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THE LAW OF ACCESSION OF STATES TO
THE EUROPEAN COMMUNITIES: THE
CASE OF THE HELLENIC REPUBLIC.

A THESIS SUBMITTED TO THE FACULTY OF LAW
FOR THE DEGREE OF MASTER OF
LAWS.

DEPARTMENT OF EUROPEAN LAW, THE
UNIVERSITY OF GLASGOW

BY
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GLASGOW 1983.

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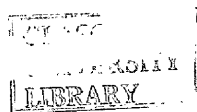


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My mother, father and brother, professional colleagues and friends are thanked for tolerating my occasional complaints about the cost, time or intellectual frustration which an undertaking such as the present thesis brings with it. The responsibility for this work is mine alone.

I have tried to state the law and developments as at 1st June 1982.

William J. Stewart.

Glasgow 1983.

SUMMARY

The thesis examines the accession of the Hellenic Republic to the European Communities on January 1st 1981 and compares it with the accession of the United Kingdom, Denmark and Eire on January 1st 1973 to determine the contribution of law to the enlargement process and to appraise its quality as a Law of accession.

While for reasons of space the thesis had to be selective, the whole history of enlargement has been considered from the important Association "with a view to membership," with Greece in 1961 to the present. The proposed accessions of Spain and Portugal are mentioned only by way of illustration.

We consider the forces that motivate enlargement and the impact of enlargement to assess the extent to which law can control non-legal factors. We look at national law, international law, and community law and the underlying assumption that the function of law in the communities is to promote the goal of European integration or at least to advance the wider aims of the Preamble of the E.E.C. Treaty.

This thesis reflects the opinion that it is impossible, when studying a dynamic system such as the Community, to refrain from commenting on the successes and failures of the integration process

in the hope of offering possible solutions to problems of the accession method by indicating how changes could be made in the law and practice of accession.

In assessing the impact of the law of accession the thesis examines the institutions, to see how they have been affected by the exercise both directly and consequentially.

A selection of Community policies are looked at to see what kind of effect accession may have.

We have felt compelled to explore the problem of withdrawal from the Communities and the related difficulty of re-negotiation; these represent an antithesis of enlargement. Such a study might lead to a broader understanding of accession as a legal process.

Finally, in the conclusions, we apply the understanding gained in the main body of the thesis of the scope and effect of the law of accession and the relative practice, to the problems we have identified. We then suggest changes to the established accession procedure by taking an overall approach trying to avoid the retrograde effect that the present method seems to have.

TABLE OF TREATY
ARTICLES AND OTHER PROVISIONS

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY(1957)

Referred to as:- "E.E.C. TREATY" "TREATY OF ROME"

Art.237 is not noted.

Art.	Page	Art.	Page
5.....	98	164.....	38
8.....	95	165.....	117
		167.....	118
		175.....	65
110-		177.....	119
116.....	43	189.....	38
132.....	44	238.....	42, 43, 45
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TREATY CONCERNING THE ACCESSION OF DENMARK, IRELAND
AND THE UNITED KINGDOM TO THE E.E.C. AND EURATOM.(1972)

Referred to as:-

"Accession Treaty" "Accession Act" "Brussels Treaty"

All references are to the Annexed Act.

Art.	Page	Art.	Page	Art.	Page
2.....	80,87	60(2)...	89	151.....	88
3.....	96	63.....	90	234.....	87
4.....	96	65.....	97		
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TREATY CONCERNING THE ACCESSION OF THE HELLENIC REPUBLIC TO THE E.E.C. AND EURATOM(1979).

references are to the Annexed Act. Referred to as:-

"Athens Treaty" "Athens Act"

Art.	Page	Art.	Page
2.....	80	16.....	117
3.....	81	23.....	88
4.....	82,96	41.....	91
5.....	82	130.....	91
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ASSOCIATION AGREEMENT BETWEEN THE COMMUNITIES AND GREECE(1961).

Referred to as:- "Athens Association" "Athens Agreement"

Preamble,45; Art.72:45,47f.,52; Art.18:49,57.

VIENNA CONVENTION ON THE LAW OF TREATIES(1969).

Art.31:123; Art.54:166; Art.56:163; Art.62:124

OTHER PROVISIONS

Art.43 European Convention on Human Rights(1966):117

Art.10 Merger Treaty (EUROPEAN COMMUNITIES,1965):111

Constitution of the Hellenic Republic:41

Constitution of the United States:Art.8,9,10,Fn.23;

Art.3:119

Art.28 Charter of the Organisation of African Unity(1963)

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11/70	Internationale Handelsgesellschaft -v- Evst. (1972)C.M.L.R.,255.....40
169/73	Compagnie Continentale France -v- The Council (1975)1 C.M.L.R.,578.....97
185/73	Hauptzollamt Bielefeld v Konig(1974) E.GR. 607.....96
15/74	Centrafarm B.V. -v- Sterling Drug Co. Ltd. (1974)2 C.M.L.R., 480.....96
6/76	Kramer et.al.(1976)2 C.M.L.R.,440.....97
61/77	Ireland -v- Commission(1978)2 C.M.L.R., 466.....97
141/78	French Republic -v- The United Kingdom(1980) 1 C.M.L.R.,6.....99
185-204/78	Van Dam en Zonen et.al.(1979)E.C.R.2345.98
231/78	Commission -v- The United Kingdom(1979) 2 C.M.L.R.,427.....89
258/81	Mettallurgiki Halyps S.A. -v- CommissionFn.100
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THE LAW OF ACCESSION OF STATES TO THE
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"... but when states are acquired in a province differing in language, in customs, and in institutions, then difficulties arise; and to hold them one must be very fortunate and very assiduous."

(Niccolo Machiavelli, The Prince.)

CHAPTER 1

INTRODUCTION

The second enlargement of the European Communities as a result of the accession of the Hellenic Republic (Greece) as its tenth member has been an event of significance for the Communities: not only because of the expected impact in political, economic and social terms, but also, and it is with this that we shall be most concerned, as another illustration of the Communities' practice in carrying into effect the commitment contained in the eighth indent to the Preamble of the 1957 Treaty of Rome, ".... to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts ..."

Such a statement implies both a process and a procedure, a gradual coming together. It is, as we shall see, a process that has a number of legal components

not all of which are contained or based on the three foundation Treaties. The larger part of the process is carried out as a matter of practice; a practice emerging from the action of officials and authorities at the national and at the supra-national levels.

The purpose of the present dissertation is to examine the Communities' practice or method of effecting enlargement and to identify and evaluate the function of law. We shall look for concordant practices which we may consider to be part of the law of accession following aspects of Hart's approach to Law¹.

By thus having distinguished between the legal and the non-legal aspect of the enlargement method and by having considered the nature of the legal components, we shall then indicate whether the accession of the Hellenic Republic has evidenced the existence of a law of accession. We may then discuss the efficacy of this body of law.

While inquiring, in this dissertation, into the Greek accession we shall contrast and compare it with that of the United Kingdom, Denmark and Ireland ("the first accession").

Although negotiations with Spain and Portugal are well advanced, for reasons of space and clarity we have restricted references to these negotiations and applications to footnotes and for occasional emphasis in the text. Our relative familiarity with the effects of accession on the United Kingdom is the main reason for selecting the British experience as representative of the first accession in 1973: the four applications were, at that time linked with each other, and the pace and direction of negotiations was dictated by the British application. We have not hesitated to consider aspects of the Irish accession or Norway's "slip twixt cup and lip." It has been, in addition, essential to look at the first abortive British application in the 1960s because it was then that the practice evolved which has become the foundation of the law of accession.

The European Coal and Steel Community (E.C.S.C.) and the European Atomic Energy Community (EURATOM) are discussed hardly at all. The E.E.C. is by far the most wide-ranging and dynamic of the Communities. The saving of space also supports such an approach. We have frequently chosen to speak of " the Communities "

where speaking generally, of the activities of any of the institutions of the three Communities.

We begin our aim of isolating the legal contribution in Chapter II in the form of a "screening-out" of (a) geographic and historic factors; and, (b) political and economic factors. Admittedly this may involve an arbitrary selection: one could as easily choose sociological, linguistic or even gastronomic factors, all of which could possibly be relevant. We have chosen these two sets of related factors, firstly, because they themselves are the aggregate of a number of other factors and, secondly, because of the intimate connection they bear to the topic.

We are investigating a European Economic Community: Europe may be defined, in the first instance, as a geographic and historical entity; Art. 2 of the E.E.C. Treaty clearly sets out its economic purpose, if such a statement were necessary; and while a community need not always be political, when the inter-relations of states and their economic activity are an issue, politics becomes inevitable: "We are not in business at all: we are in politics," said Walter Hallstein². Ernst Haas too in the early days of economic integration in Europe, considered the E.C.S.C. to be a political community³.

Our choice of such an approach is justified in the context of Chapter III, where we go on to consider the importance of integration theory. Integration theories, as will be seen, concentrate to a greater or lesser extent on the economic and political factors which usually involve and specify a use of law in the integration process. It is only the application of these theories to enlargement that concerns us and not other applications to integration elsewhere in the Communities. We touch here, for the first time in the thesis, on the importance of goal-definition. Integration theory assumes that integration is per se desirable and we accept this as a criterion of efficacy (which the reader may treat as a caveat.). Integration theory provides a standard which may facilitate the evaluation of the contribution of law. It will be noted too that integration theory is itself always in a state of flux; we assume too that this second accession, with which we are concerned, may affect integration theory once its significance is fully received.

Chapter IV, discussing the contribution of international and municipal law, is included as a necessary preliminary to later discussions. This leads us to the core of the topic which is

treated in Part Two of the dissertation.

Part Two begins by scrutinising the law and practice of accession in its application to the accession of the Hellenic Republic. Chapter V should be of particular interest: it examines the worth of a pre-accession association agreement. This is, historically and technically, the single most significant legal distinction between the first and second accessions. We begin to notice, in chapter V, how restrictions in any particular stage of the process of accession or enlargement in the wider sense of the term can have consequences for the other stages. This relationship, which goes to the heart of the inquiry dealing with the role of law in accession, becomes gradually more evident in Chapters VI & VII where the other advanced stages of the accession process are reviewed.

Going beyond the limits of a solely theoretical study we enquire about the goal which law might be expected to achieve and are consequently compelled to look (without being exhaustive) at the practical results of enlargement. Chapter VIII studies institutional changes induced by the accession of a new member state. Such changes are expressly contained in the accession documents and admit easily of comparison. The implied and consequent changes are sufficiently predictable to allow of discussion. Chapter IX

deals with some of the less easily traced consequences of enlargement: those areas where the direction of Community functioning is affected by accession. This is a selective exploration which takes into account the dynamic features of the Communities.

In Part Three, the concluding section of the dissertation, Chapter X, canvasses the emerging issue of the possibility of withdrawal from the Communities and the other related output - failures in the present enlargement method, viz. re-negotiation and secession. The final Chapter XI integrates conclusions already drawn in the course of the thesis and critically appraises the function of law in the enlargement method and offers practical suggestions for the improvement of the way in which the Communities enlarge.

As already indicated, our method involves contrast and comparison. The greater part of the research for this dissertation was executed between September 1979 and September 1981. There was, at that time, no systematic survey of the Greek accession negotiations. Accordingly, our first task was to prepare a narrative account of the Greek negotiations from the often scanty reports in the Bulletin of the European Communities ("the Bulletin") and newspaper reports.

The passage of time has brought with it an increasing amount of published work incorporating pertinent, though not predominantly legally directed, material (most notably, The European Community and its Mediterranean Enlargement by Loukas Tsoukalis, 1981). Such material has been included as footnotes, or to the extent it supplies crucial information, in the text. We have included our narrative account of the Greek negotiations referred to above as Appendix A; it may be of some interest in its own right; it is, at the same time, the factual basis for many of our arguments and conclusions. The inclusion of the narrative account in the body of the thesis would have diverted attention from the thrust of our argument.

The source material we have used is that available in English. Whilst this facilitated our research in relation to the British attempts at accession and the two accessions themselves, there was a scarcity of material written in English about the Athens association agreement. A number of apparently cognate articles in Greek, cited in English works, remain uninvestigated.

Our principal sources of reference are the Community Treaties, the appropriate secondary legislation, the jurisprudence of the Court of Justice, reports and working papers of the Community institutions and organs,

especially the Association Council under the Athens association agreement. We have made considerable use of the Bulletin and other publications of the Information Office of the European Communities. All of these have been available at Glasgow University library as an official depository of Community documentation. We have in addition relied upon related academic writings of the European Communities.

PART ONE

CHAPTER 11

MAJOR NON-LEGAL FACTORS

The enlargement process of the Communities, when a state applies for accession, involves a number of legal considerations; and while we may be able to identify a law of accession, the content of that law will vary from time to time. In comparing and contrasting the first and second enlargements, the attribution to the application of legal norms as causing major differences, which may actually be the result of unique factual or historical circumstances, should be avoided. We shall in this chapter make reference to these factors.

(a) Geographic and Historic factors.

Historically, Greece was always likely to answer the call in the Treaty Preamble (page 1 above). The earliest Greeks, known to us as a barbaric tribe, the Hellens, had drifted down from the Danube/Black Sea area around 1400 B.C. and had later returned to Europe as a colonial power (see Galtung page 59 below) colonising between 800 and 600 B.C. the area now known as Naples in Italy and Marseilles in France. There then followed, (4th century B.C.), the Golden Age of Pericles when democracy, science, and philosophy flourished⁴. The macedonian conquest pulled Greece

back towards the east but Roman conquest brought her closer to developments in the European area. Later, in the 4th century A.D., the Goths invaded Greece and it was not until the 1820's, after the Byzantine era and Ottoman rule, that Greece gained independence as a political entity and state.

In 1909 a military coup took place. In 1936 the Metaxas dictatorship was established. The aftermath of the Second World War brought a civil war between the Royalists and the Communists, lasting from 1946-1949. Then the British, who had included Greece within their sphere of influence, were unable to sustain their role in the area and were replaced by the United States.

The United States' response in 1947 was to shape its own foreign policy until the present day and have a substantial impact on Greece: "The very existence of the Greek state is today threatened by the terrorist activities of several thousand armed men led by communists, who defy the government's authority at a number of points, particularly the northern boundaries..... I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or outside pressures. Should we fail to support

Greece and Turkey in this fateful hour, the effect will be far reaching to the West as well as to the East. We must take immediate and resolute action."⁵ This is, among other things, the source of the Greek fear of Turkish aggression and distrust of N.A.T.O. which we shall later see was to play a substantial part in the accession negotiations (see page 150 below and App. A). The Monarchy was formally abolished in 1973 after the military coup of April 21st 1967 and shortly before the fall of the military government due to its failure to deal with the disagreement with Turkey over Cyprus in 1974. Karamanlis was recalled from exile to begin what was to become Greece's eventual progress towards membership of the Communities.

This historical background informs us of certain aspects of Greek foreign policy which we shall see reflected in later developments; for example, accession had to be able to deal with the Greek/Turkish relationship. When one recalls that this same accession procedure was used to resolve the question of New Zealand butter imports to the United Kingdom we begin to see how there can be a difficulty in formulating a generally applicable law of accession.

The foregoing brief introduction shows that the Greeks are indeed linked with Europe; this is something they vehemently stated during accession negotiations.

Greece is a medium-sized European Republic stretching across the tip of the Balkan Peninsula from the Ionian to the Aegean seas. Europe can be, and is primarily, a geographic term. The significance of this to the law of accession is that the clearest legal source of accession procedure, viz. Art. 237 of the E.E.C. Treaty states that an application can be made by "any European state...". (The reader is referred to Appendix D for relevant Treaty articles).⁷

Although this may not be immediately important, the sudden economic development of, for example, an African, Caribbean and Pacific state might make this an issue. Haas⁶ quotes Gravier who sees "a West European economic space", "elongated into West Africa". We submit that the term "European" has to be construed narrowly otherwise there is a danger of losing the loyalty to an ideal which is an integral part of the Communities and which is a focal point of integration theories (see Chapter III). We can say that the Greek accession has confirmed that a very restrictive view of Europe will not be taken by the Communities; indeed this attitude was already apparent from the Athens association agreement of 1961 which admitted of the possibility of membership.

It would seem that the correct approach is neither geographic nor historical but is multifactorial⁸.

Already we can see that law in the instance above has a definite normative function. It prohibits certain conduct even if such conduct would be otherwise indicated on other grounds: for example, the United States could not apply for membership. It has a positive aspect by encouraging applications by European states (the wider implications of this are discussed in Chapter III). Another indication of the nature of the law of accession that we obtain from Art. 237 is that it does not specify in detail who may and who may not apply.

In addition the position of Greece on the Mediterranean coast tends to bring it within the quasi-political grouping of "Mediterranean states". It is the similarity of topography and climate which associates Greece with other littoral states despite the lack of formal or economic bonds.⁹

The country extends to 51,000 sq.ml. in area, similar in size to Czechoslovakia. Most of Greece is within 40ml. of the sea and 75% of the land mass is mountainous. The climate varies radically from one area to the next, but the conditions are quite similar to those of the other Mediterranean states.

The population is concentrated in and continually drifting towards the cities. Over half of the population is classified as urban and Athens itself accounts for around 3m people¹⁰.

Greece does not share a common boundary with any other Community member state. This has implications for transport costs and the Communities aid funds. On the other hand, the Greek merchant fleet is one of the world's largest.

(b) The Political-economic background.

The Communities were formed with implicit political goals. One of these goals was a certain economic stability which was sought after World War Two, "...with the support of the United States, a powerful movement began to take shape for the restoration of commercial and economic relations in accordance with the theories which assert that international competition in a really big market will ensure that men and materials are put to the best use".¹¹

It was in this atmosphere that the three Communities were established. Political co-operation, or at least a certain degree of shared political harmony, was assumed. The immediate aim was rather economic, with scope left for gradual political progress.

The Communities are not "evangelical": it is left to non-member states to apply for membership or association. To say this is to take a legal approach. In economic terms, the establishment of the Communities has been an act which has focussed the attention of other states towards it, especially on its Common External Tariff. It was this more than any other background factor which prompted the United Kingdom and the other applicant states to seek to join the Communities. There was also considerable pressure from the United States.

In 1961, Prime Minister Macmillan said to the British House of Commons, "a Community comprising as members or in association, the countries of free Europe could have a very rapidly expanding economy, supplying as it eventually would, a single market of approximately 300m. people."¹² There was for the United Kingdom the added problem that its traditional source of food and industrial raw material, the Commonwealth, was contracting, "In the last few decades the majority of them (Commonwealth nations) have sought to enlarge both the variety of their produce and the range of their markets."¹³

The pressure from the United States was both politically and economically motivated: "Throughout 1950s and 1960s there were growing signs that the U.S. now regarded the Six as the most important ally in the cold war.... Britain had lost ... her former position of special access to Washington. A strong Europe would be able to dispense with American aid..... It would not only act as a bulwark against the spread of Soviet Communism, but would help to share the U.S. burden of distributing aid to the underdeveloped countries of the world.... after the 1960 Presidential election, Washington began to apply steady pressure on London to bridge the gap with the Six..."¹⁴

It was hoped that a substantial economic

benefit would accrue from membership. "Free competition from Europe would give our industry the stimulus to efficiency it lacked. more important, access to the mass market of the Continent would provide our more efficient industries with the opportunities to expand..... which neither the British home market nor the Commonwealth could any longer ensure."¹⁴

Politically the British were not enthusiastic about Europe. They believed they had rescued Europe from Hitler with the assistance of their former colonies and had not themselves been invaded. Britain had been separated from mainland Europe since the Norman conquest.¹⁵

It was to be some time between 1963 and 1973 that the United Kingdom would be able to enter. President de Gaulle's press conference of 14th January 1963 which effectively vetoed Britain's application came directly after the meeting at Nassau on December 19th of the previous year between John F. Kennedy, then the U.S. President, and Harold Macmillan, the United Kingdom premier, at which the U.K. effectively associated its defence policy with that of the U.S.. That extraneous matters of a political nature were able to affect an application based on an attempted economic co-ordination is an indication of a problem in the accession procedure. It is a problem which we shall discuss in the context of the Greek negotiations (see page 71 and App. A)

In comparison, the application of Greece was based on different motives from those involved in the British accession. "Enlargement is unquestionably a political imperative for the Community. To slam the door on the newly emerged democracies of southern Europe would be an act of folly as well as of selfishness".¹⁶

It has been suggested that from an economic point of view Greek accession should not have been permitted because it was too expensive or rather that the Greek economy was too weak to contribute to the progress of the E.E.C.. This is sometimes known as the "Rich man's club" argument.¹⁶ It has some force, particularly in a time of recession. It need not be a capitalist or reactionary attitude. It may be that to allow a less developed Country (L.D.C.) to join the E.E.C. would put so much pressure on it that the general political benefits would be lost.

As might be expected, when applying for membership the Greeks claimed that the economic problems, apart from being secondary, were not serious: "It may therefore be said that economic developments in Greece have been characterised in recent years by exceptional dynamism, considerably greater than that which had been predicted at the negotiations for the association of Greece with the E.E.C. in 1961."¹⁷ However, the Commission of the European Communities ("the Commission") noted that in the period between 1961 and 1975, "...agriculture lost little of its importance ..." and "...at the same time the industrial sector, because of the low starting point

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has not yet reached the stage of providing a very substantial part of the G.D.P.". ¹⁸

A cost-benefit approach, although often disavowed, was apparent in the negotiations. This may have been as a result of the experience of the first accession when economic arguments seemed so crucial and in the U.K., "...the political implications of joining the Common Market were constantly played down by the government once it had decided to join." ¹⁹ The cost-benefit analysis in so far as it was relevant was briefly as follows. Greece was to obtain an expanded market for her industry, aid from the Community regional and monetary support funds, aid from the C.A.P. and assistance in moving industry to secondary production levels from the reclamation and mineral mining stages which were predominant. The Community in return was to gain access to Greek mineral resources, especially bauxite, nickel, iron, copper, asbestos, lead and zinc.

The Community was also expected to gain from an enlarged market and from the proven oil reserves in Thassos of at least eighty thousand barrels per day. The value of Greece as a minor financial centre for the Middle East and the rest of the African littoral states was not underestimated.

Finally there was the Greek merchant fleet which was equivalent to 65% of the tonnage of the existing members, "Greece also brings with it as a dowry, the largest merchant fleet in the world..." ²⁰

a statement which suggests that apart from this asset, there was very little of short term benefit to the Community.

There was not then the same weight of obvious economic benefit in support of the Greek application as there had been when the United Kingdom applied.

We have already referred to a point which will arise throughout this thesis: respective motives for applying for membership were different in the cases of the United Kingdom and the Hellenic Republic. In the case of the United Kingdom there was the hope of economic benefit; in the case of Greece, political stability was thought to be more important. The Communities are not supposed to consider applications in this way: they are constrained by the commitment to European unity and must allow for accession where the requirements of Art. 237 are met. What the Communities may do is to ensure that the accession does not damage the Communities' existence whatever the motivation of the applicant.

While this can be an economic or a political question, we submit that this can only be the case in the most exceptional of circumstances: a bankrupt (economically undesirable) or anarchic (politically undesirable) member could bring Community functioning to a halt. However, it should only be in extreme cases that one of these factors could weigh against the primary importance of Treaty obligation to permit accession.

This being so, a way has to be found to achieve

this task. It is at this stage that law assumes a function. The Communities are built on a foundation of law, not only international law but also its own legal order. Its functioning and development are governed - and according to the integration theories which influenced its creation - predetermined and directed by its legal nature. Thus while it could have been possible to translate an "economic" application into the terms of a "political" application and seek to deal with the same parameters and concepts, this has not been the Communities' experience. In both accessions the economic and political issues have been encompassed within Community legal terms and concepts. It would be attractive to ascribe this to an acceptance of a "rule of law" by the leading actors but we feel (and this is justified by the integration theories we discuss and the accession procedure we later examine) that the very nature of the Communities necessitates such an approach.

Law is closely and intimately connected with both politics and economics and it is to some extent impossible to "screen-out" the political and economic aspects. Dealing with this inter-relationship Walker says of politics, "As studies jurisprudence and politics are interdependent and almost indistinguishable in originIn practice the studies of law and politics are inextricably enmeshed and inseparable"; and of economics - "Much law springs from the necessity of regulating economic relations and exists

for that purpose while economic activities ...
are shaped materially by the legal forms
recognised in the community." 21

We now proceed to consider some aspects of
integration theory, having shown that the inter-
relation of law, politics and economics is of
practical significance in accession. We hope to
clarify the scope within which legal technique
may be applied in accession allowing us to examine
the actual practice critically.

CHAPTER III

THE INTERRELATION OF LAW, POLITICS AND ECONOMICS IN ACCESSION: THE VALUE OF INTEGRATION THEORY.

In considering accession as a process which alters many aspects of the Community legal and institutional functions, we are obliged to review some of the fundamental Community concepts. This is because of the "re-ordering of the stakes of integration", which is said to take place on accession (see page 72 below). There will be powerful interests seeking to change the status quo. Those promoting these interests might try to use accession as a means of effecting changes which they could not otherwise execute. If, as we have suggested, it will be for law to ensure that accession is effected in the best way suitable for the Communities' goals, then it is necessary to determine the scope of the function that law may have to fulfil before proceeding. We must do this before going on, as we do in the concluding section, to evaluate its efficacy.

The Schuman plan envisaged "a new High Authority whose decisions will bind France, Germany and other member countries".²² Remembering also the Schuman statement that, "Europe will not be made all at once; or as a single whole; it will be built by concrete achievements which first

create de facto solidarity," ²²there is little doubt that law was intended to further the political goals of the Communities by making these achievements more likely by utilising the normative function of rules ("binding decisions").

The accession of a new state necessarily involves a consideration of this fundamental inter-relationship between law and Community goals.

It must be remembered that when considering integration theory, its recent development is largely based on the Communities' own experience. These theories, deduced from the complex and dynamic political and economic status quo, deal with the way in which it is thought that law can be used. But, because it is a theory which is derived from all three disciplines, it is quite amorphous.

Federalism

is perhaps the foremost theory of integration of states (themselves legal/political/economic entities). It begins with the United States of America. Before this, integration, when it took place, did so as a result of conquest or colonisation. "Neither the Declaration of Independence of July 4th. 1776 nor the constitution ratified by the thirteen states in 1781 contain any provision authorising the the federal government to regulate trade between the states. This lack of economic unity quickly gave rise to serious complications in trade and dissatisfied several of the less favourably situated States which

were suffering economically. Hence the constitution of 1787 removed from the individual states the right to keep their own tariffs and currencies."²³

The precedents in Europe were the Zollverein and latterly Benelux established between 1943 and 1945 on a different basis from the United States of America. They decided to form a customs union, but only after the economic position had been consolidated.

Implicit in the federal model is convergence at a high political level. We are concerned only with the federal model in which power is transferred to a higher authority by surrendering powers of the integrating states to the federation. Law is used in these situations (and the U.S. constitution is an example) to demarcate the areas of competence of the states and the federation.

To this extent the legal framework of a federation is unlikely to have a dynamic enlargement facet. Indeed it is likely to inhibit dynamism. It is appropriate in this regard to note that the United States has in the past enlarged by first purchasing the appropriate territory either by private or public treaty. Thereafter the acquired territory may aspire to statehood which is given by a downward grant as in the cases of Alaska and Texas.²⁴

The political future of the Communities in the long term was and indeed still is thought of as

leading towards a "United States of Europe." The more immediate aim in the first fifty years was to be the domain of a different political organisation: "Some people may still want to ask whether the Community is a 'federation' or a 'confederation' in the contrasting terminology of nineteenth-century constitutional theory. In my view, the alternatives are false. For the Community is neither. It is not a federation because it is not a state. And it is not a confederation because it is endowed with the power of exercising authority directly over every citizen in each of its member states."²⁵

So the federal model has difficulties in truly representing the reality of the European Communities. It can be useful in a study of enlargement only by way of analogy. Admittedly however, insofar as an application is made by a state to the Communities, the accession procedure, especially the negotiating conference, has an external similarity to a federal model and the ever increasing influence of the European Council adds to the illusion of federalism.

We now turn to a selection of the more modern theories concerned with integration in the latter part of this century.

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Functionalism,

as a theory, predates the formation of the Communities, having been incubated in the nineteen-thirties. It could therefore have had an influence in the formation of the Communities themselves. Functionalism is a concept of social science rather than any of our three areas of enquiry (law, economics and politics) alone; but that being so it is applicable to all of them to a degree, all being social sciences in their own right. We propose to look briefly at its contribution to understanding the enlargement process and the position of the law therein.

The international community is seen in terms of social, economic, and technological forces which transcend national boundaries. Because of the increase in technological achievement it is postulated that the political (and legal) reality will require to adapt to accommodate this progress. This happens unconsciously and, more significantly, with a minimum of political intervention: "The nature of each function tells precisely the range of jurisdiction and the powers needed for effective performance. And for the same reason, unlike rigid political arrangements, functional arrangements can be adjusted, without political friction when the conditions of the function are seen to have changed".²⁶

The first thing we notice is that functionalism recognises what we may call an extra-territorial dynamism that is obviously relevant to a study of enlargement. If we take States A,B, &C. which all have functional links one with another, they will also have links with states X,Y&Z respectively. What is it that identifies A,B&C as a community and X,Y,&Z as outsiders?

The functionalist answer is that legal rules will develop to meet the need. This is what is suggested by Mitraný when he speaks of the "range of jurisdiction and the powers needed for effective performance". It is in the nature of law to reduce, where possible, the normative requirements to as few rules as possible and provide for these rules, to a single source of validity.²⁷

This suggests that the legal form which will arise from the relationship between A,B&C will be generalised and capable of extension because of the mutuality of their obligations. On the other hand the relationship with X,Y&Z will be particularised and limited.

Functionalism indicates two things to us. Firstly, that there is a potential for membership of a community even if mutual legal obligation is minimal and political co-operation not evident; secondly, that the more numerous these co-operations become the easier it will be to give them legal effect.

What this theory lacks is specification. We are concerned with one particular set of communities and the European Communities are far more complex than what the postulates of functionalism envisage. Neo-functionalism tries to remedy these shortcomings.

Neo-functionalism,

Goes on from functionalism and begins to take account of factors other than technological change. Foremost among these factors according to Haas is the central position of the political actors or as he later describes them "elites". It is the shifting of their activity towards a centre with institutions which brings about unity. Moreover these institutions either possess or demand
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jurisdiction over the member states.

A theory such as this involves a considerable legal contribution. An institution is established by law and its activities are likely to include the power to legislate.

The other major theme of neo-functionalism is "spillover". This term refers to the way in which activity in one field makes activity in another field essential. The most obvious example was the drift to formation of the E.E.C. and Euratom after the success of the E.C.S.C. (see also "spill-back" in App. B).

Haas anticipated an extra-territorial spillover: "Is there not evidence that countries not

initially members of the regional grouping find it desirable to deepen their ties with the integrating bloc? Is there evidence, in short, that the geographical, as well as the functional dimensions of integration, tend to expand as new sectors are added? The evolving attitude of Great Britain towards Euratom and the General Common Market provides some interesting speculative material ..."²⁹ His examination of Britain's then apparently casual ties with the Communities (an association agreement with the E.C.S.C. being the only formal manifestation) concluded with the statement that, "A geographic spill-over is clearly taking place."³⁰ While the U.K.'s accession seemed to substantiate this analysis, the Greek accession following on the Athens Association appears to put the matter beyond doubt. Neo-functionalism clearly does offer a theoretical basis for enlargement.

Of greater legal interest is the way in which the institutions are taken account of in the theory. This view is taken further by Lindberg and Scheingold³¹ who include the ideas of competence and decision making within their theoretical community model. Neo-functional theory as developed by these two writers is quite complicated but because it is of great analytical value; and because it provides a convenient shorthand mode of expression of key terms we have included a brief summary which comprises appendix B.

They said that enlargement with the U.K. was, "not simply geographic expansion with its own special considerations, but, more significantly, several

distinctive kinds of internal redistributions which might be expected to flow from British entry". As integration itself is a process, then accession procedure must also be dynamic. Hallsteins analogy is still a graphic description of this: enlargement is like a passenger boarding a ship; it cannot go back to port nor can it change course and both must be kept moving.³² This is recognised by neo-function-alism which accepts that the Communities cannot make progress without first consolidating achievement and moving forward. We shall look to see whether this is reflected in our examination of the law and procedure.

In so far as the applicant has to be speeded up or the Communities slowed down, it is likely to be law which is used for this purpose, having, as it does, a central position in the Communities. In our next chapter we look at the nature of the law which is or can be applicable to accession. However law is not just a technique for effecting enlargement, legal changes are themselves the reality of enlargement. This is picked up by Lindberg and Scheingold in their discussion of "systems change" (which they consider accession to be). This systems transformation is, "an extension to specific or general obligations that are beyond the bounds of the original Treaty commitments either geographically or functionally. It typically entails a major change in the scope of the Community or its institutions, that often requires an entirely new constitutive bargaining process among the member states, entailing substantial goal

redefinition among national political actors."³³

Even although Lindberg and Scheingold are especially concerned with politics, we can see that this core concept of systems transformation has a considerable legal component. For example they speak of "commitments" and "obligations" which in the Community are frequently capable of analysis in legal terms. The components of their theory will be measurable in some instances by considering legal instrumentation. They also expressly acknowledge the extension of obligations geographically as a systems transformation which accords with our earlier consideration of enlargement as a "geographic spill-over".

We shall in the course of the thesis refer back to Lindberg and Scheingold's model both for convenient terminology and to provide a theoretical framework for understanding the significance of the legal changes we shall see take place on the accession of a new member state.

We now proceed to look at the different range of norms applicable to accession.

CHAPTER IV

INTERNATIONAL LAW AND MUNICIPAL

LAW : ACCESSION AND THE NEW LEGAL ORDER.

"(The Community) has a constitutional law, which inter alia governs distribution of powers among its various jurisdictional centres; and yet it also has a strong element of Treaty law, and relies on international law techniques for certain types of legislation and , indeed, for amendment of its Constitution, the constitutional acts themselves acquiring their sanctity because they are treaties and not because they emanate from the people in constitutional assembly..."³⁴

We do not find the above analysis entirely satisfactory (with no criticism intended of the learned author who was writing with a different perspective), but it does illustrate the point we wish to make: accession is effected by the operation of multifarious rules. Whether these are rules of the same or different legal systems can give a practical as well as theoretical result (see Lord O'Hagan's question page 164 below).

To those who think in terms of a hierarchy of norms, the initial statement has much to recommend it. Hunnings speaks above of sanctity but this is hardly an appropriate term being a hybrid moral/legal/political concept. It does however point to a considerable problem in Community law in general, and to the

process of accession in particular.

Article 237 E.E.C., in that it refers to "an agreement between the member states and the applicant state", is contemplating what in international law is a treaty. The rules of international law relating to treaties will therefore apply to the accession treaty. International law is not yet sufficiently clear on all the questions of form and effect of treaties. It has been said that, "the intention to be bound is the critical point."³⁵ We submit, that the question of intention to be bound in international law may differ from the intention to submit to binding rules.

How far then does accession depend upon international law? We think it sufficient to say that it is a source (in a non-technical sense of that term) of the law of accession. International law is not however a true source of Community law.³⁶

The principal application of international law is the accession treaty. We have already indicated that a binding international agreement may not be an essential part of Community membership; why then is a treaty concluded?

A number of reasons are possible. It may be that the content suggests the form: the negotiation phase of the accession procedure closely resembles traditional international relations. The determining factor may be the need for supremacy of Community law which is achieved in some states only with difficulty. The conclusion of a treaty being thought

of as a higher source can allow the "external" norm to have internal effect.³⁷

We do not have the space to review the whole supremacy question here and neither is there any need to do this. We accept that Community law must take precedence over even inconsistent later national legislation.³⁷ It is this necessity of being able to accept the supremacy of Community law, whatever its foundation, that we consider to be part of the law of accession. Where does this obligation come from? Art. 237 E.E.C. makes no mention of supremacy; neither is there any mention of it in the foundation treaties themselves. The doctrine was, in fact, developed by the Court of Justice of the European Communities ("the Court of Justice" or "the Court") in the now well known series of decisions in the early 1960s: case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, (1963) C.M.L.R. 105. By analysing the effects of the treaty referring in particular to the possibility of Community law directly affecting individuals without the need for its conversion or adoption by national legal systems, the Court found that the Community legal system was a new legal order; the later case 6/64 Costa v E.N.E.L. (1964) C.M.L.R. 425 saw the Court going further and by founding on the reciprocally binding effect on the state of accepting the Community treaties, the need for the treaty to be effective and the individual rights conferred, held that a subsequent national rule, incompatible with

the aims of the E.E.C. treaty could not apply in any conflict.

In subsequent cases,³⁸ the Court clarified the supremacy of Community Law to the point where it can no longer be in dispute. The position was already clear when the first accession took place, but it is fair to say that it was not settled when the U.K. applied for membership. Acceding member states must accept this jurisprudence as part of the acquis communautaire (see page 67 below).

It is curious that in each of the accessions we have examined, some attention has been paid to the doctrine of supremacy which itself is not mentioned in the foundation treaties. The Commission Opinions forming part of the accession documents both state, "Whereas it is an essential feature of the legal system set up by the treaties establishing the Communities that certain of their provisions and certain acts of the Community institutions are directly applicable, that Community law take precedence over any national provision conflicting with it and that procedure exists for ensuring the uniform interpretation of this law; and whereas accession to the Communities entails recognition of the binding force of these rules observance of which is indispensable to guarantee the effectiveness and unity of Community Law."³⁹

We submit that this itself has no binding force. Certainly Art. 189 E.E.C. states that opinions shall have no binding force. It is probably there to give political support to a position which is given its legal protection by accession itself, in that Art. 164 E.E.C. gives the Court sole jurisdiction to interpret the Treaties.

There is much of interest in looking at how the applicant states bring their national legal systems into line with the supremacy doctrine, but it is beyond the scope of this thesis to examine this. The domestic problems of Eire and the Hellenic Republic are well set out by others⁴⁰: Both of these states enacted constitutional amendments which provided for the supremacy of Community Law and it justifies our saying that some such arrangement is an informal but essential requirement before accession will be permitted.

We now return to the idea of sanctity of the constitutive treaties. An acceptance of this idea causes difficulty when accession is contemplated, Does the alteration of these treaties materially affect the new legal order which has been founded on them? We would submit that this is not the case. An accession will not seriously affect the new legal order if it is accepted that its validity rests upon a rule of recognition, which Hart speaks of as "providing the criteria by which the validity of the other rules of the system is determined."⁴¹ He calls

this an "ultimate rule". The usefulness of the Hartian view is that it does not rely solely upon a perusal of the treaties themselves to determine the content of the rule. "A rule of recognition is unlike other rules of the system. The fact that it exists can only be an external statement of fact."⁴²

We would apply this to accession to the Communities by submitting that for so long as the features which led the Court to declare the new legal order and the supremacy of Community Law remain in existence the Communities constitution remains intact.

This sort of reasoning was apparent in the E.N.E.L. (page 36 above) case. The Court said, "In fact, by creating a community of unlimited duration having its own institutions, its own personality... real powers... the member states have restricted their sovereign rights."⁴³

The corollary of this is that as a new member state brings about a new factual status, the rule of recognition may change slightly.

The importance of having an understanding of the nature of Community Law is seen for example when we later see that the negotiation phase of the accession procedure raises questions about the difference between adjustment (provided for in Art. 237 E.E.C.) and amendment (provided for in Art. 236 E.E.C.).

How these articles are interpreted can have enormous ramifications for accession procedure. If instead of accepting the Hartian analysis one were to take a Kelsenian view, considering the treaties to be the locus of a "grundnorm" or basic norm, then the choice between adjustment and amendment could become a technical matter. If one accepts the rule of recognition analysis, the choice between these two courses becomes a matter of qualitative appraisal. A final indication that the rule of recognition line is more appropriate is seen in Lindberg and Scheingold who in their consideration of systems transformation place some weight on the "political economic reality" (see also Friedman).⁴⁴

Two final issues need to be mentioned about the implications of international law. The Court of Justice ruled in case 11/70, Internationale Handelsgesellschaft (1972) C.M.L.R. 255 that "respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to member states, must be ensured within the framework of the community structure and objective"⁴⁵. This raises much the same question as we looked at above. It also seems to be an acceptance of the argument that the Community constitution can be altered, albeit imperceptibly, without formal amendment of the Treaties.

Another aspect of the same motif is the effect that accession has on the ability of the Communities at some stage to amend the Treaties. This difficulty arises because the new member states may be barred by their constitutions from allowing such a course considering that they might be exceeding the original power granted by constitutional amendment to join the Communities. Lang⁴⁰ certainly felt that this might be the effect of the Irish constitutional amendment. Art. 28 para. 3 of the constitution of the Hellenic Republic could easily have the same effect. While these enabling clauses, being widely drafted, are not likely to become obstructions to future amendment, this is a contingency which must be provided for.

This concludes our preliminary investigations into the motives for enlargement and the general political, economic and legal background factors. We now proceed to inspect the accession procedure itself.

PART TWO

" "And must one have a permit to sleep here?" asked K..."One must have a permit," was the reply..." "Well I'll have to go and get one," said K. yawning..."And from whom pray?" asked the young man..."From the Count," said K., "that's the only thing to be done." "A permit from the Count in the middle of the night!" cried the young man..." "Is that impossible?" inquired K. coolly, "Then why did you wake me?" " " (Franz Kafka, The Castle)

SECTION A

THE PROCEDURE AND PRACTICE OF ACCESSION.

CHAPTER V

ASSOCIATION WITH A VIEW TO MEMBERSHIP.

As we shall see when examining the negotiation phase in the next chapter, applicant states must at times feel that K., the proverbial camel and rich man could not experience as great a difficulty in reaching, respectively, the castle, the other side of the needle and the kingdom of heaven, as applicants have from experience had in trying to accede to the European Communities. A procedure has developed and we start by looking at what we suggest can be thought of as the first legal regime providing for the controlled accession of an applicant state to the Communities: a Community legal act under Art. 238 E.E.C.. We look first at association agreements generally and then at the idea of association with

a view to membership. Chapter VI which follows examines Art. 237 E.E.C. which is the only Treaty article expressly providing for accession. Chapter VII looks at the legal regime which applies subsequent to accession,

We look at association first because it is logically prior and historically it was the Communities' first response to application (which according to Lindberg and Scheingold can be considered as "demand" within their equation) for eventual membership.

Association under Art. 238 is to be distinguished from application for membership under Art. 237 and from commercial agreements in terms of Arts. 110-116 E.E.C.. The latter are concluded by the Communities alone and bind the member states. The Commission makes a recommendation to the Council which then gives a negotiating mandate to the Commission. The Council forms a mandating committee to assist the Commission.

Article 238 on the other hand is a wide and flexible provision; "reciprocal rights and obligations" can be as wide or as restricted as the parties themselves desire. A possible restriction one could posit is that these rights and obligations should not be inconsistent with the Treaties themselves. Another restriction would be to apply the rule expressio unius alterius exclusat to the relationship between Arts. 237 and 238. This would prevent any association agreement amending or adjusting the Treaties.

There are three identifiable uses to which the association agreement is put.

The first use is to regulate the relationship of the Communities with the member states' former dependencies and ex-colonies. The principles governing these arrangements are found in Art. 132 E.E.C.. These may be concluded under the so-called "mixed procedure" which differentiates them from other association agreements⁴⁶. Examples of these are the agreements with Nigeria and Lome Conventions.

Secondly, the Communities have association agreements with the Maghreb states, with Malta, Austria, Iceland, Portugal, Sweden, Switzerland, Turkey, Finland and Norway among others. These are themselves broadly divisible into categories. The Maltese and Maghreb agreements resemble preferential trade agreements common enough in international relations, although they do have the hallmark of the Communities: an institutional structure viz. the Association Council.

The agreements with Switzerland, Austria and Sweden are also distinguishable; these agreements exist despite: (a) Switzerland's permanent neutrality first recognised during the Congress of Vienna and now internationally accepted; (b) Austria's similar neutrality and its obligation under the State Treaty for the Re-establishment of an Independent and Democratic Austria (1955), preventing Austria entering a political or economic union with Germany; (c) and Sweden's "non-legal"

neutrality founded on a neutral foreign policy. (see Eek).⁴⁷

This shows how flexible association under E.E.C. Art. 238 can be. As Eek said, "It is important, however, to note that Art. 238 in the Rome Treaty is drafted in wide terms and permits a minimum of rights and obligations between the parties to an association agreement as well as an arrangement which comes very close to full membership."⁴⁷ Indeed Sweden's second application was considered by the Communities as having been made under article 237 and not 238.⁴⁸

. Association was taken to its limits (for the present) in the case of Greece. This was the first association agreement and as can be seen from our chronology (see page 215 below) the beginning of the Communities' enlargement policy. The distinguishing feature of this, the Athens association agreement, and the Ankara agreement with Turkey is that they were concluded expressly with a view to the eventual full membership of the associate. This is evident from the preamble of the Athens agreement at para. 4, "Recognising that the support given by the European Economic Community to the efforts of the Greek people to improve their standard of living will facilitate the Accession of Greece to the Community at a later date."

This is given substance by Art.72 of the Athens agreement: "As soon as the operation of this agreement

has advanced far enough to justify envisaging full acceptance by Greece of the obligations arising out of the Treaty establishing the European Economic Community, the contracting parties shall examine the possibility of the Accession of Greece to the Community." Admittedly this is not a very onerous obligation but it is more than an expression of hope, for otherwise the preamble expression would have been sufficient.

What is noticeable even at this early stage is the Communities' insistence upon "full acceptance". This inchoate expression was later to blossom into the doctrine of acquis communautaire (see page 67 below).

There is a similarity between the idea of a grant of aid by the Community to Greece and the grant by the United States to the original member states under the Marshall Aid between 1948 and 1952. The form of the agreement also closely follows that of the Community treaties. This suggests that the Communities were acting reflexively rather than deliberately: an ad hoc response.

Not only was this association with Greece the first move towards enlargement, but it was not intended to be the last. At the signature ceremony the then President of the Council said, "We see in your country ...the cradle of European culture. How then could we possibly conceive a European Community without Greece?...it is with your country that we make the first step towards the extension of our

Community."⁴⁹

The desire for eventual adhesion was provided for in a practical way in the agreement by the attention to economic detail: "It is certainly true that the association is no mere commercial agreement. The texts quite clearly show that it...was in fact intended as a preparation more or less advanced according to the area - for full membership in many, if not in most, of the main areas of activity mentioned in the Rome Treaty."⁵⁰

What this suggests is that association with a view to membership does not depend on an Article such as Art. 72 Athens alone, but upon the scope and nature of the substantial provisions contained in the agreement. On the other hand the political effect of Art. 72 Athens was to be confirmed when the association was "frozen", which we discuss later in this chapter (see page 51 below).

The definition, if we were to seek one, of association with a view to membership would be based on integration theory which we looked at in Chapter III, (see page 24 et seq above) and would reflect the existence of legal political and economic motivating forces.

If we accept that the political requirement was met by para. 4 of the preamble and Art. 72 Athens, where should we look for the economic indicator? "The agreement of association went beyond the establishment of a customs union. It called not only for the complete abolition of all

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barriers to trade between Greece and the E.E.C. over a transitional period of twenty-two years but also for the harmonisation of Greece's agricultural financial and transportation policies with those of the community".⁵¹ Accordingly only the closest possible economic ties justify the "with a view to membership" tag. It was the detailed legal obligations binding upon both parties which actually made the Athens agreement part of the law of accession. It is analogous to the motoring rules which ensure that vehicles are travelling at a sufficiently fast speed before joining a motorway. The accession procedure and particularly the association with a view to membership is analogous to the lane markings which allow a "filter feed - in lane" where a driver hoping to join the traffic can pick up speed (Highway code ch. 149).

We have then an agreement with a long term political aim and a medium term economic aim. Which was the greater influence? It was said that "The problems of economic unions between countries that are in different stages of economic development have not yet been resolved. Extension of the traditional customs union theory to problems of economic unions between developed and developing countries is not always appropriate for the special conditions of such unions." ⁵²This sentiment was expressed by others suggesting⁵³ that it must have been largely a political decision to associate with Greece at that particular time.

The contents of the agreement are well described

by the other writers cited in this Chapter but a brief summary follows for the sake of continuity.

The agreement took effect from November 1st. 1962: A twelve/twenty - two year transitional period was established for the full realisation of customs union and Greek exports were given equivalent reductions on tariffs to the member states themselves. Special attention was given to sensitive products. Tobacco and raisins were given preferential treatment but quantitative restrictions were placed on some fruit produce. All imports from the E.E.C., with the exception of most industrial products produced in Greece, were to be subject to complete tariff reduction in a staged period within twelve years. Art. 18 of the agreement allowed Greek derogation, "provided this action would help stimulate new activity." Industrial products were treated similarly but were subject to a 22 year transition period; by staged reductions within the transition period Greece was to adopt the Common External Tariff: An association Council was formed; free movement of labour, capital and services was to be achieved and Greece was promised loans of 125m. U.S. dollars in the first five years of association.

Clearly this was an agreement differing in degree rather than in the essentials from the original Treaties.

We now ask how this was likely to contribute to the enlargement method and how it did contribute to the course of enlargement.

Referring to the theoretical model in Appendix B we suggest that association is an example of demand in the enlargement process. Of course, an application for full membership is demand also but both can be distinguished on qualitative grounds: Association is a lesser demand. Among the other factors mentioned by Lindberg and Scheingold, systemic support was not high at the time of the Athens association because the Communities themselves were only recently formed. Leadership was at a high level as the Commission was at that time unfettered by the Assembly or by Court decisions.

It was therefore likely that a systems transformation could be predicted, i.e., that the Athens agreement would result in an increase in the functional scope and institutional capacities of the Communities.

It is not certain that association with a view to membership was intended to be such a theoretically sound proposition, but the resort to a system of rules indicates a conceptual approach. Had, for example, only economic aid been intended this could have been done in other ways.

We now consider how far these theoretical expectations were justified in fact.

We must first mention the freezing of the association. This, unfortunately, makes it extremely difficult to gauge the practical effectiveness of an agreement such as the Athens association in the accession process.

The circumstances of the freeze are well-known⁵⁴. The Greek army seized control of the Government on 21st April 1967. The Communities' answer was then to "freeze" the association. What they meant by this was not entirely clear. The Commission said in 1967 that the freezing would affect, "areas requiring further negotiation and not bound by specific legal provision."⁵⁴ This is an indication that there can be a division (although it may be only temporary) between politics, economics, and law in the accession process (and incidentally is a partial justification for the division we have made between these three disciplines). Indeed, if we assume that the legal nature of the association was as dynamic as the original treaties then a freezing which did not interfere with the fundamental rules would have little retrograde effect on integration.

The other theme was that the association was reduced to current administration. The problem from the Communities' view was that the Greeks were not in breach of their agreement. The "view to membership" provisions were then used to try to justify what was in fact political disapproval of the regime. The President of the Commission said on

November 28th 1967, "the association agreement with Greece was not only an economic agreement but also an agreement having a political bearing as it would lead to the ultimate adhesion of Greece to the Community."⁵⁴

This was perhaps unfair because the agreement only "could" lead to membership and not "would" lead to membership. There was in fact no legal basis for such an action. Coufodakis⁵⁴ states, "Art. 237 on membership set not only the geographic limits of the Community, i.e., a European Community but also carried the de facto condition of Parliamentary democracy..." We look at this in more detail as a point raised at the time of accession (see page 120 below) but at this stage we submit that whatever the interpretation of Art. 237 E.E.C., to use that article to restrict the operation of the association was to take an extreme view of the extent of the binding force of Art. 72 Athens. It is accordingly the case that the reader must beware of the distorting effect of the freeze in the discussion that follows.

The association did not live up to its economic promise. It had been thought likely, on theoretical grounds, that the Greek economic position would suffer if the agreement were to be adhered to but that economic support would compensate for this. Hitiris predicted, "The deficit of the Greek balance of trade will expand during the period of association and the welfare effect of the changes in trade will not be very significant. If the deficit in the balance

of trade means also a deficit in the balance of payments, Greece will probably meet additional difficulties in her effort for accelerated growth and development. However, the E.E.C.'s compensation of the detrimental effects of the association in the form of economic aid could possibly be extended to become the basic instrument in the process of development through association."⁵⁵

In any event, the Communities were always likely to advance in the space of twelve or twenty-two years, making some obligations difficult to fulfil. Financial support was not forthcoming- under the Athens agreement the European Investment Bank was to allow loans of 125m. U.S. dollars in the first five years of association. By 1970 only 69m. U.S. dollars had been advanced. The Communities claimed that this was because of the freeze. Part of the failure to obtain the appropriate level of funding was in part due to the Greek failure to find sufficient capital and projects to absorb the loans (a maximum 2/3 capital could be required). Some 32m. U.S. dollars had been repaid before the freeze. It was suggested on the other hand that the industrial loan rate was too high.⁵⁶

The Community's attitude, when considered with the two and a half year delay by the Community in ratifying the second financial protocol authorising loans of 280m. u/a, led Strathos to speak of "a lack of any substantial assistance."⁵⁷

This economic problem in itself need not have been at all serious , as Hitiris was speaking only of static effects and it was apparent that there would be dynamic gains for the less developed country resulting from the relocation of resources and tariff changes.⁵³

These dynamic effects are widespread and can explain why, notwithstanding the lack of enthusiasm on the Communities' part the Greek economy continued to grow. Kalamatosakis went so far as to say that, "If the economic miracle which associate membership has brought continues to benefit Greece the country will be in a position to assume its responsibilities of full membership in the E.E.C. before 1984."⁵⁹ (Incidentally this comment reflects the psychological force of Art. 72 Athens which made full membership by 1984 seem certain.)

Greece for its part continued to act as if the association had not been frozen causing it to suffer financial losses. The Greeks thought that this was of some value in the later accession application, "In fulfilling the obligations of the association for fifteen years... Greece has long since begun to adapt its economic structure to that of the Community and moulded it towards full and complete accession."⁵⁷ It could have gone further. Had the association not been frozen, political initiative could have built upon the legal framework which had been provided to allow of a more active association, preventing a situation arising where it could be said that "participation in the Communities'".

customs union is very different from being in a customs union under the association agreement."⁶⁰

As it was, the resulting position was more modest: "the existence of the 1962 association agreement, which makes provision inter alia for the gradual establishment of a customs union between the Community and Greece, puts the (Economic and Social) Committee in a better position to assess the results and problems of merging the two economies."⁶¹

It should have been possible to make more of the association; we shall discuss this in our conclusions. Without a doubt, the association left much economic integration to be achieved which in the context of accession as we shall later see means that political issues will be needlessly involved.

The association agreement was a useful political lever. Its value in this regard was due largely to its legal nature. The Greeks had after all continued the agreement against the strongest possible political opposition and they did not forget this when the time came to apply for membership of the Communities.

We shall now look at how the existence of this agreement was taken account of in the enlargement process at the accession stage. This, to some extent pre-empts our discussion of negotiations, but it seems proper that the association should be dealt with in all of its aspects at the same place,

as it is pivotal in this thesis.

The Greeks insisted that progress should continue to be made under the Athens agreement and that the timetables contained therein should be followed. The Association Council on learning of the application under Art.237 E.E.C. confirmed that the work involved in negotiating entry should not delay the development of the Association.⁶² It was also stated at this time that it was thought that progress already achieved under the association would help some of the problems posed by accession. This "separate development" operated satisfactorily but as time went by it was suggested that it was unnecessarily formal to insist that negotiations and the work of the Council should be kept apart.

The fifth report of the Association Council reveals that whilst Greece continued to reduce its customs duties under the time-table of the Athens agreement, some of its work was affected by the negotiations then in progress. Indeed, as the Council's work was now relegated to day to day running, it was felt unnecessary to hold Association Council meetings at all, leaving the work to an Association committee. The Committee, reopening talks on the special tariff arrangements for the Dodecanese, was informed the Community could not proceed with entry negotiations on free movement of goods in the industrial sector until the special tariff arrangements had been resolved, and had deferred consideration until the deputies meeting on 20th February 1979.⁶³

The Committee itself decided not to discuss the question of duty free arrangements but to leave this to be resolved in the accession negotiations.

These were pragmatic solutions. As such they did detract from the legal obligations contained in the Athens agreement. They did regrettably divert political activity from the association, which in the event of the collapse of the accession would have left the association weakened.

Greece took action under Art.18 of the Athens agreement to re-introduce a customs duty on cathode ray tubes for television sets at the substantial rate of 12% for the E.E.C. and 20% for other countries. As required, a note was given of the economic grounds in support of the derogation. The Community thought these inadequate and complained that notice had been given two months after their imposition. They were in the end approved.

The significant point for us is that in the accession negotiations this re-introduction had been requested and rejected by the Commission. And so in a real sense the separate development continued in full force.

It has been said that, "there can be no doubt that the association has been a useful preparation for full membership...nor can there be any doubt that the preparation would have been even more useful had the association agreement been fully carried out!"⁶⁰ In an economic sense it had not been a triumph: "the only area where a concrete preparation for full membership (had) in fact been achieved (was) that of the Customs Union".⁶⁰

Neilsen questions the value of a consideration of the Athens agreement in discussing accession because "the accession negotiations are not based on the association agreement and the extent to which its various provisions have been carried out".⁶⁴ The only criterion she correctly points out is the ability of the applicant to accept the acquis communautaire and not whether either side has observed its obligations under the association agreement.

We cannot comment on how far we would adapt the present enlargement process until we have discussed negotiation and the other stages in the procedure. However, already we can say that law has had a positive and negative effect on the other aspects of enlargement. It consolidated past achievement by preventing the political act of freezing from terminating the relationship between the states - a negative function; the positive thrust of the provisions encouraged economic and political harmonisation. We expect to see these functions appear in the other phases of the procedure.

It is however impossible to evaluate fully the possible uses of association as part of the accession mechanism until we have looked at the other stages. We must bear in mind too that the Community itself did not know how difficult accession was at the time of formulating the Athens association agreement.

We now turn to look at the procedure and practice founded on Art.237 which has already been mentioned in passing.

CHAPTER VI

ACCESSION PROCEDURE FOUNDED

ON ARTICLE 237 E.E.C.

The express terms of Art. 237 imply that certain procedural steps will take place: An application by "any European state"; a unanimous Council Act; a Commission opinion; an agreement between the member states and the applicant state which must contain the adjustments to the Treaty necessitated by admission.

We propose to discuss this procedure but not seriatim because the Community response to application is not easily allotted to these categories.

We have already discussed the geographic and historical implications of an application (page 10 above). Much has been read into this provision other than those aspects we mentioned earlier. Galtung said of the Community, "It is also considerably less than "European": It is only for those powers in Western Europe that meet certain requirements, above all recent loss of Empires and/or N.A.T.O. membership!"⁶⁵ This may well reflect the Communities' external appearance, but it is not given a legal warrant in Art. 237. However, we shall see that acceptance of an application does not always proceed upon legal grounds.

A less speculative extension of the term European is that mentioned by Bambaseli, among others:

"One of the instructions of the preamble to the Treaty of Rome is that only countries which are both European and Democratic can become members of the Community".⁶⁶

We can certainly see nothing in the English text of the Preamble, nor in the U.N. Charter to which it refers, to support this proposition. We shall return to this question when looking at the Court of Justice (page 120 below). What we can say is that neo-functionalism assumes the existence of a pluralist state of some description in order that demand and pressure for progress generally can be processed in such a way that spill-over results. To this extent there would be a utilitarian argument for restricting membership to pluralist states. While almost every democracy is pluralist (indeed this is part of some definitions of democracy) not every pluralist state need be a democracy. As we shall later see, the acquis communautaire implies that Community initiatives will be followed, and the ability of the applicant to fulfil the acquis communautaire comprises a consideration of its pluralist nature, because we saw in Chapter 111 that the Community depends considerably upon elite groups to function and elite group activity can only affect government in a pluralist state. The Economic and Social Committee is a manifestation at the highest level of this pluralist approach.

The law here is clear and we would submit that there is no reason why a non-democratic state could not apply. Neither can we properly imply "pluralist" into Art.237; it is of course a consideration in determining whether the application should be accepted -

in the first place which would throw upon the Communities the onus of refusing an application, politically more awkward than ruling an application ineligible.

Moving on to the question of application itself, E.E.C. Art. 237 makes no mention at all of who should make the application. International law provides for the conclusion, ratification and authentication of treaties but not for their negotiation. As Art. 237 procedure is completed by a treaty, then it is appropriate that the agreement should be as a result of the transactions only of the party which eventually completes the international law requirements.

As, "Every state possesses capacity to conclude treaties"⁶⁷ and the practice of international law recognises by custom certain designated delegates of states to carry out these functions⁶⁸, then the Community will insist upon dealing only with these parties. This is not stated in Art. 237 because it is part of the international law context we discussed briefly in Chapter 1V. Art. 237 by referring to "states" accepts this analysis.

States it seems take the precaution of having domestic political authority before applying for accession. This may either be a requirement of national constitutional law, but may also be an attempt to add political weight to the application and at a later stage to avoid political pressure for withdrawal. Certainly the Community would have no obvious legal grounds for refusing an application because it did not follow on a parliamentary mandate.

Obtaining such authority does seem to be an almost universal practice: The Macmillan government went to Parliament on 3rd August 1961 after having been elected in July 1959; The second application in May of 1966 was also made after Parliamentary approval had been sought; The Commission, commenting on the Spanish application noted that, "the unanimous support of all the political parties represented in the Spanish Parliament and of both sides of Industry" was in favour of membership.⁶⁹ The Greek application was made 7 months after an election had given the pro-european New-Democracy Party 54% of the vote.

We submit that obtaining a national domestic mandate before application should be considered as being truly part of the law of accession; we shall in our conclusions consider whether it presently takes an appropriate form (see page 173 below). It should be considered whether the Community would be better advised to incorporate a provision specifying the way in which applications ought to be made, such as is found in Article 28 of the Charter of the Organisation of African Unity.⁷⁰

It is also surprising that there is no place in Art. 237 for the Assembly, the members of which are now directly elected. "Determined to lay foundations for an ever closer Union between the peoples of Europe"⁷¹ must be given more meaning, especially in the context of accession. Apart from Art. 237 itself it is the international law dimension which

has deprived the peoples of Europe from having a part to play through the Parliament in the accession procedure. The experience of Greenland⁷² must emphasise how crucial it is to introduce a popular element into accession procedure. So far the law and practice of accession precludes such an approach.

We now look at the origins of the interpretation of Art. 237, an interpretation which was, and we feel, significantly used again in the case of Greece. This covers three legal acts: the Commission opinion; the Council act; and the agreement between the member states. The first two of these are acts of Community Law and the third of both Community law and of international law. We look at this mainly because it constitutes the basis for the negotiation phase.

One month after the signature of the Athens Association Agreement, the British government sent a letter addressed to the Council on Aug. 9th 1961. It stated that the U.K. wished "to open negotiations with a view to acceding to the Treaty of Rome under Art. 237."⁷³

It was then not clear whether this was the way things were meant to be done, but the U.K. had no formal guidance from the Treaties nor practical guidance from the Community itself. We can assume that extensive informal discussions had taken place between the major political actors in the applicant and the member states. This was confirmed by Macmillan's statement to the House of Commons "During the past 9 months we have had discussions

with the E.E.C. governments. We have now reached the stage where we cannot make further progress without entering into formal negotiations Art. 237 envisages that the conditionsshould be the subject of an agreement. Negotiations must therefore be held in order to establish the conditions on which we might join".⁷⁴

This is the first indication of a procedure and a time scale to supplement the skeletal Art.237. Macmillan's course of action would have been formulated in conjunction with the heads of state of the member states and perhaps with the Commission. A plain reading of Art. 237 would suggest that the Council Act and the Commission opinion would be prior to the Agreement, the Council Act confirming the political will in principle and the Commission commenting on the effect upon the treaty structure.

What we must remember is the significance of the British application to the Community and the world. It meant a gradual disintegration of the Sterling Area and the Commonwealth preference. It also involved E.F.T.A. as an organisation; the U.K.'s application was made conditional upon acceptance of those of the three other then applicant states: Ireland, Norway and Denmark.

Barbara Castle, M.E.P., has stated, "Enlargement is only possible within the context of abandonment of the Treaty of Rome, the abandonment of the Parameters of the six. There's got to be a fundamental root and branch reconsideration and rebuilding. There should have been that when Britain, Denmark and Ireland

joined".⁷⁵ This may well have been what the British were originally seeking. The first British application came at a time when the Community itself was hardly established, the various transitional provisions contained in the Rome Treaty being extant. This may have resulted in some unnecessary inflexibility 'in the Communities' attitude. We now turn to the Communities' response.

The Council replied to Macmillan that "the procedure envisaged by the Treaty had been set in motion".⁷⁶ The Council then wrote to the Commission asking for an opinion. This the Commission refused to do until the negotiations were completed. If the Commission had replied immediately, it would have been deprived of further control of the process as there would only remain the agreement to be concluded. This is concluded by the member states and the applicant states alone.

Presumably, this statement by the Commission was enough to constitute a definition of its position within the terms of Art. 175 so as not to constitute a failure to act. In any event the Council did not require a positive opinion to act, the only legal requirement being that an opinion be taken. Art. 237 did not specify a time scale.

It had then been established that negotiations would take place and that they would precede the Commission opinion and the Council act; it remained to be seen who would conduct the negotiations. The Council decided that the member states would negotiate at its meetings of the 26th and 27th of

September 1961. This was contrary to the Commission's view that the Commission should negotiate on a bilateral basis. They felt this appropriate because (a) of their knowledge of the working of the Community, (b) it would allow separation of ordinary Community business from the negotiations, (c) according to their reading of Art. 237, it was legally appropriate. The Commission was allocated the role of counsellor to the parties and a right to be heard, but was not even given the chair in the negotiation meetings.

We would submit that, on legal grounds, the Commission's argument was not well founded. Art. 228 gives the Commission a negotiating role in Community agreements whereas Art. 237 expressly states that the agreement is to be concluded between the member states and the applicant. If a negotiating role had been intended for the Commission, it would have been stated: Expressio unius est exclusio alterius.

However, the Treaty was not to be imperiled even in the absence of the Commission, for the Council stated a number of principles which would be followed in the negotiation process, "...any application for accession to the Community would mean that the country unreservedly accepted the rules and objectives of the Treaty of Rome; consequently, negotiations could only deal with the conditions of admission and adaptations of the Treaty which these would involve".⁷⁷ (It was also stated that for political and economic reasons, membership of the E.E.C. would entail membership of Euratom and E.C.S.C.; This was not legally essential especially

before the Merger Treaty.)

These principles were developed into the doctrine now known as acquis communautaire as a result of the British reply. The U.K. "...reserved the right to discuss other subjects arising from various articles of the Treaty, particularly in regard to the regulations, directives, decisions and recommendations adopted since the Treaty came into force. The British government suggested that the examinations of some of these problems could wait until after the U.K. had acceded to the Treaty, although for the more vital matters the British Government considered that it was desirable to establish mutual understanding before accession".⁷⁷ The reply to the U.K. was in total opposition to the British initiative. "...We start from the principle that these protocols must not be allowed to modify the tenor and the spirit of the Treaty and must essentially concern transitional arrangements only...problems...need to be settled without exceptions becoming the rule and vice versa. Exceptions must not be of such scope and duration as to call into question the rules themselves or impair the possibilities of applying these rules within the Community".⁷⁷

As we shall go on to show, the same approach was taken with Greece, and consequently, this initial coagulation of policy needs to be properly understood. We have already pointed out how in concluding the Accession agreement, the Community had indicated that accession meant assuming all of the obligations of membership.

The Council statement was wrongly phrased. It should have been the other way around. As put, it was an example of petitio principii: the reason that an applicant must accept the "rules and objectives" is that Art. 237 restricts it to this by limiting consequent changes to "necessary adjustments".

As we shall now see, this is the received interpretation of the Treaty: Art. 237 allows of only changes which directly and closely result from membership and as such may be effected by the subsequent agreement.

The British were, not without some justification, to try to go one step further: to accept that they would be bound by the Treaty as it stood, but then to try to undermine the legislation developed thereafter. Even Art. 237 gives no legal basis for preventing this review. It is Community law itself which has developed the idea of acquis communautaire, not international law. Acquis communautaire has come to mean more since the first attempt at enlargement (mainly because the Community itself progressed) and it now comprises all Community achievements: This acquis communautaire was given a restatement on the opening of the negotiations for the second British negotiating conference when the Community required, "the acceptance of the Treaties and their political objectives, all the decisions of every type which have been taken since the Treaties came into force, and the choices made in the field of development.

The solution of any problems of adjustment which may arise must be sought in the establishment of transitional measures and not in changes of the existing rules; as a general rule, they must incorporate detailed timetables".⁷⁸

The acquis communautaire in its renewed form was restated at the first meeting of the Greek negotiations.⁷⁹ It was said by the President of the Commission, Herr Stoel, that the institutions are continually evolving and that Greece must accept the Treaties, their political objectives and decisions taken subsequently and the options taken for development. Adjustments were to be solved by transitional measures and not by changing the rules. Detailed timetables would of course be provided, though their respective duration might be variable.

The Greeks made nine points in reply:⁸⁰ They undertook to abide by decisions taken on the political development of Europe and others that might be taken before accession, with consultation procedures provided for in the Association Agreement being available; further progress was to continue to be made under the Association agreement, particularly with respect to the coordination of agricultural and commercial policies; transitional measures should last a maximum of five years; some obligations should be postponed until after the transition period; no steps were to be allowed which would retard the Association agreement. The Association agreement was to be adopted in providing the timetable for achieving the customs union in the industrial sector, with full union to be

completed by the end of the transitional period provided therein; and finally, Greece stated that it would require special treatment in agriculture, especially in relation to infrastructure, in steel and in entering the "own resources" system.

This means that the content of the acquis communautaire as it is now understood, is a matter of politics and economics: Its existence is legal and based on a particular interpretation of Art. 237. This interpretation which allows the acquis communautaire a legal protection is not taken on a consideration of what is most efficacious for the Community, but is rather a result of political pressure. Whether or not this protection of the acquis communautaire is a benefit or not in terms of integration theory, is a different question. We shall not begin to answer it until we have looked at the results of the Accession mechanism.

Before going on to consider the negotiation phase, it may be as well to point out that the Council act and the Commission opinion have now been relegated to the level of formalities. The Commission opinion, unfavourable to Greek entry, was virtually ignored. The Commission has accepted its role as an interested, informed observer. A modus operandi has been established.

At this stage the reader is referred to appendix A, a chronological summary of the negotiations, intercollated with contemporaneous reports of relevant extra-systemic events. Before going on to discuss the whole Community approach to negotiation, we shall mention briefly some examples of events which are

worthy of comment.

Negotiations were supposed to be dealing with adjustments necessitated by the enlargement of the Community. This was not always strictly observed; The Commissioner responsible for external affairs became involved in the Greek application to the U.N. and the International Court of Justice over the Sismik I dispute in September of 1976; in January 1977 Greece replaced its negotiators as a result of a suggestion that Greek entry would be dependent on the merits of the Spanish and Portuguese applications. Greece was granted a large loan under the Athens Agreement before the fourth deputy level negotiating meeting and France demanded a revision of the Community wine, fruit and vegetable policy at the sixth deputies meeting.

This influence of external matters on the negotiations continued: the third ministerial level meeting advanced the negotiating timetable shortly after Spain applied for membership; Karamanlis pursued his hopes of a special relationship with NATO after the tenth deputies meeting; a considerable amount of negotiation appears to have been taking place at a political level between the tenth and eleventh deputies meetings and the fifth and sixth ministerial meetings. The position of Spain and Portugal and NATO were all canvassed; the United Kingdom suggested that the Greeks hold a referendum after the seventh ministerial meeting; and before the eighteenth deputy meeting there were rumours about the exercise of a veto.

Enlargement can be seen as a test of Community functioning as well as a separate exercise. As Lindberg and Sheingold said, "the point to be made is that British entry meant a reordering of the stakes of European integration for all members across the whole range of issues posed by Britain's application."⁸¹

This is what the Community had hoped to avoid in the formulation of the acquis communautaire doctrine. The inclusion of another state with other interests challenges the value of any existing balance of interests consolidated in the Treaty. The Commission said, "for political reasons the only adjustments made to the provisions of the Treaties by the First Accession Treaty in 1972 were those directly reflecting the increase in the numbers of member states...More far reaching changes will therefore be necessary this time if the enlarged Community is to work properly."⁸²

This again raises the legal question of whether this can be done under Art. 237 or whether Art. 236 would have to be brought into play: adjustment or amendment? Certainly there is scope for arguing either way. The Commission, in the above statement, by using the word "necessary" is referring to Art. 237 adjustment; also by saying "only adjustments" the existence of other changes which could be made by adjustment. What is not clear is how the acquis communautaire would stand after such an exercise. It is submitted that if negotiation were to be formally extended to cover matters such as were raised in the first and

second accessions, then little would remain of acquis communautaire. When Karl Heinz Narjes was asked, "Is enlargement to blame for everything?", he replied, "Not for everything...it was a serious error to exclude most matters of substance and concentrate simply on adapting the texts of the Treaties and Secondary legislation. This has stored up a wealth of problems which have become a permanent brake on the Community. The most recent example being the common fisheries Policy".⁸³

This gives us two categories of topics for negotiation, changes which are directly consequential and the more extensive category of changes which are required for the proper functioning of the Community. There is a possible third category and that is, put simply - everything else; we must remember the legal criterion is solely "necessitated".

Our consideration of the Greek negotiations has shown us that matters which were not then part of the E.E.C. system nor were likely to become so, were discussed, albeit not at the formal negotiating sessions. We refer here especially to Turkey and NATO. The same was true of the British negotiations. Lindberg & Scheingold spoke of "two sets of negotiations, one explicit and the other tacit." The tacit ones included, "penumbral problems" like the Fouchet Plan which "strictly speaking....did not have to be resolved in order to incorporate Britain into the Community system because the Community system did not extend to these questions".⁸⁴

We can only return to a consideration of what

negotiations should cover, and whether they could be organised in a different fashion, after we have looked at the effect of the negotiated position on the Community system, and accordingly we now turn to some of the secondary effects of negotiations. These are effects on the Community enlargement mechanism which negotiations are not expressly designed to have. They do, however, have to be taken account of in a law of accession.

"The enlargement negotiations to some extent diverted the Community and so postponed the development of a new crisis-test situation..."⁸⁵ This is to say that the Community can become so engrossed in the enlargement process that it does not deal with development of the Community itself (the reader will find examples of this in the chapter (Chapter V111, page 101 below.) on institutional changes). This was particularly dangerous when the foundations of the Community had not been laid. It is of course more likely to be harmful if one enlargement is attempted while another is not yet complete.

This is something about which law can do little. The Commission has the burden of carrying on daily Community functions and should make use of any provisions which necessitate action. It is apparent that these are becoming fewer and fewer as the Community progresses. What was remarkable about the Greek negotiations was their duration: Four years passed from application to the conclusion of an accession Treaty. Appendix A shows how negotiations were delayed, mainly by the extra systemic questions,

or as Lindberg and Scheingold would have it "penumbral problems", such as Turkey and even French elections. It appears that the same problem is already occurring with Spain.⁸⁶ In terms of the Lindberg equation this is a failure to process demand by the Community system and being a reflection of the institutional capacity and scope will be reflected in most areas of Community endeavour, dependent on demand processing, not just enlargement.

We have said that the Community is enlarged by the diversion of attention of elite groups. These elite groups are then expected to use the domestic political mechanisms to enable the legal formalities of Art.237 to be carried out. Such a move may lack substantial popular support, making it all the more important to have if at all only one election before accession. Evans asked of the British Accession, "Were Britain's democratic institutions by-passed completely....or did they merely operate according to customary processes which are less democratic than we fondly imagine. Clearly with an issue of such magnitude there must have been pressure groups at work both in Britain and abroad and a great deal of money, imagination and effort has been expended".⁸⁷

In making that statement Evans is advancing his own conspiracy theory but it corroborates what we would expect from our examination of neo-functionalism.

We must ask ourselves whether there is a role for law to play in advancing the course of integration.

There is an obvious answer. A legal timetable could be provided - not a political expression of hope as we have at present, but a strict timetable either with positive (membership confirmed at expiry) sanctions or negative (reapplication required at expiry) sanctions. Had Greek negotiations dragged on to another election Greece would probably not now be in the Community taking into account the attitude of the Papandreu Government (see page 159 below). We shall discuss the legal instrumentation and technique to be used later, after having examined the effect of negotiations on the Community.

There are pervasive and serious problems in the negotiation phase. The Greeks complained bitterly of delays. The Spanish too have found themselves in the same position. It was reported in 1980: "The Spanish government which applied for membership as long ago as July 1977 has nailed its foreign policy colours firmly to the Community mast, but it has been seriously embarrassed domestically by the slow pace of entry negotiations". It was also pointed out that the estimated entry date had been put back at least once.⁸⁸ A remedy for these delays could be subsumed within the law of Accession because there is a whole panoply of legal instrumentation available.

The failure of the British application when de Gaulle used a veto continues to have a considerable effect on negotiations. Although widely condemned at the time, its legality was unquestionable. Precedent has become a damoclean sword which hovers above

every applicant seeking accession; especially when negotiations have been progressing for some considerable time: an applicant is not likely to want to lose hard won points and domestic prestige by being vetoed.

The negotiations, if successful, result in the conclusion of an Accession Treaty with the Agreement between the member states and the acceding states attached to it. The Treaty must then be ratified in terms of Community and international Law and it is to that stage we now turn.

The final stages in Community law envisaged by Art. 237 E.E.C. are the conclusion of the agreement and ratification of it. Conclusion is marked by a formal ceremony where the plenipotentiaries sign a treaty according to the form of international law which has annexed to it the Agreement between the states, expressly mentioned in Art. 237. The Agreement requires moreover, ratification according to the constitutional requirements of the contracting states. This can take some considerable time, on average about six months. There is a legal lacuna during this time.

The applicant state accedes to a Community which may have changed since the accession treaty was negotiated. This was still a problem in the Greek accession. Shortly before the Athens Treaty came into force it was reported that "Mr. Kaneopoulos (Greek Agriculture Minister) accused the E.E.C. of reneging on the terms of the Accession Treaty.." ⁸⁹

From Athens this was seen in a different way. It was reported that the Nine were accusing the Greeks of trying to renegotiate by "tough bargaining on some key Greek farm products such as olive oil, fruits and vegetables, wine sugar and tobacco".⁷⁴

The then opposition leader Andreus Papandreaou said that the Greek Government "panic stricken by the probable consequences of the Accession agreement it had negotiated on the country's agricultural economy, was in fact trying to renegotiate the terms of accession. This was rejected by our Community partners from a position of strength".⁹⁰

There are provisions which make difficulties in the interim period prior to ratification less likely. The Community consults with acceding states on any developments in the Community of concern to them (Declaration 6 attached to the Final Act of the Athens Treaty). There is also the "arrangement regarding the procedure for adopting certain decisions and other measures to be taken during the period preceding accession which has been reached within the conference between the European Communities and the Hellenic Republic which is annexed to this Final Act". This arrangement, also used in the first accession, explicitly recognises the dynamic aspect of accession by describing the relationship between the Community institutions and the applicant states by calling them "acceding states". This terminology was not followed in the case of Greece, but the conceptual position was the same. This is a sensible pragmatic approach for solving a

practical question. It is effective because the threat of non-ratification would be sufficient to prevent abuse by the Community. Even with these arrangements it seems likely that the Community will be unlikely to break new ground in the period between signature and coming into force for fear of provoking a dispute resulting in non-ratification. Accordingly the benefits of Enlargement are to some extent paid for by a loss of dynamism in other areas of Community activity.

An applicant state may withdraw at this stage simply by not ratifying the Treaty. There is no legal obligation on an applicant to accede other than that created by political embarrassment. The failure of Norway to accede showed that the interim period was not a mere formality. Norway found itself bound for internal political reasons to a consultative referendum on membership. "Powerful economic organisations wanted to see it ratified, including the national trade union organisation, industry, shipping and the employers federation. Above all the government was now committed to working for ratification".⁹¹ For a variety of reasons the Norwegian people rejected membership (53% against and 46% for: interestingly a poll showed that according to 43% of the electorate, the issue should not have been put to them).

Such a failure to accede means that the executed treaty has to be adjusted (where there is more than one acceding state). In the case of Norway, Art. 2 of the Brussels Treaty made specific provision for this contingency by permitting the Treaty to be adapted to reflect the non-accession of an applicant. This certainly corrects the legal position, but as we have constantly stressed, the contribution of law is limited: While Art. 2 Brussels regularises the legal position, it does nothing to correct the underlying political and economic disruption. That is to say, because of the wide-ranging nature of the negotiations and the essential interdependence of subject matter, many of the agreements reached at negotiation and appearing in the Treaty, which might have been arrived at by the negotiating parties after their having considered the effects of the treaty on the resulting Community, would not have the same meaning as when they were agreed: A hypothetical example would have been France accepting the risk of the United Kingdom attracting foreign investment considering itself compensated by gaining access to Norwegian markets; a clearer example was the way in which the new Member States could not, after Norway left, form a blocking minority in the Council (see page 105 below).

Another aspect of non-ratification is that it might turn the formerly acceding state away from the Community, thus defeating the Community's goal of unity: Norway had to negotiate an agreement from

a position of weakness. While this is a political problem, we raise the issue because the Greek accession suggests that by using Community law, the political damage can be reduced. The Greeks insisted upon maintaining their association in full force despite the accession procedure. In the event of non-ratification the Athens agreement could have been fallen back upon to maintain the essential links with the Communities.

The Accession Treaty comes into force on the date stated in the Treaty, provided the instruments of accession are deposited before that date (Art. 2 Athens Treaty, Art. 2 Brussels Treaty). The provisions which bring the acceding state into the Community are on the whole self explanatory. We summarise them here to make subsequent discussion clearer. By Art. 2 of both Acts of Accession "the provisions of the original Treaties and the acts adopted by the institutions of the Communities shall be binding on (the New Member state) under the conditions laid down in these Treaties and in this Act." (Athens Act.)

Art. 3 Athens binds the new member state to the decisions and agreements adopted by the representatives of the member states meeting in Council; it must also accede to all other agreements concluded by the member states related to the functioning of the Communities or connected therewith; it undertakes to accede to Art. 220 E.E.C. Conventions and to negotiate the adjustments with the member states; it binds itself to observe the principles deriving

from declaration of the Council and those adopted by the common agreement of the member states.

Article 4 binds the Hellenic Republic to agreements of the Communities with the third states and international organisations: it must accede to agreements of the member states and the Community acting jointly; and to the so called Internal Agreements between the member states; there follows a general obligation upon the new member state to adjust its position in relation to international agreements, in accordance with its obligations under the Treaty.

Article 5 Athens adopts the provisions of Art. 234 E.E.C. in respect of international agreements concluded before accession. Such agreements are not affected but the new member state is obliged to remove inconsistencies and must be assisted in this by the other member states.

Arts. 143-149 Athens provide for the applicability of the acts of the institutions: Greece is treated as being an addressee and as having received notification of Directives and Decisions in terms of Art. 189 E.E.C., assuming the original member states themselves received notification; the Greeks are required to put into effect the legislation necessary to comply with the said secondary legislation; other acts requiring adaption not included in the Act are to be adjusted by the Council on a Commission proposal (for Council acts) or by the Commission for its own acts. This is, as we would expect, an adherence to acquis communautaire by carefully drafting the Act so that exceptions must be stated no matter how trivial or extensive, thus

ensuring the efficiency of omitted or forgotten secondary legislation.

It seems clear that the scope for improving the Community system during the accession process is limited. The cause of this restriction is not clear: it could be Art. 237. However it would be possible to take wider action during Accession without doing violence to Art. 237. Is it then the doctrine of acquis communautaire which restricts wider activity during accession? We suggest that it is now impossible to determine whether the interpretation of Art. 237 has been derived from adherence to the doctrine of acquis communautaire - or whether that doctrine is merely a detailed statement of the position which Art. 237 creates. We submit that there is no need to make a satisfactory analytical/logical distinction.⁹² The problem exists and can be resolved simply by change in attitude of the officials and leading actors in the Communities.

From the foregoing it is clear that the relevant legal provisions have no dynamic aspect. They would, if unmitigated, result in the immediate inclusion of the applicant in the Community. Such an immediate inclusion being economically and politically impossible, the legal provision is designed to allow adjustment. This is what "creates" the transitional Period (see Chapter VII below).

CHAPTER VII

THE TRANSITIONAL PERIOD

Ratification formally completes the legal integration of the acceding state into the Community legal order. The acceding state then participates in the institutions and may benefit from Community funds. Economically there are greater problems; Community membership requires substantial economic realignment and restructuring. If done suddenly it could detrimentally affect both the economy of the Community and of the acceding applicants' economies.

In both cases of accession in 1973 and 1981, the applicant states needed time to comply with the economic and political consequences of enlargement. There have in this respect always been two alternatives. The first allows accession but provides for leaving some obligations unfulfilled; the second delays full membership until the economic positions are compatible. The latter course is politically unacceptable. If Community membership means substantial internal changes, the government of the acceding states should be able to point to superior obligation to effect these changes, otherwise there may be considerable internal political resistance. The first of the two above indicated alternatives has been adopted as a solution.

Transitional provisions have a history as long as the Community itself. The Rome Treaty established the Community in three stages; The 1961 Athens agreement used a two tier transition and

the 1973 Brussels Accession Treaty used a five year transitional period.

The transitional periods affecting accession are shaped by the other aspects of the accession procedure, particularly, by the notion which demands that accession of the applicant state should not impede the Community's progress and that the new member state should accept all Community obligations in full. This implies that the transitional period must be finite.

This principle requires further elaboration. When a new member state accedes immediately it joins the Community institutions. Thus it will have the political power to influence Community decisions from the date of accession. In fairness to existing member states a situation where a state would have no immediate responsibility for its activities cannot last too long. The transitional period must thus be short enough not to allow such distortions and be long enough to permit economic adjustment. As accession is by way of a legal instrument, the transitional period will have a legal character. In addition the desiderata of limited time and specific exemption are especially easily effected by legal techniques and norms. The acceptance of the acquis communautaire also demands that the transitional framework must be rigid, another quality which law provides.

The negotiations must accommodate the negotiated position within the transitional framework. This intimate connection between the transitional period, which has a legal nature, and the negotiations, which do not, was noticed by Inciante, "These (formulas of transitional periods) have been tested on the occasion of the setting up of the Common Market and tried again during the extension of the Community. There should not therefore be great surprises in the negotiations.⁹³". The systemic negotiations are, as a corollary, limited to adjusting matters that can competently be included in the transitional period. A consideration of the transitional period is therefore of value not only in itself, but it will enable us to properly evaluate the other stages in the process. We are fortunate in having the benefit of the experience of the U.K. accession. As this accession involves a legal regime it is subject to the jurisprudence of the Court of Justice of the European Communities (hereinafter "the Court of Justice"). This judicial competence augments and develops the legal dimensions of the transitional period. To this extent the transitional period applicable to Greece differs from that applied to the first being, as we shall see, more accurately defined in scope and content.

L.J. Brinkhorst and M.J. Kuiper have examined the transitional measures used in the first round, discussing the general principles governing the transitional period and have considered the transitional regime itself.⁹⁴ They discovered that the problem had been

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treated "patchily and unsystematically". One hundred articles of the Brussels Act, five annexes and most of thirty protocols relate to the transitional period. They have also pointed out that most of chapter five of the Brussels Act contained a number of transitional rules. The place of insertion in the accession documents viz. act, protocol or annex, appeared arbitrary or dictated by political pressure especially evident with respect to the protocols. The transitional measures have however the legal character of treaty law and cannot be altered by the institutions acting on their own.

To prevent stagnation Art.7 of the Brussels Act attached legal force to articles and acts to which the transitional regime related and did not remove the competence of the institutions to change the acts in such a way that the transitional measures would not apply. This position is obtained by reading Article 7 along with Article 2 and Article 9 of the Brussels Act. The possibility remained then that because of a change in legislation the transitional regime could be distorted.

Brinkhorst and Kuiper noted that Art.135 Brussels allows the adoption of protective measures by either the Community or a new member state, and that Article 5 of the Act allows derogation from Article 234 of the Act which otherwise would have had the effect of depriving new member states of rights and obligations incurred between signature and entry into force. There are some deviations from the general principle that transitional measures may not be suspended, amended or repealed other than

by the means of the procedures by which the original Treaties can be revised; and although we speak of a transitional period, a number of different time limits may apply: fishing till 1982; finance to 1979; a special regime was established for New Zealand butter. As the transitional measures may not always be specific as to their content, as in the case of the common Agricultural Policy, it is left to the institutions to take implementing measures.⁹⁵ Implementing measures can only be taken after the entry into force of the Treaty and so Article 151 Brussels delayed application of the particular sections until February 1973. A Council resolution of July 20th 1973 was made on the basis of discussions in the Interim Committee (see p.78 above) introducing a procedure whereby the Council acts on Commission proposals after consulting the acceding states. These drafts are published and on entry into force the Council accepts that they will be confirmed.

The principles applied to the first enlargement have been followed in the case of Greece. There have however been a number of additions and innovations and attempts at improvement. The Athens Accession Act is rather more precise in its positioning of some provisions, differentiating between adaptations and transitional measures: for example Part Two, Title 1, Chapter 1, Art.10, deals with the assembly under the heading Adjustments to the Treaties: provisions covering the Institutions. However there follows in Part Four, Title 1, Art.23, a provision under the heading of "Transitional measures; provisions governing the Institutions", which delays the holding of

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direct elections until the rest of the Community is ready and in the interim allows the members to be delegated by the national legislature. This provision was not of course necessary in the first round but it does evince a clarity of approach, which Brinkhorst and Kuiper, by citing Art. 49 (2), suggest was lacking in the first Accession.

In comparing the two Accession Acts, we notice there is a change in the wording of Article 9 which is approximately the same in both Acts and lays down the fundamental principle of the transition period. This redrafting was no doubt due to the ambiguity which had been experienced in the original (clause 9.)

This point was considered in Case 231/78 Commission V United Kingdom (1979) 2 C.M.L.R. 427 involving the British potato marketing board which was in terms of Art. 60(2) Brussels a national organisation of the potato market. Art. 42 of the Brussels Act provided for the abolition of quotas or measures having equivalent effect by 1st. Jan. 1975. The United Kingdom refused to allow imports of potatoes. The Commission raised an action alleging failure to observe the obligation created by Art. 30 E.E.C. and the relevant provisions of the Brussels Act. The French government intervened. The U.K. government based its defence on Art. 60(2) of the Brussels Act (see appendix D). This Article exempts products not covered by a common organisation if a national organisation exists. The case then rested on Article 9, in particular on paragraph 2, in which three exemptions from the application of the transitional regime are included:

They relate to dates, time-limits and special provisions. The United Kingdom considered 60(2) of the Brussels Act to be a special provision and that the general termination rule, Art. 9 Brussels, should not apply. The Court held however that the Accession Treaty is to be interpreted according to a principle of equality between member states and having regard to the foundations and the systems of the Community. However, the Court said that the Act cannot be interpreted as having established, for an indefinite period, a legal position different from that of the original members. The Court decided that the responsibility for the market became that of the Community; special measures could still be envisaged under Art 63 Brussels. They could not be adopted unilaterally by the member state but only by the Community generally.

This decision is valuable from the point of view of fostering integration, but does not seem to be a proper interpretation of the precise words of the Treaty: it is submitted that it was a policy decision more than an interpretation. The Court is not bound by its previous decisions; therefore when drafting the Athens Act, it was evidently thought prudent to rephrase Article 9, leaving no doubt that with the transitional period, unless a specific time exemption is made, the transitional period ends as stated and that anything which is encompassed within the Treaty and the transitional regime will then become a matter of Community competence.

There are other differences in the Brussels and

Athens Treaties. New sections reflect the additional Community activity since the Brussels Act, one was relating to direct elections and another is in relation to the Lomé convention. Moreover it should be noticed that in the first round the African, Caribbean and Pacific framework was treated merely in a protocol. Similarly the Common Commercial Policy finds a place in the Athens Act under the title on external relations.

Other differences reflect the idea of improvement of loose or inappropriate provisions. The safeguard clause, Article 135, Brussels turns up in a slightly altered form. It is necessarily extended to cover the long transitional period as well as the general five year period. However, where under Art. 135 Brussels the Commission had to 'work without delay'; the Athens Act 130(2) para. 2 demands that the Commission 'act within five working days' and further makes the measures immediately applicable instead of allowing the Commission to 'specify the circumstances and manner in which they are to be put into effect'. In the same way, in agricultural matters the Commission is to act within twenty four hours and again the measures come into effect immediately. These changes are tacitly a criticism of Commission unresponsiveness, and illustrate how accession can provide an opportunity to make improvements to the Community system generally.

Article 41 of the Athens Act differs from the equivalent Art. 45 Brussels in that the former refers to the Commission taking action from the date of

Accession, whereas the latter demands that the Commission should do this before a fixed date. This shows a more flexible approach without sacrificing security.

Despite these differences we have mentioned and others that we have not, there has been no fundamental change in the Community's approach to the transitional period.

Admittedly the Commission had given some attention to the possibility of altering the transitional period. It was suggested that the transitional period would have to reflect the economic incompatibility of the new member states, which was not the case in the first accession, lest some new members be unable to maintain their obligations. The Commission starts first by stating that "Given the extent of the adjustment problems it would seem advisable to tackle them during the negotiating period...⁹⁸" The sentiment prompting such a suggestion was no doubt laudatory but the suggestion involves considerable problems. One inconvenience would be the competence of the Community to take steps towards, for example, harmonisation of structural redevelopment policies in the absence of any legal relationship between the parties. On the other hand, association is a foundation upon which such measures could be attempted. Another is that the negotiating period is already fraught with sufficient danger of delay, without the addition of anticipatory organisational measures.

One particular danger which was highlighted in

the debates on the Pintat Report, was that for the Communities to insist upon pre-accession measures might imply a certain degree of commitment on the Communities' part to accept an application⁹⁶ (or depending on the stage of the process, to surrender points on debate).

The resolution of some transitional problems outside of the Treaty would add to the patchwork framework making it difficult to identify transitional measures. There would remain a legal problem concerning the status of measures taken in anticipation; presumably they would require to be adopted later, i.e., within the Act of accession thus giving them the necessary status of Community law.

We remain of the opinion that anticipatory measures should be kept to a minimum and, if appropriate, should be unilateral and should preferably operate in spheres where the applicant state has no existing regime. An example of such a measure found in the case of the Second Enlargement is the Greek Anti-Trust Law "on the control of the monopolies and oligarchies and on the protection of free competition" (which is described in an article by Andreopoulos⁹⁷ upon which the following comments are based). The existing law dated back to 1913; this in itself does not suggest that there existed a legal lacuna. However, in its terms the former law appears to have had little of the scope necessarily involved in modern anti-trust legislation. Andreopolis points out that the new law is virtually a Greek translation of the competition provision of the Rome Treaty, Arts. 85 & 86.

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Although there is a similarity of wording, it is not certain that the Greek courts would interpret the words in the same way or even that officials would take the same attitude, creating a possible source of conflict. The added danger is that the formal similarity would disguise this divergent activity. On the other hand, the Court of Justice's interpretation of the Treaty would stand, and so any damage would be subject to correction (assuming of course that the matter were litigated).

We submit that if anticipatory measures are taken, they should only be carried out under an association agreement which provides both the political background and the legal framework. The negotiations for Greek entry have indicated that it is possible to have a separate development of the negotiations and the association, a separation which would allow useful anticipatory measures to be implemented without prejudice to the application or negotiations.

The Commission correctly noted ⁹⁸ that a major difficulty of the transitional period is that because it is decided in advance the economic and political climate cannot always be predicted, emphasising the inter-relation of factors analysed in Chapter III (page 24 above). They therefore looked for a transitional formula consisting of definite and flexible measures. A two phase enlargement was envisaged: a first stage including definite timetables and targets with progress to the second stage being subject to suspension, if necessary, by the Council on a

Commission proposal voting by majority, a second extension of the first stage by unanimous vote of the Council. The operation of the delay automatically reduces the second stage. This type of measure is admittedly modelled on Article 8 of the Rome Treaty. However the Commission conceded that this cannot be directly transposed by saying that (when making a different point) "the provisions in question were experimental".⁹⁹ They chose to accept the technique without the time limit. We would suggest that this is not an option, for both the technique and time limit are closely related. The "success and move on" method is only appropriate if there is some time to spare. In the case of enlargement this is not so, because of economic imperatives and because new member states enjoy full rights under the institutional system. In certain cases the proposed system might be useful where there is little prospect of extension to the stages being likely; but to say this is in a way to deny the reason for having the measure in the first place: to be able to respond swiftly to unexpected developments.

The Athens and Brussels Acts should not be considered solely on their express terms: the Brussels Act and to a lesser extent the Athens Act, have been interpreted by the Court of Justice. Accordingly a body of more general principles about the Accession Acts and especially the transitional period will develop. Because of this developing jurisprudence it cannot always be said that any accession act will have the same effect as its predecessor, even if the two are similar in form.

and language. To emphasise this we now look at some of the cases in which the Accession Act has been considered by the Court, both to contribute to our understanding of accession and to see to what extent the Athens Act must be thought of as being more certain than the Brussels Act.¹⁰⁰

The first case worthy of mention is Hauptzollamt Bielefeld v König, where the Court held that the Acts of Accession have as their essential purpose the extension to the new member states of Community law in force at the time of Accession. Even Article 3 of the Brussels Accession Act cannot be construed as validating measures, whatever their form if they are incompatible with the Treaties establishing the Communities.

This decision appears to support the narrow interpretation of Art. 237 E.E.C. which we discussed (page 68 above) but the Court was, we suggest, only concerned with establishing the minimum effect of the Brussels Act and was not prohibiting the use of the Accession Act for other purposes other than "essential purposes".

In a later decision the Court further defined the scope of the Accession Act. In Case 15/74 CENTRA-FARM v STERLING DRUG (1974)² (C.M.L.R.480) it was held that the Act of Accession is to be read with the Treaty, and where a given transitional measure is related to a principal Treaty Article, then it is to be construed with that term. In the instant case, para.2 of Article 4 Brussels allowed measures having equivalent effect to quantitative restrictions on imports and

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exports to be abolished by 1st January 1975. This was to be considered as referring to the same type of measures which had been abolished by the original member states under E.E.C. Articles 30 and 32-35.

The meaning of the system of compensatory amounts contained in Article 65 and 66 of the Brussels Act was considered in Case 61/77 IRELAND v THE COMMISSION(1978) (2C.M.L.R.466). The Court took a restrictive view of the Act of Accession by disallowing conversion factors. The Court held that such measures would have to be expressly laid down in the Act to be effective. The flexibility crucial to transition was not lost, however, because the Court emphasised that action of the kind it had prohibited could be taken if it were clearly necessary for fixing the correct application of the compensatory amounts. And in the case of Compagnie Continentale France v Council, case 169/73(1975)(C.M.L.R. 578), the Community was held not to be contractually liable with respect to the effects of the Act of Accession and, the wider principle was stated that the Act of Accession is an integral part of the Accession Treaty. Case 6/76 Kramer v Others(1976)(2 C.M.L.R.448) provided the Court with a problem of how to deal with an apparent serious lacunae in the transitional provisions. Article 102 Brussels was inaccurately framed leaving doubt as to how member states should behave. First, the Article was ambiguous about its commencement date; it was not clear whether the beginning or the end of the six year period was intended. (This issue was resolved in the later Case Van Dam en Zonen discussed below.)

Secondly, it was not clear what the transitional position should be. The Court decided that the Community had rule-making authority in matters of high seas fisheries on the basis of the Accession Act Article and Regulation 2141/70 and, curiously, "the very nature of things". It then went on to explain that as the Community had not exercised its power in this field, the new member states had the ability to regulate these matters themselves. The Court added that under Art. 5 E.E.C. and Art. 116 of the Brussels Act the member states would still have the obligation to avoid taking action prejudicial to the Community interest.

It appears that the Court of Justice is capable of filling out an Accession Act if necessary. However, the Court is not sufficiently informed on economic matters to be able to take the correct decision in every instance. Neither is it appropriate for the Court to decide upon matters which may have political importance and where the member states would have had the opportunity for discussion and agreement in advance. Thus again we note how the Act is interpreted with the Treaty in sight and not in isolation.

A Dutch national court, in a prosecution against sea fishermen for contravention of applicable Dutch fishing rules, made a request for a preliminary ruling requesting an interpretation of Art. 5 E.E.C. and Art. 102 Brussels of the Act. VAN DAM EN ZONDEN ET AL 185-204/78(1979)(E.C.R. 2345). The Court of Justice disposed of the question concerning the time limits which had been inaccurately set, by referring to

Article 9 of the Brussels Act and saying that Art.102² Brussels would have no practical effect if the term were not read as meaning the end of the year in question. The Court also adopted its decision in the case *Commission v Ireland* (page 97 above). This decision was in fact a clarification of the position set out in the *Ireland* case. It was held that it was permissible for one member state to have stricter rules than other member states, so long as they were applied equally to all within that member state's jurisdiction, thus upholding the principle of non-discrimination.

The first finding that a member state had failed to fulfil its obligations under the Rome Treaty resulted from the accession of the United Kingdom in the case 141/78 THE FRENCH REPUBLIC v GREAT BRITAIN AND NORTHERN IRELAND (1980) 1 C.M.L.R. 6. The U.K. adopted the Fishing Nets (N.E. Atlantic) Order 1977 which restricted the taking of certain unprotected species where the catch included more than 20% of a protected species. A French trawler which was found to be in breach of this regulation was fined. The Community had, awaiting the creation of a Common Fisheries Policy, come to an interim agreement: the resolution by the Council at the Hague of 30th October and 3rd November 1976 which stated "pending the implementation of the Community members (to ensure the protection of the resources situated in the fishing zones along their coastlines), the member states will not take any unilateral measures in respect of the conservation of the resources."¹⁰¹ (Quoted in the judgment)

This was however in addition to the existing duties under Art. 5 of the Rome Treaty. The U.K.'s defence, after admitting that the Hague resolution was binding, was that the measure had not been unilateral in terms of the resolution, because it was adopted in pursuance of the North East Atlantic Fisheries Convention. This argument was not upheld because it was found that the U.K. should have adopted the procedure laid down and would have consequently received a sympathetic hearing from the Commission.

Looking at the Treaty of Rome alone, from preamble indent 8 and Art. 237, it might be thought that accession was only a matter of political will. We hope we have shown that, although political will is important, it need not be overwhelmingly strong and that there is a body of law and practice which now regulates accession. We have seen too that although accession can be broken into stages, these stages are mutually interdependent and would overlap within certain parameters.

One of the most perplexing parts of the procedure is the acquis communautaire doctrine and its relationship with Art. 237 E.E.C.. We have seen how the acquis communautaire affects the accession process. The difficulties involved in Art. 237 E.E.C. will be seen more clearly in our next section dealing with some of the effects of accession. This is an important exercise, because although it is not a part of the accession itself, it comprises the outer parameter of the accession process.

SECTION B

THE EFFECTS OF ACCESSION

CHAPTER VIII : THE INSTITUTIONS

We have already mentioned how the new member states immediately obtain membership of the Institutions. This is essential if a strict interpretation of E.E.C. Article 237 is taken and is permitted without amendment because it is a necessary adaptation. We shall however see that even simple numerical "adjustment" can have important effects which may not be intended.

We now propose to examine the changes effected on the institutions of the Communities by accession, trying where possible to look for implied changes in addition to examining those explicitly in the Act of Accession. These almost imperceptible shifts of emphasis deserve some special notice. We shall examine each institution in turn in the order in which they appear in Part 5 of the Rome Treaty, and shall finally consider whether the European Council has a particular place in enlargement. We have chosen not to consider the lesser institutions for reasons of brevity.

(a) THE PARLIAMENT

In considering this institution, numerical adjustment is least relevant. The first enlargement itself had little effect upon the Parliament. Admittedly the acquisition of budgetary powers and the holding of direct elections came after accession but the first steps to budgetary adjustment were taken well before even the signature of the Luxembourg budgetary Treaty on 22nd April 1970, thus predating

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the accession. Likewise the Parliament submitted proposals under Article 138-3 on a regular basis, commencing in May of 1960, requesting direct elections which were persistently refused the support of the Council. It required the heads of Government to provide the impetus (some evidence of the decline in the systemic dynamism). This was done in December 1974 after British accession. These are two interesting points as they prove the acceptance by the acceding states of the acquis communautaire at least to a considerable degree, in accordance with the assumption that they gave the necessary consent to the Second Budgetary Treaty of 22nd July 1975 and gave approval, in Council, to direct elections on 20th September 1976.

The Commission opinion¹⁰² had little to say about the Parliament as it felt that only amendment under Art.23 6 could be used to make any important changes although it did urge an extension of the conciliation procedure. This procedure allows the Council and the Parliament to speak together directly, the Commission having observer status.

It is possible that the increase in membership inspired the most recent moves towards establishing a single seat for the Parliament. Certainly the addition of every new member to a three seat rather than a single seat body can mean two extra return journeys between the seats. Parliament's resolution of Thursday 20th November 1980, stated that the Parliament approved the initiative towards establishing a single seat by the French President, and demanded that the

Governments of the member states should make a decision on the matter by June 1981 after consultation with Parliament and finally set the ultimatum that failing satisfactory action the Parliament itself would take the necessary action to improve its effectiveness.

Numerical adjustments vary in significance with the importance of the institution. The Parliament as an institution is still trying to assert itself politically, rather than concerning itself with internal power struggles. Consequently, a slight imbalance between member states or political factions is not likely to cause any great upset or difficulty either from the point of view of member states or the Community as a whole. In the future the question of parliamentary seats may become an issue. The political complexion of the applicant state could easily become part of the negotiating process with the member states ensuring that a comfortable political status quo is not disrupted.

The Parliament began life with France, Germany and Italy having 36 seats each, Belgium and the Netherlands 14 and Luxemburg 6. The proposed Act of Accession figures gave Britain 36 members and Ireland, Norway and Denmark 10, the original member states retaining their former allocation.

When Norway failed to accede its seats were simply disregarded, and the membership of each state remained the same. Direct elections provided for a 410 seat Parliament to sit for the July 1979 session

allocating France, Germany, Italy and United Kingdom 81 seats; Belgium, 24; Netherlands, 25; Ireland, 15; Denmark, 16 and Luxemburg 6.

As Luxemburg's seats were not increased as were those of the other member states, it would seem that a "minimum level of representation"¹⁰³ has been fixed at six. It seems that any state acceding can expect six seats regardless of G.N.P. or population.

The Parliament cannot enlarge by a redistribution of the existing seats. There is a practical reason for this with a directly elected Parliament: to do so would require a redrawing of the national constituencies which would cause problems at the national level with allegations of Gerrymandering being made at every future enlargement. Therefore the fact that this adjustment by addition was taken in the first round shows that the commitment to direct elections was clearly maintained. Consequently this method of adjustment made a consideration of direct elections essential and this may have assisted in increasing the pace towards this aim.

Greek membership added 24 members (Art.10 Athens Act) and the accession of Spain and Portugal will add, on the Commission's figures, 58 and 24 members respectively. The political groupings within Parliament changed to some extent. New Democracy, the Democratic Centre Union, and the Democratic Socialists in favour of community membership and on the other hand PASOK and the Greek Communists in opposition to continued membership formed alliances with other groups but until real political power is at issue

these are of little real consequence. The democratic emphasis of the Greek Accession must have given the Parliament some encouragement to push for an ever greater role in community affairs.¹⁰⁴

(b) THE COUNCIL

"The community is the first serious attempt in the world to evolve a method whereby the relation between states can be effectively regulated by mutual consent and the rule of law. It should be judged as such."¹⁰⁵ It is majority voting which provides the basis for consensus government and makes the existence of a vote of law most apparent. Anything which affects this principle is worth the most serious consideration. As we shall later find the attitude of the members on this subject were made the subject of a "pre-condition" of Greek Accession which particularly makes this question pertinent to enlargement. In addition the numerical adjustments in weighting under the majority voting system resulting from enlargement have themselves serious implications. We shall consider these adjustments before considering the wider implications.

Under Art. 148 of the Treaty of Rome, France, Germany and Italy had 4 votes each, Belgium and the Netherlands 2 each, and Luxemburg had 1 vote. The treaty required a qualified majority of 12 from a total of 17 making 6 votes a minority capable of blocking a measure requiring a qualified majority. From these figures no single state could block a proposal although as few as two could. Consequently,

the "big three" could pass anything on which they were agreed and the relatively homogeneous Benelux group were not given a blocking power.

The Act of Accession initially allocated France, Germany, Italy and U.K. 10 votes; Belgium and Netherlands 5 votes; Ireland, Netherlands, Norway and Denmark 3 votes and Luxemburg 2 votes, making a qualified majority 43 out of 61 and a blocking majority 19. Two big states could still block a proposal but now a single large state required at least two or even three members voting with it to block. The Benelux member states could block if voting with a large state but this was not possible even if voting with two of the smaller new members. The "Big Four" were not a majority on their own and Luxemburg was of no value as an ally to them.

Significantly, the new member states voting together could block a proposal. The practical result of this was an institutionalisation for the future of the enlargement exercise creating a possible distinction between old and new members. This is something which cannot happen within the formal enlargement process and cannot be incorporated in any provision because of the terms of E.E.C. Art.237 and the doctrine of acquis communautaire. This would have been a dangerous position which could have undermined the acquis communautaire. This is a clear example of how numerical adjustment cannot properly maintain even the status quo ante.

As it transpired the actual weighting established by Art. 14 was to give France, Germany, Italy and the U.K. 10 votes; Belgium and Netherlands 5 votes; Ireland, Denmark, Netherlands 3 votes and Luxemburg 2, producing a qualified majority of 41 from 58 and establishing a block of 18. Two large states could still block. The new members thus lost their ability to block, an unexpected benefit for the Community. For the U.K., which could have been fairly confident of carrying all the new members with it should the occasion have arisen, this change must have made majority voting seem suddenly less attractive to those opposed to entry. (This is reflected in P.M. Wilson's statement quoted below, page 125). However, Luxemburg gained in status as becoming able to support a Big Four proposal.

After the latest accession Germany, France, Italy and U.K. received 10 votes, Belgium and Netherlands joined Greece in having 5 votes, Denmark and Ireland held 3 and Luxemburg 2. Thus Denmark, Ireland and Luxemburg all lost their "Big Four ally" status and Benelux as a group became insignificant (45 out of 63 being a qualified majority and 19 a block).

The original six members of the Community have passed control to the new members. The possibility of continuous realignment becoming more likely (assuming of course that majority voting had any real meaning). Zolotas was correct in a wide sense when he said that: "Greece is merely going to become the tenth member of the E.E.C. by taking the place of Norway... ..the accession of Greece will give rise to no more

problems than would have been faced as a result of the accession of Norway."¹⁰⁶ The operation of the Luxembourg accords has the effect of making every increase in the number of Council members all the more likely to bring decision making to a halt (as unanimity is required where a member state considers its vital interests to be at stake).

Encouragement is evident in the Report of the three wise men.¹⁰⁷ So many other causes are given for the difficulties in decision making other than the Luxembourg Accords that the consequences directly following from the increase in membership of the Community similarly diminish in importance; "there is no doubt that the Luxembourg compromise has become a fact of life in the Community. In the reality of the Community today voting cannot be used to override individual states on matters which they regard as involving very important interests."¹⁰⁷ This was an affirmation of the Commission's view when it announced that it had no intention of reviving an old quarrel on a particularly delicate point on which the member states had agreed to disagree.¹⁰⁸

This is typical of the pragmatism in Community life, but it is an unfortunate disregard for the rule of law. The rule of law, if infringed, can have wider implications than merely the practical difficulties of the infringement. Esch¹⁰⁹ said that "the issue of majority voting is not a matter of effectiveness even although it is true that a system of unanimous decision making between nine member states is bound to lead to paralysis. Beyond questions of

efficiency the agreed system of majority decision forms such an essential element of the rule of law within the Community that it may safely be considered a precondition for its continuation."

Esch then begins to speak in terms of enforcing the rule of law and despite the Council's practice to the contrary the method may be summarised as follows:

- (i) the Commission asks officially for a vote to be taken.
- (ii) the Commission though not obliged to call a vote find it difficult to refuse to do so.
- (iii) the members may then have a duty to vote as it is suggested that failure to do so would be in breach of Art. 5. However, he accepts that abstention would be an avoidance of such a breach.

A return to the scheme envisaged by the Treaty is unlikely for the present. On the other hand regularisation of the position should be possible. So long as there is some acceptable code which is close to the Treaty provisions then we need have no fear for the rule of law, as had Esch. We in the U.K. with our constitutions of conventions have no difficulty in finding the rule of law even where there may be no rule or no law.

We feel that the situation may resolve itself in the same way in which it was created. There may arise an issue about which all but one or two members feel very strongly and which is met with a "Luxemburg" veto. The majority would vote and the other party or parties would, having no legal remedy, be faced with the option of withdrawal. It would be then that they will realise that they are practically committed

as well as legally.¹¹⁰ The Community of today is not the Community de Gaulle was able to disrupt.

The Commission as we have noted accepted the decline of the majority vote but did come up with a most ingenious alternative strategy: "Considering this development and the implications of enlargement, it may legitimately be asked whether the Community would not gain valuable room for manoeuvre if the areas in which this code applies were extended.¹¹¹ This is very much the idea put forward by Olmi also.¹¹¹

This refers back to the question which we previously introduced relating to what scope is offered for adjustment under Art. 237 E.E.C., because both the Commission and Olmi offer detailed proposals for changes to the voting structure which they consider could have been carried out in an enlargement round without the necessity of amendment under 236. This proposal did not appear in the Athens Treaty either because a strict interpretation was taken of Art. 237 E.E.C. or because the necessary political commitment was not there. (It is remarkable to note how much in agreement were the Commission's proposals and those of Olmi, the only significant difference being that the Commission cites articles 75(3), 76, 93(2) as being unacceptable for any extension of the majority principle although Olmi does not. Both comment on the mixed nature of Art. 100 which can apply to the most trivial or important matters equally).

Perhaps we should close with Fitzgerald's prophetic words, "Only the issue of enlargement offers a chance to bring this matter (decision making in the

Council) to a successful conclusion, and if this chance is missed the opportunities of making progress with improvements in decision making thereafter may be few, and remote in time."¹¹²

(c) THE COMMISSION

The Commission of the European Communities consisted originally of nine members (Art. 157 E.E.C.) one from each state and no more than two from any one. This was altered by Art. 10 of the Merger Treaty and Council decision of January 1st, 1973 to 13 members, each member to have one Commissioner but none more than two. Before the withdrawal of Norway 14 had been fixed as the number of members. The reduction provided for in the Merger Treaty to 9 never took place, showing how enlargement can adversely divert the course of Community activity. Membership was not retained at 14 as this would have resulted in one of the small states being given two Commissioners.¹¹³

Hallstein (the first President of the Commission) had said before the first enlargement, "The number of Commissioners should be kept as small as possible. The governments have agreed on nine as the optimum number: an increase to 14 members is expressly limited to a short transitional period after the merger of the executives. This means that when the Community is enlarged it will probably not be possible to maintain the principle that nationals from every member state must sit on the Commission as the driving force of the Community would be unwieldy to the point of inability to act."¹¹⁴ It was not to be.

The Commission ended up having 13 members which not surprisingly did result in a degree of paralysis.

This time more caution and prudence was in evidence. The Commission itself instructed D. Spierenburg to report on the Commission's operations.¹¹⁵ It is outwith the ambit of this study to review the whole scope of Commission reform. The review body echoed the call for a small Commission and considered that the work justified only eight portfolios with perhaps a maximum on enlargement to 12 and an overall membership of one member per state. Even this is a considerable regression from the position Hallstein¹¹⁴ held which would have had some states unrepresented on the Commission. A view we feel is supported by the oath taken by Commissioners and their individual characters which ensures that there should be no national bias on the Commission's part.

The Report on the European institutions (known as the "Three wise men" Report) attributes the difficulties of Commission decision making to the merger rather than merely the first accession: "Since the enlargement of the Commission in 1967 there has been a loss of collegiality in its members' method of working combined with inadequate internal coordination."¹¹⁶ This left the Commission in a weakened position. Certainly size alone is not the Commission's only problem. The remedies put forward by Spierenburg and adopted by the "Three Wise Men" are to some extent size dependent: for example, the strengthened presidency to which both reports refer becomes more difficult to operate in practice with a large rather than small Commission and the rationalisation of directorates-

general is dependent upon a structured Commission arranged in a logical manner of dossiers rather than in national terms.

The Spierenburg solution had already been foreseen by the Commission. "As for the future composition of the Commission the guiding principle, as for the other institutions of the Community should be to ensure its efficient functioning. Various formulas would be possible: one possibility, already suggested by the ministers of foreign affairs (informal meeting at Leeds Castle) is that the College would be composed of one national of each member state. However that would result in a marginal reduction in the number of members of the Commission from the existing level of thirteen which would pose certain practical problems in view of the increased burden of work in a wider community, particularly during the transitional period".¹¹⁷

A first comment is to ask why the Commission did not consider a reduction to 9 or 10 if as they say the guiding principle was efficient functioning. A second is that the "practical problems" excuse does not seem valid considering that the Merger Treaty had foreseen a substantial and sudden drop in the number of members. (In the same way the first accession despite the extra workload resulted in one Commissioner being dropped). Finally, even speaking in terms of a marginal reduction, the consideration in terms of a Community of twelve, is unrealistic, for Spain and Portugal certainly were unlikely to become members for several years and in that interim period

the Commission will be overinflated. This was a case where the Commission should have proposed interim measures while maintaining a "global context".

In endorsing the Spierenburg proposals the "three wise men" said that "...the switch to the new principle must be made at the next reappointment of the Commission which usefully coincides with Greek Accession (January 1981). If the will cannot be found to act at this stage, it will certainly not be found at any later date".¹¹⁶ This was written after sight and in knowledge that the Athens Act signed on May 1979 by Art. 15 amended the first subpara. of Art. 10(1) of the Merger Treaty to read that the Commission should consist of fourteen members, and in fact a Commission of 14 took office from January 6th 1981 until 5th January 1985.¹¹⁸ This is despite Commission President Jenkins speech to the Parliament on February 1980 that the Spierenburg report would be acted upon without delay especially relating to staff matters and coordination. He said, "...decisions will soon be necessary on the composition of the next Commission. Our experience does not lend itself to think that it should necessarily be smaller than the present one, but nor do we think it should be significantly larger ...".¹¹⁹ What this means is of course beyond logical comprehension but the result we know.

Criticism of the new Commission was soon forthcoming over the allocation of new portfolios. Michael O'Kennedy was allocated the post of President's delegate, personnel and administration, statistical

office and publications office, a post lacking in much political influence. It was thought that The Irish Commissioner was likely to have too little to do whereas other Commissioners would have a sufficiency. This must have impressed upon the member states that a formal requirement that they be allowed one Commissioner offers them no guarantee of influence in Community affairs.

Apart from the membership question, accession causes concern because of increased routine work, namely translation and interpretation. The "three wise men" stated that they believed that "people from all member states who engage in Community activities have a presumptive right to use their national language to express themselves". This is a problem which can only increase in alarming logarithmic proportions with increased membership. However, because of the division of labour in a modern pluralist state, political information and activity is channelled through experts, and so, there is no reason why one or two working languages could not be adopted. Parliament may be a special exception because of the residual influence of the plenary democratic tradition. The benefits of this reform would not only be to save resources but would also create a bond of common language between the Europeans as they slowly realised that to take part in the ever expanding European competence they would require skill in the working language, much the same way as Latin and English were learned in their respective imperial times.¹²⁰ This would best be done before European integration drowns

in a sea of multilingual paper. The Spanish and Portuguese accessions provide the opportunity.

(d) THE COURT OF JUSTICE

There have been no serious criticisms of the Courts functioning: it copes effectively with its work load and as an instrument of integration has filled its role well. The only adjustment to be considered is the numerical alteration, which raises no significant problems but nevertheless does raise a few interesting questions.

Art. 165 of the Treaty of Rome established a court of seven judges one from each state and an additional Italian. Such is the oath taken by the members of the Court and the calibre of the men swearing it that the question of nationality should be irrelevant. Certainly in a small Community it is reasonable that every state should have at least one member. For example the European Court of Human Rights cannot have two judges who are nationals of the same state and has a membership equal to the number of members of the Council of Europe.¹²¹

On the other hand, the International court of Justice consists of fifteen, no two of whom may be nationals of the same state.¹²² The United States Supreme Court at present has nine members¹²³ and there is no mandatory allocation of seats. It can be said then that it can be expected that the "one state one member" rule should remain until membership exceeds say fifteen to twenty whereupon it might be considered possible for some states to be unrepresented. It has

been said that for the present "the rule should be upheld that all member states must be represented in every Community institution and organ".¹²⁴

Art. 17 of the Act of Accession for a 10 member community anticipated an eleven member court. On Norway's non-ratification it was said, "The non-appointment of a judge of Norwegian nationality would reduce the court to the even number of 10 which is clearly unacceptable for a judicial organ. A reduction to nine members seems logical,"¹²⁵ and indeed Art. 9 of the Adaptation decision stated that the Court should consist of nine judges. The Commission has accepted by implication the even number argument, "it may be stated that application of the existing criteria (165 E.E.C.) would mean that the court should consist of thirteen judges (an odd number to avoid tied votes.)".¹²⁵ This view reflected the original composition of seven judges when there were only 6 members. Art. 16 of the Athens Treaty increased the courts membership to 10.

This seems to be a strange decision in the light of the precedent established in the first accession and the Commission's approach. Looking again at the comparative examples previously mentioned we see that the International Court of Justice has taken a firm "unequal" stance with a fixed odd number of judges. The European Court of human rights can have an odd or even number of members but Article 43 of the Convention¹²⁶ restricts the Court to a chamber of seven members when it is exercising its judicial function which may have awkward political implications.

if member states lose actions when their judge is not on the bench.

The Community's solution appears to be similar. Art. 20 of the Brussels Act declares that the Court's decisions shall only be valid when an uneven number of judges have entered the deliberations. This again causes the political problem we have mentioned: which judge should not sit.

We would suggest that the type of scheme and indeed the attitudes that have been taken in the question of the size of the Court of Justice have been uninspired. There are three points to be made: first, there is no rule which requires that the Court of Justice should have one member from each state; secondly, there is no need for members to be nationals of member states; and thirdly, there is no reason why a court should not function in plenary session with an even number of judges. The first point has been considered generally above. The second point has potential for the development of the Enlargement Policy. Whereas Art. 10 of the Merger Treaty states that "Only nationals of Member States may be members of the Commission.", there is no comparable provision for the Court of Justice (see Article 167 E.E.C.). This leads us to assume that, providing the requirements of 167 are met, a national of a non-member state might be appointed. This might be done where there is a long-term association such as the Athens Agreement. It should have no effect on the Court's decision as such but would be of political and practical significance. It would also have avoided the

problem of giving a member state an extra member,
as in the case of the "extra" Italian.

The United States Supreme Court was created
by Art. 3 sec. one of the U.S. constitution which
simply stated that "the judicial power of the United
States shall be vested in one Supreme Court...."¹²⁷
Twelve States were signatories to that constitution
yet its initial membership was set at five by
congressional act of 1789. Thus here we have a size
comparable with that of the Community which was
content to allow the judicial function to be exercised
by a Court upon which every state was not represented.
Even after the Supreme Court established perhaps a
wider jurisdiction than may have been intended in the
case of Marbury v Madison in 1803 (like the Court
of Justice itself in Costa v Enel), the States,
when later increasing the number of justices, did
not alter the position.

The Supreme Court has consisted of an even
number of members on a number of occasions: 1790-
1807 - 6; 1863-1866 - 10; 1866-1869 - 8. The Courts
practice is that in the event of a tie the decision
of the highest court below is sustained.¹²⁸ Certainly
the European Court of Justice's role differs from that
of the Supreme Court particularly in the Art. 177 E.E.C.
reference which is largely advisory and there would then
in the event of a tie be no opportunity to adopt a rule
similar to the U.S. rule. The Treaty demands that in
such Art. 177 E.E.C. rulings that the Court sit in plenary
session. A possible solution would be to give to the
President of the Court the right to produce the

Court's opinion in the light of the deliberations of the judges; other solutions could be devised.

Another question was raised, by Brown and Jacobs who said that "...the prospects of further enlargement of the Communities to include Greece....would have an immediate impact on the working of the institutions".¹²⁹ They appreciated that this would involve the Court of Justice and continued, asking "...whether the court should continue to sit normally in plenary session or whether more frequent use might be made of chambers or divisions with a quorum of say five or seven judges. Thus it would be possible to envisage that the court sit regularly in two divisions. When a plenary session was still necessary it might be desirable to introduce to the enlarged Court a proportionally lower quorum than the present, of seven out of nine judges".¹²⁹ The addition of one judge to the Court of itself does not raise too many problems but if consideration is not given to these questions the situation can get out of hand. The Commission has projected an increasing court, but will the workload always justify this?

Beyond the question of composition of the Court suggestions were made at the time of this enlargement to extend the jurisdiction of the Court to include some way of dealing with non-democratic states. The inspiration for this was the realisation that the applicant countries had all recently thrown off the yolk of dictatorship coupled with a cynical acknowledgement that they might slip back again (we recall the storming of the Cortez in 1981). Perhaps the some-

what hasty ill-considered and ad hoc response of "freezing" to the Colonels Coup during the Athens Agreement had shown the need for a considered response. Again we can see that the political reality exercises an influence upon the legal structure: to ensure an accession that would not disturb equilibrium it was thought to be clear that the law would have to provide extra stability, something which it would not be able to do simply by adjusting the applicant state into the Community system.

Christopher Soames said, "If any member country of the Community ever got itself a government that ceased to follow the precepts of a pluralist democracy and the freedoms that they involve, then that country could no longer remain a member of the Community".¹³⁰ This is a commendable sentiment evincing as it does a concern for pluralism which we have said is crucial to integration theory but we must ask: how is it to be achieved? It was suggested in the Pintat report that on the model of the mechanisms for imposing legal sanctions in the case of infringement of the Treaties the Court of Justice should be able to establish the failure of a member state to respect the principles of freedom and democracy.¹³¹ Since 1974 all three applicants have fulfilled the most important unwritten qualification for membership - that they should establish democratic institutions. But whether any would be expelled in the event of a return to authoritarianism is less certain. This does not take us far enough! To be

of real practical value a sanction would have to be provided. If it is to be expulsion we have entered a difficult area for there is no withdrawal mechanism let alone expulsion mechanism in the Treaties: they are concluded for an unlimited period.

The mere declaration of an infringement would have little effect on a dictatorship, and expulsion is a radical and irrevocable step. The dictatorship might only be temporary and shortly overthrown: the Community would then have to consider something not unlike the Freeze. Another alternative would be suspension which would be analogous both to de Gaulle's withdrawal of 1965 and the freezing of the Athens Association. The Community could not, we suggest, cope as well with the absence of a member state as it could in 1965. There is now a far greater range of Community activity which is not specifically laid down by the Treaties, and a failure to make progress in perhaps crucial areas might result; for the same reasons a freeze would be dangerous. However, once full Community membership is achieved it is unlikely that problems will occur because of the inevitable support for pluralist democracy which comes from Community membership. We shall for the present put this question aside and look at the Court of Justice position.

There was no "democracy" clause included in the Athens Act. However, the Preamble of the Treaty (Athens) states that it was concluded, "Considering that the Council of the European Communities after having obtained the opinion of the Commission has

declared itself in favour of the admission of this state". The said Commission opinion of 23rd May differed from the otherwise similar opinion of 19th January 1972 for the first enlargement in that it had a clause which runs as follows: "Whereas the principles of pluralist democracy and respect for human rights form part of the common heritage of the peoples of the states brought together in the European Communities and are therefore essential elements of membership of the said Communities". This is not as extensive as was sought and its legal effect, we would submit, is negligible.

There is some doubt as to the Court of Justice attitude to the legal effect of the Preamble generally. Scherpers said, "The problem of the force of the preamble is different when not only the motives but also the aims of the Treaty are mentioned in more specific terms".¹³² In saying this, Scherpers is looking essentially at the Regional policy and concludes that part of its legal foundation lies in the Preamble. He cites the International Court of Justice decision in the Asylum case and the Vienna convention Art.31 as general authority. We agree with much of what is said, but our problem is not answered by such analysis. This particular Preamble provision is too general to be actually used either as a guide to interpretation or as a foundation for some action. The Court of Justice, we would submit, would be unable to take any action in terms of it.

We suggest that the purpose of this clause is altogether different. It anticipates a situation

where the breakdown in democracy would be so serious that the Treaty would have to be dissolved. As there is no provision in Community Law for this it would have to be done in terms of the General International Law. The clause then takes on a more obvious purpose. If we look at Art. 62 of the Vienna Convention (see Appendix D) the clause is such that it would be a valuable indication of a circumstance which "constituted an essential basis of the consent of the parties to be bound by the Treaty".

So the new clause in the Commission opinion is not the extension of jurisdiction of the Court which some had proposed. None the less it is a significant addition to the law of accession.

(e) THE EUROPEAN COUNCIL

Although not an institution, specifically recognised by the Treaty and not mentioned in the Accession Acts, the European Council has a two-fold significance for a study of enlargement; it came into existence at the end of the U.K. enlargement - it has played a part in the Greek enlargement.

We have shown that there was no thorough reform of the institutions at the time of the U.K. enlargement. Indeed this was not even thought necessary. It was appreciated that decision making would be more difficult. The reasons for the creation of the European Council are obscure, "The European Council was created to meet the demands of a period in which the detailed guidance in the Treaties was running out, external circumstances had grown hostile, and the capacity to tackle these problems both of the Council

of ministers and of the Commission had declined".¹³³ Enlargement probably had as much of a part in its genesis. Hallstein said, "It is not correct to claim that the enlargement of the Community to seven or more members will necessarily entail a change in its character, a watering down of its aims, a reduction of its dynamism. This would be true only if enlargement were not taken as an occasion to streamline the Communities' organisation...".¹³⁴ As the Accession documents made no provision for institutional reform then it is a safe assumption that the European Council was thought of as the solution to a number of problems including the decision making difficulties consequent upon enlargement.

It must also be more than coincidental that the Council was formed in late 1974 following the U.K.'s expressed intent to renegotiate made to the Council of Ministers in Luxemburg on April 1st 1974.¹³⁵ The British Prime Minister Wilson felt able to say that the heads of government had, "already de facto asserted a degree of political power at the top level, not only for the month by month decisions but over the general method of operation of the market. This does not mean that the market has become a Europe des patries. It is a Community but, as compared with even a year ago, vital interests of individual nations are now getting much more of a fair hearing...".¹³⁶ So yet another possibility arises. The European Council could have been an attempt to pacify the U.K. in the face of renegotiation demands. If this is so it again suggests that the European Council was a

by-product of enlargement. The existence of the European Council is a justification of the argument which says that enlargement should include a review of the existing position rather than merely increasing the numbers.

The value of the European Council is derived from its position outside the Community system.¹³⁷ It could however constitute the Council of the European Communities and take decisions if it saw fit. It is an institution which is difficult to place into the Lindberg formula (see App. B): it could be considered within the category of systemic support or leadership or even as part of the General Error Term. Certainly its role has been one of leadership and this would appear to be the appropriate category in which to place it.

We might expect that this latest accession will put more pressure on the European Council. Many of the same difficulties (which were experienced after the first accession are still present which is an indictment of the functioning of the European Council). If neither the European Council nor subsequent reform is able to remedy the difficulties of the second accession, some other ad hoc measures may be taken to relieve the pressure on the Community institutions. Because the European Council is not governed by any rules, its future actions cannot be anticipated. Neither the content nor the scope of its behaviour is predictable. Nor is its own jurisdiction and competence at stake in the enlargement other than

its membership being enlarged. It does not have to consider as carefully the effect of accession on itself as did the other institutions.

CHAPTER IX

COMMUNITY POLICIES

We have seen how the accession affects the institutions in a way more extensive than the numerical changes alone would suggest. Next we must obtain an indication of how the method used affects Community functioning. Here we have to place some limitation on the scope of our enquiry. We propose only to look at some areas where substantial progress could have been achieved and where it was not in the first enlargement. We then comment on how far if at all a different approach has been taken in the Greek enlargement. Accordingly we do not look at the Four freedoms. These were virtually complete at the time of the first enlargement and were further advanced at the time of the Greek accession. In any event their final state is determined by the Treaties as they are measures of negative integration and are less illustrative of the point we are examining: how is the development of the Community affected by the enlargement method. This is a narrower question than asking how enlargement as a whole affects the Communities' functioning but logically comes after a consideration of the first.

We thus turn to look at some of the Communities' policies. We do not follow the Treaties' distinction between Foundations (part 2) and Policies (part 3) as we are looking at development. For example competition Policy (part 3) is less a matter of concern from the point of view of progress than is transport policy or common agricultural policy (part 2). The development of the Communities' Mediterranean Policy is a particularly interesting matter and we would propose to leave that to a separate section and to include in that discussion other observations on the Greece/E.E.C./Turkey relationship.

(a) ECONOMIC POLICY

We begin by looking at Economic Policy, particularly important in an economic Community. Encompassed within this we intend to make mention of economic and monetary union and a common currency which are related topics.¹³⁸

Economic Policy has a Treaty base.¹³⁹ There was no substantial progress made in this field before the first enlargement. The desire to move to full Economic and Monetary Union became an excuse for putting off the less far-sighted proposals. The customs Union itself, a prerequisite for E.M.U. was not complete until 1968. The six's initiative was the Werner committee following upon the Hague Summit of 2nd December 1969.

By the time a Council resolution was promulgated based on a Commission proposal following on the Werner recommendations, the British Accession Treaty was almost ready for signature. "What the British found in the way of Community patrimony on joining the Community, besides thearticles of the Treaty was a medium term economic policy programme, decisions to coordinate the economic and monetary policies of the member states and two resolutions dated March 1971 and March 1972 on the achievement by stages of economic and monetary union in the Community".¹⁴⁰ Not only did the U.K. accept these measures but allowed the agreement and coming into force of the various measures of 18th February 1974.¹⁴¹

It is clear that economic and monetary union was supposed to have been achieved by 1980. This was declared as an objective at the Hague Conference. This has manifestly not been achieved. Can this failure be attributed to a failure to include a specific obligation upon the new member states in the accession treaty? It has been said, "L'élargissement de 1973 n'a pas modifié cette orientation (towards e.m.u.) même si, sous la pression des événements monétaires internationaux et des chocs impartis aux structures économiques du monde occidental, l'optimisme témoigné par le rapport Werner quant à la durée de l'entreprise à du faire place à des attitudes plus réalistes".¹⁴²

This is an acceptable analysis.¹⁴³ It is difficult to ascribe any particular mishap in Community affairs to an individual cause. The most we may be able to say is that enlargement did not contribute to the development of E.M.U.. Indeed the U.K. failure to join the European Monetary System is still considered a problem.¹⁴⁴

The Greek enlargement is different from the first in that, in itself, it makes the substance of economic union much more difficult to achieve. This is to say that even although the legal means of bringing about E.M.U. need not be changed, the actual economic adjustment it must bring about is greater as we saw in the introductory section (see page 16 above). This may result in auxiliary legislation to deal with these additional difficulties. The Commission said, "In view of this whole range of difficulties enlargement could well place a serious handicap on the Communities' momentum: on its internal momentum, particularly the consolidation and development of the internal market and the achievement of E.M.U...."¹⁴⁵

We can ask whether, if the economic conditions of the Greek enlargement were expected to be more difficult, there should not have been some specific short term economic regime established. This may

have made a Treaty amendment essential or it could have been achieved by making decisions before the Accession of Greece in terms of the existing powers which are adequate for the purposes. What is dangerous is to ignore the problem and to leave regulation of the Greek economy until Greece is a member, for then she will be able to resist from within the Community System measures which might be politically unacceptable in Greece.

(b) FISHERIES

This is perhaps the clearest example of a distortion of Community functioning. The Community Regulation 2141/70 and 2142/70 (O.J. 1970, L236/1;5) had established the Community character of fishing grounds up to 12 nautical miles from member states territories. Norway and the U.K. opposed the existence of this regime on the basis that the measures were not acquis communautaire when negotiations started. This was accepted by the Community.

The Community will in future be reluctant to advance policies while negotiations are in progress as a result of this experience lest they be left

with the problem of having to allow substantial derogations. In the case of fisheries what resulted was not so much derogation but a roll-back of the Community regime. All of the nine, not just the acceding states were permitted to limit fishing within a six mile limit. Another interesting point about fisheries was that this was an area where the U.K. and Norway had their own mutual and inconsistent differences.

The post enlargement Community did manage however, to play a substantial part in fisheries policy even if not in the scene of developing it. A brief examination of the Norwegian demands for a 200 mile limit not only enables us see the state of Community fishery policy, but it also shows how the Community copes with disputes between members and associates. (particularly relevant in the context of the Greece/Turkey situation - see page 150 below). This fisheries dispute is complex and is well documented elsewhere.¹⁴⁶

The E.E.C./Norway agreement allowed considerable tariff concessions on fish. This agreement being concluded with the E.E.C. gave the Community some bargaining power. Norway had to look to the Community as a whole even although the Community did not have a developed fisheries policy.

Norway's ultimate aim was a 200 mile economic zone much the same as that declared by Iceland in 1975. The consequences for Iceland had involved the suspension of the association agreement. The U.K. later had to take its case to the International Court of Justice where it was successful. The U.K., Eire, and France were all in favour of an eventual 200 mile E.E.C. economic zone. The Commission also was broadly in favour of this. Norway's demands were not, therefore, so extreme. The law of the sea is a matter of public international law and that was undergoing an overhaul at the time at the UNCLOS negotiations. The Norwegians for domestic political reasons were unable to wait for the mechanics of the Convention to be concluded. Instead they proposed a no trading zone of a non-discriminatory nature with an extent of 50 miles.

In negotiating these zones the Norwegians wished to hold bi-lateral talks with the affected states (France, Eire, U.K. and West Germany) merely keeping the Commission informed of progress. The reason for this was that Norway intended only to offer limited access to the U.K. and eventually to phase out access for France and West Germany. The U.K. wanted to preserve its position for the future

in relation to exclusive territory. These were long term issues. France and Germany were looking to the division of Community fishing rights as were the smaller E.E.C. states. The three E.E.C. states managed to maintain a common front for the negotiations on the "no trawling zones". The smaller E.E.C. states were able to insist upon Norway negotiating with the Commission by using the Association Agreement as a bargaining devise.

This Community reaction to a major economic event such as no trawling zones shows how disabled the Community was in its post-accession period. There was no common position which could have obtained better terms from Norway. The Commission was not as closely involved as perhaps it should have been consequently weakening the influence of the smaller member states. As matters progressed it was to be seen just how serious these problems were to become.

In October 1975 Norway proposed bi-lateral negotiations towards the establishment of a 200 mile exclusive limit: the major concessions were to be offered to the U.K., the other E.E.C. members being given only transitional exemptions. However the Commission then proposed that the eventual Community Policy should include a coastal belt within the 200 mile economic zone. On this basis

the U.K. accepted that the Commission could be given responsibility for negotiating with the other countries involved. Regrettably the Council was unable to formulate a negotiating mandate for the Commission and the negotiations came to a halt. The U.K. pressed for action and the Community agreed that a 200 mile limit would be accepted by January 1st 1977. Norway declined this as a target date for its own limit to be concluded. The difficulty was the size of the U.K. zone: until this was resolved the E.E.C. had little to offer the Norwegians. Eventually the E.E.C. established this area leaving the problem of the U.K.'s exclusive area open. The fisheries policy itself has taken longer to resolve.¹⁴⁷

How far can the lack of success be attributed to Accession. The reservation of the fisheries question was in our submission inexcusable. Admittedly accession negotiations should not be prejudiced by a single issue but neither should a significant issue be left unresolved. More use could be made of the pressure which accession negotiations provide to bring both sides towards agreement, for we see from this example that it is difficult to negotiate a common position when the implications of it in the short term are obvious

to a member state. It was not just a divergence of opinion that produced Community intransigence but the pervasive problem of the Commission's negotiating position. The Commission should insist upon receiving a sufficient mandate before undertaking any negotiations, certainly in circumstances similar to the fishing dispute.

We have seen a general Community problem not exclusively caused by enlargement but in which it is a major contributing factor. It is one which should be solved before the range of matters of Community competence increases beyond the ability of the presently inadequate Community decision making process to handle it. It is this increased divergence of interests which is the hidden impact of enlargement not reflected in the legal acts (except perhaps incidentally in the protocols attached to the Accession acts). One solution is to improve decision making. The other is to rule out the need for decisions to be taken. This second is the method used in the four freedoms. It is not an option except to a limited degree where developing policies are concerned. This follows naturally as the situations the policies must accommodate are not known at the time of Accession.

(c) REGIONAL POLICY

In contrast, the regional policy appears to be a successful consequence of accession.

The Treaty of Rome made no particular provision for regional policy although in places mention was made of regional considerations.¹⁴⁸ The Court of Justice even declared that the Community was not empowered to operate a general regional policy under E.C.S.C. powers. Until 1972 little progress was made although the Commission continued to submit plans. There were existing measures available with which some relief from the centralising effects the Common Market was having could be obtained; 75% of E.I.B. loans went to regional projects; finance was also available under the coal and steel treaty which could be diverted on a regional basis founded on the word "rational" in Art. 2.; the social fund made available funds for retraining and re-allocation, which would tend only to be necessary in depressed areas which can be defined in regional terms. The Agricultural Guarantee Fund was able to be used within its terms for regional purposes, in matters of infrastructure.

This was not adequate to offset the problems of expanding conurbations and particularly within the context of trying to achieve E.M.U. by 1980 because of the pressures which members having large regional problems would face. An indication of the interconnection of regional policy and economic and monetary union can be seen in the requests by the Italians and Irish that additional regional

assistance be given to their underdeveloped or declining regions before they would consent to join the E.M.U. and consequently losing some of their freedom to adjust exchange rates.

The question which must concern us is whether enlargement itself makes a regional policy more vital. The answer has to be affirmative although in a case such as Luxemburg or Ireland neither of which is regionalised this is less so. But the idea of a regional policy in its redistributive function means that whether a new member is rich or poor it will have something to contribute to a regional policy and something to gain: the giving or receiving of finance or the opening up or availability of a new market. Economically the implications can be just as great as E.M.U.. In any event an advanced regional policy will be conducive to the conclusion of E.M.U. in that the transfer of large sums from national economies will make a united money market almost vital. The original six were geographically highly centralised (excepting the French departments) and the addition of new members introduced a new periphery making transport and communications all the more important.¹⁴⁹

Another more likely reason for the emergence of the Regional Policy was that the U.K., in particular, finding that it would be a net contributor and being unable to alter the acquis communautaire was looking for a means of recovering funds within

the Community scheme (later of course the pretence was given up and special financial mechanism adopted). Regional policy was being actively considered and indeed acted upon prior to enlargement. The U.K. at the 1972 Paris Summit we are to believe argued quite vehemently in favour of such a policy.¹⁵⁰ This summit took place, interestingly enough bearing in mind much of what we have stated in the first section (see page 70 above) after signature but before coming into force of the Treaty and so the possibility must have existed even at this very late stage for a breakdown in the enlargement process.

The communique noted the intimate connection between E.M.S. and regional policy rather than connecting it with enlargement, "a high priority should be given to the aim of correcting in the Community, the structural and regional imbalances which might affect the realisation of economic and monetary union". The heads of government however do refer to, "the correction of the main regional imbalances in the enlarged Community".

The effect of regional policy thereafter on enlargement is a different question because there is now a financial disincentive to the admission of new poor members. This of course is only a short term loss and is compensated by the benefits of alleviation of over-centralisation. Most states

operate some form of regional policy and so Accession to the Communities will mean a realignment of these policies so that no distortion is created.

The ratio of highest to lowest G.D.P. within the nine at the time of enlargement was one to five. The regional policy developed was based on the idea of a regional development fund which was suggested by the 1972 Paris Summit and reiterated at the 1974 Paris Summit which stated that the Regional Development Fund would be put into operation by the Community institutions by 1st January 1975. The distribution or allocation of these funds according to need saw the U.K. receiving the second highest grants and in effect four times as much as Germany and twice as much as France. Following the Communities institutional method a committee for regional policy was established consisting of member states and of the Commission. The policy does not prevent national action but is designed rather to be complementary. Perhaps the most disappointing feature of the fund was the amount at its disposal, some £125 million. This did not, at current prices, pay for a general hospital or two schools. (£541 available in first three years).

The Regional Development Fund was established by regulation and the Commission was obliged to re-examine the principles of the fund, and make recommendations to the Council before the end of Nineteen Eighty. The Commission recommended a 15%

share for the Greeks but to compensate the states like the U.K. who would lose substantially because of this it was recommended that overall funding be increased. The Council cut this but the parliament re-established it in the budget.

Obviously enlargement would be imperiled by such a reduction in funding and although enlargement implied an increase, the regulation should be amended to make such increases automatic. Even if circumstances made a fixed rule somehow inflexible there would at least be the benefit that there would, in the absence of agreement exist a positive rule of law preventing stagnation. Part of the reason was that no method of calculating the amount of adjustment had been created because there might be political overtones to the inclusion of a measure specifically recognising a future enlargement. This has now been worked out and it is calculated on the relative deviation from the Community mean of per capita G.D.P. in member countries.

The size of the regional fund prevents regional policy being a crucial issue in enlargement. The Council's attempt to devalue the Regional Development Fund shows how easily an extra-treaty obligation can be diluted. Its protection can now perhaps be entrusted to the parliament with its new democratic authority; although there is still a case for trying to take matters such as this outside the scope of general debate.

The admission of Greece has made the G.D.P. ratio closer to one to fifteen which if anything makes a case for the more generous endowment of the fund. The Accession of Greece also meant that the number of regions with a per capita G.D.P. below 50% of the Community average increases from 9 to 17.

The Commission's report on the policy on June 1st 1979 found it to be defective in many ways and it remains to be seen how far enlargement will interfere with the taking of measures necessary for the improvement of the policy. The Accession of Greece and the potential Accession of the other applicants will make its perfection all the more necessary; it is fair to state that it is particularly the U.K. which has and will have most to gain, in the short term financial sense, being such a high contributor in other respects, whereas poor agricultural countries should be making gains under the C.A.P.. The Commission is still dependent upon the national projects and it finds that these are not designed sufficiently well to take into account the effects of other Community policies and indeed other national policies.¹⁴⁹

Is the Regional Policy the success it seems to be? The Commission had certainly felt it to be important before the first Accession and its value cannot be disputed as a tool of integration. On the

other hand it came about without a clear treaty base.¹⁵⁰ There is an argument to which we would adhere that if Regional Policy were felt to be essential to E.M.U. it should have featured as a treaty amendment. If essential to the proper functioning of the enlarged Community it could have appeared as an adjustment under a wide definition of 237 or as an amendment. Not to do this leaves what might easily become a major feature of Community life with no foundation.

Again the support the Regional Development Fund had during its genesis came from a desire by some members to effect a financial re-adjustment to compensate for the cost of enlargement. This is a misuse of a Community policy and leaves it open to distortion. In any event because of the need for member state participation it is an unreliable means of adjusting the financial consequences of enlargement. A better solution to that problem is that suggested by Bergehman.¹⁵¹ He suggested a special reserve to deal with the economic problems of enlargement from which funds could be allocated as need be. He counselled against resorting to non-Community or extra-budgetary means to cover the real cost of accession. When the scheme is considered with the idea of giving aid to an acceding state where necessary we have an alternative view of how the R.D.F. could be used.

It would also prevent the use of the argument that the R.D.F. was an "on cost" in any accession negotiation; it would be entered in the "enlargement account". The obvious danger of this accounting is that it might be substituted for a complete analysis by short-sighted politicians.

Accepting our foregoing remarks and reservations, the Regional Policy is an indication of the innovation and progress that a new member can bring to the Community without deliberate conscious planning.

This enlargement has affected functioning in a number of ways. The method of obtaining commitment to the acquis communautaire from the acceding states seems to give political support to maintaining development. It does not and cannot offer real protection in the same way that the transitional period does for the functioning of the Common Market. There must surely be an argument for codifying the acquis communautaire before enlargement even with the danger that such an exercise could be used to subtly alter the substance of the acquis communautaire and might result in the loss of practical arrangements which

member states would not wish to have codified but which are nonetheless valuable.

(d) MEDITERRANEAN POLICY

It would be difficult to imagine a more directly affected area of activity than the Mediterranean Policy and in this respect we are fortunate because we can see more easily these non-explicit implied changes which we have been discussing.

The Community before Greek Accession had a partially completed policy towards the littoral Mediterranean states. With the inclusion of Greece within the Community a complete restructuring of this policy was essential. This was an aspect of Community functioning where the acquis communautaire had to be abandoned. The delicate relationship between the E.E.C., Turkey and Greece also requires to be included within some workable framework.

The policy before Accession:

From the Athens Agreement the Community began its close association with the Mediterranean states. It is fair to say that the Community was not quick to develop a policy as such, "...the importance of the problems was almost matched by the incoherence of the policies lacking an agreed overall conception of its own, the Community simply reacted to the requests of its neighbours by taking little

steps of scanty economic and political significance... and the end product was a mosaic of agreements that have little relation to one another.¹⁵²

Lambert¹⁵³ spoke of 17 littoral states and pointed out that of these the Community had agreements with all but three. He noticed that the Communities' relationships with these states were in terms of the association agreements under Art. 238 E.E.C.. He pointed out that in principle, all countries along the northern shores of the Mediterranean being European countries, qualify for full membership under Art. 237 E.E.C., but that in practise, this would remain a dead letter for a long time to come since the general level of development and in most cases also the political regimes ruled out that solution . We have already seen (page above) how extensive and flexible the Association can be. The problem with Mediterranean policy was its ad hoc nature as Lambert also pointed out the Communities' relations with the Mediterranean countries were almost "unnoticed in the debate on the enlargement of the Community". This is despite the fact that enlargement makes re-negotiation of these agreements compulsory.¹⁵⁴

Attempts were made at various stages: the Italians proposed the creation of a general free trade area with the Moro memorandum of 1964. The Council in 1972 asked the Commission to report upon the Communities' relations with the Mediterranean States. The Paris Summit of 1973 also proposed progress in the form of a global policy to take

effect by 1974 (App. E) but little was achieved. It was only with the Greek application that the Community realised that it would, "...have to seek with those countries parallel to the process of enlargement, a new equilibrium based on active ~~co-~~ operation to permit orderly trade and to enable them to pursue their development with the support of the Community".¹⁵⁵

Greek Accession and after:

It was again an economic problem rather than one of legal form which faced the Community when Greece applied for membership. Most states in the Mediterranean produce substantially the same goods. The Community cannot grant unlimited preference. The problem of surplus would also arise with Italy and Greece (and eventually Spain and Portugal) producing broadly similar goods. The danger which the Community must avoid is not just an economic one. The strategic importance of the Mediterranean is such that it can be dangerous to operate even an economic influence, Cyprus being a poignant example.

The long term view of European Union demands that the possibility of membership of these states be considered. There are difficulties because once both trade and problems relating to security are considered it becomes difficult to isolate a Mediterranean area. In addition to the geographical problem the other difficulty is the way in which political and economic matters are not easily combined in the framework of association agreements.

Accession brings with it the problem of Turkey and projected enlargement with Spain and Portugal and similar problems (Spain and Morocco and the non-recognition of Israel-(see generally, De la Serre).¹⁵⁶

There can be little doubt that the future of the policies will be to move towards alignment of the agreements. How far positive steps can be taken to achieve a "global" approach is debateable. The substantial new southern group in the Community will not be keen to see their newly acquired large home market invaded by other Mediterranean states. The Mediterranean problem is now internalised but progress is continually being made in so far as this is possible with Spain and Portugal's applications pending.¹⁵⁷

The Community, Greece and Turkey

This problem comes only partly within the scope of Mediterranean policy but it raises a number of problems relating to accession which we also look at here. As soon as the Community began looking for a policy it became apparent that special treatment would be necessary for Turkey. The Ankara Agreement had already set Turkey apart giving it a "with a view to membership" status. After the Truman doctrine Greece's new western ally was not as pro-hellenic as had been the British. The interest of the Western Military powers has been primarily military, Greece and Turkey effectively monitoring and controlling the movement of the Russian fleet if required: it is not important to the U.S. whether it is Greece or Turkey which carries out this task. In fact the Greeks themselves perceive the most likely threat to their security as coming from Turkey.

The territorial claims of each over Cyprus is the principal manifestation of the issue between these states. N.A.T.O. and the E.E.C. both tried to resolve the dispute as did the United States and to a degree the United Kingdom. The E.E.C. demanded an ending of hostilities and talks with Britain acting as "honest-broker" but this had little effect. More likely it was the intervention of Dr. Kissinger which brought the hostilities to a close.¹⁵⁸

Perhaps the Greeks have felt that membership of the E.E.C. will give them an edge in the event of similar or more serious outbreaks of aggression: "Turkey would think twice before attacking a member of the E.E.C.". ¹⁵⁹ The relationship featured quite significantly in the Accession negotiations. Indeed the Sismik incident took place right at the start of negotiations (App. A). Zolotas ¹⁶⁰ said in 1976 that "...it is unthinkable for Greece to tolerate blackmail attacks or humiliations and like any other country she will firmly defend her integrity, dignity, and prestige. But the argument that our country must not be accepted into the E.E.C. because after fifteen or twenty years we might obstruct the Accession of another country is untenable". He went on to point out that the U.K./Iceland dispute over cod fishing had not been treated as a significant obstacle in the first round. He also pointed out that Turkey was protected by the Ankara Agreement, (of the U.K./Norway dispute page 132 above). However, in Athens, Greek parliamentarians offered a number of permutations to resolve the problem ranging from withdrawal from N.A.T.O. and non-entry to the E.E.C. to full membership of both and even the middle position of the Centre Union seeking a European defence policy. Apart from real or imagined military support Greece as a Community member has a considerable say over the Communities' attitude towards Turkey.

It is not out of the question that the Turks could apply for membership under 237.¹⁶¹ The Ankara Agreement was designed with this in view and when the agreement was resuscitated in 1980 it was said to be with a view to facilitating the accession of Turkey to the Community.¹⁶² The Greeks have given assurances that they will not unfairly prejudice any Turkish application but this can be of little comfort to the Turks. Once Greece is a Community member there is nothing that can legally be done to enforce such a pre-Accession promise. Even the future development of the Ankara Agreement will depend upon Greece. There can be little doubt that the position of the Hellenic Republic is strengthened against Turkey.¹⁶³ A partial solution is the "Troika" formula whereby the President, his successor and predecessor in office of the Council undertake to keep Turkey informed of all pertinent developments but this is obviously dependent upon a considerable degree of bona fides.

The military coup of September 1980 and the politically unacceptable regime in Turkey makes it unlikely that the Community would have any difficulty in supporting Greece in the event of a dispute or renewed hostilities. Although a return to democracy in Turkey might again provide a political imperative making membership an issue again.¹⁶¹

The Greek application created a need for action where none had been contemplated but the enlargement procedure did not make a positive contribution by utilising the desire to rationalise, prior to accession. The legal necessity of re-negotiation of existing association agreements afforded a considerable incentive for creative thinking on the part of the Community.

What an examination of Mediterranean policy does make apparent is the necessity for fundamental change where accession will have a considerable factual impact. While attempts have been made in the Mediterranean policy we can question why the same approach has not been taken in other areas where the impact has been as great as upon Mediterranean policy. The answer appears to lie in the legal nature of the Community regime: if the acquis communautaire formal applies then negotiation leading to improvement is precluded, only transitional adjustment being permitted. This position did not apply to Mediterranean policy because the "Community patrimony" was unable to cope with the problems raised.

Incidentally, we also notice the U.S. involvement in Accession. Although the U.S./E.E.C. relationship was at first philanthropic (in the shape of Marshall Aid) it has now become a matter of self-interest. The U.S. had in the past complained of the Community breaking G.A.T.T. Agreements in its preferential agreements. Hillenbrand¹⁶⁴ said that the

U.S. might begin to exclude E.E.C. associates from the scope of its generalised preference scheme. He also went on to say "apart from the end result of enlargement, the U.S. obviously will have an interest in the process itself by which new member states enter the Community. American policy will presumably continue to be not to interfere with that process, but the U.S. clearly has no interest in any weakening of the Community by following a destructive route to enlargement". This is yet another example of the General Error term category of Lindberg.

PART THREE

"On the day before the first General Election the P.P.U. hired five hundred cars and toured the island. It was the P.P.U.'s finest moment. The Party had been founded two months before the parade, it died two days after it But Trinidad had been impressed by the parade and after that no election was complete without a parade". (V.S. Naipaul, The Suffrage of Elvira.)

CHAPTER X

RENEGOTIATION, SECESSION, THREATENED WITHDRAWAL

In this concluding section we do not wish solely to draw together all the results of earlier discussions while recapitulating some of our findings. The remainder of the results of our investigation shall be included in the final Chapter XI when criticising the use of law in the Enlargement process.

Before such a peroration we intend to look at the key questions of re-negotiation and threatened withdrawal. Although we admit that it would appear not to be within logical sequence to include new matter in the concluding section, there are equally good reasons for discussing these questions here. The first is that neither re-negotiation nor withdrawal are properly part of the law and

practice of Accession (if anything they are opposing related processes) and have no place in the largely comparative study in Part II. Secondly, it would have been improper to include these topics in the introductory section, for without the narrative content of Part II re-negotiation and withdrawal could not be understood. Thirdly, whereas we had to establish, in the introductory section, what was beneficial in Accession by examining integration theory before examining the process, no such consideration is needed when looking at re-negotiation and withdrawal as they are both ex-facie retrograde steps.

"We shall submit to the British people the reason why we find the terms unacceptable and consult them on the advisability of negotiating the withdrawal of the United Kingdom from the Community".¹⁶⁵ This was the attitude taken by the British Labour Government when it assumed office after the election in February 1974. This statement was made to the Council of Ministers in Luxemburg on April 1st, 1974.

No legal warrant was proposed for the statement and none exists. What is interesting is that the end result was said to be negotiation leading to withdrawal.

The expressed aim of the re-negotiations were broadly: (a) changes in financing the Community budget as the existing scheme was thought dangerous, transferring resources promoting economic divergence; (b) a change in direction of the Common Agricultural Policy away from protectionism; (c) improved terms for the Commonwealth and the third world and finally (d) to prevent the implementation of the social and regional policies restricting national efforts in that direction. This is a return to the expressed position of Britain at the time of the first U.K. application (see page 67 above). This was rejected at that time by the E.E.C.; it is an acceptance of the principles of the Treaties but not of what has followed upon them; a rejection, in part, of the acquis communautaire.

The British expressed the desire of negotiating within the scope of the Treaty of Rome and the Brussels Treaties. In substance their true aims were incompatible with the Brussels Treaty. The Community properly treated the matter realistically.

It chose to introduce new measures; this rather than repeal existing ones, or to allow further derogation or extension of transitional periods. Thus the U.K.'s external relations demands were included in the eventual form of the Rome Convention; the C.A.P. was subjected to stocktaking at Germany's request which gave the U.K. an opportunity to draw attention to alleged inequalities. The re-negotiation took almost a year to complete during which time the U.K. Labour Party members did not fill their allocation of seats in the Assembly which at the time was not directly elected.

There seems little justification for allowing a new member state to obtain terms different from those prior to Accession. Legally, as we have seen, apart from express derogations, and transitional measures the U.K. was legally bound to the Community. The threat of withdrawal and the commitment to a referendum must have put political pressure upon the Community not to take a legalistic approach even if one were available.

Once the immediate crisis of the U.K. re-negotiation was over the danger of re-negotiation was its use as a precedent in subsequent Accessions. This is precisely what happened when Papandreou's PASOK won the Greek general election of October 1981.

Before the election, PASOK had taken a strong anti-E.E.C. line. PASOK's attitude to the E.E.C. and N.A.T.O. before the 1974 election was to oppose completely membership of either, favouring instead a non-aligned status with close third-world links.¹⁶⁶ By the time of the 1977 elections a subtle change was observable. The opposition to E.E.C. membership was still apparent, but now there were suggestions that an association on the Norwegian model might be suitable. PASOK did remain opposed to N.A.T.O..

Just as the U.K. Labour Party's October 1974 manifesto had committed a Labour government to refer the issue of continued membership to the people, PASOK was pledged to hold a referendum on the issue. Unlike the Labour manifesto, no time was set within which the referendum had to be held. The realities of office have mellowed this extreme position. Papandreu's position is that "in view of the reconsideration of all of the policies of the E.E.C., what is opening up as a possibility is the definition of a special status for Greece which will make it possible for Greece to survive within the E.E.C.".¹⁶⁷

Two possibilities have been projected as falling within this brief. The first is full membership of a new Community where the poorer members obtain, within the Community rules, a better financial deal, allowing more scope for the adoption of domestic development policies by Greece. The other alternative is to allow the Greeks substantial derogation from their treaty obligations. It was suggested that the "Greek government aims to achieve a series of improvements

which it will be able to present to the Greeks in an eventual and increasingly distant referendum".¹⁶⁷

What the Greeks are doing is in effect renegotiation but carried out in a more subtle way. The principal tactics remain the same. The Greeks are using the existing mechanism as a means of increasing financial transfers. They then try to have the detrimental effect upon the acquis communautaire reduced by proposing new developments. This is becoming a pervasive enlargement problem: "Si le peuple donne sa préférence à un parti ayant fait campagne contre l'adhésion ce parti, appelé à former le Gouvernement, se trouve dans l'embarras. D'une part, il ne peut pas, du jour au lendemain, faire une volte-face et accepter sans discussion le statut d'adhésion qu'il contestait avant les élections. D'autre part, il ne peut pas prendre sur lui la responsabilité d'isoler le pays de L'Europe...Il est donc obligé de trouver une formule de compromis avec la Communauté".¹⁶⁸ It is one which must be solved.

We have seen how difficult negotiations are, (page 71 above), and we have seen how the Communities surrendered important points in negotiation in order to conclude an accession agreement. If renegotiation is to become a regular feature then the enlargement method has failed. It has failed politically in that it allows a new government to have scope to renegotiate; it also fails as a legal exercise because the legal structure has not given effect to the agreement between the parties. A solution to the problem would of course require only one of the restraints to be

effective, the political or the legal.

As the damaging position of the renegotiating new member state comes from the threat of withdrawal, we are forced to look at this hopefully hypothetical and unlikely possibility. The attitude to this so far has been what we might describe as the "ostrich" approach. This does not imply that the Commission has been stupid in doing this. On the contrary, it is a technique, conscious or unconscious, which by the use of language tries to eliminate the concept represented by the words from discussion: "In our time, political speech and writings are largely the defence of the indefensible...thus political language has come to consist largely of euphemism, question begging and sheer cloudy vagueness."¹⁶⁹

If re-negotiation were frankly discussed as comprising the threat of withdrawal then perhaps the political and legal frameworks could be overhauled. Withdrawal then becomes an issue in this study and in any event needs to be considered because it would have to be effected legally itself.

The first serious mention of withdrawal was in the aftermath of the failure to agree the C.A.P. proposals by June 30th. 1965. The French withdrew from the Council of Ministers and did not participate fully in the daily life of the Community. At this time the idea of withdrawal was canvassed in France but it faced great resistance from French farmers.

It was not a realistic position to take. The Community had been designed to meet the needs particularly of France and Germany. The solution to that

crisis was to be a preview of renegotiation. General de Gaulle submitted his "decatalogue" which sought changes not requiring treaty amendment.

Nevertheless, the reference to majority voting in the Luxemburg accords can only be construed as an attempt to rewrite the Treaties.

It was perhaps British entry which raised withdrawal as a possibility. As already indicated, the United Kingdom Labour Party was hostile to the terms of entry negotiated by the Conservative government. The matter was raised by the party at the 1972 Labour annual conference.¹⁷⁰ A resolution was passed (but not with the 2/3 majority needed to make it party policy) which decided inter alia; "This conference declares its opposition to entry to the Common Market on the terms negotiated by the Tories (British Conservative Party) and calls on a future labour government to reverse any decision to join unless new terms have been negotiated...".¹⁷⁰ This reversal is obviously a euphemism for withdrawal.

This attitude remained. The National Executive Committee of the Labour Party stated on March 26th. 1975 that, "a majority of the N.E.C. believe that the terms even as re-negotiated do not satisfy Britain's requirements and therefore opposes Britain's continuing membership of the common market and so advises the special conference".¹⁷⁰ More recently at the 1978 conference a wrecking resolution was carried convincingly which if effected as government policy would reduce the E.E.C. to an intergovernmental discussion group (assuming of course it were in the power of the U.K. to achieve

such).

We feel secure in saying that a trend has been established whereby withdrawal is becoming less of a veiled threat and more of a political possibility. The experience of Greenland¹⁷¹ must offer support for this proposition. Greenland is withdrawing from the Community in that some of the peoples of Europe are leaving. It is an event which is legally distinguishable from the departure of a member state. International law has had to recognise state succession and the idea of a territory achieving some measure of home-rule as a corollary of state theory. Different problems are posed when a state which joined an organisation wishes to leave, a situation different from that of Greenland which didn't itself join the Community but was taken in by Denmark.

Withdrawal would we think be treated as a matter of international law. An indication of what the international law might be on this point is given by Articles 54 & 56 of the Vienna convention on the Law of Treaties.¹⁷² Under Art. 54 the termination of a treaty or the withdrawal of a party may take place, "in conformity with the provisions of the Treaty; or (b) at any time by the consent of all the parties after consultation with the other contracting states". The first of these alternatives is not in this case possible and it seems likely that the second could not be achieved.

Article 56 states that, "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation

or withdrawal is not subject to denunciation or withdrawal unless:- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right to denunciation or withdrawal may be implied by the nature of the Treaty. 2. A party shall give not less than twelve months notice of its intention to denounce or withdraw from a treaty under para.1".

This particular provision may have provoked or been the foundation for some of the more extravagant claims in the increasing dialogue about withdrawal. Lord O'Hagan asked the Commission, "The Labour Party's National Executive Committee document asserts:- We do not accept that we shall be in breach of International Law by seeking to withdraw from the E.E.C. having given due notice;-does the Commission accept this to be a true statement of the position?" President Thorn replied for the Commission, "The Commission does not share the views expressed in the statement referred to by the Honourable gentleman."¹⁷³

This is essentially a question of international law and we do not intend to discuss it further having established that this issue is one which produces arguments for and against its legality.

However, it is true to say that the legal bonds that exist between member states are not the only forces that hold the Communities together. The gradual harmonisation that takes place even during the accession transitional period provides a disincentive to withdrawal. This is what brought Commissioner Narjes to accept the description of the Communities

existence as "an irreversible fact". He said, "The Community member states are now so heavily interdependent that in normal political circumstances - that is to say in peace time the social, economic and political costs of leaving the community would be so high that any government which tries it would sooner or later pay with its political life". When asked, "So the Communities' existence is an irreversible fact because the economic imperative becomes the political indicative", he replied, "I can't rule out fits of political lunacy".¹⁷⁴

Political lunacy is not a disease of epidemic proportions but one outbreak would be sufficient to disable the Communities. Indeed the N.E.C. of the Labour Party appears to be making its decisions on some political grounds. Regrettably the "irreversible fact" analysis does not provide a complete answer. In the first few years of membership the economic and social ties between the acceding state and the member states have not coalesced.

Our examination of the enlargement method and the detailed accession procedure has revealed it to be a pragmatic and ad hoc method in which considerations for the rule of law and indeed for economic realism seem to have been placed behind political considerations. This has had some unfortunate results in the effecting of enlargement. The political dimension and its powerful influence is seen at its most destructive in the continuing demands for renegotiation which are without any apparent legal foundation.

CHAPTER XI

CONCLUSIONS

Considering the contribution of law to the Community, enlargement and accession processes, we may submit that the quality of this contribution is not very high. The law has not prevented the emergence of post-accession problems. Taking a more radical approach it could be said that it has contributed to the emergence of these problems.

On the other hand, taking a broader view and taking into consideration the other factors influencing the process, no exaggerated expectations of what might be accomplished by legal means should be formed. Chapter II (page 10 above) tried to identify at an early stage how, for example, geographic and historical factors inhibit legal solutions. We also looked at the considerable force that political and economic factors have.

It was in Chapter III however that we saw how enlargement is, in fact, a phenomenon which can be described from the point of view of any discipline and how division between legal, political and economic fields of activity is quite arbitrary. Chapter IV looked at integration theories which we treated as being attempts to cope with the difficult inter-relationship between these disciplines. An examination of some of these theories, particularly where they were found to be applicable to enlargement, provided us with both a model for discussion and a potential source of assistance in goal definition. The analytical work of Lindberg and Scheingold was

adopted for this purpose as indeed was much of their terminology which while being useful as a shorthand method of description was not in any sense divorced from reality.

In examining the legal contribution the final preliminary task was to clarify precisely what law was applicable and once we had found that there was a range of potentially applicable norms, to indicate how these can co-exist.

Our examination of the results of Accession (in Part 11 sec.B and Chapter X in Part 111) and our examination in some detail of the procedure and practice of accession (in section A of Part 11) leads us to express concern at the present position.

We dealt in Chapter V with an attempt to make enlargement a gradual process, by means of association agreement, which ended in failure for political reasons. Association with a view to membership was not adopted in the 1973 accession but we considered the surrounding political/economic circumstances of the two accessions were such that it was impossible to discount association because of the experience with it to date.

Chapter VI reviewed the procedure and the practice of the enlargement method which, with the benefit of comparison and contrast between the U.K. and Greek accessions, can be seen to be (i) illogical and ill-prepared, arrived at as a result of the exigencies of the time, (ii) intimately connected with Art. 237 E.E.C., a legal provision lacking in detail or guidance, (iii) too cumbersome to meet political

demand and finally (iv) now so "received" so as to be difficult to alter.

Having already drawn conclusions on some matters in the course of the thesis, we do not intend to rehearse these here but to proceed to consider the wider possibilities of our findings.

The results of accession make a critical appraisal necessary: (i) although looking at only a few policies, it was apparent both that enlargement can have adverse effects and that the mode of accession does not assist greatly in reducing these, economic policy being perhaps the clearest example (see page 129 above). (ii) The institutions were seen in (Chapter VII page 101 above) to be suffering from problems irrespective of enlargement. Accession was seen to add to those problems by being both detrimental in its own right, for example in the case of Council majority voting (see page 105 above) and, as having been a missed opportunity to remedy these aforementioned institutional difficulties, the size of the Commission being pre-eminent among these (see page 111 above).

(iii) Unfortunate results of the kind mentioned in (i) & (ii) above are certainly serious but should not prove irremediable to an otherwise healthy Community; the same cannot be said of the problems outlined in Chapter X (see page 155 above). That similar issues have arisen after both accessions indicates that we are not in the realm of "political lunacy" but are witnessing a manifestation of an infelicitous enlargement method.

We now proceed to discuss, using where appropriate the terminology of Lindberg and Scheingold, what is wrong in principle and how far there can be a remedy using the numerous legal techniques which are available.

According to Lindberg & Scheingold (see Appendix B), systems transformation is a function of five variables: the existing system; systemic support; demand; leadership and a general error term. In a way, this is merely stating the obvious but the categories are identifiable by function and by an examination of the law.

We do not propose to consider the state of each of these at any given time for two reasons: enlargement is too dynamic a process to make this worthwhile, and as Lindberg & Scheingold themselves confess, there is no quantitative element in their model: It tells us what to look for but not how much of it we need.

We have seen deficiencies in both accessions: Decision making at Community level has slowed down every stage of the operation; Norway failed to ratify after a popular referendum; the processing of demand is at its clearest in the negotiating phase and the failure of the first U.K. application is an example of a failure to process demand; leadership has been inadequate since the Commission failed to take an initiative in the first application in 1961 and was replaced by the member states who have been unable to lead effectively. The first U.K. exclusion is also evidence of the general error term.

We can take, at least, the following proposition from Lindberg and Scheingold: an increase in any of the four major variables should make enlargement easier.

Having already given indications in the thesis of areas where law can improve these variables, we intend now to look at those changes in the law of accession which would most impressively increase the quantitative levels of these variables.

The Association with a view to membership could be used in a more extensive way. Freezing, (in the case of Greece) we submit, prevented the value of this device from being fully appreciated. The extensive use of law which it makes improves a number of the variables: an Association Council both provides additional leadership resources, and because of the activity in national life, increases systemic-support.

The most striking effect is the way in which it processes demand. Our view is that it ought to be used as an "ante-chamber" both consolidating past progress and forming a framework for future developments. This would be a valuable use of law and entirely in keeping with the incremental nature of the Communities themselves. In this way we would pre-empt many of the accession problems as a degree of political and economic integration would, by the time that an application under E.E.C. Art. 237 was made, have been achieved. Apart from making accession easier for the applicant state, such an approach puts less stress on the Communities themselves.

Failing such a step, or even in addition, a fresh approach to Art. 237 E.E.C. would be beneficial. We are of the view that it is extremely unlikely that this will be done. The procedure following upon the Article (see page 59 above) is now almost as much Community Law as the Article itself. This is particularly so because the Commission's call to allow more than mere mechanical adjustment, was ignored (see page 72 above).

This does not increase any of the variables but it is a negative contribution from the legal system. It is an example of the characteristic effect of law operating in an unhelpful way. Obvious and perhaps uncontentious matters pass unresolved, only because it is felt that it is not legally permissible to change them without amendment. Certainly the reluctance to invoke the Art. 236 E.E.C. procedure is understandable; it must appear to be something of a Pandora's box, all sorts of hard won Community compromises being re-argued again.

There is we suggest, a middle way, and it is for the Court of Justice to be given a jurisdiction to advise whether the Treaties can be amended in a proposed fashion under the "necessitated" part of Art. 237 E.E.C.. A similar power exists under Art. 228 E.E.C.. Such a power might have to be conferred in an amending treaty but this need not be the case. Just as the supreme Court of the United States refused to issue an advisory opinion when George Washington submitted 29 questions to it on the effect of international law, it would, we submit, be open to the

Court of Justice to choose to issue such opinions. In any event the existence of Art. 177 E.E.C. would make such an action appear to be unobjectionable in principle. In this way the flexibility which some feel Art 237 E.E.C. was always supposed to have could be restored, at no loss to the acquis communautaire.

Our third and final improvement would be a call for goal definition in enlargement. This admittedly is a wide and general remedy, but by putting accession fully into its position in the overall sweep of Community activity accession would be made easier, assuming an appropriate goal is selected.

This is in fact a call for a scientific reappraisal of the enlargement method which we have seen has grown in an ad hoc fashion. The development of the acquis communautaire doctrine reflects this pragmatic growth. Simply put, the acquis communautaire doctrine was developed as a bulwark against retrenchment; once established, a minimal position could be taken, whereby it would be possible to disregard the quality of the enlargement method, knowing that the respect for the doctrine would protect existing achievements and that the momentum of accession would bring about a satisfactory outcome.

While the Community system could have been expected to cope with such stress once, the danger we see is that acquis communautaire is being accepted as a sufficient bulwark. This it is not in real terms as we saw in section B of Part 11. In settling for acceptance of the acquis communautaire as a criterion

a goal has been selected which is too myopic.

The conclusive evidence of misdirected goal definition is the repeated problem of re-negotiation (chapter X.). The Communities have to think beyond bringing the applicant into the Community; they must insist upon keeping the new member state in.

The re-negotiation problem could be dealt with in two ways but first there has to be a recognition that it is a serious issue which requires to be dealt with.

Firstly, there is the mainly political solution (which would require the support of a legal mechanism) of dealing with demand properly. At present the call in the preamble in the Treaty of Rome is answered by state governments and not the peoples of Europe.

Both the Greek and the U.K. re-negotiation claims came after elections deposing the negotiating governments. Based on the experience we have described of accession, we feel that there is a case that can be stated for having the Communities insist upon a referendum being held before dealing with an application under Art. 237 E.E.C.. It has been established that referendums stifle political activity quite effectively. Both Norway and the U.K. have abided by the outcomes of their respective referendums. As it seems that they do play a significant part in accession, should they not be turned to advantage?

We acknowledge that there could be difficulties in persuading applicants to participate. It could be said that by insisting upon popular approval we take the risk of losing the influence that national actors or elites have in leading the state to application. We would accept this as a valid criticism of our proposal. However, that argument loses its force if this proposal is read with our earlier comments concerning association with a view to membership: under such an association the incremental integration would already have taken place; the national elites would already have had the opportunity to influence the ultimate response. It would then be a case of putting the question of almost certain membership to the people. We submit that this approach is more theoretically sound and more practical than the method presently used. It need not even require treaty amendment for its implementation.

Our second solution would require treaty amendment but avoids the political components of the first solution. Our aim would be to avoid the argument, such as was put forward by the N.E.C. of the Labour Party (see page 184 above) circulating and gaining support. The Communities should recognise that withdrawal (and re-negotiation which is tacitly based on a threat of withdrawal) can actually happen even if only de facto. As soon as this is done the Communities put themselves in the position of being able to prevent

withdrawal happening. This would be achieved by inserting a provision allowing a new member state to withdraw on an application made after seven years of signature of the Accession Treaty.

Such a term would make re-negotiation possible and it would no longer be a matter to be dealt with in the swing of national politics. It would be the legal significance of such a rule that would have the most valuable results. It would mean that the international law rules, in the absence of the consent of the other parties, would allow the new member state to withdraw only in obedience to this rule. (see Art. 54 of the Vienna Convention on the law of treaties).

We have suggested seven years because (a) it would in most European countries permit a general election to take place, and (b) it would allow the Community to become the "irreversible fact" Narjes spoke of (see page 165 above). We submit that by this apparently anti-Community provision, the opponents of successful enlargement would be dealt a pre-emptive blow. Again if the seven year period followed upon say five years of meaningful association, it is not much of a risk to take.

There is one criticism of this solution which might make the first solution we suggested (referendum) more acceptable. It is that Costa v E.N.E.L. (see pages 38 and 39 above) saw the Court founding upon, inter alia, Art. 240 E.E.C. in supporting the supremacy of Community Law. It did this when it referred to a Community of unlimited duration. Alteration of Art. 240 E.E.C. in the way we have suggested would

undermine this particular premise of the Court's decision. Accordingly if it were felt that alteration of Art. 240 E.E.C. would seriously affect the principle of supremacy of Community Law then we would have to abandon this particular solution. However we feel that the Court expressed so many alternative foundations for supremacy that we cannot see that the principle of supremacy would be materially affected.

It is hoped that our attempts to isolate a law of Accession is thought to be valid. Like Agricultural Law which, "deals with contract generally, the particular contracts of sale, hiring and employment, delictual liability to and for employees and for animals, the law of landownership, leases and small holdings compensation and arbitration",¹⁷⁵ the law of Accession is a synthesis.

The law of Accession is more "a functional selection of topics which are useful for particular groups of students and particular professions".¹⁷⁵ In Community law its significance is a little wider than being a convenient handbook for prospective applicant states. That a law of accession can be isolated tells us more about the Communities. It emphasises the importance of the rule of law in the Community. From it too we see the continuing interdependence of Community functions and we see how the "theoretical" concepts which underly the Community are surviving the test of experiment. Spill-over, especially, the dynamic aspect or expansive logic, is seen

still to be an active force in the Community in Greece's progress from associate to member.

And finally, having isolated a law of Accession we obtain the opportunity of looking at its specific content and examining it critically. We have commented adversely on aspects of the present accession procedure but it has the benefit of being certain and predictable. A radical and scientific approach looking at the whole of the Accession process instead of the immediate or politically sensitive issues arising at any given time would, we submit, bring forth a more useful law of Accession.

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We have not analysed the Community legal order nor indeed the law of accession from the point of view of Hart's concept: that would be both time consuming and would in any event be unnecessary for the purpose of the thesis. We refer to Hart merely to emphasise that looking to the treaties or alternatively what Hart calls at 110,"..the depsychologised commands of the founders", is not a sufficient basis for us to deal with the law with which we are concerned.

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28. E.B. Haas (Fn. 3 above), 16, 17.
29. E.B. Haas (Fn. 3 above), 314.

30. E.B. Haas (Fn.3 above),317.
31. Lindberg and Scheingold (Fn.22 above),227.
32. Quoted in G. Olmi (Fn.40 "Bruges" below),79
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102. Bull.Sup. 2/78 para. 20,53.

103. Walter Hallstein, "The Institutional Problems Involved in British Membership of the Common Market". in Problems of British Entry into the E.E.C. (London: Chatham Ho, 1969),102.

104. D. Biehl has suggested in "Bruges" (Fn.40 above), 211 at 239, that the addition of more and more new member states will create a demand for a regional representation in Parliament. The solution suggested was a second chamber of the Parliament where seats would be accorded by region and not according to the number of votes - through which all regional matters would have to pass. This is for the future but again it is an example of an amendment which would be appropriate before enlargement.

105. Broad and Jarrett, Community Europe To-Day (Wolf, 1972),119.

106. Zolotas (Fn.17 above),19.

107. Report on the European Institutions Presented by the Committee of Three to the European Council. (Brussels,1979).

108. Bull. Sup. 2/78 para.31.

109. Bastiann van der Esch, "Legal Policy in an Enlarged European Community". 10 C.M.L.Rev.,1973,56.

110. In the middle of 1982 it seems that majority voting was re-asserted as being properly applicable where a vital interest was not evidently at stake. (see the Bulletin June 1982). This gives an account of the circumstances surrounding the use of the vote (a formal vote was not actually taken). The U.K. were

holding up agricultural measures to secure concessions on budgetary matters and it was felt that this was an abuse of the Luxemburg arrangement.

111. Bull.Sup. 2/78 para.33. This was also dealt with in a very similar fashion by Olmi, "Aspects Institutionnels et Juridiques de l'Elargissement". Bruges 1978 (Fn.40 above),76.

112. Garret Fitzgerald, "The Opportunities and Risks of Enlargement", Bruges 1978 (Fn.40 above),14.

113. Brinkhorst and Kuiper (Fn.78 above), footnote page 216.

114. Hallstein (Fn.103 above),101.

115. Dirk Spierenburg, "Proposals for Reform of the Commission of the European Communities and its Services" (Brussels: Commission,1979).

116. (Fn.107 above),67.

117. Bull.Sup. 2/78 para.24.

118. Euroforum March 1981.

119. Bull. 2/80 1-1-11

120. An interesting general review of language in the Communities can be found in Europe 1982 (Oct.),9. The language problem is also dealt with in the "three wise men report".

121. Art. 38 European Convention on Human Rights, in (Brownlie Fn.7 above),217.

122. Art. 3 Statute of the International Court of Justice in Brownlie (Fn. 7 above),267.

123. Henry Abraham, The Judicial Process (Oxford, University Press, 3rd ed., 1975),169.

124. Bull.Sup. 1/78 para.50.

125. Bull. Sup. 2/78 para.25.
126. Brownlie (Fn. 7 above), 218.
127. (Fn.23 above),40.
128. Abraham (Fn.123 above),199.
129. L. Neville Brown and Francis G. Jacobs, The Court of Justice of the European Communities. (London: Sweet and Maxwell,1977),242.
130. Christopher Soames in Douglas, ed. (Fn.66 above), 25.
131. Fn.96 above,138.
132. Stephan Scherpers, "The Legal Force of the Preamble of the E.E.C. Treaty", 1981, E.L.R., 356.
133. Fn.107 above, 19.
134. Hallstein (Fn.103 above),108.
135. Britain and the European Community (London: H.M.S.O. 1976),23.
136. Fn.135 above, 34.
137. R.H. Lauwaars, "The European Council" 14 C.M.L.Rev.1977, 25 at 42.
138. Tibor Scitovsky, Economic Theory and Western European Integration (Unwin University Books,1958),74:
 "A common Western European currency is generally believed to be an important condition, and its absence an important obstacle in the way of western european economic unionit appears therefore that the condition of a common currency is the presence of market forces able automatically and without the aid of deliberate economic policy to obviate balance of payments difficulties".

139. Title 2 of Part 3 of the E.E.C. Treaty: Art.103 covers conjunctural policy, articles 104 to 109 are concerned with balance of payments and Commercial policy is found in articles 114-116.

140. The Effects on the U.K. of Membership of the European Community, (Directorate General for Research and Development of the Commission: Feb.1975), Ch.III, page1.

141. Council decision 18/2/1974, economic policy: Council directive 18/2/74, stability and full employment in the Community; Council decision 18/2/74, settling up economic policy committee; (all O.J. No. L 63/74) and Council resolution 18/2/74, short term monetary support (O.J. No. C 20/74).

142. P. Van Den Bempt, "L'Elargissement de la Communauté et L'Union Economique et Monétaire". in Bruges 1978 (Fn.40 above), 247.

143. Bull. Supl. 9/78 para.10. Opinion on Spanish Membership: "The last few years have been stormy ones for the world economy. The disruption of the international monetary system following the U.S. decision in 1971 to discontinue dollar convertability, the quadrupling of oil prices at the end of 1973 and the serious payments imbalance and exchange rate fluctuations which appeared as a result contributed to the start in 1974 of the worst recession since the war".

144. Formed in 1972: The U.K., Ireland, Italy and France withdrew. Tindemans recommended all the member states should join even if assistance had to be given to some of the members. Calls are still being made. "Until now, the British Government has

considered it inappropriate for the pound to participate fully in the European Monetary System. This is explained by the importance given to monetary policy as an economic instrument It is also linked with the status of the pound as a petro-currency. ... the time is now ripe, in my opinion, for Britain to join the E.M.S. ... a stable exchange rate would make the overall economic environment more favourable for investors and would help structural adjustments of the U.K. economy". Gaston Thorn, President of the Commission, Euroforum Jan./Feb. 1983.

(iii)

145. Bull. Supl. 3/78 para.102.

146. Hilary Allen, Norway and Europe in the 1970's, (Oslo: Uneversitetsforlaget, 1979). Most of the information in the text is extracted from this work.

147. "When the news emerged yesterday lunch time that a common fisheries policy has been agreed, E.E.C. observers were half inclined to dismiss the story as a practical joke. For seven years hopes of an agreement on a "blue Europe" have ebbed and flowed like the tide". Ian Murray, "E.E.C. Fishing pact: Britain's proposals broke deadlock", The Times 26/1/83; and as if to provoke a footnote he continued, "The agreement also means that the huge Spanish fishing fleet will have to comply with C.F.P. rules as and when Spain joins the Community".

148. Scherpers (Fn. 132 above), 356.

149. A Greek official is quoted in the Financial Times of Feb. 19th. 1982 as saying that, "We should have got 15m E.C.U. to help our fishing industry last

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year, but by the end of October we had only submitted projects worth 200,000 E.C.U."

The Communities have however, it has been reported, sent experts to Greece to help the Greeks to prepare acceptable projects.

150. Fn. 140 above, Chapter 111 page 9.

151. Bargehman "What is the Cost to the Community", St. Anthony's (Fn.88 above).

152. Shlaim and Yannopoulos, (eds.) (Fn.51 above), 2.

153. John Lambert, "The Cheshire Cat and the Pond: The E.E.C. and Mediterranean Regions". X J.M.C.S., 1971/72, 37.

154. Baklanoff (Fn.9 above), 229.

155. Bull. Supl. 1/78; para.41.

156. Francoise de la Serre, "The Communities' Mediterranean Policy after the Second Enlargement". XIX J.C.M.S., 1980/81, 377.

157. "The Mediterranean policy clearly needs to be revised and given a new breath of life, not only in view of the Community's future enlargement (to include Spain and Portugal) but also if the Community's relationship with its neighbours in the Southern Mediterranean are to be preserved ... Even if enlargement were not imminent and negotiations with Spain and Portugal were to slow down, the Community must reconsider the Mediterranean Policy ..." Fernando Riccardi, "Steps towards a Mediterranean Policy" Europe 82 (Nov.), 14. This article summarises the terms of the so called Natali Memorandum to the

Council and the Parliament on behalf of the Commission. Briefly, it insists upon duty free access for sensitive products; financial aid to permit structural change; avoidance of migration of labour to the Communities, sweetened by fairer treatment for those already in the Communities.

158. P. Tsakaloyannis, "The European Community and the Greek-Turkish Dispute". XIX J.C.M.S., 1980/81, 35.

159. Economist 26th. July 1979.

160. Zolotas (Fn.17 above), 15.

161. Sir Bernard Burrows, "A Community of 13?: The Question of Turkish Membership of the E.E.C.". XVIII 1980, J.C.M.S., 143. This was written before the Coup of Sep. 1980. However, recent newspaper reports indicate that the less than satisfactory human rights record of Turkey will deter the government from applying for full membership. In "Turks Press for Full E.E.C. Status" Gurdilek reports comments of S.R. Pasin, a senior government minister, at a seminar. The minister confirmed that Ankara would apply under E.E.C. Art.237 when democracy was fully restored. He pointed out that the Association agreement did not preclude an earlier E.E.C. Art. 237 application. He indicated that the President had prepared to make the application and advised the E.E.C. of his intentions.

162. The Times 6th. Feb. 1980.

163. Loukas Tsoukalis, The European Community and its Mediterranean Enlargement, (London: Allen and Unwin, 1981), 143., quotes Demirel as saying that the

Greek application was, "a political act aimed at getting a new international platform against Turkey".

164. M.J. Hillenbrand, "The American Response to Further Enlargement of the European Community towards the Mediterranean". Bruges 1978 (Fn.40 above), 400.

165. Fn.135 above, 23.

166. Richard Clogg, "The Greek Political Context" in Tsoukalis, ed. (Fn.49 above), 108 ap 121.

167. Financial Times 20th. October 1981.

168. Editorial, "De L'Adhesion à la Communauté: A Propos de la Question Hellénique". 1982 Revue du Marché Commune Jan.,2.

169. George Orwell, "Politics and the English Language". in George Bott, George Orwell, Selected Writings (London: Heinemann Educational Books, 1972 rep.),85.

170. For a detailed record of the Labour Party's attitude to Europe see P. Ebsworth ed. (Fn.15 above),17.

171. After a Referendum on 22nd. February 1982, the people of Greenland voted to leave the European Communities. Greenland has seen Iceland protect its fishing industry and resources while it feels its own seas have been exploited. Greenland whose area exceeds that of the rest of the Community, is also rich in mineral resources. The Greenlanders had rejected membership when Denmark joined but were taken in by Denmark. The Community did not give notice of withdrawal terms prior to the referendum, partly not to create a precedent, see Europe 82 (Jan./Feb.),18.

Perhaps if they had clearly stated the disadvantages a "NO" vote would not have been obtained. The United Kingdom and Greece will examine the mode, methods and cost of the Greenland affair in detail.

172. Brownlie (Fn.7 above),253.

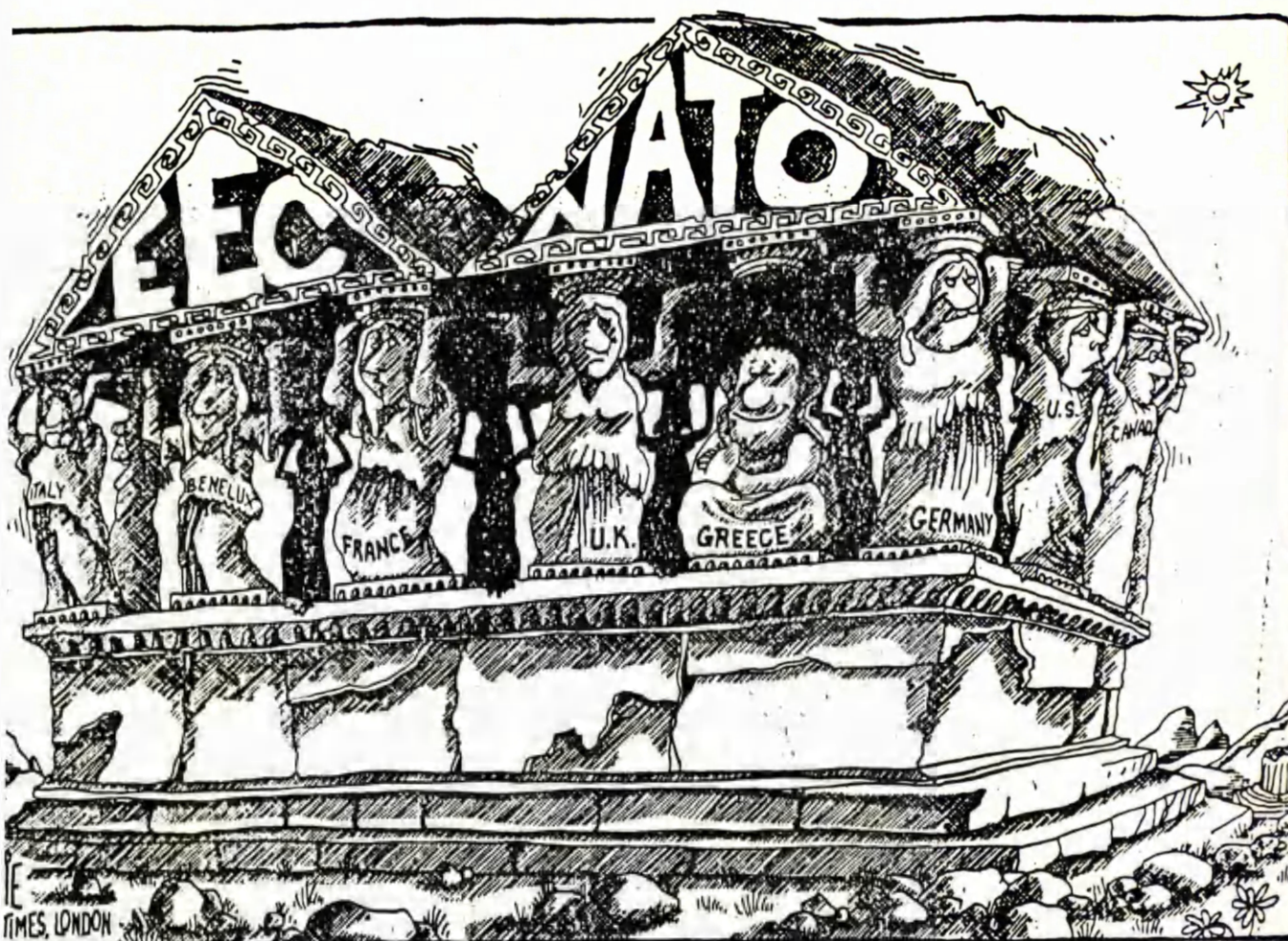
173. Europe 1982 (March),23.

174. Europe 1981 (October),9.

175. Walker (Fn.21 above),120.

APPENDIX A

A Narrative Account of the Accession Negotiations
Between the Hellenic Republic and the
European Communities



The negotiating conference opened on July 27th. 1975¹. It had been preceded by some frantic "diplomatic" activity. In early June there was anxiety over Karamanlis' trip to Paris. A Turkish research vessel Sismik was exploring disputed areas of the Aegean². The Greek Prime Minister was no doubt checking with his most sympathetic community contact on what action would be appropriate.

Apart from this extra-systemic issue, it was reported on 12th. July that the E.E.C. member states had failed to meet their own deadline for agreeing their negotiating position³. Relations with Turkey could have resulted in deadlock. The British were opposing any freeing of movement for Turkish workers. It was eventually decided that negotiations would open by the end of the month⁴ and a package deal was offered to the Turks on 24th. July. The package of trade and aid was given a "cool" welcome⁵. The delegates decided to meet again at ministerial level before the end of the year. They did in fact meet again on 19th. October 1976. In the Interim, the globalisation issue was introduced⁶ viz. that the terms of entry for Greece should be adjusted with those of other countries who had made application for membership.

In September, Greece complained to the Security Council of the U.N. and the International Court of Justice about the continued progress of the vessel Sismik 1. At the same time they announced a military air/sea exercise which took place over the disputed part of the Aegean⁷. This precipitated the departure

of Soames, the external relations commissioner, to Greece, another sign that the Communities were to take the Turkey question very seriously.

Following the practice adopted in first accession, ministerial meetings were fixed to take place every three months and deputy/ambassador level meetings, once a month. In November, Karamanlis set off on what was to turn out to be a series of travels round European capitals, running in parallel with the formal sessions. At the same time, procedural rules were settled at Berne for the resolution of the dispute with Turkey⁸.

In January 1977, negotiator Kyriazidis was replaced by Theoderopolous; this was seen by some as a tactical switch⁹ in an attempt to hasten progress. Fears of globalisation were driving the Greeks to try to enter the Communities at the earliest opportunity. Liberals in the European Parliament began to pressure for alacrity requesting that negotiations should be completed by the end of the year¹⁰.

The second deputy level meeting, the first since the Greek substitution, took place on 31st. January. The Community made a statement of its position on the customs union, and the Greeks on External relations, the budget competition and regional policy. Secondary legislation discussions began on agriculture¹¹. This was hailed in the press as, "The Greeks agree to accept the E.E.C. agricultural policy". In fact, the Greeks had specifically exempted dairy products and meat.¹²

The third deputies meeting took place on 28th. February. The Communities demanded the acceptance by

the Greeks of its external relations policy and stated its position on regional policy and state aids. The Greeks replied to the Communities' statement at the second meeting on the customs union¹³. More details were discussed at the technical level on seeds, fats, cotton, poultry eggs, free movement of capital, economic and monetary union and Euratom.

Another resignation from the Greek delegation, that of Papaligouras, resulted in the appearance on the team of Varfis the deputy governor of the Bank of Greece. This was thought to be as a result of the influence of the right wing of the New Democracy Party. Criticism was made of the haste in negotiation technique of Karamanlis, in that the speed might result in the best terms being lost or important matters being left unresolved. The first fear was not unreasonable, the second was less likely.¹⁴

Prior to the fourth deputy level meeting of 30th. March, progress was still being made under the association agreement. Greece was granted 116m. Sterling until 31st. October 1981. Despite this, Strathos for the Greeks suggested this was inadequate, noting that only 73.5m. Sterling had been received since 1962.¹⁵ The Greeks also ordered a farm census in order that they would be able to refute arguments that the entry would be too expensive. Previous discussions had been based on 1971 statistics, which were discovered to be extremely inaccurate.

The fourth deputies meeting brought the Communities' view on the budget and a reply from Athens on external relations and E.C.S.C.. The secondary

legislation committee dealt with Social affairs, the right of establishment and cereals. It was also noted that the Commissions third report had been produced. The first was on environmental and consumer protection; others were on taxation and regional policy¹⁶. At this time, it was revealed¹⁷ that the Greeks were actively preparing for entry by providing government fellowships in conjunction with private enterprise, to train lawyers, scientists, magistrates and linguists in Community Law and language.

The second ministerial meeting of 5th. April summarised achievements to date, although the secondary legislation committee began contemplation of Harmonisation of electrical appliances, motor vehicles and foodstuffs¹⁸.

The Fifth deputies meeting of 4th. May brought a Community reply on E.C.S.C. and saw the Greeks make statements on social affairs, free movement of workers and the social fund. The secondary legislation talks continued relentlessly on Harmonisation of dangerous substances, solvents, detergents, textiles, fertiliser, patents, fruit and floriculture. Natali, the chief Community negotiator, made an official visit to Greece.¹⁹

The Community replied to the Greek statement on social affairs at the sixth deputies meeting on the 9th. of June at which the Greeks made clear their stance on free movement of capital and the right of establishment, while the secondary legislation committee, switched from Harmonisation to the budget, the

institutions and staff regulations²⁰.

However, this may be an optimistic view of the progress of negotiations. It was reported²¹ that at this meeting, the sixth, of the deputies, France had demanded a complete revision of Community policy concerning wine, fruit and vegetables before effective negotiations could take place. This was one month after Presidential statements had been made supporting entry. It was thought that the french attitude was an attempt to appease the farmers of the french Midi. However under the headline "Barrier to Greece lifted" we discover that the Italians and the French agreed not to insist on reform and instead to wait for a Commission report on the subject²².

At the seventh deputies meeting, another disagreement provided an illustration of the negotiating principles in practise. As the secondary legislation committee discussed tobacco, the Community laid down the position to be accepted by Greece in agriculture and answered the Greek proposals on establishment and free movement of capital²³. In these statements the Community rejected Greek requests for subsidies because of its transport costs. Neither would the Community permit an increase in the proportion of sugar production covered by unconditional price guarantees nor extend market support to raw cotton and raisins as it was felt that this would constitute a modification of the C.A.P.²⁴. Coincidentally, the next day the negotiations were described as progressing at a snail's pace²⁵.

The third ministerial meeting set a new time table and brought forward the next ministerial meeting to 17th. Oct.²⁶. This may have been inspired by the application of Spain and the hints about similar Portugese action.

Before the eighth deputies' meeting of 23rd. September²⁷ Turkey expressed its concern that Greece might exclude them from the Communities in the future. The Greeks denied that they had refused to undertake not to veto the Turks The Turks admitted that they were not in a position to make application under Art.237²⁸.

The eighth deputies' meeting had the Communities commenting on capital movement and establishing a procedure for considering the results and problems of secondary legislation as the committee itself was considering competition rules. The Greeks made a declaration on the institutions²⁹.

The fourth ministerial meeting saw some progress being made and the begining of substantive talks. It was agreed that the customs union, Paris Treaty, capital movement and external relations and industrial goods could be shortly resolved. This may not have been unconnected with the forthcoming Greek elections and could have been to assist the New Democracy, pro-European Party domestically³⁰. The Community and Karamanlis were not disappointed: PASOK, the leading anti-E.E.C.party, increased their vote from 13% to 25% which gave them 93 seats as opposed to 13. There was overall 60% support for pro-community parties.

At the ninth deputy meeting of 11th. Nov. the Greeks talked more of the E.C.S.C. and Euratom as did the Communities, clarifying the position for sectoral talks and, as did the secondary legislation committee, discussing external relations³¹.

Karamanlis was now convinced that the negotiations were "developing normally"³² and proceeded to condemn Turkey's conduct. He again made reference to the special relationship he was seeking with N.A.T.O..

At the tenth deputy meeting of 9th. December the Community had been concerned with social affairs, state aids, regional policy, agriculture and transitional measures; the Greeks with the customs union, free movement of industrial goods and the secondary legislation committee looked again at external relations³³.

There then followed the fifth Ministerial meeting of 19th. December at which a Commission memorandum on the customs union in industrial goods was discussed³⁴. At the end of December³⁵ it was suggested that the member states had taken an informal decision to admit Greece on almost any terms but to resist the Spanish and Portuguese applications.

It was thought that progress on the question of Mediterranean produce would have to wait the outcome of the French elections. The Greeks pressed for early entry. They said it was to resolve all questions save the budget and the C.A.P. by the end of March. The Commission president said that the situation was too complex to be hurried³⁶. This was sufficiently disturbing to result in Karamanlis making

another tour of European capitals.

On this tour he chose, cleverly, to discuss both the E.E.C. and N.A.T.O. which might have helped prevent Commission censure. Turkish generals had been appointed to the Izmir command which gave the Greeks cause for concern despite a U.S. embargo on arms sales to Turkey during the Cyprus crisis³⁷. Karamanlis proposed in these extra-systemic talks a maximum five year transitional period³⁸ and although receiving no positive reply he did hear from the U.K. that they would keep Greek negotiations separate from the Spanish and Portugese applications³⁹. President Jenkins then made a statement for the Commission. He did not, as he could not, commit the Community to signature of a Treaty by the year end but said that talks should be almost complete by then. He also assured the Hellenic Republic of a positive approach on the Communities' part⁴⁰. Mr. Karamanlis returned to Greece "satisfied"⁴¹ and again emphasised that the N.A.T.O. talks had not been connected with the E.E.C. negotiations.

On the 7th. Feb. 1978 the Council announced that it had agreed its final negotiating position⁴². France had tried to have a commitment made for entry at the end of 1980 but this was not accepted. The U.K. expressed concern that the Community had been giving too much attention to the Greek application and voiced suspicion that France and Italy were considering blocking Spain and Portugal's applications⁴³.

The eleventh and twelfth deputies' meetings were devoted to agreeing details on the customs union and free movement of industrial goods⁴⁴.

The thirteenth deputy meeting considered the free movement of capital and customs union in industrial goods and external relations⁴⁵. The sixth ministerial meeting of 3rd. April presumably gave the final consensus to conclude talks on the subjects of capital movement and the customs union in industrial goods⁴⁶.

The Commission then submitted another Memo which was to be a regular feature. Karamanlis now felt able to predict that Greece would be a full member in two years⁴⁷.

The fourteenth deputy meeting of 12th. May, the 15th. of 12th. June, and the 16th. of 23rd. July dealt progressively with the E.C.S.C., the external relations, in industrial goods common market, free movement of capital and Euratom. This coincided with the Commission's fifth Memo on Euratom⁴⁸.

There then followed the seventh ministerial meeting on the 26th. June discussing Euratom, E.C.S.C. and capital movement⁴⁹. The secondary legislation committee examined statistics, data processing and rules on origin of goods. The Commission produced Memos on economics and finance and on agriculture.

About this time⁵⁰ the United Kingdom had suggested that the Greeks hold a referendum of entry which was rejected by the Greeks quite reasonable, as the British themselves had not held a referendum on entry.

Progress was made at the seventeenth deputy meeting of 27th. July. Agriculture, economics and finance, fishing, transport, agriculture and trade with non-member third states were on the agenda. The Greek

system of import and capital payments were talked about. The secondary legislation committee looked at rice, beef and the Commission submitted memorandums on social policy, institutions, state aids and regional policy.

It was now understood⁵² that 1981 would be the entry date for the Greeks and that there would be a two tier transitional period of five years and seven years and it was hoped that negotiations would end by December. Before the eighteenth deputy meeting of 29th. September an interesting problem arose. There were rumours of a veto of Greek entry by the French. Whether there was ever any possibility of this we shall never be able to determine and this might merely have been an idea put out by the French to test the water, or even by some other member state to see what reaction would ensue. It was said⁵³ that the members of the European Parliament would challenge the use of such a veto. It is difficult to fathom the import of such a statement. Effectively the Parliament would have been as impotent as at the time of de Gaulle.

The eighteenth deputies' meeting itself involved talks upon textiles and relations with third states, state aids, regional policy and outstanding problems in secondary legislation. The secondary legislation committee began the task of effecting Harmonisation in the C.A.P. and made a report to the Commission asking for a Memo to be produced which was in fact done at the nineteenth deputies' meeting of 27th. October⁵⁴. At this meeting economics and finance, the industrial

customs union, state monopolies and external relations were the topics. Hops, flax and hemp preoccupied the secondary legislation committee.

Shortly after this meeting it was heard that the United Kingdom and the French Republic had taken a strong line over Council voting in order to maximise their own influence⁵⁵.

The secondary legislation continued in its examination of agricultural problems and the Commission submitted working papers on right of establishment, own resources and transport policy⁵⁶. It was after this meeting that it seemed certain that the Treaty would be signed in the following year. Greece did express some concern as to the timing of the grants and subsidies⁵⁷. These doubts were assuaged by Giolatti for the Commission⁵⁸. December was indeed, as promised, to see the breakthrough in negotiation.

The twelfth deputies' meeting on 1st December was unremarkable and again looked like marking time until the forthcoming ministerial meeting. (Discussions ranged across finance, the institutions, the customs union, state aids, regional policy and V.A.T. took place⁵⁹).

It was however the presentation of a package by the Community at the ninth ministerial meeting on the 6th. December which saw the beginning of a new phase⁶⁰. Transitional provisions, agriculture and derogation, the troublesome problems were set out. The Greek reply came at the twenty-first deputy meeting at which, on the 15th. December⁶¹ they requested another ministerial meeting.

It was at this the tenth ministerial meeting of 20th. December that these questions were settled. A special protocol was permitted for cotton and a safeguard provision similar to Art. 35 included. Priority was to be given to Greek workers in employment matters until the end of the transitional period.

A visit by Contogeorgis to the Commission on 23rd. January helped to clarify the questions yet to be resolved⁶². The twenty-second deputies' meeting of 23rd February allowed consideration of the customs union in industrial products, transport, movement of capital, state aids and regional policy. A procedure was agreed for the drafting of an accession treaty. The secondary legislation committee looked at external relations, right of establishment and social affairs. The Commission sent final proposals on Agriculture, the transitional budget and fisheries bringing the number of such proposals (Memos) to nineteen. This was to be the last Commission document and the secondary legislation committee was not recorded as having been active⁶³.

The twenty-third deputies' meeting reconsidered the customs union, external relations, E.C.S.C., Euratom, economics and finance, E.I.B. transport and agriculture, establishment, tax and regional policy and, not surprisingly the eleventh ministerial meeting of 3rd. April 1978 was able to state that all questions had been agreed.

The Commission began the chore of treaty drafting.⁶⁴ Notwithstanding the conclusion above there was a twenty-fourth deputies' meeting on May 14th. to

discuss the E.I.B. and another, the twenty-fifth and final in May on the topic of the Parliament, some five days before signature of the Accession Treaty on 28th. May.

REFERENCES TO APPENDIX A

The Bulletin of the European Communities is cited herein "B" and the London Times thus "T". References to the Bulletin, unless otherwise stated, are to the year/part followed by the paragraph. The Times citations are to the day of the month of the year (all 1900's) and then, when available, the page number and column.

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|------------------------|-------------------------|
| 1.B.76.7/8.1201 | 20.B.77.6-2.2.1. |
| 2.T.8, July, 76. | 21.T.13, June, 77.5a. |
| 3.T.12, July, 76.4d. | 22.T.23, June, 77, 11a. |
| 4.T.13, July, 76.5d. | 23.B.77.7/8.-2.2.1. |
| 5.T.27, July, 76.6d. | 24.T.9, July, 77.31. |
| 6.T.12, Aug, 76.12c. | 25.T.25, July, 77 |
| 7.T.4, Sept. 76.4a | 26.T.26, July, 77 |
| 8.T.13, Nov. 76.4a. | 27.B.77.9-2.2.1. |
| 9.T.6, Jan, 77.5b. | 28.T.15, Sept. 77 |
| 10.T.20, Jan, 77.6a. | 29.B.77.10-2.2.3. |
| 11.B.77.1-2.2.1. | 30.T.12, Nov, 77.5b. |
| 12.T.1, Feb, 77.6g. | 31.B.77.11-2.2.1. |
| 13.B.77.2-2.2.1. | 32.T.15, Dec, 77, 6a. |
| 14.T.1, March, 77.5g. | 33.B.77.12-2.2.1. |
| 15.T.11, March, 77.7a. | 34.as above. |
| 16.B.77.3-2.2.1. | 35.T.19, Dec, 77.4c. |
| 17.T.31, March, 77.5g. | 36.T.20, Dec. 77.31. |
| 18.B.77.4-2.2.1. | 37.T.7, Jan, 78.3g. |
| 19.B.77.5-2.2.1. | 38.T.23, Jan, 78.8a. |

39.T.26, Jan.78.5a.

40.T.28, Jan.78.4a.

41.B.78.2-2.2.1.

42.as above.

43.T.2, Feb.78.5a.

44.B.78.2-2.2.1.

45.B.78.3-2.2.1.

46.B.78.4-2.2.1.

47.T.7, April, 78.6a.

48.B.78.6-2.2.1.

49.as above.

50.T.18, June.78.16c.

51.B.78.7/8-2.2.2.

52.T.28, July.78.6a.

53.T.28, Sept.78.5f.

54.B.78.10-2.2.1.

55.T.30, Oct.78.1a

56.B.78.11-2.2.2.

57.T.7, Nov.78.7c.

58.T.28, Nov.78.9f.

59.B.78.12-2.2.2.

60.as above.

61.as above.

62.B.79.1-2.2.1.

63.B.79.2-2.2.2.

64.as above.

APPENDIX B.

Lindberg & Scheingold : Some Terminology and concepts.

It is unfair to try to summarise a complicated and well argued theory and that is not our aim. In this appendix we repeat some of the definitions given by the authors for their terminology.

"Once an undertaking like the European Community is launched, the complex set of agreements that it implies....may be fulfilled, retracted, or extended to areas where only tentative commitments existed, or to altogether new policy areas. These notions of fulfilled, retracted and extended obligations will constitute for us contrasting patterns of decision making outcomes. They are linked directly to system change because what they identify are the effects of decisions taken by the community system on the system itself".

"....system change (operationalised ... as changes in the functional scope and institutional capacities of the community) can be predicted (explained) according to the following equations:

where d:-a change in; S:-the existing political system;
f:-is a function of ; Su.:-systemic support; D:-demand;
L:-leadership; E:-general error term.

Their systemic support is of two kinds "identitive", links between community citizens and "systemic", being links to the community itself. "Support does establish important parameters for the decision making process".

Demand is considered to be an essential factor for continued growth and is analytically divided into two parts that of the subject demanding and the content of the demand.

Leadership is seen in terms of processing demand. Leadership is vested in the supra-national institutions and the member states.

The following terms are also used.

"Forward Linkage" describes a sequence whereby commitment to participate in joint decision making has initiated a process that has led to a marked increase in scope of the system or its institutional capacities. In terms of the growth of the system this model yields potentially high benefits but at considerable risk of failure.

"Output failure" refers to a situation in which such a commitment was accepted but where the system was unable to produce an acceptable set of policies and rules and where the capacity and scope of the system were not enhanced. In fact scope and authority could both be decreased since the failure is one that might be generalised as due to a lack of will or leadership to go on with integration as such.

"Equilibrium" occurs when an area of activity is routinized or institutionalized. Rules are established and recognized, and there is little need for new inter-governmental bargaining. Nor is there any increase in scope or in institutional capacity, although the original commitment may involve important joint tasks in both regards. In terms of growth, the gains are very modest, but so are the risks.

"Spill back" refers to a situation in which there is a withdrawal from a set of specific obligations. Rules are no longer regularly enforced or obeyed. The scope of Community action and its institutional capacities decreases"

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APPENDIX C.ENLARGEMENT CHRONOLOGY

1951 - 1981

April 1951	Treaty establishing the E.C.S.C. signed in Paris.
Dec. 1954	Association agreement between the U.K. and the E.C.S.C. concluded.
Feb. 1957	The U.K. proposes establishment of a European free trade area.
March 1957	Treaties of Rome signed, setting up the E.E.C. and Euratom.
Feb. 1959	Co-operation agreement between the U.K. and Euratom signed.
Nov. 1959	European Free Trade Association convention signed in Stockholm.
July 1961	Signature of the Athens Association Agreement.
August 1961	Irish Republic applies for membership of the Communities.
August 1961	The U.K. and Denmark request nego- tiations aiming at membership of the E.E.C..
October 1961	The U.K. and the E.E.C. commence negotiations.
March 1962	The U.K. applies for membership of E.C.S.C. and Euratom.
April 1962	Norway requests negotiations for membership of the E.E.C..
Jan. 1963	British negotiations with European Communities broken off following

Appendix C: An Enlargement Chronology

	press conference at which General de Gaulle expressed opposition to British entry.
April 1967	Colonels Coup in Greece.
May 1967	The U.K., Irish Republic, Norway and Denmark submit formal applications for membership.
Sept. 1967	European Commission publishes opinion on enlargement.
July 1969	Following resignation of de Gaulle in April 1969, M. Pompidou, newly elected French President, indicates that he has no opposition in principle to U.K. entry.
Oct. 1969	Commission publishes second opinion.
Dec. 1969	Summit conference of Heads of state or Government agrees on future development and enlargement of the Community.
Dec. 1969	End of Community's transition period.
June 1970	Opening of negotiations with Britain, Irish Republic, Denmark and Norway.
August 1970	Association with Spain concluded.
Oct. 1971	Parliament (U.K.) votes overwhelmingly in favour of entry.
Jan. 1972	Negotiations concluded with all applicants. The Treaty of Accession is signed in Brussels.

Appendix C: An Enlargement Chronology

May 1972	A referendum in the Irish Republic approves entry.
July 1972	Association agreements between Portugal and E.E.C. and E.C.S.C. concluded.
Sept. 1972	A referendum in Norway gives a result against entry.
Oct. 1972	A referendum in Denmark approves entry.
Oct. 1972	A summit conference of the Heads of State of the nine in Paris set guidelines for the future development of the Community.
Jan. 1973	Community of Nine States effective.
March 1974	Labour Government assumes office in U.K. pledged to renegotiate the terms of membership and to consult the British people.
April 1974	The U.K. informs the other Community members of its general renegotiation objections.
June 1974	The U.K. presents the Council of Ministers with its detailed renegotiation aims.
Dec. 1974	A meeting of the Heads of Government makes progress on Britain's demands and agrees a regional development fund.
June 1975	Greek application submitted.

June 1975	U.K. referendum: vote to stay in Communities by 2 to 1 majority.
Feb. 1976	Council accepts Greek application.
July 1976	Negotiations opened with Greece.
July 1976	Spain applies for membership.
March 1977	Portugal applies for membership.
Nov. 1978	Commission opinion on Spanish membership.
Feb. 1979	Negotiations with Spain begin.
April 1979	Negotiations with Greece concluded.
May 1979	Athens Accession Treaty signed.
Jan. 1981	Athens Treaty takes effect.

APPENDIX D.TREATY ARTICLESArt.237 E.E.C.

Any European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the Commission.

The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Art.238 E.E.C.

The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.

These agreements shall be concluded by the Council, acting unanimously after consulting the Assembly.

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

Art.236 E.E.C.

The Government of any Member State or the Commission may submit to the Council proposals for amendment of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for

the purpose of determining by common accord the amendments to be made to this Treaty.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Art.131 E.E.C.

The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy, the Netherlands (and the United Kingdom).

These countries and territories (hereinafter called "countries and territories") are listed in Annex 1V to this Treaty.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

Art.9 BRUSSELS.

In order to facilitate the adjustment of the new Member States to the rules in force within the

Communities, the application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.

2. Subject to the dates, time limits and special provisions provided for in this Act, the application of the transitional measures shall terminate at the end of 1977.

Art.9 Athens.

The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.

2. Subject to special provisions in this Act laying down different dates or shorter or longer time limits, the application of the transitional measures shall terminate at the end of 1985.

Art.60 BRUSSELS.

2. In respect of products not covered, on the date of accession, by a common organisation of the market, the provisions of Title 1 concerning the progressive abolition of charges having equivalent effect to customs duties and of quantitative restrictions and measures having equivalent effect shall not apply to those charges, restrictions and measures if they form part of a national market organisation of the date of accession.

This provision shall apply only to the extent necessary to ensure the maintenance of the national organisation until the common organisation of the market for these products is implemented.

Art.62 VIENNA.

Fundamental change of circumstances.

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) if the treaty establishes a boundary; or
- (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

APPENDIX E.THE GLOBAL MEDITERRANEAN POLICY : WORKING HYPOTHESIS.

(from MEDITERRANEAN EUROPE & THE COMMON MARKET,
BAKLANOFF page 230)

(1) Geographical area : the policy will apply to those coastal Mediterranean countries (including Portugal), plus Jordan, that apply for it.

(2) Throughout that area, a free-trade area in industrial products, qualified by exceptions for sensitive products, should be gradually established.

(3) Some reciprocity should exist between the E.E.C. and the partner countries, but this need not necessarily take the form of reverse preferences.

(4) A 'considerable' (but numerically undefined) percentage of agricultural goods should be covered, these concessions to be periodically reviewed. Safeguard clauses would apply. These concessions would not be uniform but would take account of variations from country to country.

(5) All agreements would include a 'co-operation' section but financial aid would be excluded for Spain, Portugal, Israel and Yugoslavia.

(6) The global agreements should enter into force if possible at the beginning of 1974.

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