[14] Former British Prime Minister Harold Macmillan said that Nixon had "brought the oldest civilization in the world back into the game to redress the new Russian

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[6] ROC-Japan, art. II, 138 UNTS 3, *noted in* Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan,* 94. AM.J. INT'L L. 453, 458-59 (2000).

[7] FactBook Taiwan, *supra* note 2.

[8] *See generally* United States Dept. of State, *supra* note 1; *see generally* FactBook Taiwan, *supra* note 2.

[9] Christopher J. Carolan, *The "Republic of Taiwan": A Legal-Historical Justification for a Taiwanese Declaration of Independence,* 75 N.Y.U.L. Rev. 429, 436-37 (2000).

[10] Y. Frank Chiang, *State, Sovereignty, and Taiwan,* 23 FORDHAM INT'L L.J. 959, 975 (2000).

[11] Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, U.S.- P.R.C. 6 U.S.T. 433. In accordance with the terms of the Treaty, the United States and Taiwan pledged to offer material (i.e. military) and economic assistance against an attack on either Party. Thus, an attack on Taiwan would likely result in an armed conflict between the United States and the aggressor.

[12] First Taiwan Strait Crisis: Quemoy and Matsu Islands, *at* http://www.fas.org/man/dod101 /ops/quemoy_matsu.htm (last visited October 11, 2003).

[13] *See* United States Dept. of State Report on the Diplomatic Relations of the Republic of China and the People's Republic of China, available in 11 I.L.M. 571 (1972), *noted* in Angeline G. Chen, *Taiwan's International Personality: Crossing the River by Feeling the Stones,* 20 LOY. L.A. INT'L & COMP. L.J. 223, 234 (1998).

[14] James C. Humes, NIXON'S TEN COMMANDMENTS OF STATECRAFT: HIS GUIDING PRINCIPLES OF LEADERSHIP AND NEGOTIATION, 64 (1997).

Empire."[15] Although this action settled the issue of who represented China at the UN, it failed to address the question of whether the PRC represented Taiwan.[16] In 1972, President Nixon visited China and issued the "Shanghai Communiqué," which committed the US to removing its military presence from Taiwan.[17] On January 1, 1979, President Carter formally established diplomatic relations with the PRC, recognizing it as the sole government of China and, in essence, "un-recognizing" the ROC.[18] The US subsequently terminated the Mutual Defense Treaty with Taiwan and put a one-year freeze on arms sales to the ROC.[19]

Current Diplomatic Relations Between Taiwan and the United States

Despite the growing populist desire for statehood, Taiwan has yet to declare its independence.[20] The United States has acknowledged, but not necessarily adhered to, the PRC's claim that there is "one China and Taiwan is part of China," as evidenced by continued political and economic relations with Taiwan.[21] This is further evidenced by the Taiwan Relations Act of 1994, which has increased military training and coordination with Taiwan.[22] According to the Act, the Secretary of Defense is required to ensure that "direct secure communications" exist between the military forces of the US and those of Taiwan.[23] Although the Act does not commit the US to the defense of Taiwan in the case of an attack by the PRC, it does allow the US to sell defensive armaments to Taiwan and establish operational links for coordination in the event of hostilities.[24] The Act also requires that US military schools reserve additional seats to train Taiwanese military officers and that the technical staff at the American Institute in Taiwan be substantially increased.[25]

The existence of the American Institute in Taiwan alone is indicative of the

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[15] *Id.*

[16] G.A. Res. 2758, 26 GAOR, Supp. No. 29, U.N. Doc. A/8429 (1971). Resolution 2758 was passed to replace Taipei with Beijing in the United Nations and its Security Council. (R. 21.4), *noted in* Chen, *supra* note 13, at 234.

[17] Joint Communique, Issued at Shanghai, Feb. 27, 1972, 66 Dep't St. Cull. 435 (1972) [hereinafter Shanghai Communique].

[18] Colin P.A. Jones, *United States Arms Exports to Taiwan Relations Act: The Failed Role of Law in United State Foreign Relations,* 9 CONN. J. INT'L L. 51, 53 (1993).

[19] *Id.*

[20] *See generally* United States Dept. of State, *supra* note 1; *see generally* FactBook Taiwan, *supra* note 2.

[21] Shanghai Communiqué, *supra* note 16.

[22] Taiwan Relations Act, 22 U.S.C. §§ 3301-16, Pub. L. 96-8 (1979); *see also* Greg May, *Reality Check: A Victory for Chen Shui-Bian, Not Taiwan Independence, at* http://chinaonline.com/commentary_analysis/intrelations/newsarchive.asp (last visited December 2000).

[23] Taiwan Relations Act, 22 U.S.C. §§ 3301-16.

[24] *Id.*

[25] *Id.*

fact that the US does not treat Taiwan as part of China.[26] Although the US technically describes the Institute as unofficial, the staff is provided with official functions and diplomatic privileges and immunities, just as are the members of Taiwan's Economic and Culture Offices in the United States.[27] Hence, there exists an unofficial diplomatic channel between the United States and Taiwan by which the US impliedly recognizes Taiwan independent from China. Further evidence of such recognition is indicated by US support of Taiwan's membership in international organizations, such as the Asia-Pacific Economic Cooperation and the Asian Development Bank.[28]

The PRC's Views on Taiwan

In its 1993 White Paper, the annual official policy papers of the PRC's communist government, Beijing explicitly stated that it regards Taiwan as nothing more than a rebellious province and that the issue of Taiwanese reunification with the mainland, is strictly internal.[29] According to the White Paper, "Taiwan's status as an inalienable part of China has been determined and cannot be changed, and 'self- determination' for Taiwan is out of the question."[30] Although made over ten years ago, the PRC's policy established in the White Paper has not changed. The PRC firmly continues to assert that the "Taiwan separatists' attempt to change Taiwan's status as a part of China by referendum on the pretext that 'sovereignty belongs to the people is futile."[31] The PRC states that there are still hostilities between it and Taiwan left over from the civil war, and "to safeguard China's sovereignty and territorial integrity and realize the reunification of the two sides of the Straits, the Chinese government has the right to resort to any necessary means."[32] Although proclaiming peaceful measures to be the ideal means of settling the Taiwan issue, the PRC has officially stated that "the Chinese government always makes it clear that the means used to solve the Taiwan issue is a matter of China's internal affairs, and China is under no obligation to commit itself to rule out the use of force."[33]

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[26] Stephen Lee, *American Policy Toward Taiwan: The Issue of the De Facto and De Jure Status of Taiwan and Sovereignty,* 2 BUFF. J. INT'L L. 323, 324 (1995-96).

[27] *Id.*

[28] United States Dept. of State, *supra* note 1. *See also* Lee, *supra* note 26, at 324.

[29] *See The One-China Principle and the Taiwan Issue,* N.Y. TIMES, Feb. 21, 2000 (the NEW YORK TIMES published the excerpts of this release by China's Taiwan Affairs Office and the Information Office of the State Counsel) [hereinafter One-China].

