

## AMERICAN BUSINESS AND THE SINGLE EUROPEAN ACT: SCALING THE WALLS OF "FORTRESS EUROPE"

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### INTRODUCTION

By virtue of the Single European Act of 1986 (SEA),<sup>1</sup> the twelve nations of the European Community (EC)<sup>2</sup> have committed them-

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1. Single European Act, *done at Luxembourg*, Feb. 17, 1986, *and at The Hague*, Feb. 28, 1986, *in force* July 1, 1987, 29 O.J. EUR. COMM. (No. L 169) 6 (1987), *reprinted in* 49 COMMON MKT. L.R. 741 (1987); 10 FORDHAM INT'L L.J. 471 (1987); 19 EUR. COMM. BULL. (Supp. 2/86); 25 I.L.M. 503 (1986). For commentaries on the SEA, *see infra* note 13.

2. The Community originally consisted of six members: Belgium, France, Italy, Luxembourg, The Netherlands, and West Germany. In 1973, the first enlargement of the Community took place when Denmark, Greenland, Ireland, and the United Kingdom became part of the Community. Norway, which also had planned to join, failed to do so following the defeat of a national referendum on the question. In 1981, the second enlargement occurred when Greece was added to the Community. In 1983, Greenland resigned its membership due to disagreements over Community fishing policies, the same reason why Norway refused to join the Community ten years earlier. Finally, Portugal and Spain entered the Community in 1986 as part of the third enlargement. For general discussions about the Community's evolving composition, *see* Dagtaglou, *The Southern Enlargement of the European Community*, 21 COMMON MKT. L.R. 149 (1984); Jenkins, *The European Community As It Faces Its Second Enlargement*, 18 VA. J. INT'L L. 381 (1978); Symposium, *Expansion of the Common Market*, 37 LAW & CONTEMP. PROBS. 219 (1972); Thompson, *The Common Market: A New Legal Order*, 41 WASH. L. REV. 385 (1966); Toepke, *The European Economic Community—A Profile*, 3 NW. J. INT'L L. & BUS. 621 (1981); Recent Developments, *European Economic Community: Entry of Spain and Portugal*, 27 HARV. INT'L L.J. 250 (1987). For a discussion of the Community's fishing policies, *see* Feestone & Fleisch, *The Common Fisheries Policy in INSTITUTIONS AND POLICIES OF THE EUROPEAN COMMUNITY* 77 (J. Lodge ed. 1983). Although Turkey applied for full membership in 1987, hostility between it and Greece, coupled with the requirement contained in Article 8 of the SEA that new members be unanimously approved by the Council and also approved by an absolute majority of the Parliament, *see* 25 I.L.M. at 510, makes her future admission uncertain at best. *See generally* Turkey Applies to Join the European Community, 10 MIDDLE E. EXECUTIVE REP. 20 (June 20, 1987).

In addition to the existing members of the European Community, more than sixty countries, primarily former colonies of the members, are affiliates of the Community under the so-called Lome Conventions. Such countries normally are referred to as the "ACP" countries, which stands for African, Caribbean and Pacific Associates. *See generally* Kibola,

selves to forming a true internal market<sup>3</sup> by December 31, 1992.<sup>4</sup> Although it is impossible to say at this early stage whether that deadline will be met, it seems clear that the EC intends to do its best to comply with the ambitious task it has set for itself.<sup>5</sup>

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*Stabex and Lome III*, 18 J. WORLD TRADE L. 32 (1984).

For countries not covered by the ACP, particularly those in the Mediterranean, the Community has entered into external trading arrangements. At the present time, the Community has cooperation agreements with Malta (since 1970); Cyprus (1972); the Maghreb countries (Algeria, Morocco, and Tunisia) (1976); the Mashrik countries (Egypt, Jordan, Lebanon and Syria) (1977); and Yugoslavia (1980). Weingardt, *Portugal's Accession and Integration Into the European Economic Community*, 15 DEN. J. INT'L L. & POL'Y 317, 332 n.109 (1987). Since 1975, it also has had a free trade agreement with Israel. *Id.*

3. As explained *infra* note 74 and accompanying text, the SEA defines an internal market as an area in which there are no barriers to the movement of goods, persons, services or capital. For a further discussion, see Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L.R. 361, 364-70 (1987). The goal is to create a single unified region in which businesses will be able to compete on an equal footing and without regard to local rules.

The model for the EC's internal market is, of course, the market of the United States. When widespread agreement emerged that the Articles of Confederation, which were in effect from 1781 until 1789, were hindering internal commerce by placing too much power in the hands of local legislatures, thereby permitting commercial friction to occur among the states, the nation shifted to a republican form of government. See CONFEDERATION AND CONSTITUTION, 1781-89 (F. McDonald & E. McDonald eds. 1968). As result of this decision, the United States has enjoyed unprecedented prosperity, which has been fostered in large part by the central government's ability to fashion a true internal market. Whether the EC can replicate the American experience is considered in *From the Redwoods to the Gulfstream*, THE ECONOMIST, July 9, 1988, at S41.

4. As discussed *infra* notes 74-85 and accompanying text, however, this deadline is somewhat illusory inasmuch as no penalties will be triggered if the deadline is not met. Many observers believe that the goal will not be met until 1994 or 1995, and therefore refer to 1992 as a "target date" rather than a "deadline." Giovanni Agnelli, the president of the Italian automaker Fiat, has said that, "We must [begin to] pretend it's 1992. Personally, I think it might be one, two years later. But it will come before 1995." Chesnoff & Wolf, *No Fences Make Good Markets*, U.S. NEWS & WORLD REP., Feb. 29, 1988, at 40, 41.

5. Because measuring the overall progress made by the EC to date is difficult, most analyses focus on a statistical model. See, e.g., *So Hard to Make a Dream Come True*, THE ECONOMIST, Feb. 13, 1988, at 47 (reporting that at the end of 1987 the Council had adopted just 70 pieces of legislation on the internal market, instead of the scheduled 160). Such analyses, however, tend to understate the Community's actual progress. According to one commentator:

Measuring progress achieved thus far and forecasting developments in the coming years is a difficult task. To the extent there is any precise measure, it is a quantitative one. As of the end of 1987, the Commission had submitted proposals for about two-thirds of the subjects included in the White Paper, and action had been completed by the Council on about one-fourth of these. The most recent tally of June 30, 1988 (the end of the German presidency of the Council) shows 211 proposals made by the Commission and 91 adopted by the Council. The Commission expects to be only slightly behind schedule, with 90 percent of its proposals submitted by the end of 1988. The Council is farther [sic] behind. On a strictly arithmetical basis, its record is not very good, with action completed on about one-third of the items at nearly the half-way point in the program. However, when compared to the timetable set out in the White Paper [which provides for more actions to be completed toward the end of the period], the numbers are less disappointing.

M. CALINGAERT, *THE 1992 CHALLENGE FROM EUROPE: DEVELOPMENT OF THE EUROPEAN COMMUNITY'S INTERNAL MARKET* 37 (1988). Mr. Calingaert also believes that the track

In building their internal market, the members of the EC will face many difficult issues.<sup>6</sup> How they are resolved will have an enormous impact on the final form of the internal market and the future well-being of the economies of the individual EC members. It also will affect the level and type of interaction that will occur among the EC and foreign countries after 1992. At the outset, it should be recognized that the internal market will affect the foreign trading relationship with the EC in one of three ways: 1) it could open the EC to increased levels of trade and investment from foreign sources; 2) it could close the EC and thereby depress foreign trade and investment in Western Europe; or 3) it could have no impact on the EC's trading partners.

The creation of the internal market will galvanize the peoples of Western Europe into a market worth approximately \$4 trillion resting on a consumer base of more than 300 million people, a market equal in importance to that of both the United States and Japan.<sup>7</sup>

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record of the EC is better than mere numbers might suggest because of the introduction of certain programs whose importance is understated in number-crunching exercises. As examples, Mr. Calingaert points to the introduction on January 1, 1988 of the Single Administrative Document (SAD), which has reduced the number of border entrance/exit documents for goods from as many as 100 to 1, and to the development of a Community Tariff system. *Id.* at 39. For a review of Mr. Calingaert's book, which has been described as "The best answer so far" for the person who seeks a clear, unbiased, and readable work on the SEA, see *At Last, Clarity*, THE ECONOMIST, Nov. 26, 1988, at 98.

Even if one accepts the importance of statistical analyses, however, it is clear that the EC's record is getting better. By the beginning of March 1989, nearly one-half of the necessary proposals had been approved, a considerable increase from just one year earlier. See McCartney, *Europe Seeks An Economy of Scale: Twelve Nations Work to Build A Real Community Market by 1992*, Wash. Post, Mar. 19, 1989, § 1, at A1, col. 1. See also *infra* note 132.

6. See *infra* notes 103-12 and accompanying text. See also CALINGAERT, *supra* note 5, at 34-37.

7. Professor Pierre-Henri Laurent has written:

By 1992, over 325 million people would become not simply the largest global trading bloc but, for all economic and financial purposes, a single lucrative market with worldwide influence equal to that of the United States and Japan. One international relations expert noted that this change could rank historically with the emergence of the United States and the Soviet Union as superpowers. In less than three years, the complicated job of establishing one open European market has swiftly become the central issue of significance in West Europe, sharing the limelight with the issue of superpower arms reduction.

Laurent, *The European Community: Twelve Becoming One*, 87 CURRENT HIST. 357 (1988). Elsewhere it has been noted that:

[A] fully integrated Community would contain 323 million consumers, compared with 244 million in the U.S. and 122 million in Japan. The combined gross domestic product of E.C. countries last year was \$4.2 trillion, almost equal to that of the U.S. (\$4.4 trillion) and considerably more than the combined total for Japan, South Korea, Taiwan, Hong Kong and Singapore (\$2.7 trillion).

Painton, *Toward Real Community?: Europe Has Four Years to Get It Together*, TIME, Apr. 18, 1988, at 54.

Hardly anyone believes that the creation of such a market will not alter world trading patterns. Rather, the question is whether increased or decreased foreign commerce will become the legacy of the European internal market. For reasons to be explained below, the coming of the internal market heralds the closing of Europe to outside parties and the beginning of an era of new and unprecedented protectionism on the part of the members of the EC.

This article is divided into five sections. The first section provides a review of the developments which led to the passage of the SEA.<sup>8</sup> The next section examines those portions of the SEA which directly affect the formation of the internal market.<sup>9</sup> The third part of the article considers whether the internal market will be accompanied by the erection of barriers to foreign trade (or what has become known in some circles as the "Fortress Europe" syndrome).<sup>10</sup> As the article concludes that the answer to this question is yes, the fourth part of the article discusses the form that the barriers are likely to take.<sup>11</sup> The final portion of the article contains suggestions as to how the negative impacts of 1992 can be minimized.<sup>12</sup>

## I. A HISTORY OF THE SINGLE EUROPEAN ACT<sup>13</sup>

The Single European Act was drafted in the fall of 1985. Because of hesitation on the part of Denmark and Italy, it was not opened for signature until February 17, 1986, at which time all of the countries in the European Community signed the SEA with the exceptions of Denmark, Greece, and Italy. They signed the SEA eleven days later, following a special Danish referendum which resulted in approval of the SEA by a margin of 56.2% to 43.8%.<sup>14</sup> During the next several months, all of the states of the Community

8. See *infra* notes 13-71 and accompanying text.

9. See *infra* notes 72-99 and accompanying text.

10. See *infra* notes 100-19 and accompanying text.

11. See *infra* notes 120-30 and accompanying text.

12. See *infra* notes 131-51 and accompanying text.

13. For additional views on the drafting of the SEA, see P. CECCHINI, *THE EUROPEAN CHALLENGE 1992* (1988); 20 BULL. EUR. COMM. (Supp. 1/87); Glaesner, *The Single European Act*, 6 Y.B. EUR. L. 283 (1987); Glaesner, *The Single European Act: Attempt At An Appraisal*, 10 FORDHAM INT'L L.J. 446 (1987); Heath, *European Unity Over the Next Ten Years: From Community to Union*, 64 INT'L AFF. 199 (1988); Murphy, *The Single European Act*, 20 IRISH JUR. 17 (1985); Nuttall, *European Political Cooperation and the Single European Act*, 5 Y.B. EUR. L. 203 (1985).

14. See Gulmann, *The Single European Act—Some Remarks From a Danish Perspective*, 24 COMMON MKT. L.R. 31 (1987), and Worre, *Denmark At the Crossroads: The Danish Referendum of 28 February 1986 on the EC Reform Package*, 26 J. COMMON MKT STUD. 361 (1988).

ratified the SEA,<sup>15</sup> and plans were made for it to become effective on January 1, 1987.<sup>16</sup> These plans were derailed, however, when a challenge in the Irish Supreme Court led to a finding that Ireland's ratification had been unconstitutional,<sup>17</sup> thereby forcing a special referendum to amend the Irish constitution to be held in May 1987.<sup>18</sup> When the Irish people voted in favor of the amendment,<sup>19</sup> the effective date of the SEA became July 1, 1987.<sup>20</sup>

In order to understand the SEA and what it seeks to accomplish, one must have some sense of the European Community itself.<sup>21</sup> The term "European Community" is a catch-all phrase which actually refers to three separate but inter-dependent communities whose purpose, broadly defined, is to achieve material advantages for their members:<sup>22</sup> a coal-and-steel community, founded in Paris in 1951;<sup>23</sup>

15. Article 33(2) of the SEA states that, "This Act will enter into force on the first day of the month following that in which the instrument of ratification is deposited of the last Signatory State to fulfil [sic] that formality." 25 I.L.M. at 518. As such, ratification by each member of the EC was necessary before the SEA could become effective. *See generally Single European Act: A Milestone on the Road Toward European Union*, 4 COMMON MKT. REP. (CCH) ¶ 10,812, at 11,886 (Sept. 25, 1986). Ratification was not easily achieved, however, as numerous attacks were made on the SEA. For the essence of the complaints about the SEA, *see* Pescatore, *Some Critical Remarks on the "Single European Act,"* 24 COMMON MKT. L.R. 9 (1987).

16. *See* Peel, "Single European Act: Blueprint for Cooperation," EUROPE, Nov. 1987, at 27.

17. *See Crotty v. An Taoiseach and Others*, 49 COMMON MKT. L.R. 666 (1987).

18. *See* Lang, *The Irish Court Case Which Delayed the Single European Act: Crotty v. An Taoiseach and Others*, 24 COMMON MKT. L. REV. 709 (1987).

19. For an examination of how Ireland is likely to fare under the SEA, *see* McAleese & Matthews, *The Single European Act and Ireland: Implications for a Small Member*, 26 J. COMMON MKT. STUD. 39 (1987).

20. Peel, *supra* note 16.

21. For a general review, *see* Commission of the European Communities, *Twenty-First General Report on the Activities of the European Communities 1987* (1988). *See also* Hoffman, *Reflections on the Nation-State in Western Europe Today*, 21 J. COMMON MKT. STUD. 21 (1982); Wallace, *Europe as a Confederation: The Community and the Nation-State*, 21 J. COMMON MKT. STUD. 57 (1982); Weilee, *Community, Member States and European Integration: Is the Law Relevant?*, 21 J. COMMON MKT. STUD. 39 (1982).

22. "All three are regional international organizations, economic in character. Their object is to unify the economies of the member countries by creating among them a common market. . . . At the heart of these enterprises, there is a common economic philosophy that can be defined by the concept of regulated competition or institutional markets." Reuter, *Juridical and Institutional Aspects of the European Regional Communities*, 26 LAW & CONTEMP. PROBS. 381, 381 (1961).

23. *See* Treaty Instituting the European Coal and Steel Community (ECSC), *done at* Paris, Apr. 18, 1951, 261 U.N.T.S. 140 (1957). The ECSC was formed at the urging of Robert Schuman, France's Minister of Foreign Affairs, and was spurred on by the desire of the West German steel industry to gain control over French iron ore deposits and a similar desire on the part of French industry to obtain access to German coal. For a history of the Schuman Plan, as Robert Schuman's vision came to be called, *see* W. DIEBOLD, *THE SCHUMAN PLAN: A STUDY IN ECONOMIC COOPERATION 1950-59* (1959). *See also* Morgenthau, *The Schuman Plan and European Federation*, 46 AM. SOC. INT'L L. PROC. 130 (1952).

an atomic energy community, founded in Rome in 1957;<sup>24</sup> and an economic community, also founded in Rome in 1957.<sup>25</sup> Since 1967 all three communities have been served by a single Council and a single Commission.<sup>26</sup>

The Community's work is carried out by its four coordinate branches, which consist of the Council (whose meetings rotate from site to site within the Community), the Commission (headquartered in Brussels), the Parliament (currently located in Strasbourg, France, but likely to relocate in the future to Brussels), and the Court of Justice (which sits in Luxembourg).<sup>27</sup> While the Council and the Parliament carry out the legislative functions of the Community, the executive function is performed by the Commission, and the judicial role belongs to the Court.<sup>28</sup>

Of the four institutions, only the 518-member Parliament is elected directly by the citizens of the EC nations.<sup>29</sup> The Council

24. See Treaty Establishing the European Atomic Energy Community (EURATOM), done at Rome, Mar. 25, 1957, 298 U.N.T.S. 167 (1958). The drafting history of the EURATOM Treaty is discussed in detail in Mathijsen, *Problems Connected with the Creation of EURATOM*, 26 LAW & CONTEMP. PROBS. 438 (1961).

25. See Treaty Establishing the European Economic Community (EEC), done at Rome, Mar. 25, 1957, 298 U.N.T.S. 3 (1958). Because of the much greater importance of the EEC Treaty relative to the ECSC and EURATOM Treaties, many people refer to the EC as the EEC. This is technically incorrect, however, since the EEC is simply one leg of the EC. In addition, many people speak of the EC as having been founded by the Treaty of Rome. This introduces a note of confusion into any discussion since both the EURATOM and EEC Treaties were completed in Rome on the same day, six years after the ECSC Treaty was completed in Paris.

26. See Homan, *The Merger of the European Communities*, 3 COMMON MKT. L. REV. 397, 397 (1966); Houben, *The Merger of Executives of the European Communities*, 3 COMMON MKT. L. REV. 37 (1965); Thompson, *The Leiden Meeting*, 15 INT'L & COMP. L.Q. 276 (1966); Weil, *The Merger of the Institutions of the European Communities*, 61 AM. J. INT'L L. 57 (1967).

27. In addition to these four branches, there are several ancillary Community institutions, including various consultative bodies, technical committees, the European Investment Bank, management and regulatory committees, and the Court of Auditors. For a discussion of these entities, see D. LASOK & J. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 235-47 (4th ed. 1987).

28. For a further discussion of how the communities function, see K. BORCHARDT, THE ABC OF COMMUNITY LAW (2d ed. 1986); P. MATHIJSEN, A GUIDE TO COMMUNITY LAW (4th ed. 1985); R. PLENDER, A PRACTICAL INTRODUCTION TO EUROPEAN COMMUNITY LAW (1980); B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS (2d ed. 1986). See also LASOK & BRIDGE, *supra* note 27.

29. The Parliament was known as the Assembly from 1951 until it renamed itself in 1958 following passage of the EURATOM and EEC Treaties. See Heidelberg, *Parliamentary Controls in the Three European Regional Communities*, 26 LAW & CONTEMP. PROBS. 430, 432 (1961). Originally, the Parliament was selected indirectly by the governments participating in the EC. The Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage of September 20, 1976, however, shifted responsibility for selection of the Parliament to the citizens of the European Community starting in 1979. See 19 O.J. EUR. COMM. (No. L 278) 1 (1976), discussed in 2 COMM. MKT. REP. (CCH) ¶ 4306.08 (1977). At the present time, Belgium elects 24 representatives, Denmark 16, France

consists of twelve ministers (one from each EC member), who respond to legislative initiatives from the Commission.<sup>30</sup> The Commission, in turn, consists of seventeen persons who are chosen by the EC's members, with at least one person coming from each of the twelve countries and with no more than two persons being from the same country.<sup>31</sup> Finally, the Court is composed of thirteen members, who are elected by the governments represented within the EC.<sup>32</sup>

As might be expected, the major difficulty which has faced the Community, particularly the Council and the Parliament, is the relationship between the EC and the national political institutions. Although power has been gradually shifting away from the national political institutions and towards the institutions of the EC, it is understood that the speed with which this occurs, and whether it continues to occur, is firmly in the hands of the national political institutions of the member states.<sup>33</sup>

With this sketch, it is possible to locate the economic roots of the SEA. In 1981, the Commission decided to make the Community aware of the lack of progress being made in the establishment of a truly integrated market, despite its status as the primary goal of the EEC Treaty. The Commission's 1981 communication on the state of the internal market, followed by two more communications

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81, Greece 24, Ireland 15, Italy 81, Luxembourg 6, The Netherlands 25, Portugal 24, Spain 60, the United Kingdom 81, and West Germany 81. See generally van Schendelen, *The European Parliament: Political Influence Is More Than Legal Powers*, 8 J. EUR. INTEGRATION 59 (1984). For an up-to-date look at the Parliament, see Bieber & Bradley, *Legal Developments in the European Parliament*, 7 Y.B. EUR. L. 285 (1988). See also *infra* notes 66 and 98 and accompanying text.

30. M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 219-20 (1988). For an interesting look at the Council, see Bulmer, *The European Council's First Decade: Between Interdependence and Domestic Politics*, 24 J. COMMON MKT. STUD. 89 (1985).

31. JANIS, *supra* note 30, at 220.

32. *Id.* at 221. In practice, each country within the EC is allotted one seat on the Court, with the thirteenth seat rotating periodically among France, Italy, the United Kingdom and West Germany. *Id.* Of all of the institutions of the Community, it is the Court which receives the most attention from scholars. For recent discussions regarding the Court, see Bradley, *The European Court and the Legal Basis of Community Legislation*, 13 EUR. L. REV. 379 (1988); Cappelletti, *Is the European Court of Justice 'Running Wild?'*, 12 EUR. L. REV. 3 (1987); Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28 (1988).

33. Although the Community is a sovereign association whose legal system stands apart from the legal systems of its member states, the Community's powers nevertheless are circumscribed. This was recognized expressly in the case of *Costa v. ENEL*, in which the Court of Justice held that the power of the Community is directly related to limitations which the members of the EC have seen fit to place on their sovereign rights. See [1964] E. COMM. CT. J. REP. 585, 593. For a general discussion of the unique position which the Community occupies with respect to international, as well as municipal law, see Sasse, *Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1966).

in 1982 (one detailing economic sectors ripe for reform and the other listing obstacles to free movement within the Community), caused the Parliament to request preparation of a study on the subject by a French civil servant and a British academician. The resulting Albert-Ball report, released in 1983, documented widespread inefficiencies and costs due to the Community's failure to realize a true internal market,<sup>34</sup> and prompted the Council in mid-1984 to call for a study of measures to be undertaken to abolish border controls.<sup>35</sup>

In late 1984 Jacques Delors, the former Finance Minister of France, was elected to the position of Commission president.<sup>36</sup> Lord Cockfield, a former government official, businessman and cabinet member in the United Kingdom, was appointed to serve as the new commissioner for the internal market.<sup>37</sup> Following these events, the Council at its March 1985 meeting in Brussels endorsed the goal of

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34. See M. ALBERT & J. BALL, TOWARDS EUROPEAN ECONOMIC RECOVERY IN THE 1980S: REPORT TO THE EUROPEAN PARLIAMENT (1984). The report calculated that the lack of a true internal market was costing the members of the Community in excess of \$60 billion each year.

35. Although border controls should be the first barriers to fall in the development of any internal market, for both symbolic and practical reasons, they are most likely to be the last barriers to fall within the EC. See *Border Wars*, THE ECONOMIST, July 9, 1988, at S8, and *Plenty to Declare*, THE ECONOMIST, Dec. 24, 1988, at 57.

36. For a profile of Mr. Delors, a Socialist who many regard as "the father of 1992," see Sullivan, *The Czar of Brussels*, NEWSWEEK, Feb. 6, 1989, at 32. See also *infra* note 117.

37. Lord Cockfield is widely credited for being the architect of 1992, for it was he who drafted the White Paper, the blueprint of the 1992 movement. See *infra* note 38 and accompanying text. Although few people believed that Lord Cockfield would make a mark on the EC when he was placed on the Commission in 1984, he soon proved the critics wrong by drafting the White Paper in record time:

At Mr Delor's bidding, Lord Cockfield, a doughty British conservative ex-businessman and tax-supremo, who had arrived in Brussels with no great fanfare as commissioner for the Internal Market, took to the task of preparing a white paper with almost alarming gusto. His tactics would have delighted Monnet and Schuman. He rapidly cobbled together a list of 300 measures that were needed for a wholly unified European market. He laid out the hectic timetable that would have to be followed to get those directives (European laws) adopted by the end of the next commission's reign, December 1992. The cleverness of the approach lay in the absence of priorities—which always favour one member-state's interests over another's—and in the strict focus on practical ends such as "no security checks at frontiers", rather than on political consequences, in other words, "this means a common immigration policy."

The magic of those 300 directives was potent—20 or more have since been quietly dropped, but the mystique of Leonidas' round number remains. After years of piecemeal fiddling, European governments were suddenly presented with the full measure of what they said they wanted.

After the Fireworks, THE ECONOMIST, July 9, 1988, at S5, 6. Lord Cockfield became so strident and unwavering in his support for an internal market that he eventually alienated Prime Minister Thatcher, a frequent critic of the SEA. See *infra* note 116. As a result, she did not reappoint him to the Commission when his term ended. See CALINGAERT, *supra* note 5, at 36. See also *infra* note 117.



creating an internal market by 1992. Responding to this mandate, the Commission issued a White Paper entitled "Completing the Internal Market" in June 1985.<sup>38</sup> The White Paper listed 310 specific steps (reduced to 285 by 1988) which would have to be taken if a true internal market was to be achieved,<sup>39</sup> and divided the reasons why an internal market had not yet been achieved into three categories of barriers—physical,<sup>40</sup> technical,<sup>41</sup> and fiscal.<sup>42</sup> At its meeting in Milan in June 1985, the Council endorsed the White Paper and agreed that all necessary steps should be taken by December 31, 1992, because the composition of the Commission is scheduled to change on January 1, 1993.<sup>43</sup>

As mentioned above, the economic roots of the SEA go back to 1981, and culminated in the Commission's 1985 White Paper. The political roots of the SEA, however, go back to 1969 when the Community attempted to regroup after having nearly completed a major integration of its national economies, only to have the effort fail at the last minute.<sup>44</sup> In the wake of 1968, The Hague Summit

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38. See Commission White Paper, *Completing the Internal Market*, 1984-1985 EUR. PARL. DOC. (COM No. 310 Final)(1985). The White Paper is divided into two parts. The first part consists of a fifty-page narrative describing the reasons why a true internal market currently does not exist. In the second part, which is attached to the narrative as an Annex, is a list of 300 measures which should be taken by 1991 (thereby leaving 1992 solely for implementation). These measures are neither exhaustive nor descriptive, but instead are intended to indicate general subject matter.

39. See Pelkmans & Robson, *The Aspirations of the White Paper*, 25 J. COMM. MKT. STUD. 181 (1987).

40. Physical barriers are defined in the White Paper as those which interfere with the movement of goods and people, and include import formalities, border controls, quotas, documentation requirements, health measures (such as food labeling requirements and fruit and plant inspection), extradition rules, and the stopping of travelers to check for drugs, arms, and contraband.

41. Technical barriers include all regulations which make it difficult for common services to be rendered across national borders. Thus, impediments to mortgage transactions, mutual funds, and securities operations, restrictions on the banking, insurance, and securities markets, non-recognition of university diplomas and licenses, and differences in national patent, copyright, and trademark laws are included.

42. Fiscal barriers encompass the dissimilarities in the rate structures and subjects of the value-added taxes and excise duties collected by the members of the Community.

43. The Commission is selected once every four years, with the next selection scheduled for 1992. See LASOK & BRIDGE, *supra* note 27, at 185.

44. The year 1968 marked something of a watershed in Community history because progress towards unification stalled after that year:

Hopes were high, commitment was strong, and the goal [of unification] was mostly achieved by 1968. But then ancient nationalisms reasserted themselves, and Europe's progress on economic integration came to a halt.

The resurgence of nationalism was stimulated by a series of setbacks that drove each country to look after its own interests. In the early 1970s, the EC was hampered by economic events: The failure of Bretton Woods created monetary chaos and the energy crisis hit hard at the real economy.

In response, new border taxes were levied, national production or trade quotas

of December 1969 sought to revitalize the Community by establishing a framework for mutual cooperation in the setting of foreign policy, increasing the European Parliament's budgetmaking powers, coming to terms with the Common Agricultural Policy (CAP),<sup>45</sup> and establishing a new financial footing for the Community.<sup>46</sup>

The Hague Summit was followed in 1970 by a decision of the Community's foreign ministers at Luxembourg to coordinate political action. In October 1972, the final communique of the Paris summit meeting committed the members of the Community to establish a European Union within eight years, and finish work on a common economic and monetary union. In 1973, the European Monetary Cooperation Fund and European Monetary System was established by the Council.<sup>47</sup> In the next year, it was agreed that

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were reintroduced, national subsidies increased and nontariff barriers to trade multiplied. These policies not only stopped progress toward more integration, but also erased many gains.

Lee, *An Impossible Dream?*, FORBES, July 25, 1988, at 78.

45. The Common Agricultural Policy of the EC is found in Articles 38-47 of the EEC Treaty, *supra* note 25. Those articles pledge the members of the EC to work together to stabilize agricultural markets, ensure a fair standard of living for EC farmers, increase agricultural productivity, and maintain reasonable consumer prices for agricultural goods. As those familiar with the EC know, The Hague Summit's solution to the problems of the CAP, based on the Mansholt Plan of 1968, was not a success. Accordingly, the CAP continues to account for a substantial portion of the Community's yearly expenditures, and, as a result, remains the single most divisive issue among Community members. For further discussions of the CAP, see Avery, *Agricultural Policy: The Conclusions of the European Council*, 25 COMMON MKT. L. REV. 523 (1988); Fennell, *Reform of the CAP: Shadow or Substance?*, 2 J. COMMON MARKET STUD. 61 (1987); Demekas, Bartholdy, Gupta, Lipschitz & Mayer, *The Effects of the Common Agricultural Policy of the European Community: A Survey of the Literature*, 27 J. COMMON MKT. STUD. 113 (1988). The CAP has become such a permanent and dominant feature of the EC that even the Court of Justice has had to play a part in setting Community agricultural policy. See Miller, *The Role of the Court of Justice in the Development of Agricultural Policy in the European Communities*, 8 VAND. J. TRANSNAT'L L. 745 (1975). See also F. SNYDER, *THE LAW OF THE COMMON AGRICULTURAL POLICY* (1985).

46. Because of the failure to solve the financial problems associated with the Common Agricultural Policy, see *supra* note 45, the budget of the EC continues to remain in disarray. For a recent examination of the Community's budget, see Koite, *The Community Budget: New Principles for Finance, Expenditure Planning and Budget Discipline*, 25 COMMON MKT. L. REV. 487 (1988).

47. The European Monetary Cooperation Fund was established on April 3, 1973. Its purpose was to facilitate "the smooth operation of the exchange arrangements introduced in the Community, . . . [assure] the multilateralization of intra-Community settlements and . . . administe[r] the short-term monetary support mechanisms." E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES AND READINGS* 1086 (1976). Following the creation of the European Monetary Cooperation Fund, plans were made to replace it with a European Monetary Fund, which would be the first step towards establishing a full-fledged European central bank. Although an agreement was signed on March 13, 1979 calling for a European Monetary System, the program stalled during 1980. *Id.* at 369 (1985 Supp.). The European Monetary System functions on the basis of European Currency Units (ECU's). The ECU is a composite monetary unit based on a "basket" made up of the currencies of some, but not all, of the members

the Council would meet at least three times each year to coordinate the political affairs of the Community.

Despite these and other initiatives, as well as numerous studies,<sup>48</sup> political harmony within the Community proved impossible to achieve, as major disagreements continually surfaced on a wide variety of basic issues.<sup>49</sup> Nevertheless, the idea of creating a politically-united Europe remained a subject of constant discussion by the Council. Discussion of a united Europe had a particularly prominent role at the Council's meetings in Copenhagen in December 1982, in Stuttgart in June 1983, in Fontainebleau in June 1984, in Dublin in December 1984, in Brussels in March 1985, and in Milan in June 1985.<sup>50</sup>

The logjam finally was broken in 1983 when a committee headed by Altiero Spinelli, an Italian member of the Parliament and a former member of the Commission,<sup>51</sup> put forth a bold new program which called for the scrapping of the EEC Treaty and the enactment of a new Treaty of European Union (TEU).<sup>52</sup> Under the

of the EC. *Id.* While the ECU and the European Monetary System continue to grow in importance, they do not yet operate on a scale at all close to that of a true national currency or central bank. See further P. LUDLOW, *THE MAKING OF THE EUROPEAN MONETARY SYSTEM* (1982). It is envisioned, however, that the role of the ECU and the European Monetary System now will be strengthened as part of the overall program to prepare for and adapt to 1992. Article 20 of the SEA specifically provides for "further development in the field of economic and monetary policy," with the members of the EC directed to "take account of the experience acquired in cooperation within the framework of the European Monetary System (EMS) and in developing the ECU. . . ." 25 I.L.M. at 512. See further Emerson, 1992 *and After: The Bicycle Theory Rides Again*, 59 THE Q. 289, 293-95 (1988).

48. One of the best known studies was the so-called Tindemans Report, which was submitted in January 1976. See 9 Eur. Comm. Bull. (Supp. 1/76). It called for increased cooperation on matters of foreign policy and defense, further development of a common monetary union, increased attention to the environment and consumer protection, and the establishment of a passport union. Despite its good intentions, little became of the Report. H. SMIT & P. HERZOG, 1 *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY* P-15 (1976 & 1988 Supp.). For a critical examination of the Tindemans Report, see Mitchell, *The Tindemans Report*, 13 COMMON MKT. L. REV. 455 (1976). See also Langeheine & Weinstock, *Graduated Integration: A Modest Path Towards Progress*, 23 J. COMMON MKT. STUD. 185 (1985).

49. The major differences, however, continued to concern the Common Agricultural Policy and the Community's budget.

50. Forwood & Clough, *The Single European Act and Free Movement: Legal Implications of the Provisions for the Completion of the Internal Market*, 11 EUR. L. REV. 383, 385 n.3 (1986).

51. Mr. Spinelli was also the founder, in 1980, of a group that came to be known as the "Crocodiles." The Crocodiles sought to overhaul the existing Community treaties with widespread reforms, including the development of a new treaty which finally would achieve the dream of true European unity. In opposition to the Crocodiles, a group known as the "Kangaroos" sprang up in the European Parliament. The Kangaroos were dedicated to a full implementation of the existing treaties, including finalization of the internal market. Lonbay, *The Single European Act*, 11 B.C. INT'L & COMP. L. REV. 31, 53-54 (1988).

52. 27 O.J. EUR. COMM. (No. C77) 33 (1984). For discussions about the TEU, see AN

terms of the TEU, the members of the Community were to be drawn into a tight political union; so tight that some observers began speaking of a United States of Europe.<sup>53</sup>

The TEU was approved by the Parliament on February 14, 1984, and immediately thereafter was submitted to the various members of the European Community for consideration. Even before this could be accomplished, however, the foreign ministers of Italy and West Germany developed the Genscher-Colombo Plan,<sup>54</sup> which, although similar to the Treaty of European Union, was not nearly as comprehensive. The Genscher-Colombo Plan generated little interest. It eventually was shelved following a polite statement of support entitled the "Solemn Declaration on European Union," which was issued by the Council at its meeting in Stuttgart in June 1983.<sup>55</sup>

Despite the failure of the Genscher-Colombo Plan, the Treaty of European Union soon ran into political trouble. At its June 1984 meeting in Fontainebleau, the Council formed an ad hoc group known as the Committee for Institutional Affairs and a second group, later known as the Adonnino Committee, to study further the subject of European cooperation.<sup>56</sup> In March 1985, the Committee for Institutional Affairs, which by now was being referred to as the Dooge Committee, generated a report<sup>57</sup> which recommended that rather than adopting an entirely new treaty, such as the TEU, an Inter-Governmental Conference (IGC) ought to be held to nego-

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EVER CLOSER UNION: A CRITICAL ANALYSIS OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION (R. Bieber, J. Jacque & J. Weiler eds. 1985); F. CAPOTORTI, M. HILF, F. JACOBS & J. JACQUE, *THE EUROPEAN UNION TREATY* (1986); Feld & Mahant, *New Efforts for European Union: Hopes, Progress, and Disappointments*, 10 J. EUR. INTEGRATION 39 (1986); Jacque, *The Draft Treaty Establishing the European Union*, 22 COMMON MKT. L. REV. 19 (1985); Lodge, Freestone & Davidson, *Some Problems of the Draft Treaty on European Union*, 9 EUR. L. REV. 387 (1984).

53. Winston Churchill used the term "United States of Europe" in a speech in 1947, but it is doubtful that he coined the phrase. One commentator has suggested that the term was in regular use by the time of World War II. See Everett, *Foreward*, 26 LAW & CONTEMP. PROBS. 347, 347 (1961).

54. The ministers named the Plan after themselves.

55. See Hendry, *Of Cabbages and Kings*, 8 EUR. L. REV. 394 (1984), and Weiler, *The Genscher-Colombo Draft European Act: The Politics of Indecision*, 6 EUR. INTEGRATION 129 (1983).

56. See Recent Developments, *Institutional Reform Under the Single European Act*, 3 AM. U.J. INT'L L. & POL'Y 299, 309 n.83 (1988).

57. *Id.* at n.84. The Dooge Report is notable in that it called for both structural and directional change. With respect to the former, the Dooge Report recommended increased power for the Commission, an expanded role for the Parliament, and a downgrading of the status of the Council. As to the latter, the Dooge Report called for intensified cooperation on numerous matters, including the environment, foreign affairs, defense, and social and cultural programs.

tiate modifications to the existing treaties.<sup>58</sup> At about the same time, the Adonnino Committee, having finished its investigation into the means available for making the peoples of Western Europe more aware and supportive of the European Community, released its report.<sup>59</sup>

The Dooge Committee's recommendations were studied by the Council during its June 1985 meeting in Milan where, as noted earlier, the White Paper drafted under the direction of Lord Cockfield also was studied. The effect of the two reports was the issuing of a call for an IGC to be held in Luxembourg in the fall of 1985. Although only seven of the ten members<sup>60</sup> initially supported the idea of holding such a conference, in the end representatives from all twelve states participated in the same meeting.<sup>61</sup>

In preparing for the IGC, the Council established two separate committees. One committee was charged with the responsibility of devising a plan for amending the Treaty of Rome to strengthen the

58. A word or two needs to be said about the Dooge Committee's call for an IGC, which was suggested following the Committee's careful review of both the Genscher-Colombo Plan and the TEU. See deZwinn, *The Single European Act: Conclusion of a Unique Document*, 23 COMMON MKT. L. REV. 747, 749 (1986). Under Article 236 of the treaty establishing the European Economic Community, see *supra* note 25, the Council, following consultation with the Parliament, and where appropriate the Commission, is empowered, through its president, to convene an IGC for the purpose of considering and adopting amendments to the economic community treaty. Article 204 of the EURATOM Treaty, *supra* note 24, is identical to Article 236 of the EEC treaty. However, Article 96 of the ECSC Treaty, *supra* note 23, is dissimilar to both Articles 236 and 204 because it was drafted six years earlier. While Articles 236 and 204 permit the Council, following consultation, to convene an IGC, Article 96 allows the Council to do so only if a two-thirds majority exists. Because the three communities, while interdependent, are legally separate, the IGC had to be called under all three treaties. See *supra* text preceding note 22. The ECSC Treaty's requirement of a two-thirds majority just barely was met. See *infra* note 60.

59. The Adonnino Committee report actually consisted of two separate reports. See 18 EUR. COMM. BULL. 7, 17 (Supp. 7/85), both of which later received Council approval. *Id.* at 15, 31. Although the Adonnino Committee reports failed to generate much enthusiasm, they contained numerous recommendations which already have found or are likely to find their way into the 1992 movement. Thus, for example, the reports called for the elimination of border checks, the universal recognition of university diplomas, greater cultural cooperation, establishment of a European Academy of Science, Technology and Art, increases in joint social programs, and the adoption of Community symbols (such as flags, banners, and anthems) to increase awareness among the peoples of the EC that they are citizens of both their homeland and the Community.

60. While Belgium, France, Ireland, Italy, Luxembourg, The Netherlands, and West Germany favored the idea of holding an IGC, Denmark, Greece, and the United Kingdom were opposed to the idea. See Lodge, *The Single European Act: Towards A New Euro-Dynamism?*, 24 J. COMMON MKT. STUD. 203, 208 (1986). Denmark continued to waver on the SEA following the conclusion of the IGC. See *supra* note 14.

61. Portugal and Spain, the eleventh and twelfth members of the European Community, officially joined the EC on January 1, 1986. See *supra* note 2. Nevertheless, they had been participating in the work of both the Council and Commission since July 1, 1985. See 18 BULL. EUR. COMM. (No. 6) point 2.2.2 (1985). As a result, they also were invited to the IGC.

economic unity of the Community. The other committee was given the task of drafting an entirely new Treaty of Political Cooperation with a View to a Common External Security Policy. The work of the two committees quickly melded, however, and as a result they submitted a combined economic-political draft when the conference was convened on September 9, 1985.

Because the conference opened with the submission of a single document, the delegates to the conference focused from the beginning on the idea that they would work towards adoption of a document which would at once strengthen the existing economic institutions of the Community while introducing unprecedented political coordination among the members of the EC. By early December this goal largely had been achieved, and the delegates found themselves in a position to vote. To underscore the fact that their efforts were directed at both the political and economic operations of the Community, they named their handiwork the Single European Act.<sup>62</sup>

Passage of the SEA had four immediate consequences. First, the TEU, and the idea of a new document which would address political matters, became a dead letter.<sup>63</sup> Second, the three existing treaties of the Community, each of which had been drafted to serve solely as an instrument of economic cooperation,<sup>64</sup> were saved as the basic documents of the European Community. Through the amendments contained in the SEA, these treaties were converted into far-flung political documents.<sup>65</sup> Third, increased political power passed from the members of the European Community to the European Community itself, particularly the Parliament.<sup>66</sup> Fourth,

62. See deZwann, *supra* note 58, at 753.

63. This greatly angered a large number of persons, who believed that the SEA was a gross political mistake which would actually undo many of the past achievements of the EC without any new benefits. For one such discussion, see Pescatore, *supra* note 15.

64. See *supra* note 22.

65. The SEA declares in Article 1 that it is based on the ECSC, EURATOM, and EEC Treaties, and on such Treaties and Acts as shall in the future amend or modify the Treaties. See 25 I.L.M. at 507. Nevertheless, except for certain changes in the Court of Justice, see *infra* note 81, which affect all three treaties, the SEA amends only the EEC Treaty, and leaves the ECSC and EURATOM Treaties intact. Thus, while Articles 4 and 5 of the SEA amend the ECSC Treaty and Articles 26 and 27 of the SEA amend the EURATOM Treaty, Articles 6-25 of the SEA amend the EEC Treaty. Article 1 of the SEA also recognizes several other earlier instruments with respect to the subject of political cooperation, including the Genscher-Colombo Plan discussed *supra* notes 54-55 and accompanying text.

66. A very good analysis of the shift in power created by the SEA is contained in Edward, *The Impact of the Single Act on the Institutions*, 24 COMMON Mkt. L. REV. 19 (1987). See also *infra* note 98.

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December 31, 1992 became the deadline for establishing an internal market.<sup>67</sup>

Before turning to an examination of those portions of the SEA which deal with the internal market, one other event must be noted. The entry of Greece into the Community in 1981 as well as Portugal and Spain in 1986 (following their active participation in the Luxembourg conference at the end of 1985) increased the disparity between the Community's richer members (Belgium, Denmark, France, Luxembourg, Great Britain, The Netherlands, and West Germany) and its traditionally less affluent members (Ireland and Italy).<sup>68</sup> In order to reverse this phenomenon, while helping the economies of the weaker Community members adjust to the challenge posed by the creation of the internal market, the Commission proposed the "Delors Package" in February 1987. The centerpiece of the Delors Package was a plan to double the structural funds, or economic development credits, of the Community.<sup>69</sup> This proposal was approved by the Council at its February 1988 meeting in Brussels after an intensive lobbying effort.<sup>70</sup> Acceptance of the Delors Package, it is hoped, has secured the future of the SEA.<sup>71</sup>

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67. See *infra* notes 73-86.

68. This disparity had led Willy Brandt, the former Chancellor of West Germany, to recommend in a speech he gave in Paris in November 1974 that the members of the European Community ought to be permitted to develop at different speeds in order to take into account the fact that their economies were at dissimilar stages in their growth. Commentators soon dubbed this suggested approach as being "two speeds" or "two tiers." Chancellor Brandt's idea, and the impact it would have if accepted, is considered further in Ehlermann, *How Flexible Is Community Law? An Unusual Approach to the Concept of "Two Speeds"*, 82 MICH. L. REV. 1274 (1984), and Grabitz & Langeheine, *Legal Problems Related to a Proposed "Two-Tier System" of Integration Within the European Community*, 18 COMMON MKT. L. REV. 33 (1981).

69. The structural funds of the European Community are actually three separate funds: the European Agricultural Guidance and Guarantee Fund-Guidance Section (EAGGF); the European Social Fund (ESF); and the European Regional Development Fund (ERDF). As their names suggest, the EAGGF assists projects designed to improve agricultural production, the ESF seeks to improve employment opportunities, and the ERDF attempts to redress the principal regional imbalances of the Community by directing monies to areas whose development is lagging behind that of the rest of the Community. In addition to these three funds, the Community also has a number of other financial arrangements, the best-known of which is the European Investment Bank, which makes loans to projects deemed to be of importance to the Community's development. Recognizing the importance of these arrangements to the eventual success of the internal market, the SEA, in Article 23, directs the Community to study and adopt such reforms in them as may be necessary. See 25 I.L.M. at 513. For a further discussion, see Croxford, Wise & Chalkley, *The Reform of the Regional Development Fund: A Preliminary Assessment*, 26 J. COMMON MKT. STUD. 25 (1987), and Lowe, *The Reform of the Community's Structural Funds*, 25 COMMON MKT. L. REV. 503 (1988).

70. See *The Delors Package: The Result of a Successful Commission Strategy*, 25 COMMON MKT. L. REV. 479 (1988).

71. See further Williamson, *The Package, "Making A Success of the Single Act"* 25

## II. THE SEA AND THE INTERNAL MARKET

The SEA consists of four titles and a total of thirty-four articles.<sup>72</sup> Of greatest importance for purposes of the internal market is Title II, Chapter II, Section II, Subsection I of the SEA, particularly Articles 13, 14, 15, 18 and 19.

Article 13 amends the Community treaties by adding Article 8A, which pledges that, "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . ."<sup>73</sup> Article 8A defines the internal market as being "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the Community's treaties]."<sup>74</sup> Although Article 8A sets December 31, 1992 as the deadline for realizing the internal market, this deadline is not a firm one because no penalties will be levied if the deadline is not met. This is made clear in the "Declaration on Article 8A," one of twenty such declarations annexed to the SEA at the time of its signing.<sup>75</sup> The Declaration on Article 8A states that:

The Conference wishes by means of the provisions in Article 8A to express its firm political will to take before 1 January 1993 the

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COMMON MKT. L. REV. 483 (1988).

72. The structure of the SEA is not a thing of beauty. Title I, which consists of Articles 1-3, lists common provisions. Title II, which contains four chapters, comprises Articles 4-29, and amends the ECSC, EURATOM, and EEC Treaties. Title III, which is Article 30 (but which is very lengthy and covers twelve paragraphs, many of which have their own sub-paragraphs), concerns European cooperation in the sphere of foreign policy. See Freestone & Davidson, *Community Competence and Part III of the Single European Act*, 23 COMMON MKT. L. REV. 793 (1986). Finally, Title IV, entitled General and Final Provisions, comprises Article 31-34. So as to avoid confusion throughout the rest of this article, an explanation must be given as to the numbering system found in Title II of the SEA. Because Title II amends the ECSC, EEC, and EURATOM Treaties by adding new articles to them, the SEA speaks in terms of where its amendments will fit into the affected treaty. By way of illustration, Article 26 of the SEA amends Article 140 of the EURATOM Treaty by adding a new Article 140A to the treaty. Thus, Article 26 of the SEA and Article 140A of the EURATOM treaty refer, although perhaps not in the strictest sense, to the same subject. One commentator has suggested that the reason for the unusual structure of the SEA is due to the desire of the drafters to "submerg[e the details of the SEA] in a flood of verbose vagueness." See Pescatore, *supra* note 15, at 15.

73. 25 I.L.M. at 510-11.

74. *Id.* at 511.

75. The twenty declarations include five declarations made by individual members of the EC (Denmark, Greece, Ireland, Portugal, and the United Kingdom), nine declarations on the amendments made by the SEA to the EEC treaty, one declaration on the Court of Justice, two declarations on Title III of the SEA, one declaration on border controls (particularly with respect to the movement of drugs, weapons, and stolen works of art), and two declarations on the Council and the Commission. See 25 I.L.M. at 504-05. Whether the declarations have any legal effect is an open question. See Tothe, *The Legal Status of the Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803 (1986).



decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market. Setting the date of 31 December 1992 does not create an automatic legal effect.<sup>76</sup>

In order to compensate for the weaknesses of Article 8A, Articles 18 and 19 add, respectively, Articles 100A and 100B to the treaties.<sup>77</sup> Article 100A(1) permits the Council, acting by qualified majority, to attempt to harmonize the disparate national laws of the EC members. It should be carefully noted, however, that paragraph 2 of the Article 100A exempts fiscal, travel, and employment matters from the scope of Article 100A.<sup>78</sup> It also should be noted that paragraph 4 of Article 100A permits any member of the EC to refuse to accept any harmonization measure adopted by the Council if national conditions require such rejection.<sup>79</sup> In the event of a rejection, however, the Commission is authorized by paragraph 4 to investigate whether the rejection is justified.<sup>80</sup> Disputes as to whether a particular rejection is proper are to be submitted to the restructured<sup>81</sup> Court of Justice.<sup>82</sup>

Because it is likely that complete harmonization will not occur by the 1992 deadline, Article 100B directs the Commission during 1992 to "draw up an inventory of national laws, regulations and administrative provisions which are subject to Article 100A and which have not been harmonized[.]"<sup>83</sup> Article 100B then goes on to state that the Council "may decide that the provision in force in a Member State must be recognized as being equivalent to those ap-

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76. 25 I.L.M. at 504.

77. *Id.* at 511-12.

78. *Id.* at 512. The decision to exclude these critical areas from the purview of Article 100A, while no doubt an important factor in getting the SEA passed, will clearly make it more difficult to arrive at a true internal market.

79. *Id.*

80. *Id.*

81. Article 4 of the SEA authorizes the creation of a new Court of First Instance within the ECJ. *See* 25 I.L.M. at 508. Although the new court has not yet been established, the ECJ has requested that the court be set up as soon as possible. *See* 51 COMMON MKT. L.R. 185 (1988). While the powers of the new court will be less extensive than that of the ECJ, it is expected to have a significant impact on the speed with which the ECJ disposes of cases. For a further discussion of the new court, *see* Perrott, *European Communities*, 22 INT'L LAW. 1227, 1227-28 (1988), and Schermers, *The European Court of First Instance*, 25 COMMON MKT. L. REV. 541 (1988).

82. 25 I.L.M. at 508. What the exact effect of Article 100A(4) will be, and how often the members of the EC will make attempts to use it remains to be seen. Many of the questions which are likely to arise with respect to the operation of Article 100 A(4), however, are thoroughly reviewed in Flynn, *How Will Article 100A(4) Work? A Comparison with Article 93*, 24 COMMON MKT. L. REV. 689 (1987).

83. 25 I.L.M. at 512.

plied by another Member State.”<sup>84</sup> Thus, where true harmonization cannot be achieved, the SEA permits the Council to simply deem harmonization to exist by making a finding of “equivalence.”<sup>85</sup>

Articles 14 and 15 of the SEA complete the task of setting a legislative framework for the achievement of the internal market. Article 14 amends the treaties by adding Article 8B. Article 8B directs the Commission to report to the Council before the end of 1988 and again before the end of 1990 on the progress being made towards achieving the internal market by 1992.<sup>86</sup> It also authorizes the Council, acting by a qualified majority, to determine the guidelines and conditions necessary to ensure that “balanced progress” is being made.<sup>87</sup>

On its face, Article 8B’s authorization of qualified majority voting hardly seems startling. Yet it certainly represents, if not a revolution in Community thinking, tacit acknowledgement of the evolution of Community practice.<sup>88</sup> To those unfamiliar with the history of the EC, a word of explanation is needed to place Article 8B in its historical perspective. Since the Luxembourg Compromise of 1966,<sup>89</sup> any member of the Community has been able to prevent

84. *Id.*

85. For a further discussion of the subject, see Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25 J. COMMON MKT. STUD. 249 (1987).

86. 25 I.L.M. at 511.

87. *Id.*

88. From 1951 through 1965, the Community never acted except by unanimous agreement. Following a crisis in 1965 involving French farming interests, see *infra* note 89, the Community began to make decisions by so-called “qualified majorities,” although during the period 1966-74 less than a dozen such decisions were made. J. DE RUYT, *L’ACTE UNIQUE EUROPÉEN* 116 (1987). Between 1974-79, the number of qualified majority decisions more than tripled, to 35. *Id.* By 1980-84, a total of 90 decisions were the product of qualified majorities. *Id.* One reason for the growth in the use of the qualified majority, of course, has been the expansion of the Community from six members in 1966 to ten members between 1981-83 (and twelve members since 1986).

89. The Luxembourg Compromise ended a crisis within the Council which had begun in June 1965. During that month, the Community for the first time was unable to reach a unanimous decision, due to France’s refusal to go along with the other five members of the Community on a creative plan dealing with the Common Agricultural Policy, customs proceeds, and the powers of the Parliament. Asserting that its vital national interests were being prejudiced, France walked out of the Council and refused to return for seven months. As a result, the Community became paralyzed and was unable to move forward on a wide variety of critical matters. The crisis finally was resolved on January 29, 1966, when the Council agreed to seek unanimity on all subjects which did or could prejudice the vital interests of any member. Unfortunately, the Compromise neither established a definition of vital interests nor did it set up a procedure for how to proceed if a deadlock developed. Accordingly, unanimity became the order of the day within the Council, thereby reducing the effectiveness and efficiency on the Council on both large and small matters. See Nicoll, *The Luxembourg Compromise*, 23 J. COMMON MKT. STUD. 33 (1984). Because the Compromise was never reduced to a formal agreement, and was the result of political blackmail, at least one former judge of the Court of Justice has argued that it “is not a valid part either of Community or

the Council from acting by pleading that the subject touches upon a "vital national interest" of the country seeking to block the vote. This veto power, which has proven very damaging to the Council's ability to act on sensitive matters,<sup>90</sup> is eliminated by Article 8B on issues affecting the internal market. In its place, the SEA substitutes a qualified majority or weighted voting procedure under which votes are apportioned by the size of each Community nation. Thus, only a group of nations will be able to block action as the internal market moves from dream to reality.<sup>91</sup>

Finally, Article 15 adds Article 8C to the treaties. Article 8C permits what are termed "derogations," or exceptions, to be made for individual countries if their development requires them to proceed at a pace slower from or different than the other members of

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International Law." Pescatore, *supra* note 15, at 13 n.1. Despite the end of the crisis, France, under the leadership of Charles de Gaulle, continued to refuse to cooperate with other Western powers; she soon withdrew from the North Atlantic Treaty Organization (NATO), forced American troops to leave France, and caused the high command of NATO to move its headquarters from France to Belgium. For an examination of de Gaulle's adverse influence on the Community, see Rusk, *Perspectives on European Unification*, 37 LAW & CONTEMP. PROBS. 221, 222-23 (1973).

90. Partially as a result of the Luxembourg Compromise, for example, efforts to move forward on the internal market proved nearly impossible. DE RUYT, *supra* note 88, at 113.

91. There are a total of 76 votes on the Council of which France, Italy, the United Kingdom, and West Germany each have 10 votes, Spain has 8 votes, Belgium, Greece, The Netherlands, and Portugal have 5 votes, Denmark and Ireland have 3 votes, and Luxembourg has 2 votes. Since it requires 54 votes to have the Council act affirmatively on a Commission proposal, a minimum of three countries (assuming that at least two of the countries come from among the Big Four and the third country is not Luxembourg) must vote against the proposal for it to fail. However, if all four of the big four vote in favor of the proposal, at least three other countries (and in some circumstances more than three others if one of the three is Luxembourg) would still be needed to vote yes. See Recent Developments, *supra* note 56, at 301 n.14.

Because of the composition of the Council and the distribution of votes among the EC, it has been suggested that the shape of the internal market will depend on how effectively blocking techniques are utilized:

The real game as the council gets into the more controversial bits of 1992 legislation will be less about forming majorities than about putting together minorities. With 23 votes against, a draft directive is thrown out. It takes only two of the big four countries plus any other (except Luxembourg, which is too small) to thwart a proposed law.

Consider how the game might work. At some time in the next two years the council will have to vote on ending national quotas on imports of Japanese cars. The toughest restrictions are imposed by Italy, Spain and France. If the commission seems too generous to Japan in its proposals, Italy and France will vote against them. Spain may hesitate; it is a base for Japanese investments in Europe and wants to attract more. So France and Italy would be looking for another partner. This other country (Greece? Portugal?) could choose to sell its support to France and Italy in return for a commitment by them to join it in blocking a piece of 1992 legislation it does not like. Since there are still 150-odd directives to go, the choice is wide.

*The Powers That Be*, THE ECONOMIST, Feb. 25, 1989, at 49, 50.

the Community.<sup>92</sup> Such derogations, however, are frowned upon and, if made, "must be of a temporary nature and must cause the least possible disturbance to the functioning of the common market."<sup>93</sup> Thus, while not actually accepting the idea of a "two-speed" Europe,<sup>94</sup> the SEA recognizes that allowances will have to be made for the disparate stages of development in which the EC's members currently find themselves.

Although Articles 13-15 and 18-19 are the primary articles for purposes of the internal market, the SEA makes other changes within the Community which will affect the internal market. Chief among these are: 1) obligating the Community to the objectives of increased "economic and social cohesion," a phrase which is understood as meaning that the nations of the Community will diminish the uneven economic development of the Community's various geographical regions;<sup>95</sup> 2) joining the member states in a common research and technological development policy,<sup>96</sup> and 3) promising renewed development of the European Monetary System.<sup>97</sup> The SEA also increases the power of the Parliament, one of the strongest supporters of the SEA,<sup>98</sup> and pledges coordination among Community members on issues affecting the environment.<sup>99</sup>

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92. 25 I.L.M. at 511.

93. *Id.*

94. *See supra* note 68.

95. Article 23 of the SEA adds a new Part Three to the EEC Treaty, which states that "the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions." *See* 25 I.L.M. at 513.

96. Article 24 of the SEA states that the Community shall seek to encourage European industry so that it will be more competitive at the "international level." *Id.* at 514-15.

97. *See supra* note 47.

98. Under Article 7 of the SEA, the Parliament is for the first time given an opportunity to review Commission recommendations and is also given a method of considering proposed Council action on the recommendations. *See* 25 I.L.M. at 509-10. Usually referred to as "Cooperation," this new procedure significantly increases the powers of the Parliament, albeit only with respect to matters arising under the EEC Treaty, since Article 7 does not extend to either the ECSC Treaty or the EURATOM Treaty. Because of the rather complex and detailed procedures laid out by Article 7, the reader is referred to Bieber, Pantis & Schoo, *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767 (1986), and Fitzmaurice, *An Analysis of the European Community's Co-operation Procedure*, 26 J. COMMON MKT. STUD. 389 (1988), for a further discussion. *See also* Edward, *supra* note 66, at 24-26, and Recent Developments, *supra* note 56, at 310-12. The Parliament has taken its new powers very seriously, with attendance at its plenary sessions having increased by more than 30% since passage of the SEA. *See Credibility Before Democracy*, THE ECONOMIST, Feb. 11, 1989, at 46.

99. Article 25 of the SEA adds new language to the EEC Treaty regarding the SEA, and commits the Community to "preserve, protect and improve the quality of the environment." *See* 25 I.L.M. at 515. At the same time, Article 18 of the SEA directs the Commission, in drafting proposals which concern environmental protection, to "take as a base a high level of protection." *Id.* at 512. For a further discussion of environmental policy under the SEA, *see* Kramer, *The Single European Act and Environmental Protection: Reflections on*

### III. THE INTERNAL MARKET AND FOREIGN TRADE

Since the passage of the SEA, commentators and businessmen alike have been divided over the precise effects that the SEA will have on foreign traders and investors.<sup>100</sup> Some have predicted that the SEA will open the EC to increased trade and investment from the outside.<sup>101</sup> Others have argued that the SEA will cause the members of the EC to erect new barriers, thereby turning the EC into an impenetrable fortress.<sup>102</sup> Although reasonable arguments can be put forth in support of either position, sooner or later the EC will have no choice but to raise up the drawbridge and become a fortress. In order to understand why this is so, it is necessary to understand the political, cultural, and economic price which the SEA requires be paid by the Community's members as 1992 draws closer.

Compliance with the SEA will require wholesale changes to be made in the political structures and institutions of Western Europe. In order to achieve a true internal market, the members of the European Community, at a minimum, will have to eliminate all trade barriers, harmonize their legislative, administrative and taxation policies, and increase their cooperation on monetary and fiscal matters.<sup>103</sup> To achieve this, it will be necessary for each country within

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*Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659 (1987), and Vandermeersch, *The Single European Act and the Environmental Policy of the EEC*, 12 EUR. L. REV. 407 (1987).

100. Former Secretary of Defense Caspar W. Weinberger, for example, has written: Within three years, American business will face new marketing conditions in one of our largest markets—conditions that may make it vastly more difficult to maintain the current volume of goods sold, or that could mean substantially increased opportunities for more sales with much less cost. The choice is largely up to Europe and the way in which the new Common Market is administered after the critical date of 1992.

Weinberger, *The Common Market—Friend or Foe?*, FORBES, Mar. 6, 1989, at 31 [emphasis in original].

101. The advent of the internal market could make it easier and more profitable for foreign companies to do business in the Community because of the plan to eliminate tariff and trade barriers, harmonize regulations and standards, and reduce paperwork. One commentator has written: "[t]he S.E.A. will be a commercial magic wand that simplifies procedures for U.S. companies exporting to the EC. The rules will be the same for all 12 European countries as they are for one—whether that one is West Germany, or Greece, or Great Britain." Keeble, *True Unity at Last? A Plus for U.S. Firms—If Reality Reflects Rules*, INDUS. WK., Sept. 21, 1987, at 21.

102. See, e.g. Shapiro & Sherrid, *Building 'Fortress Europe'? The Big Question Is Whether External Walls Will Get Higher in 1992*, U.S. NEWS & WORLD REP., Feb. 29, 1988, at 42. See further *infra* notes 119-30 and accompanying text.

103. According to one expert, the Community will have to eliminate border controls, allow increased immigration and emigration rights, recognize foreign diplomas, harmonize indirect taxation regimes, establish a common legal framework, lift existing controls on capital and financial investment services, deregulate the service sector of the various national

the EC to surrender large portions of its sovereignty to the Commission, the Council and the Parliament.<sup>104</sup> Adjusting to this shift in power and focus will be very hard for the nations of the EC, each of whom have a long tradition of political independence.<sup>105</sup>

Second, because a true internal market requires the elimination of all differences between member countries, each nation in the EC will be required to give up or compromise on deeply-held cultural values, such as Denmark's insistence on strict environmental standards<sup>106</sup> and West Germany's commitment to a strong labor union system.<sup>107</sup> These values will be replaced by a single, uniform stan-

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economies, adopt standard regulations, particularly in technical areas, and open bidding for government contracts to nationals of other EC countries. CALINGAERT, *supra* note 5, at 38-61.

104. This fact is beginning to be realized by national political leaders. A recent news report summed up the situation within the Community in the following manner:

Yet, increasingly, Mr. Delors lacks the enthusiastic, overt support he once enjoyed in Bonn and Paris for this grand design. In other capitals, politicians are realizing, too, that the sum of the details of the 1992 undertaking means the surrender of large chunks of sovereignty to Brussels [where the Commission is headquartered].

Markham, *Europe, Facing Tougher Decisions, Now Cautious on A Single Market*, N.Y. Times, Mar. 11, 1989, at 1, col. 3 (nat'l ed.).

105. For a commentary which suggests that this goal simply cannot be met due to jealousy, mistrust, greed, and the forces of history, see Lee, *supra* note 44. See also CALINGAERT, *supra* note 5, at 34-37.

106. One reason why Article 18 of the SEA directs the Commission, when considering environmental protection legislation, to start at a high base, was the desire to ease the fear of the Danish delegation that their anti-pollution standards, the highest in the Community, would be compromised by the Commission. See *supra* note 99. Despite the wording of Article 18, however, the Danish government felt compelled at the time of signing the SEA to include a Declaration which specifically addresses the subject. The Declaration by the Government of Denmark on Article 100A of EEC Treaty states:

The Danish Government noted that in cases where a Member State is of the opinion that measures adopted under Article 100A do not safeguard higher requirements concerning the working environment, the protection of the environment or the needs referred to in Article 36, the provisions of Article 100A(4) guarantee that the Member State in question can apply national provisions. Such national provisions are to be taken to fulfil [sic] the abovementioned aim and may not entail hidden protectionism.

25 I.L.M. at 505. As has been pointed out by an official of the Commission, the Danish declaration assumes "that the Member State, and not the Community legislator, has the last word on Article 100A(4)." Kramer, *supra* note 99, at 681.

107. See Protzman, *Affluent German Unions Fear 1992*, N.Y. Times, Mar. 8, 1989, at 29, col. 3 (nat'l ed.). While German labor unions have been an accepted part of German industrial life since the late 19th century, and have gained an influential position in West German politics, the same is not true of labor unions in other countries within the Community. West German unions, for example, get paid an average of \$18.17 per hour, the highest in the Community, compared with just \$2.96 per hour for Portuguese union members. *Id.* West German unions work an average of 1,716 hours per year (or 33 hours per week), the fewest hours in the Community, compared to 2,025 hours per year in Portugal (an average of 39 hours per week). *Id.* Finally, West German unions receive 30 vacation days each year, the second highest in the Community (after The Netherlands), against just 22 days per year for Portuguese union members. *Id.* This disparity in wages has led Ernst Breit, the chairman of the large West German trade union group Deutsche Gewerkschaftsbund, to ask: "Will the

dard, except where a member is able to invoke Article 100A(4).<sup>108</sup> As a result, the unique cultural differences which always have marked the countries of the EC will be swept aside despite centuries of development.<sup>109</sup>

Finally, the completion of the internal market will deprive countries of the EC of their power to protect struggling, nascent and embryonic industries. As a result, the industrial sector of each country will suffer, to a greater or lesser degree, from the introduction of competition which in the past has been kept out by national legislation. Thus, past attempts to build up or to prop up key sectors of the national economy<sup>110</sup> will now be torn down as unrestrained competition is permitted to occur within the Community for the first time.<sup>111</sup> Chief among the casualties will be national procurement contracts, which for decades have assured steady work for large portions of the local populace.<sup>112</sup>

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completion of the integrated market lead to a worsening, a weakening or even a dismantling of rights and social protection? Will the conditions we have be reduced to some European average?" *Id.* See further *infra* note 114.

108. See *supra* notes 79-82 and accompanying text.

109. Danish environmental standards and West German labor unions are not the only cultural values which risk being lost in the drive towards 1992. British animal breeders, for example, are worried that if frontier barriers are dismantled, rabies and hoof-and-mouth disease will be spread from the Continent to the United Kingdom, thereby endangering the health of their pets. See Sullivan, *Who's Afraid of 1992? The European Community is Beginning to Face Up to a Fateful Year*, NEWSWEEK, Oct. 31, 1988, at 32. At the same time, soccer clubs, particularly those in the United Kingdom, are concerned that after 1992 Italian and Spanish clubs will dominate the sport because their large budgets will allow them to hire away the best players of other EC teams, who will be unable to stop their stars from leaving due to the liberalized work and emigration rules which will prevail. See *Not Sporting*, THE ECONOMIST, May 7, 1988, at 68.

110. A list of such efforts can be found in *They've Designed the Future, and It Might Just Work*, THE ECONOMIST, Feb. 13, 1988, at 45. See also Chesnoff & Wolf, *supra* note 4; Lee, *supra* note 44; Sullivan, *supra* note 109.

111. Articles 30-36 and 85-86 of the EEC Treaty specifically outlaw artificial restraints on trade. See generally B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (2d ed. 1985). Nevertheless, national legislation within the EC has always favored domestic concerns at the expense of those located in other EC countries. For detailed examinations of such legislation, see Mattera, *Protectionism Inside the European Community*, 18 J. WORLD TRADE L. 283 (1984), and van Thematt & Gormley, *Prohibiting Restriction of Free Trade Within the Community: Articles 30-36 of the EEC Treaty*, 3 NW. J. INT'L L. & BUS. 577 (1981).

112. Without a doubt, the liberalization of bidding rules for government contracts will be the most difficult change to swallow for the members of the EC, whose heavily nationalized economies, particularly in the defense field, have for decades provided a steady source of work and revenue for their citizens. According to one estimate, while government contracts amount to 20% of all economic activity in the Community today, just 2% of such contracts go to companies from countries other than the country which is the contracting party. See Chesnoff & