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COMMENTARY

THE INSTITUTIONS OF THE EUROPEAN COMMUNITIES IN A CHANGING POLITICAL CLIMATE

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The cult of national sovereignty has become mankind's major religion. The intensity of worship of the ideal of the national state is, of course, no evidence that national sovereignty provides a satisfactory basis for the political organization of mankind. . . . The truth is very opposite. . . . It seems fairly safe to forecast that, if the human race survives, it will have abandoned the ideal and the practice of national sovereignty.

Arnold Toynbee (The Reluctant Death of Sovereignty)

The European Communities share with the rest of the world a multitude of serious economic problems. With the entry of the United Kingdom, Ireland, and Denmark, the Communities constitute one of the world's largest economic units with a total population of more than 253 million inhabitants. However, much of the enthusiasm surrounding the foundation of the European Communities has disappeared, and serious problems threaten its very existence. Agreements among the nine member nations have become difficult to reach. In an era requiring prompt and effective decision-making, the presently inadequate decision-making process threatens the very purpose of the European Communities.

This commentary will explore some of the legal problems which have fostered the present difficulties. A complete overview of the institutional structure of the European Communities would be beyond the scope of this article. However, some comment will be made regarding the principle institutions of the Communities,

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1. Since January 1, 1973, the member states of the European Communities are: Belgium, Denmark, Germany, France, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom.
2. For a survey of the Community institutions, see generally, E. Noel, How the European Community's Institutions Work, European Community Topics 39 (Luxembourg 1973).
namely, the Commission, the Council of Ministers, the European Parliament and the European Court of Justice.

I. THE INSTITUTIONAL STRUCTURE

In 1951 Jean Monnet and Robert Schuman proposed to place the coal and steel industries of Germany and France under a centralized authority. The result was the European Coal and Steel Community (hereinafter referred to as the ECSC). In comparison to other international organizations, the institutional structure of the ECSC was unique.

Since it was realized that traditional treaty principles would be insufficient to accomplish the task, a new structure was created to insure that community interest would overcome national interest. Four institutions were established: the High Authority, having exclusive rule-making power and composed of independent men appointed with the unanimous consent of all the member national governments; the Council of Ministers, composed of ministers of the respective national governments; the Assembly, entrusted with consulting responsibilities and composed of delegates designated by each national parliament; and the Court of Justice, designed to insure the observation of the law in the interpretation and application of the treaty.

The uniqueness of this institutional structure rested in the powers assigned to its components. A supranational body, the High Authority, could make decisions which were binding upon the member states and upon individuals without interference by the national parliaments. The national interests were still protected, however, by requiring the consent of the Council of Ministers for many decisions of the High Authority. In theory, the system was viable. In practice, it soon became clear that any action by the High Authority was impossible if opposed by the member states represented in the Council.

3. Treaty establishing the European Coal and Steel Community, Paris, April 18, 1951. When the United Kingdom joined the European Communities, an English translation of the original Community treaties was made by an ad hoc committee. The text was annexed to the Act of Accession, the provisions of which form an integral part of the Treaty of Accession. Article 2 of the Treaty of Accession and Article 160 of the Act of Accession provide that the English texts are authentic under the same conditions as the original texts of the treaties. For a critical study of the English text of the treaties, see Bowyer, Englishing Community Law, 9 COMM. MKT. L. REV' 439 (1972).


5. Mogan, Political Representation and European Integration, 1970 INTEGRATION 293.
In 1957 the European Economic Community (hereinafter referred to as EEC) and the European Atomic Energy Community (hereinafter referred to as Eurotom) were created. Each Community was given an institutional structure similar to the one of the ECSC. But under the EEC and the Eurotom Treaties, the High Authority was now called the Commission; and unlike the ECSC Treaty, in which the rule-making power was vested exclusively in the High Authority, the power was shared by the Commission and the Council of Ministers. Most important decisions were to be made by the Council. This marked an evolution from the ECSC structure, in that the new organizations admitted the superior influence of the independent states.

In each Community, the responsibility of the Commission was to administer the treaty and to prepare proposals for future action in the Council. By granting the exclusive right of proposal to the independent Commission and by requiring a Commission proposal for most Council decisions, the treaties intended to promote Community interests. In this way, the treaties established a balance of power between the Community interest represented by the Commission and the interests of the member states represented by the Council.

With the creation of the EEC and Eurotom there existed in Europe three Communities, with two Commissions and one High Authority, three Councils of Ministers, one Court of Justice, and a single Assembly common to the three Communities. With each

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6. A treaty established the European Economic Community in Rome on March 25, 1957. The EEC is often called the "Common Market." The establishment of a common market, however, is only one purpose of the EEC treaty. A common market reaches further than a custom union. In a custom union, all customs, duties and other restrictive regulations of commerce between the member states must be eliminated and a common outer tariff is substituted for the national custom tariffs previously applicable to trades with third countries. A common market in addition requires that all barriers of trade between member countries are abolished and that the conditions of competition are the same in each country. See also, Waelbroek, Recent Developments and Future Prospects of the Common Market, 1 GA. J. Int'l & Comp. L. 1 (1970).


9. The Council and the Commission are assisted by the Economic and Social Committee (144 members) for EEC and Euratom matters and the Consultative Committee (81 members) for ECSC matters. Both committees consist of representatives of various sectors of economic and social life, e.g., trade associations, unions and farmers. On many subjects, they have to be consulted before a decision can be taken.
institution having distinct powers and procedures, conflict was inevitable. Furthermore, certain matters such as transportation, energy, and trade regulation fell within the concern of all three Communities.

With the Treaty of Brussels in 1965, the executives [High Authority, two Commissions, three Councils] of the three Communities were merged in an attempt to bring order to the chaos. A uniform institutional structure was established for the three Communities, the single commission and the single council exercising all the powers and responsibilities formerly vested in their respective predecessors.11

Since then, significant changes have occurred in the Community decision-making process and in the relationship between the Community institutions. The economic integration provided by the Community treaties was intended to result in a further political integration, but uprising national interests have caused the European Communities to be in "a situation of permanent crisis."12

As will be shown in this article, this situation of permanent crisis is clearly reflected in the institutional evolution of the Communities. The first section of this article will examine more closely how the delicate power balance between the Commission and the Council has been tipped from the Commission back to the Council and the national capitals. Second, the evolution of the relationship between the European Parliament and the Commission will be explored. Third, the examination of two cases will show the influence of the European Court of Justice on the relationship between the Council and the Commission. Finally, the article will explore how the implementation of the decisions of the 1974 European summit in Paris may bring some relief from the institutional crisis in the European Communities.

II. THE DIALOGUE BETWEEN THE COMMISSION AND THE COUNCIL OF MINISTERS

An essential characteristic of the decision-making process in the European Communities is the so-called "dialogue" between the


11. This means, for instance, that the Commission acting under the ECSC treaty as the former High Authority has more power than acting as Commission under the EEC and Euratom treaties.

Commission, an independent body whose task it is to define and uphold the general Community interest, and the Council in which the representatives of the member governments give expression to their own national interests.

The Commission has not only executive and administrative functions arising from its responsibility for insuring that the treaty provisions and the decisions taken by the Community institutions are correctly applied, but also the Commission has an independent power of decision, and by exercising its right of proposal sets in motion the law-making activity of the Council.\(^1\)

On the other hand, the Council representing the governments of the member states is more than an intergovernmental conference of national ministers. The Council, as a Community institution, must act both in the general interest of the Community and in accord with the provisions and procedures instituted by the treaties.\(^2\)

The treaties have established a delicate balance of power between the Council and the Commission, each being necessary and fulfilling its own role in the decision-making process. However, if a dialogue is to have meaning and be productive, the Council and the Commission must be on equal footing.\(^3\) The fact that Council and Commission must be equal partners in the execution of their respective functions is the basis of profound disagreement among the member states. Unlike the ECSC treaty, the later Rome treaties do not expressly state the supranational character of the Commission.\(^4\) Furthermore, the Rome treaties use the neutral term "Commission" rather than the stronger term "High Authority." Thus, some member states have concluded that the Commission is not an equal partner of the Council, and its task is merely to assist the Council in making decisions. These member states have argued that the Commission could not act independently without the unanimous consent of the member states and would have no political role to play.

This misunderstanding of the role of the Commission culminated in an institutional crisis in 1965 when the Commission, pur-

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13. Article 155 EEC treaty; Article 124 Euratom treaty.  
14. Article 4 and 145 EEC treaty; Article 3 and 155 Euratom treaty.  
15. Hallstein, supra note 8, at 730.  
16. Article 10 of the Merger treaty now only stresses the independent character of the Commission as a necessary condition to protect the Commission's independent right of proposal.
suant to Article 201 of the EEC treaty, proposed to replace the financial contributions of the member states with a system of its own Community resources to finance the Common Agricultural Policy. France reacted very strongly, as the Commission's proposal implied an extension of the powers of the European Parliament, and ultimately resolved to withdraw its permanent representative to the Communities and to cease participation in any Council meetings. France took this opportunity to offer its objections to the supranational system of the Community in a series of ten complaints drawn up against the Commission, which France asserted had gained too much influence and prestige and acted too independently. The crisis was resolved by the Luxembourg Agreement of January 28, 1966. The Foreign Ministers of the six member states decided that the Commission, before adopting any particularly important proposal, would first consult the member governments through the Committee of Permanent Representatives, and that no proposals or other official acts of the Commission would be made public until the member governments had formal notice of such proposals or other official acts and would be in possession of the texts. In addition, to diminish the Commission's prestige outside the Community, the six also agreed to the French request that the credentials of heads of missions of non-member states accredited by the Community would have to be submitted to both the President of the Council and the President of the Commission. In this way it was made clear that the Commission was not a kind of European government. Although these arrangements were certainly the expression of a particular conception of the role of the Commission, they did not directly affect the "dialogue" between Council and Commission.

17. By decision of April 21, 1970, it was decided that from January 1, 1975, the budget of the Communities would be financed entirely from the Communities' own resources (Common Customs tariff, agricultural levies and a percentage of the value added tax), irrespective of other revenues. This necessarily implied an increase of the budgetary powers of the European Parliament as the Community budget escapes the control of the national parliaments. In order to extend the powers of the European Parliament an amendment of the treaties was required. This was done by the Treaty of Luxembourg of April 22, 1970. On request by the European Parliament the Foreign Ministers of the nine member states agreed on December 3, 1974 to extend once more the budgetary powers of the European Parliament by giving it the right to reject the entire budget proposed by the Commission and the Council.

18. Before the Luxembourg Agreement the credentials were submitted only to the President of the Commission. See also, Thompson, *The European Economic Community After the 1965 Crisis*, 16 INT'L. & COMP. L.Q. 2 (1967).
Another clause of the Luxembourg Agreement, however, had a disastrous effect on the decision-making process within the Communities. The EEC and Eurotom treaties state that, unless otherwise provided by the treaty, the Council must act by a majority of its members.\footnote{Article 148(1) EEC treaty; Article 118(1) Euratom treaty.} The provisions respecting majority voting in the Council are of enormous importance: they guarantee the smooth working of the decision-making process since no member state can invoke the right of veto to block a decision. But majority voting in a supranational organization also requires a certain degree of maturity on the part of the organization and its member states. In a system of majority voting a member state can be outvoted and can be required to implement a decision it does not favor. As a result of the 1965 crisis, the six agreed in Luxembourg that majority voting would not be used in the Council in all cases where the “vital national interests” of one or more partners were at stake. The Agreement, which the Commission never recognized, resulted in a complete distortion of the decision-making process in the European Communities. Unanimous voting became the rule, and nothing remained of the delicate balance of power established by the treaties.\footnote{Article 149 EEC treaty; Article 119 Euratom treaty.}

The important clause in the “dialogue” between Commission and Council, requiring unanimity by the Council in order to adopt amendments to a proposal of the Commission, became nearly meaningless.\footnote{Berg, \textit{Zur Leistungsfähigkeit der "Gemeinschaftsmethode" der Europäischen Gemeinschaften}, 1971 \textit{Integration} 205.} This provision was intended to protect the Commission’s right of proposal. When the Council wanted to overrule the Commission’s proposal, the treaties required a unanimous vote, and the Commission could alter its original proposal as long as the Council had not acted upon it. On the other hand, when in defiance of the treaties, all decisions in the Council are taken unanimously, the guarantee that the Community interest will prevail over the national interests of the member states no longer exists.

While the Commission originally intended its proposals to represent the Community interest, it has now become more important to define them in terms of acceptability for the Council. Hence, the Commission became more “realistic,” and the quality of its proposals to the Council has diminished accordingly.

Before submission to the Council, each proposal is discussed in
various committees and sub-committees, most important of which is the Committee of Permanent Representatives. This committee, consisting of the permanent representatives (ambassadors) of the member states to the Communities, was not originally provided for by the Rome treaties. The Treaty of Brussels of 1965 (Merger Treaty) confirmed the Committee's existence and gave it the responsibility of preparing the deliberations of the Council.22 This Committee acts as a filter through which most of the Commission proposals pass before reaching the ministers in the Council. A committee of this kind is necessary to prepare the deliberations of the Council, so as not to overburden that body. The tendency, however, among the permanent representatives is to come to a unanimous agreement, thus strengthening the compromise-character of the Commission proposals.23 Once submitted to the Council, yet another compromise is necessary to obtain unanimity. This results in a procedure which is characterized by package-deals and marathon sessions, characteristics which are certainly not conducive to efficient decision-making.24 With the enlargement of the Communities by the entry of the United Kingdom, Ireland, and Denmark in 1973, unanimous voting in the Council became very difficult. The result has been a permanent crisis and apparent paralysis of the decision-making process.25 With the evolution of this condition, the necessity of eliminating unanimous voting in favor of the more mature system of majority decision making in the Council has been seen as an absolute prerequisite for any further progress in European integration.

III. POLITICAL CONTROL BY THE EUROPEAN PARLIAMENT OVER THE COMMISSION

If one considers legislative power and the direct election of its members as a necessary requirement for a parliament, the Euro-

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22. Article 4 of the Merger treaty: "A Committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council."

23. FALLSTEIN, DER UNVOLLENDETE BUNDESSTAAT. EUROPÄISCHE ERFahrungen und ERKENNTNISSE 65 (Düsseldorf/Wein 1969).

24. Berg, supra note 20, at 211. Good examples of this "Marathon" procedure are the yearly sessions of the Council of Ministers where agricultural prices for the coming year are determined. These meetings usually last about 24 hours and even then a unanimous decision is only possible when a dissenting state is guaranteed special future consideration in an area of particular interest to it.

European Parliament cannot be considered a true parliament. The European Parliament has only a consultative function. It exercises the advisory and supervisory powers conferred upon it by the treaties. Each country is entitled to a specified number of seats and votes, with appointment powers for these positions vested in the national parliaments. The responsibility of its delegates, however, is dualistic, since "the representation of the peoples of the States brought together in the Community" gives them a mandate to ensure the common as well as the national interest of each member state considered separately. At the same time, the delegates occupy a position of independent judgment. They are not instructed by their national parliaments or governments and are not accountable to any external authority for their speeches and votes.

In theory, the European Parliament exercises political control over the Commission. In actuality, its chief role is that of influencing the dialogue between Commission initiative and Council approval. Parliament and Commission have shown a close partnership in defending the common European interest against the insurgent national interests in the Council.

The trend in the Council of requiring a unanimous vote in all cases, when coupled with a certain passiveness on the part of the Commission, has resulted in some changes in this intimate collaboration between the Commission and the European Parliament.

On November 16, 1972, a French socialist representative, Mr. Spenale, introduced in the European Parliament a motion to censure the Commission, because he believed that the Commission had failed to timely present a proposal for increasing the Parliament's budgetary powers, pursuant to a declaration of the Council.

26. The treaties use the term "Assembly." On March 20, 1962, the Assembly gave itself the name "European Parliament," which, with the longtime exception of the French, has come into common usage.

27. Article 137 EEC treaty; Article 20 ECSC treaty; Article 107 Euratom treaty: "The Assembly which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the advisory and supervisory powers which are conferred upon it by this Treaty."

28. Article 138 EEC treaty; Article 21 ECSC treaty; Article 108 Euratom treaty. The number of delegates for each country is as follows: Germany, France, Italy and the United Kingdom: 36; Belgium and the Netherlands: 14; Denmark and Ireland: 10; Luxembourg: 6.

29. Article 137 EEC treaty; Article 20 ECSC treaty; Article 108 Euratom treaty.

30. Article 9 of the Protocol on the Privileges and Immunities of the European Communities, Brussels, April 8, 1965; Hogan, supra note 5, at 292.

31. Hogan, supra note 5, at 293.
made April 12, 1970. Although Mr. Spenale withdrew his motion, probably because he expected that the motion would not receive the required number of votes, this incident clearly shows the intention of the European Parliament to follow its own course and, if necessary, to do so independently of the other institutions. It is, however, very doubtful that the execution of a motion of censure by the Parliament against the Commission would bring about a solution to the institutional problems in the European Communities.

A motion of censure levied against the Commission requires a two-thirds majority of all votes cast. As the authors of the treaties considered the possibility of a motion of censure as something very exceptional, and at the same time as a possible threat to the life of the Community, they not only required that it be passed by a large majority of votes, but also stated that the vote should be open. In addition, the Assembly must wait at least three days after the motion has been tabled before it can vote thereon. As a result of a successful motion of censure, the Commission has to resign as a body.

Since the treaties do not distinguish between the procedure for appointment of the members of the Commission after the normal finishing of their term and after a successful motion of censure, nothing can prevent the national governments from reappointing the same Commission. This would make the parliamentary control over the Commission nearly meaningless. The Parliament, for its part, could not immediately vote a new motion of censure against the same reappointed Commission because the treaties state that the motion of censure has to be based on "the activities of the Commission." Even a reappointment of the same Commission would constitute a "new" body, and the Parliament would have to wait until this "new" body had acted again before it could

33. Article 144 EEC treaty; Article 24 ECSC treaty; Article 114 Euratom treaty:

If a motion of censure on the activities of the Commission is tabled before it, the Assembly shall not vote thereon until at least three days after the motion has been tabled and only by open vote. If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly, the members of the Commission shall resign as a body.
34. Article 11 merger treaty: "The members of the Commission shall be appointed by common accord of the Governments of the Member States. Their term of office shall be four years. It shall be renewable."
raise another motion of censure.\textsuperscript{35} In fact, a motion of censure against the Commission does not mean very much. The central decision-making institution in the Communities is the Council, and as long as there is no direct political control over the Council, a motion of censure against the Commission cannot change much.

However, the Council of Ministers could not be brought under the control of the European Parliament without a power to censure it from office, or to dismiss its members. This would mean, however, a competence to remove ministers who are responsible to their own national parliaments, and it is clear that a minister can be responsible to only one parliament. Therefore, the Council of Ministers, representing the national governments, cannot be responsible to the European Parliament without giving an autonomous governing power to the European Community. A supranational parliament cannot be "supreme" if the disposition of issues within its purview depends, in the final analysis, upon the national governments.\textsuperscript{36}

On the other hand, the extension of the powers of the European Parliament by giving it some legislative powers, combined with the direct election of its members by the peoples constituting the European Communities, would not only add to the democratic character of the Communities but would also provide the Parliament with a sort of direct control over the Council, as it could refuse its collaboration for decisions it considers not to be in the European interest.

IV. THE EUROPEAN COURT OF JUSTICE AS A MODERATOR BETWEEN COMMISSION AND COUNCIL

It is remarkable that since the creation of the European Communities only two disputes between the Council and the Commission were brought before the Court. In both cases the Commission took the initiative, basing its action against the Council on Article 173 of the EEC treaty. According to this article, a member state, the Council, or the Commission can bring an action before the Court of Justice for review of the legality of acts of the Council and the Commission, other than recommendations or opinions. The action has to be based on grounds of lack of competence,
infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. If the action is well founded, the Court will declare the act concerned to be void.\textsuperscript{37}

On May 19, 1970, the Commission initiated an action before the European Court of Justice seeking annulment of the “Council’s deliberations” of March 20 on the negotiation and conclusion of a revised European Road Transport Agreement (ERTA). As the revision of the ERTA related to the same subject matter as Council Regulation No. 543/69, adopted in March, 1969, and a few substantive rules laid down in the revised ERTA differed from the corresponding provisions of the Regulation, the Commission argued that in matters falling within the substantive scope of Regulation No. 543/69, authority to enter into international agreements had passed from the member states to the Community. Therefore, the Council’s “decision” that the member states would conduct the negotiations and conclude the ERTA constituted a violation of the rights of the Community and deprived the Commission of the possibility of carrying out the tasks which Article 228 of the EEC treaty assigns to it in the field of treaty-making.\textsuperscript{38}

In a remarkable judgment of March 31, 1971, the Court sustained the Commission’s position but, on the merits, ruled in favor of the Council.\textsuperscript{39}

The position of the two institutions opposing each other in this legal dispute clearly reflected the interests which each had a duty to safeguard. The Commission represented the interests of the Community and its institutions, claiming that the principle of attributed (or enumerated) powers should not be applied with the utmost strictness in the field of the Community’s external relations in an area with so many international aspects as transportation. The Council, on the other hand, clung to a narrow definition of the Community’s external powers and sought to protect the sover-

\textsuperscript{37} Article 174 EEC treaty.

\textsuperscript{38} Article 228 EEC treaty:

Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly where required by this Treaty.

eighty of the member states in the foreign field from an allegedly illegal limitation by the Community.\textsuperscript{40}

While the overwhelming majority of legal writers were in agreement that the Community possessed only a treaty-making power in the cases expressly provided for in the treaties,\textsuperscript{41} the Court rendered a rather wide definition of cases where a grant of external power can arise, offering the Commission more than it had bargained for but at the same time finding in favor of the Council on the merits because of the "particularities of the situation."\textsuperscript{42}

The second case, involving a lawsuit between the Council and the Commission, came before the Court of Justice as a result of a strike by the Community officials. In its judgment of June 5, 1973, the Court declared void certain articles of the Council Regulations of December, 1972, determining the remuneration of officials and other servants of the Communities, and the Council Decisions of March 20 and 21, 1972, on the new remuneration policy.\textsuperscript{43} Here again, the Court found in favor of the Commission in a potentially explosive situation which could have had a disastrous effect on the European Communities if the Court had upheld the Council decisions.

These two cases are the only cases in which a legal conflict between the Council and the Commission has been brought before the European Court of Justice. The lack of case law on this subject can be explained by the fact that the underlying problem in a conflict of power between the Council and the Commission is based on a conflict between national and Community law, the Council representing the interest of the member states and the

\textsuperscript{40} Winter, \textit{Annotation on case 22/70, re ERTA: Commission v. Council}, 8 \textit{COMM. MKT. L. REV.} 551 (1971).


Commission protecting the interest of the Community.

This appears clearly in the ERTA case where the conflict of power between Council and Commission was only secondary to the more important and broader question of the distribution of the external powers between the Community and the member states. Where the Court in two previous landmark decisions\textsuperscript{44} ruled that the creation and the functioning of the Communities had caused a transfer of powers from the member states to the Community in the internal sphere, the Court in the ERTA case decided that the adoption of common rules by the Community, with a view to implementing a common policy envisaged by the EEC treaty, had divested the member states of their power to act externally in a way which might affect these rules:

To the extent that such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member States affecting the whole sphere of application of the Community legal system.

One cannot therefore, in implementing the provisions of the Treaty, separate the category of measures internal to the Community from that of the external relations.\textsuperscript{45}

The Court's judgment in this case has been heavily criticized.\textsuperscript{46} The French Foreign Minister, in response to a question posed by the French National Assembly, expressed the surprise of the French government at the far-reaching ruling of the Court. The French government, however, would continue its confidence in the Court as long as it fulfilled the task the member states had conferred upon it, that is, "to ensure the respect of the law in the interpretation and application of the treaty of Rome."\textsuperscript{47}

The ERTA case once more proves that the European Court of Justice, even in such delicate situations as a legal conflict between the Commission and the Council, does not hesitate to support the

\textsuperscript{44} Case 26/62 (Van Gend & Loos v. Tariefcommissie Amsterdam) of February 5, 1963, 9 Recueil 1 (1963); Case 6/64 (Costa v. Ente Nazionale Energia Elettrica) of July 15, 1964, 10 Recueil 1141 (1964).

\textsuperscript{45} Case 22/70 (Commission v. Council) of March 31, 1971, 17 Recueil 266 (1971).


\textsuperscript{47} Réponse à Mr. Cousé par le ministe françois des affaires étrangères sur la compétence de negotiation externe de la Communauté à la suite de l'arrêt 22/70 de la CJCE, en date du 31 Mars 1971, 1971 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONALE [A.F.D.I.] 1052.
Community's point of view against uprising national interests in the Council by broadly interpreting the Community law.48

V. RECENT INSTITUTIONAL DEVELOPMENTS: THE 1974 PARIS SUMMIT MEETING

Although not provided for by the treaties, the problem caused by the abuse of the unanimity rule in the Council made it necessary to organize at regular times meetings of the heads of government of the member states so as to break the deadlock in the Council and to make major decisions for long-term Community developments. These so-called "summit" meetings raised several legal and political questions.

As these meetings were not provided by the treaties, they could hardly be considered Community "institutions." As a result, the European Court of Justice was unable to evaluate the legality of the decisions reached at these Summit meetings even when the decisions violated treaty provisions. The Commission was not allowed to take part in these meetings and thus could not exercise its right of proposal. This could easily infringe on the rights of the Commission as granted by the treaties, and the Commission often saw itself faced with a fait accompli.

Political problems also resulted from the "summit" meetings. Some considered the "summits" an escape from the supranational procedures set forth in the treaties to a situation of intergovernmental negotiations. Another problem with the summit meetings was that the decisions made during the meetings were often untimely or not implemented.

Because of the ineffectiveness of these summit meetings, it is no wonder that when the French President, Mr. Giscard d'Estaing, proposed a new summit meeting be held in Paris at the end of 1974, not all member states agreed on the need for this summit.49 In addition, the severe economic problems the political leaders of the


49. According to Article 2 of the Merger treaty, the office of president of the Council of Ministers is held for a term of six months by each member in turn, in alphabetical order of the member states. In the second half of 1974 the presidency of the Council was held by France. Therefore, the French President acted as host for the European summit and represented his European partners at his meeting with the American President on Martinique, in December, 1974.
Community member states had to face in their respective countries made a discussion of the institutional problems of the Community of far less urgency. Nevertheless, when the European summit opened in Paris on December 9, 1974, the institutional issue was put on the agenda, and, remarkably, some major decisions concerning the European institutions resulted.

To ameliorate the functioning of the Communities and aid political cooperation, the nine member states decided in Paris on a six-point program concerning the institutions:

1. The heads of government and their foreign ministers would meet at least three times a year, once in Brussels and twice in other capitals, as the newly named European Council. To avoid the delicate question of the "permanent political secretariat" which France wanted to establish in Paris, it was decided that the meetings of the European Council would be organized by the existing secretariat of the Community. The creation of this European Council meant the institutionalization of the European summits. A similar institutional framework had already been proposed by Mr. Fouchet in 1960 in his plan for a European Political Union, a European confederation (l'Europe des Etats) in the way De Gaulle wanted it. In 1962, the Benelux countries vigorously rejected this "nationalistic" proposal. It is remarkable that the communique of the Paris meeting expressly states that the creation of this European Council does not impair the provisions and procedures of the treaties and the declarations of Luxembourg and Copenhagen on political cooperation. The communique also stresses the role of the Commission in the preparation of the meetings of the European Council. It is not clear, however, whether this statement means that the European Council should be considered as a Community institution, and therefore must act in accordance with the principles set forth by the treaties and in the interest of the Community.

2. The nine member states also expressed a desire to adopt a common position on foreign policy questions affecting the interests of the Community. The president of the Council would act as the spokesman for the nine member states and would provide for necessary consultations prior to the meetings. The nine agreed that closer collaboration with the European Parliament in matters of political cooperation was necessary. This could, for instance, be done by the members of Parliament questioning the president of

50. Seydoux, Le Plan Fouchet a-t-il une chance?, Le Monde, December 29, 1974, at 3
the Council on the activities in the field of political cooperation.

3. Paragraph six of the communiques contained the following important provision:

In order to improve the functioning of the Council of Ministers, they (the Government Heads) consider it necessary to renounce the practice of making agreement on all questions conditional on the unanimous consent of the member states, whatever their respective position may be regarding the conclusions reached in Luxembourg on January 28, 1966.\[51\]

Whether this will open the way for majority decisions in all cases provided by the treaties remains uncertain. The official text of the communique is vague enough to allow different interpretations. On the other hand, it appears from comments on the Paris summit that there was an understanding that no majority vote would ever be taken on a matter in which a member country's vital interests were threatened.\[52\] The term "vital interest" is of course very relative, and a broad interpretation could render it meaningless. It is very doubtful, however, that a member state in a minority position would implement a decision constituting a real threat to its "vital national interests." As long as this exception hangs like a sword of Damocles over decision-making in the Council, no real progress can be expected.

4. The nine member states recognized the importance of immediate direct elections for the European Parliament. They recommended that the Council decide in 1976 on the proposals made by the European Parliament on the question of direct elections, according to Article 138(3) of the EEC treaty.\[53\] Direct elections could take place in or after 1978. The powers of the European Parliament would be enlarged by giving the European Parliament more powers in the decision-making process. Here again, the text

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51. After the institutional crisis of 1965, the then six member states agreed in Luxembourg that majority rule, provided by the treaties, would not be used in cases where it would threaten the "vital national interests" of a member state.

52. The Daily Telegraph, December 12, 1974, at 4, col. 3; Le Monde, December 11, 1974, at 3, col. 4.

53. Article 138(3) EEC treaty:
The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.
The Council shall, acting unanimously, lay down the appropriate provisions which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.
of the communique is vague and diplomatic enough to allow different interpretations. The heads of government clearly recognized that it was undesirable and even impracticable to have direct elections for a parliament with inadequate powers.\footnote{On the matter of direct elections to the European Parliament, there were two reservations. The Danish delegation could not assure they would hold direct elections in 1978. The British Prime Minister declared that Britain's decision on the matter of direct elections would depend on the results of the renegotiation of Britain's terms of membership in the European Communities.}

5. The nine member states also decided to give more powers to the Commission, to develop new common policies, and to grant the necessary powers to the Community institutions. Indeed, the final realization of the economic and monetary union not only requires new institutions but also the enlargement of the powers of the existing Community institutions, especially the Commission.

6. In the broader context of European political integration, the nine member states decided to establish a working group to create a "uniform passport" for nationals of all member states and, eventually, a "passport union" that might issue a standard European passport. The Belgian Prime Minister, Mr. Tindemans, was asked by his partners to submit to the heads of government before the end of 1975 a report on the creation of a European Union. The basis of this report would be documents prepared by the Commission, the European Parliament\footnote{The commission for political affairs of the European Parliament has already drafted a proposal outlining the institutional changes required for a transition of the European Communities into a European Political Union: Eur. Parl. Doc. 34.134, January 8, 1974.} and the European Court of Justice. This report would also take into consideration opinions of the national governments and of action groups representing public opinion inside the Community.

IV. CONCLUSION

The implementation of the decisions of the Paris summit will certainly help to improve the relationship between the Community institutions. Much will depend, however, on the political will of the member states. There are some signs that the thunderclouds which covered the political climate in the Communities during the past few years are slowly clearing up. On the other hand, the widening gap between the relatively strong economies of some member states, especially Germany and the Benelux countries, and the weakness in other nations, especially Britain, Denmark, and Italy, makes a stronger political and economic integration of the nine
member states very difficult. This might well result in a stronger united Europe of six or seven instead of nine countries.

The problem is that the treaties do not contain a provision for a member country to withdraw from the Community. With respect to the original member states of the European Communities, it is clear that their economies are now so closely linked that it would certainly be against the economic interests of any member to withdraw. This became clear in 1965 when the French government boycotted the Community institutions and was subsequently put under strong pressure from financial and industrial circles inside France not to withdraw from the Community or block its progress. But the situation is different for the new members of the Communities, especially the United Kingdom. Although the treaties do not contain any express condition for membership of the European Communities, except that it must be a European state, it is generally accepted that becoming a member of the Communities implies the acceptance of the underlying political aims of the Communities, such as the further political integration of its members.

When one considers the attitude of the United Kingdom since it became a member of the Communities in 1973, one really wonders whether it joined the Communities for other than purely economic reasons. It is probable that given the current economic situation in Britain, membership in the Communities is a necessary condition for this country to survive, but the continued attempt by any member of the European Communities to block the further political integration of the member states by boycotting every decision on the matter cannot be accepted.

Therefore, it is necessary to have a provision in the treaties allowing a member state to withdraw from the Communities. In the actual legal situation, withdrawal would certainly constitute a breach of an international obligation, unless, perhaps, justified by exceptional circumstances. This, however, causes very difficult problems in terms of damages and compensation for financial and other benefits received.\footnote{66}

In any case, a provision allowing a member to withdraw could

\footnote{66. Some people have already argued that if the British Prime Minister, Harold Wilson, would try to take Britain out of the Communities, they would bring him before the European Court of Justice. Whether this is legally possible is very doubtful, although this suggestion clearly reflects the reactions resulting from the British attitude toward its Community membership. See also, White, \textit{The Effect of the Common Market on British Law}, 59 A.B.A.J. 620 (1973).}
also bring a solution for the problem of unanimous voting in the Council. If a member state considers every Council decision as a possible threat to its vital national interests, it must have the right to withdraw. If one does not accept the supranational structure of the Communities, which implies majority decisions, there is only one answer—withdrawal. But the recognition of the right of withdrawal in the treaties also requires the member states to finally give a clear answer on the question of how they envision the future of a united Europe. If some member states do not agree with the then clearly expressed wish of the majority, they not only have the right but also the duty to withdraw and to establish, if they wish, a new relationship with their former partners who decided to proceed further on the way toward a European political integration.