[30] *See* Taiwan Affairs Office & Information Office of the State Council, P.R.C., *The Taiwan Question and the Reunification of China, at* http://service.china.org.cn/link/wcm/Show_Text?info_id=7953&p_qry=taiwan%20and%20white%20and%20paper (last visited Jan. 18, 2004) [hereinafter White Paper].

[31] One-China, *supra* note 29.

[32] *Id.*

[33] *Id.*

Furthermore, the PRC stated "the Chinese Government is under no obligation to undertake any commitment to any foreign power or people intending to split China as to what means it might use to handle its own domestic affairs."[34] The PRC proclaimed that it will never tolerate, condone or remain indifferent to the realization of any scheme to divide China."[35] More ominously, it continued by saying, that if:

> ". . . a grave turn of events occurs leading to the separation of Taiwan from China in any name, . . . or if the Taiwan authorities refuse . . . the peaceful settlement of cross-Straits reunification through negotiations, then the Chinese Government will only be forced to adopt all drastic measures possible, including the use of force, to safeguard China's sovereignty and territorial integrity and fulfill the great cause of reunification."[36]

Prior to this radical policy development, China had threatened force only if Taiwan declares independence or if a third party (i.e. the United States) directly and forcibly intervenes. Under this policy, if Taiwan refuses to even negotiate matters of reunification, China reserves the right to use force.[37] With the 1993 White Paper, the PRC adopted a more aggressive stance towards Taiwan, ironically coinciding with the institution of a new round of remilitarization of the PRC's military forces.[38]

Taiwan's Qualifications for Statehood

For the purposes of this article, it is necessary to examine several of the standards for statehood such as, but not exclusively, those established in the Montevideo Convention, Principles of Effectiveness, International Airspace agreements, and general participation in international systems.

Taiwan is an Independent State Under the Montevideo Convention Requirements

Under the 1993 Montevideo Convention, to which the United States is a party, Taiwan qualifies as an independent nation based on four legal requirements.[39] These requirements are generally accepted as customary international law, even for nations not parties to the convention.[40] The

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[34] *See* White Paper, *supra* note 30.

[35] One-China, *supra* note 29.

[36] *Id.*

[37] *Id.*

[38] White Paper, *supra* note 30.

[39] *See* Montevideo Convention on the Rights and Duties of States, art. 1, 49 Stat. 3097, 165 L.N.T.S. 25 (signed at Montevideo, Uruguay, Dec. 26, 1933) [hereinafter Montevideo Convention]; *see also* Restatement (Third) of Foreign Relations Law § 201 (1987).

[40] Carolan, *supra* note 9, at 450; *see also* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents,* 37 COLUM. J. TRANSNAT'L L. 403, 408 (1999). The author identifies the Montevideo Convention as the most cited authority on the definition of a state.

qualifications for independent statehood are: (1) possession of a permanent population; (2) dominion over a defined territory; (3) maintenance of an effective government; and (4) interaction with other states.[41]

Taiwan has a permanent population, consisting of over twenty-two million ethnic Chinese and natives of Taiwan.[42] Taiwan currently has a population greater than seventy-five percent of the member states of the United Nations.[43] Taiwan also has a clearly defined territory consisting of Formosa Island, the Penghu Islands, Quemony Island, and Mazu Island, which was returned to China by the Empire of Japan at the conclusion of the Second World War.[44] Taiwan no longer lays claim to the mainland, as evidenced by its formal recognition of the PRC and renunciation of any representation of China in the international community.[45] Taiwan has an effective, democratically elected government based on the Chinese constitution of 1947, with its own executive branch, legislature, and judiciary.[46] In 1987, the martial law that had been in effect since 1948 was lifted, as well as prohibitions on certain political parties. At that time, the Taiwanese government also initiated greater freedom of the press,.[47] In 1996, Taiwan held its first direct election for president; thus, bringing to an end the parliamentarian process of election via the National Assembly.[48]

Finally, Taiwan is fully recognized by twenty-nine nations and has entered into multilateral treaties with several nations.[49] Taiwan has also undergone a complete shift in its foreign policy since 1988.[50] Previously, the foreign policies of the ROC and PRC each asserted that other nations recognize either one government or the other—but never both.[51] Taiwan now welcomes recognition by foreign states unconditionally.[52] In 1991, Taiwan informally recognized the PRC and renounced its claim as the sole government of both Mainland China

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[41] *See* Montevideo Convention, *supra* note 39.

[42] FactBook Taiwan, *supra* note 2.

[43] Carolan, *supra* note 9, at 451.

[44] The Cairo Declaration, Dept. St. Bull. Dec.4, 1943 at 393 (*quoted in* Attix, *supra* note 49, at 367).

[45] Chen, *supra* note 13, at 245.

[46] FactBook Taiwan, *supra* note 2.

[47] United States Dept. of State, *supra* note 1.

[48] *Id.*

[49] Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357, 369 (1995); *see Treaties between the Republic of China and Foreign States 1982-1985* (*reprinted in* Hungdah Chui, *The International Legal Status of the Republic of China,* 8 CHINESE Y.B. INT'L L. & AFF. 12-14 (1990).

[50] Chen, *supra* note 13, at 245.

[51] *Id.*

[52] *Id.*

and Taiwan.[53] Additionally, in 1994, the ROC's government officially declared that it would no longer attempt to "represent China in the international community."[54] Thus, Taiwan meets the governing international standards of statehood as agreed upon by binding international treaty and custom in the form of the Montevideo Convention.

Taiwan is an Independent State Under the Principle of Effectiveness

Under the principle of effectiveness, if a state has exclusive control of a territory for a substantial amount of time with the intent to govern that territory as the sole sovereign, then that state will be "considered to incorporate that territory."[55] A state that has exercised such control over the territory is to be given preference in an international tribunal when there is a competing claim to that territory.[56] According to Judge Alfaro of the International Court of Justice, "[t]itle to territory is abandoned by letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. Such . . . inaction disqualifies the country concerned from asserting the continued existence of title."[57]

The PRC has never exercised jurisdiction over Taiwan, taken government actions or enacted programs on Formosa.[58] Over the past 50 years, the ROC has governed Taiwan without interruption or occupation by the PRC, largely because the PRC does not possess the military technology or equipment to take the island by force. Since its establishment in Taiwan, the ROC has served as the only government of the population and has acted as a sovereign nation both domestically and internationally. Therefore under the principle of effectiveness, Taiwan has sole dominion over the island as an independent nation.

International Airspace Agreements with Taiwan Imply Its Statehood

Taiwan has entered into airspace agreements with several nations, including Russia, Thailand, Australia, and New Zealand. Under such agreements, each nation's civil aircraft are allowed to fly directly into Taiwan.[59] The agreements,

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[53] *Id.*

[54] *Id.*

[55] *Legal Status of Eastern Greenland* (Nor. V. Den.) 1933 P.C.I.J. (ser. A/B) No. 53, at 45-64 (Apr. 5) (holding that Denmark possessed valid title to Greenland based on lengthy and sole control of the territory), *noted in* Carolan, *supra* note 9, at 453.

[56] See Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 184 (Dec. 18) (Sir Arnold McNair, dissenting) (stating that governments must be able to show authoritative exercise of jurisdiction to secure their title), *noted in* Carolan, *supra* note 9, at 453.

[57] *Temple of Preah Vihear* (Cambodia v. Thail), 1962 ICJ REP. 6, 45 (June 15) (see op. Alfaro, J.), *quoted in* Charney & J.R.V. Prescott, *supra* note 5, at 463.

[58] Anne Hsiu-An Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, 32 NEW ENG. L. REV. 715, 735 (1998).

[59] Attix, *supra* note 49, at 382.

besides serving important business and trade purposes, also give further legitimacy to Taiwan's claim of statehood. Under the Convention on International Civil Aviation, "every state has complete and exclusive sovereignty over that airspace above its territory."[60] In establishing flight authorization without having consulted the PRC, the aforementioned countries recognize Taiwan's sovereign airspace and, implicitly, its sovereignty.[61]

Taiwan's Economic Relations Reflect Those of An Independent State

Taiwan's economy has been classified as one of the "Asian Tigers."[62] Taiwan is the fourteenth largest trading nation in the world; the United States' eighth largest trading partner; the world's seventh largest investor; and owner of one of the world's largest foreign exchange reserves.[63] In 2001, Taiwan exported $27.7 billion dollars worth of goods to the United States and imported $18.2 billion dollars in goods in 2001.[64] Taiwan also has the world's eighteenth largest gross national product. Additionally, the exchange rate of Taiwan's currency, the New Taiwan Dollar, is tied to the United States' Dollar.[65]

Taiwan's association with international governmental organizations is also indicative of its sovereign and independent status.[66] The other members of the Asia-Pacific Economic Cooperation and the Asian Development Bank are all sovereign nations.[67] More significantly, in 1990, Taiwan applied for membership in the General Agreement on Tariffs and Trade ("GATT"), despite protests by the PRC that Taiwan was a province of China and, therefore, ineligible for membership.[68] With the support of the United States, Taiwan subsequently became a member of the World Trade Organization (WTO) in 1995.[69] Because the PRC is merely an applicant to the WTO, it can be inferred that Taiwan's membership represents de facto international recognition that Taiwan and the

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[60] Convention on International Civil Aviation, art. 1, 61 Stat. 1180, 15 U.N.T.S. 259 (Dec. 7, 1944), *noted in* Attix, *supra* note 49, at 382.

[61] Attix, *supra* note 49, at 382.

[62] Why the "Asian Tiger" Miracle is an Endangered Species, *at* http://members.tripod.com/~american_almanac/tigers.htm (last visited October 11, 2003). This is the nickname for Taiwan, South Korea, Malaysia and Thailand because their economies transformed themselves from poor agrarian markets to successful Western-modeled industrial and manufacturing economies.

[63] United States Dept. of State, Bureau of East Asian and Pacific Affairs, *at* http://www.state.gov/r/pa/ei/bgn/2813.htm (last visited Sept. 28, 2002). *See also* Lee, *supra* note 26, at 324.

[64] *Id.*

[65] Chen, *supra* note 13, at 238-39; *see generally* Y. Dolly Hwang, *The Rise of a New World Economic Power: Postwar Taiwan* (1991).

[66] Chen, *supra* note 13, at 237-38.

[67] United States Dept. of State, *supra* note 1; *see also* Lee, *supra* note 26, at 324.

[68] Hsiao, *supra* note 59, at 738.

[69] *Id.*

PRC are two separate political and territorial entities.[70] Based on its membership in these organizations, its trading activities, and its overall economic power, it is difficult to accept that Taiwan is not an independent nation, but rather only a rebellious province of China.

The Growing Military Imperative for Recognizing Taiwanese Independence

The Peoples Liberation Army ("PLA"), the armed forces of the PRC, is one of the largest militaries in the world. However, most of its military technology and support capabilities date back to the 1970s and some even as far back as the Korean War.[71] As a result, China is ill-prepared to launch a cross-Strait invasion and face the modern American and European weapon systems that have been sold to Taiwan.[72] The PRC began a massive re-armament program in the early 1980s called the 863 Program, which it accelerated in 1996 to achieve completion by 2010.[73] Additionally, PLA training, doctrinal writings, weapons procurement, and propaganda have been extensively focused on a military campaign against Taiwan and, if necessary, the United States.[74] This modernization, combined with the belligerent language of the PRC's White Paper, increases the threat of the PRC attempting to prevent Taiwanese independence via military means.

Notwithstanding the use of nuclear weapons to destroy Formosa, the PRC could employ several military options if it decides to use force against the ROC.[75] These options differ in terms of the PRC's technological capabilities, effectiveness, and possible international backlash. The first option is naval exercises and missile testing, such as those undertaken in 1995 and 1996, which may intimidate the Taiwanese government or, at the very least, clearly evidence the PRC's displeasure with Taiwan.[76] The second option would be to enact a naval quarantine designed to prevent the arrival of additional high tech Western arms to the ROC from the United States and Europe.[77] Although the effectiveness of such a measure is questionable, due to American airlift capabilities, it would have severe political and economic ramifications on Taiwan. The potential for such a confrontation between the US and PRC could

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[70] *Id.*

[71] Frank W. Moore, Institute for Defense and Armament Studies, *China's Military Capabilities*, *at* http://www.comw.org/cmp/fulltext/iddschina.html (last visited Oct. 1, 2002).

[72] *See* Jones, *supra* note 18.

[73] June Dreyer, *The PLA and the Taiwan Strait*, Taiwan Security Research, *at* http://taiwansecurity.org/IS/Dreyer-The-PLA-and-the-Taiwan-Strait.htm (last visited Oct. 1, 2002).

[74] Campbell & Mitchell, *supra* note 3; *see* Al Santoli, "*Chinese military resumes harassing US recon flights; Chinese navy practices attacks on US aircraft carriers,* China Reform Monitor, No. 418 (Dec. 10, 2001), *at* http://www.afpc.org/crm/crm418.html (last visited Oct. 1, 2002).

[75] Kim Viner, *Potential Military Solutions for the Taiwan Question*, ASIAN AFFAIRS, (Fall 1997).

[76] *See* Campbell & Mitchell, *supra* note 3.

[77] Viner, *supra* note 76.

cause the United States to reevaluate its willingness to risk a war in defense of Taiwan.[78]

The third option is a direct amphibious assault on Taiwan with the intent of capturing and holding it. However, this option, unless coupled with the use of biological, chemical, or nuclear strikes, would most likely end in failure due to the inadequacy of the PLA amphibious forces.[79] At this time, the PLA only has transport capabilities for 10,000 soldiers compared to the 240,000 currently serving in the Taiwanese Army, which also has a 1.5 million-man reserve force.[80] Even if the PLA augmented its troop transportation capabilities with commercial vessels, a successful invasion would still be unlikely because the PRC could not achieve a three attackers-to-one defender ratio that traditional military doctrine dictates for success.[81]

Conclusion

Under international law, Taiwan qualifies as a state. It possesses the legal requirements stated in the Montevideo Treaty and is treated as a political entity separate from the PRC by other nations and international organizations. Economically, it has proven itself to be a vital, self-sustaining member of the world market with the financial mechanisms and commitments befitting an independent nation. There is no legal justification for denying Taiwan statehood, as it clearly cannot be considered a PRC province after fifty-five uninterrupted years of self-rule. The looming threat of invasion and war with the PRC has always hung over Taiwan and is arguably the sole reason for its reluctance to declare its independence and claim sovereignty.

With the acceleration of the PRC's modernization programs, the possibility of a successful invasion of Taiwan is increasing. The PLA is specifically focusing on upgrading and creating new amphibious landing crafts to support a growing compliment of rapid reaction forces trained in airborne and amphibious island assaults.[82] Additionally, the PRC Air Force is undergoing extensive training to support an amphibious landing and to counter Western aircraft and US aircraft carriers.[83] If military buildup continues at current rates, the PRC's offensive capabilities may outstrip the ROC's defensive capabilities within the next five to

[78] Conflict in the Taiwan Strait: American Response, *at* http://taiwansecurity.org/IS/IS-Lasater-0200.htm (last visited October 11, 2003).

[79] Richard Halloran, *Analysts Downplay Threat China Poses to Taiwan*, WASH. TIMES, *at* http://www.fas.org/news/china/2000/e20000515analysts.htm (last visited Dec. 21, 2002).

[80] Moore, *supra* note 72.

[81] The Microscopic Model, *at* http://www.rand.org/publications/MR/MR638/chap2.html (last visited October 11, 2003). Military theorists from Von Clausewitz to Schwarzkopf have recognized this principle of proportionality when attacking a fortified enemy position.

[82] Moore, *supra* note 72.

[83] Santoli, *supra* note 75.

ten years.[84] The PRC's ability to crush the ROC and occupy Taiwan, bringing its territory and over twenty-two million citizens under the control of the communist government in Beijing, is increasing every year. From a purely military standpoint, Taiwan's chances for successfully declaring independence in the near future are decreasing as the PRC's remilitarization and technological overhaul of its armed forces continues.[85]

For the time being, however, the PRC lacks the military capabilities and training to stop a declaration of independence by Taiwan short of a nuclear attack. Additionally, the threat of confrontation with the United States, acting in accordance with the Taiwan Relations Act, would likely stay the unprepared PRC from military action.[86] Although the PRC cannot effectively undertake direct military action presently, the day is coming when the revamped armed forces of the PRC will be able to reunify China with force. Therefore, now is the time for the United States to let Taiwan know it is prepared to recognize it as a sovereign, independent nation.

Beyond the legal issues and Machiavellian geopolitics, there lies the simple proposition of guaranteeing the life and liberty of over twenty-two million free people who support their democratic government. To sit back and allow Taiwan to be absorbed by an aggressive, undemocratic PRC would be to repeat the mistakes of the past. Such a course of inaction, sacrificing a small democracy to appease a powerful neighbor, harkens back to when Chamberlain gave Hitler Czechoslovakia and Roosevelt let Stalin have Eastern Europe. Although the legal and political justifications for recognizing Taiwan as an independent nation are both compelling and overwhelming, the irony of a young democracy struggling for its independence against a giant power from across the sea should not be ignored by American leaders.

[84] *See* David Shambaugh, *A Matter of Time: Taiwan's Eroding Military Advantage,* WASH. QUARTERLY, (Spring 2000), *at* http://www.twq.com/spring00/232shambaugh.pdf (last visited Oct. 1, 2002); *but see* Halloran, *supra* note 80.

[85] See Future Military Capabilities and Strategy of the People's Republic of China, *at* http://www.rand.org/publications/MR/MR638/chap2.html (last visited October 11, 2003). *See also,* China Special Weapons News, *at* http://www.fas.org/news/china/1998/index.html (last visited October 11, 2003).

[86] Taiwan Relations Act of 1979, U.S.C. Title 22 Chapter 48 § 3302.

NUCLEAR DIPLOMACY: NEGOTIATING PEACE ON THE KOREAN PENINSULA

by Peter Sokgu Yuh†

Introduction

North Korea's admission in the fall of 2002 that it has an active nuclear program, in direct violation of the 1994 Agreed Framework Between the United States of America and the Democratic People's Republic of Korea[1] and the 1992 North-South Declaration on the Denuclearization of Korean Peninsula Agreement,[2] stunned the world. North Korea's open pursuit of nuclear weapons has the potential to quickly and permanently destabilize the security situation in East Asia and beyond. North Korea's bald admission that it is seeking nuclear weapons requires the United States, its allies and the entire world to quickly develop ways to work with North Korea towards a peaceful agreement. Although North Korea's admission looked like an obvious violation on its face, the United States' actions prior to the admission may have first violated the terms of the treaties between the two countries, thus releasing North Korea from the treaties. As accusations fly between the United States and North Korea as to who violated the agreements first, it is clear that this crisis on the Korean peninsula must be resolved through constructive negotiation rather than military action.

This paper asserts that had the United States lived up to its promises in the 1994 Agreed Framework, the present nuclear crisis could have been avoided altogether. Furthermore, North Korea's actions must be viewed objectively and recognized as rational under the circumstances. Considering the real threat of attack by the United States, North Korea's decision to develop nuclear weapons is logical. Initially, the 1994 Agreed Framework defused an impending nuclear crisis and was seen by many as a masterful work of diplomacy in action. A decade later, the same problems linger. This nuclear crisis is another opportunity to bring a lasting diplomatic solution to the problems on the Korean peninsula.

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[1] *See* Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, October 24, 1994, N. Korea – US, 34 I.L.M. 603 [hereinafter 1994 Agreed Framework].

[2] *See* Joint North-South Declaration on the Denuclearization of the Korean Peninsula, January 20, 1992, N. Korea – S. Korea, 33 I.L.M. 569 [hereinafter Joint North-South Declaration].

United States' Introduction of Nuclear Weapons to the Korean Peninsula

Soon after the Korean War ended, the United States introduced nuclear weapons to the Korean peninsula in spite of an armistice agreement, which prohibited the introduction of qualitatively new weaponry into the Korean theater. [3] United States policy makers, such as Secretary of State John Foster Dulles, rationalized that both North and South Korea would think twice before starting a war that would "rain nuclear destruction."[4] Thus, by the mid–1960s, the United States introduced nuclear weapons to the Korean peninsula—an action it justified under a deterrence theory.[5] This action directly violated the Military Armistice in Korea and Temporary Supplemental Agreement of 1953, which clearly prohibited both parties from introducing new weaponry into the Korean theater.[6] The United States defense strategy in the Korean peninsula centered on routine plans to use nuclear weapons very early in any new war.[7] In fact, in 1991, a high-level former commander of United States' forces in Korea gave an off-the-record presentation of United States strategy as it had developed by the 1980s, stating that the United States planned to use tactical nuclear weapons in the very early stages of a new Korean conflict.[8] He further stated that enhanced radiation weapons might also be used to kill the enemy but save the buildings if North Korean forces occupied Seoul.[9] In light of these actions by the United States, North Korea's desire to develop nuclear weapons may be seen as a reaction to mounting pressures from the United States.[10] Indeed, in its talks with the United States, North Korea has expressed a profound fear of United States aggression.[11]

The Bush administration presently faces many of the same problems that confronted the Clinton administration in 1993 and 1994. In May 1994, facing a huge energy crisis and economic insolvency, North Korea removed some 8,000 fuel rods from a key reactor and placed them in a cooling pond without the presence of inspectors from the International Atomic Energy Agency

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[3] *See* Military Armistice in Korea and Temporary Supplemental Agreement, July 27, 1953, 4 U.S.T. 234 [hereinafter Armistice Agreement].

[4] BRUCE CUMINGS, KOREA'S PLACE IN THE SUN: A MODERN HISTORY 479 (1997).

[5] *Id.* Deterrence theory is the prevention of another's unwanted actions by wielding the threat of undesirable consequences if he decides to proceed. The basis of deterrence theory is the idea that a potential aggressor would suffer too many losses to make the initiation of hostilities worthwhile. For example, during the Cold War, the build up of weapons of mass destruction on both sides was part of each actors' policy choices based on deterrence theory. For any deterrence theory to work, the consequences must be credible and assumes that both parties are rational actors.

[6] *Id.* at 477.

[7] *Id.* at 480.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

(hereinafter "IAEA").[12] North Korea argued that it had to reprocess the fuel into plutonium, a key element in a nuclear weapon, or risk a serious accident.[13] Meanwhile, Washington insisted that the rods be disposed of in such a way that would not enhance the country's ability to build a nuclear bomb.[14] Others believed North Korea was again returning to old bargaining tactics to leverage more economic aid for its struggling economy.[15] The United States and its allies feared that North Korea was diverting materials from the reactor to a weapons program, and they threatened to impose economic sanctions.[16] They even considered military action to force North Korea to readmit international inspectors.[17]

Instead of using military action, the United States successfully negotiated a treaty to defuse a crisis and to help bring stability to the region.[18] When North Korea agreed to the 1994 Agreed Framework, it was hailed by the Clinton Administration as a major diplomatic breakthrough.[19] For once, "the United States used deft diplomacy to defuse a Korean crisis, instead of sending a hailstorm of B-52s, F-4 Phantoms, aircraft carriers, and troop alerts to face down Kim Il Sung, as all previous presidents had done."[20] As a result of this agreement, the policy of the United States towards North Korea shifted from one of containment and isolation to engagement and reconciliation.[21] Indeed, President Clinton lessened the longstanding United States economic embargo by June of 2000, which was followed by Secretary of State Madeleine Albright's historic visit in late October of 2000.[22]

The 1994 Agreed Framework

The United States and North Korea signed the 1994 Agreed Framework on October 21, 1994 in Geneva, Switzerland.[23] The treaty was designed to end

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[12] Jim Lobe, *US – North Korea: US Sets Date for Talks on Diplomatic Ties*, (October 17, 2002) Inter Press Global Information Network.

[13] *Id.*

[14] *Id.*

[15] *Northern Exposure; Pyongyang's Nuclear Effort Challenges US Policy Makers, but What Prompted It?* The Seattle Times, Oct. 24, 2002 at A3 [hereinafter *Northern Exposure*].

[16] James Dao, *The Pact the Koreans Flouted*, N.Y. Times, October 17, 2002.

[17] *Id.*

[18] CUMINGS, *supra* note 4, at 485.

[19] *Id.*

[20] *Id.* at 484.

[21] *Id.*

[22] Bruce Cumings, *Stay the Course in Asia,* Bulletin of the Atomic Scientists Vol. 57, Issue 1 (Jan. 1, 2001).

[23] 1994 Agreed Framework, *supra* note 1. Robert L. Gallucci, who at the time was Head of the Delegation to North Korea and Ambassador at Large for the United States, signed the 1994 Agreed Framework. Gallucci is now Dean of Georgetown University's Edmund A. Walsh School of

nuclear proliferation in the Korean peninsula and open the door to investments in impoverished North Korea through a consortium of nations (including the United States, South Korea, and Japan) called the Korean Peninsula Energy Development Organization (KEDO).[24] Under the 1994 bilateral accord, North Korea agreed to suspend operation of nuclear reactors capable of producing weapons-grade material and to place plutonium already produced under international safeguards.[25] In return, the United States agreed, among other things, to supply North Korea with regular shipments of fuel oil to serve as an alternative to nuclear power.[26]

The main provisions of the 1994 Agreed Framework stipulate that North Korea's graphite-moderated reactors would be replaced with light-water reactors (LWR), both parties would move towards full normalization of political and economic relations, and both parties would work together for peace and security on a nuclear-free Korean peninsula.[27] The 1994 Agreed Framework also provided that, in addition to light water reactors, regular deliveries of heavy oil would be made to offset the effects of North Korea's energy crisis.[28] Pursuant to the 1994 Agreed Framework, the United States promised to end hostile relations and normalize diplomatic and economic ties.[29] Economic and political normalization were key provisions for the cash strapped North Koreans, who were dependent on foreign aid.[30] Thus, the main provisions of the 1994 Agreed Framework were meant to satisfy North Korea's need for foreign aid while maintaining peace and security in the region by removing North Korea's ability

Foreign Service. *See* http://data.georgetown.edu/sfs/bsfs/index.cfm?Target=UAP&Action=View&Source=Deans&UNum=7 (last visited Oct. 15, 2003).

[24] Karen DeYoung, *US Might Try to Salvage Part of N. Korean Accord*, WASH. POST, October 25, 2002 at A26.

[25] *Id.*

[26] *Id.*

[27] 1994 Agreed Framework, *supra* note 1. Specifically, the treaty provides: 1) Both sides will cooperate to replace the DPRK's graphite-moderated reactors and related facilities with light-water reactor (LWR) power plants; 2) The two sides will move toward full normalization of political and economic relations; 3) Both sides will work together for peace and security on a nuclear-free Korean peninsula; and 4) Both sides will work together to strengthen the international non-proliferation regime.

[28] 1994 Agreed Framework, *supra* note 1. Specifically, the 1994 Agreed Framework clearly stipulates: "In accordance with the October 20, 1994 letter of assurance from the US President, the US, representing the consortium, will make arrangements to offset the energy foregone due to the freeze of the DPRK's (Democratic People's Republic of Korea) graphite-moderated reactors and related facilities, pending completion of the first light water reactor unit. Alternative energy will be provided in the form of heavy oil for heating and electricity production. Deliveries of heavy oil will begin within three months of the date of this Document and will reach a rate of 500,000 tons annually, in accordance with an agreed schedule of deliveries."

[29] 1994 Agreed Framework, *supra* note 1, states, "The two sides will move towards full normalization of political and economic relations."

[30] DeYoung, *supra* note 24.

to produce nuclear weapons.[31]

Broken Promises

North Korea's recent admission of an active nuclear weapons program on its face suggests a violation of international agreements.[32] Richard Boucher, spokesman for the United States Department of State, recently stated in a press release, "North Korea's secret nuclear weapons program is a serious violation of North Korea's commitments under the Agreed Framework, as well as under the Nonproliferation Treaty, its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula."[33] Pursuant to the Joint North-South Declaration on the Denuclearization of the Korean Peninsula signed January 20, 1992 by both North and South Korea, North Korea's development of a uranium enrichment facility would constitute a violation of this agreement.[34]

If the newly disclosed program includes a nuclear facility, it would constitute a violation pursuant to the Safeguards Agreement between the International Atomic Energy Agency and the Democratic People's Republic of Korea (DPKR, a.k.a. North Korea). This agreement, signed January 30, 1992 in Vienna, Austria, states that North Korea must disclose any nuclear activity to IAEA inspectors.[35] In particular, Article 42 states:

> "Design information in respect of existing facilities shall be provided to the Agency during the discussion of the Subsidiary Arrangements. The time limits for the provision of design information in respect of the new facilities shall be specified in the Subsidiary Arrangements and such information shall be provided as early as possible before nuclear material is introduced into a new facility."[36]

North Korea violated Article 42 of this treaty by not disclosing its nuclear activities.[37] Additionally, it failed to place them under IAEA safeguards, which is a violation because, pursuant to Sections 71-82 of the Safeguards Treaty, North Korea has an obligation to allow the IAEA to inspect all nuclear

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[31] *Id.*

[32] *Northern Exposure, supra* note 15.

[33] Richard Boucher, US Department of State, Press Statement, North Korean Nuclear Program, Oct. 16, 2002, *available at* http://www.state.gov/r/pa/prs/ps/2002/14432.htm (last visited Oct. 15, 2003).

[34] Joint North-South Declaration, *supra* note 2. *See* Clause 2, which states, "The South and the North shall not possess nuclear reprocessing and uranium enrichment facilities."

[35] Agreement for the Application of Safeguards in Connection with the Non-proliferation of Nuclear Weapons,

January 30,1992, N. Korea – I.A.E.A., 33 I.L.M. 315 [hereinafter Safeguards Agreement].

[36] *Id.*, *see* Article 42 of the Safeguards Agreement.

[37] *Id.*

facilities.[38] As the director of the International Atomic Energy Agency stated on October 17, 2002, "the existence of any nuclear facility should be declared by the Democratic People's Republic of Korea and placed under IAEA safeguards."[39] As the international regulatory agency responsible for the monitoring of nuclear energy usage, the IAEA has a responsibility to make certain that North Korea is using its nuclear resources strictly for energy purposes and not weapons production.[40]

North Korea also violated the Treaty on Non-Proliferation of Nuclear Weapons, which, in part, prohibits the development and transfer of nuclear weapons and devices.[41] North Korea's declaration that it is developing nuclear weapons is in direct violation of Article II of this treaty, which provides that North Korea shall not manufacture nuclear weapons.[42] Furthermore, United States intelligence reports indicate that North Korea received critical nuclear technology from Pakistan, although Pakistan Embassy officials deny this claim.[43] The United States alleges that "the equipment, which may include gas centrifuges used to create weapons-grade uranium, appears to have been part of a barter deal beginning in the late 1990s in which North Korea supplied Pakistan with missiles it could use to counter India's nuclear arsenal."[44] Trading missiles for technology that would in any way aid the development of a nuclear program is in direct violation of Article II of the Non-Proliferation Treaty. [45] In part, it states that:

> "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the

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[38] *Id.*, *see* Articles 71-81 of the Safeguards Agreement. In particular, Article 71 states: "The Agency may make ad hoc inspections in order to: (a) verify the information contained in the initial report on the nuclear material subject to safeguards under this Agreement; (b) identify and verify changes in the situation which have occurred since the date of the initial report; and (c) identify, and if possible verify the quantity and composition of, nuclear material in accordance with Articles 93 and 96, before its transfer out of or upon its transfer into the Democratic People's Republic of Korea."

[39] Michael Adler, "*IAEA Concerned About Report on North Korea Nuclear Program*," Agence France-Presse, Oct. 17, 2002.

[40] *See generally* Safeguards Agreement, *supra* note 35.

[41] Treaty on the Non-Proliferation of Nuclear Weapons, signed July 1, 1968, 7 I.L.M. 809. North Korea acceded on April 19, 1985 [hereinafter Non-Proliferation Treaty].

[42] *Id.*

[43] David E. Sanger and James Dao, *U.S. Says Pakistan Gave Technology to North Korea*, N.Y. TIMES, October 18, 2002, *available at* http://www.nytimes.com/2002/10/18/international/asia/18KORE.html (last visited Oct. 15, 2003).

[44] *Id.*

[45] *See* Safeguards Agreement, *supra* note 35.

manufacture of nuclear weapons or other nuclear explosive devices."[46]

North Korea's failure to declare the existence of a nuclear weapons program to the IAEA constitutes a violation of its Safeguards Agreement.[47] Additionally, North Korea is also in violation of Article III, Section 1 of the Treaty on Non-Proliferation of Nuclear Weapons, which prohibits the diversion of nuclear energy from peaceful uses to nuclear weapons and requires that all parties be in compliance with the IAEA.[48] However, although a nuclear weapons program that employs uranium enrichment constitutes a violation of the Non-Proliferation Treaty,[49] as long as North Korea remains a party to this treaty, uranium enrichment is not in violation of Article IV, Section 1 of the 1994 Agreed Framework.[50] Article IV, Section I of the 1994 Agreed Framework requires North Korea to remain a party to the Non-Proliferation Treaty and pursuant to which all safeguards shall be implemented, but does not specifically state that North Korea may not pursue uranium enrichment *per se*.[51] No clause in the 1994 Agreed Framework considers the production of highly enriched uranium in North Korea a violation pursuant to the 1994 Agreed Framework.[52] However, the failure to have this facility under IAEA inspection constitutes a violation of Article IV, Section 2, which requires the inspection of all nuclear facilities by the IAEA.[53]

The View from North Korea

From the perspective of North Korea, "the United States has repeatedly broken agreements, harbor[ed] ideas of attacking it and inexplicably refuse[d] to even talk to a government desperate for better ties."[54] Even KEDO officials (the international consortium created as part of this agreement) concede that Washington failed to deliver on its promises.[55] Charles Kartman, executive

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[46] Non-Proliferation Treaty, *supra* note 41.

[47] *Id.*

[48] Non-Proliferation Treaty, *supra* note 41.

[49] *Id.*

[50] *Id.*

[51] 1994 Agreed Framework, *supra* note 1. Article IV, Section 1 of the 1994 Agreed Framework specifically states, "The Democratic People's Republic of Korea will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and will allow implementation of its safeguards under the Treaty."

[52] 1994 Agreed Framework, *supra* note 1.

[53] *Id.* Article IV, Section 2 of the 1994 Agreed Framework states, "Upon conclusion of the supply contract for the provision of the LWR (light-water reactor) project, ad hoc and routine inspections will resume under the DPRK's safeguards agreement with the IAEA with respect to the facilities not subject to the freeze. Pending conclusion of the supply contract, inspections required by the IAEA for the continuity of safeguards will continue at the facilities not subject to the freeze."

[54] *Northern Exposure, supra* note 15.

[55] Doug Struck, *For North Korea, US is Violator of Accords; Mind-Set Helps Explain*

director of KEDO, admits "the internal logic of the agreement was that there had to be progress in terms of improved relations."[56] Indeed, United States State Department envoy James Kelly's October 2002 trip to Pyongyang, whereby North Korea announced to the world that they were manufacturing weapons grade nuclear material, marked the first high-level talks between the United States and North Korean officials since President Bush took office.[57] Adding to the tensions, North Korea contends that George Bush's inclusion of North Korea with Iran and Iraq in an "axis of evil"[58] effectively nullified the 1994 Agreed Framework, and, therefore, North Korea had the right to build a weapon "more powerful than a nuclear weapon based on enriched uranium."[59]

Professor Bruce Cumings of the University of Chicago, opines that in the case of nuclear weapons, the law is on the side of North Korea.[60] The Non-Proliferation Treaty that North Korea adhered to in 1987 gives to nations threatened by nuclear weapons the sovereign right to possess their own.[61] In accordance with the 1994 Framework, the United States was obligated to extend formal assurances to North Korea against the threat or use of nuclear weapons.[62] The treaty clearly states "the US will provide formal assurances to the DPRK, against the threat or use of nuclear weapons by the US."[63] From the perspective of North Korea, the "axis of evil" language used by George Bush coupled with United States' willingness to send its troops to far away places such as Iraq and Afghanistan, evidences a hostile and threatening tenor that is in contradiction with the terms of the 1994 Framework.[64] Moving beyond the rhetoric, the United States fought a war against North Korea from 1950 to 1953, and maintains one of its largest military contingents of troops assembled and ready for war on the Korean Demilitarized Zone.[65] Additionally, because the North Koreans captured a United States spy ship in 1968, the United States still positions its spy satellites so that North Korea is constantly in focus.[66] These actions by the United States

Pyongyang's Actions, WASH. POST, Oct. 21, 2002, at A18.

[56] *Id.*

[57] David Sands, *N. Korea Breaks Its Promises on Nukes; White House Says It Was Told of Work*, WASH. TIMES, Oct. 17, 2002, at A1.

[58] Julia Preston and David Sanger, *North Korea Makes Demand*, DESERET NEWS, Oct. 26, 2002, at A1.

[59] *Id.*

[60] *See generally* CUMINGS *supra* notes 4 and 22.

[61] *Id.*

[62] *Pyongyang Cannot Expect Any Favours*, STRAITS TIMES, Oct. 25, 2002.

[63] 1994 Agreed Framework, *supra* note 1.

[64] *Id.*; *Northern Exposure, supra* note 15.

[65] *See generally* CUMINGS *supra* notes 4 and 22.

[66] *Id.*

support North Korea's fear of imminent attack.[67]

Furthermore, North Korea maintains that the United States has failed to follow through with promised economic benefits that were supposed to be the compensation for North Korea's agreement to halt its nuclear research.[68] KEDO is obligated under the pact to construct two new light water reactor power plants, from which weapons-grade uranium is difficult to extract, in return for North Korea's suspension of plutonium production.[69] The first plant was to be delivered sometime in 2003, but the United States' opposition to the project has experts predicting that the project is at least six years from completion.[70]

North Korea also charges that the United States has failed to deliver the 500,000 tons of heavy fuel oil that it agreed to deliver annually under the pact.[71] In fact, as of 1996, the United States Congress had only agreed to pay $19 million of the estimated $50 million required to fulfill the terms of the agreement.[72] The United States admitted to shipping problems and looked to South Korea and Japan for additional assistance.[73] In response to the oil shipment problems, Masao Okonogi, a professor and expert on Korean affairs at Tokyo's Keio University, said, "There is no option but for someone to pay for the oil. If the shipments are disrupted, it would be a breach of promise and North Korea would react harshly."[74] According to North Korean officials, United States' breaches of the promises have helped create a drastic energy crisis in the country.[75] The failure by the United States to deliver on its promises in accordance with the terms of the 1994 Treaty has put tremendous economic and political pressure on North Korea.[76]

Despite the United States' opening of telephone lines with Pyongyang in 1995, and permitting North Korea to export magnetite to the United States, North Korea still suffers under economic sanctions.[77] The 1994 Agreed Framework clearly provides specific language calling for the normalization of

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[67] *Northern Exposure, supra* note 15.

[68] Cameron W. Barr, *US Rattle a Tin Cup at Allies to Pay for Oil Due N. Korea: Federal Shutdown Set Back Plan to Wean Pyongyang off Nuclear Project*, CHRISTIAN SCI. MONITOR, Feb. 8, 1996, at 6.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Struck, *supra* note 55.

[76] *Id.*

[77] *Id.*

political and economic sanctions within certain time limits.[78] In spite of United States' promises, tangible measures, such as removing the freeze on North Korean assets in the United States have not materialized. [79] Furthermore, US banks still do not allow credit card transactions in North Korea.[80] For these reasons, North Korea maintains that the United States' failure to lift economic sanctions and work towards full normalization violates Article II, Section 1 of the 1994 Agreed Framework, which calls for movement towards normalization of relations.[81]

From this perspective, one can understand why North Korea is tired of waiting for the United States to honor its promises and instead has resumed its nuclear program in apparent violation of the 1994 Agreement.[82] Presumably, North Korea admitted to its nuclear weapons program with the assumption that the United States had already breached their agreement. Article 60 of the Vienna Convention, which deals with "the rules of release" from treaties, states that a "material breach of a bilateral treaty is both necessary and sufficient to give the victim of that breach the option to release itself from all of its obligations under the breached treaty."[83] Thus, it can be said that North Korea breached the treaty with the assumption that because the United States failed to deliver on its promises in accordance with the terms of the 1994 Agreed Framework, North Korea was discharged of its obligations. This failure by the United States has been construed by North Korea as an unequivocal manifestation of an unwillingness to perform in accordance with the terms of the 1994 Agreed Framework.[84] For these reasons, North Korea believes that the United States committed material breaches of the 1994 Agreed Framework, thus releasing them from their obligations under the treaty and justifying their admission of a nuclear weapons program.

Negotiating Peace

Considering North Korea's history of negotiating for foreign aid supplements to bolster its failing domestic economy, North Korea's admission may be

[78] 1994 Agreed Framework, *supra* note 1. Article II, Section 1, stipulates, "Both sides will work towards normalization of political and economic relations and within three months of the date of this Document. Both sides will reduce barriers to trade and investment, including restrictions on telecommunications services and financial transactions."

[79] *Full Implementation of the US-NK Nuclear Pact Uncertain*, KOREA TIMES, July 20, 1998.

[80] *Id.*

[81] 1994 Agreed Framework, *supra* note 1.

[82] *Northern Exposure, supra* note 15.

[83] John K. Setear, *Response to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 Va. L. Rev. 1, 15 (1997).

[84] *Northern Exposure, supra* note 15.

interpreted as a demand for the Bush Administration to take it more seriously.[85] Toshimitsu Shegemura, a professor of international relations at Takushoku University, is of the opinion that "North Korea admitted to the program because it wants the United States to come to the negotiating table and set a path to improve relations."[86] Ironically, North Korea may actually be trying to improve relations with the United States by raising the issue of nuclear weapons after being neglected for two years by the United States. Although crude in its strategy, North Korea's development of nuclear weapons may be seen in the context of a country frantically hoping for the resumption of dialogue. Desperate for continued economic aid, North Korea can be seen as using its nuclear program to leverage foreign aid to stabilize its economy and also initiate some much needed reforms.[87] In fact, during Secretary of State Madeleine Albright's visit to North Korea at the end of the Clinton Administration, Kim Jong Il, the leader of North Korea, confided that he had been looking at Sweden as an economic model for reforms to North Korea's economy.[88] North Korea's methods leave much to be desired, but its past examples of quid pro quo negotiations for foreign aid lead observers to believe that it simply wants economic aid to stabilize its ailing economy.[89]

The North Koreans have repeatedly expressed their willingness to negotiate with the United States.[90] Ambassador Han Song Ryol of the Mission to the United Nations, the country's sole diplomatic post in the United States, said in a statement, "Everything will be negotiable. Our government will resolve all United States security concerns through the talks, if your government has a will to end its hostile policy."[91] There seems to be a strong willingness on the part of North Korea to negotiate with the United States. Han, when asked if North Korea is willing to shut down its uranium enrichment program, replied, "Yes, I believe our government will resolve all US security concerns."[92] Furthermore, in a press conference regarding North Korea's admission of nuclear weapons capabilities, Kelly, US State Department envoy to North Korea, reported that North Korea is willing to shut down its nuclear reactors.[93] He said:

> "The conditions North Korea offered included a guarantee of no US pre-emptive attack, recognition of the North Korean government and the signing of a US-North

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[85] *Id.*

[86] *Id.*

[87] *North Nuclear Admission Puts Bush in Tight Spot*, INTER PRESS SERV., Oct. 17, 2002.

[88] *Id.*

[89] Struck, *supra* note 55.

[90] Philip Shenon, *North Korea Says Nuclear Program Can Be Negotiated*, N.Y. TIMES, Nov. 2, 2002, at A1.

[91] *Id.*

[92] *Id.*

[93] Struck, *supra* note 55. James Kelly is also the Assistant Secretary for East Asian and Pacific Affairs for the US State Department.

> Korean peace treaty. The third condition was the signing of a peace treaty with North Korea, a long-held goal of North Korea's founder, Kim Il Sung, and his son, the current leader, Kim Jong Il."[94]

However, the United States continues to refuse to negotiate with North Korea and is instead stepping up pressures to further isolate North Korea with economic sanctions through its allies.[95] Indeed, the recent decision to suspend all further oil shipments to North Korea is consistent with United States foreign policy of applying economic pressure to North Korea.[96] The United States also continues to demand that North Korea first dismantle its nuclear weapons program before any negotiations commence rather than simply opening a channel for negotiations.[97]

According to Anthony Lake and Robert Gallucci, this leaves the United States with essentially the same four options it had in 1994.[98] The United States could "launch a military strike against the identified nuclear facilities; refuse negotiations and go to the United Nations for sanctions to isolate and contain the North's nuclear program; essentially accept the new nuclear weapons status of North Korea and try to contain the damage to international nonproliferation efforts, as well as to our alliances with South Korea and Japan; or could negotiate with the North to stop the nuclear weapons program that creates the crisis."[99] Considering North Korea's admitted willingness to negotiate a hard line approach (i.e. military action) by the United States may prove disastrous.[100] Kangdon Oh, a specialist on North Korea affairs, speculates that if the United States preemptively attacked suspected North Korean nuclear facilities, North Korea would respond by "shooting artillery toward South Korea and missiles toward Japan."[101] Therefore, immediate negotiation and diplomacy by the United States would be a far better option than the use of military force to resolve this brewing crisis.

Conclusion

The policy of constructive engagement might have successfully ended North Korea's plans to develop nuclear weapons if the United States had lived up to its

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[94] *Id.*

[95] Don Kirk, *Korea Leader Backs Plan to Block Oil to the North,* N.Y. TIMES, November 16, 2002, at A11.

[96] *Id.*

[97] *Id.*

[98] Anthony Lake and Robert Gallucci, *Negotiating with Nuclear North Korea*, WASH. POST, Nov. 6, 2002, at A21.

[99] *Id.*

[100] Nicholas D. Kristof, *Hold Your Nose and Negotiate*, N.Y. TIMES, Dec. 20, 2002, at A39.

[101] *Id.* Kangdon Oh is an Asian analyst at the Institute for Defense Analysis in Alexandria, VA.

promises under the 1994 Agreed Framework Agreement.[102] The opportunity for diplomacy has presented itself in the form of a brewing nuclear crisis. Rather than resort to isolationist techniques that increase the stress levels in North Korea, now is the time for the United States to pursue meaningful dialogue in pursuit of an end to this crisis. The United States should work with North Korea to reaffirm the 1994 Agreed Framework and promptly begin dialogue without prerequisites or contingencies. Hard line measures such as cutting oil supply shipments will only exacerbate an already serious economic situation in North Korea, which will lead to further instability. South Korea, Japan, the United States, and other countries should cooperate for humanitarian support and exchange, rather than pursue policies of isolation. Through successful diplomacy, this crisis may be resolved and lay the groundwork for future peaceful reforms in the region. The United States, as a world leader, has a responsibility to manage its global power with sensible diplomacy. This latest nuclear crisis is an opportunity for the United States to show leadership through initiatives that may ultimately help heal the wounds of a peninsula divided for far too long.[103]

[102] *See* Lake and Gallucci, *supra* note 98.

[103] CUMINGS *supra* note 4 at 487.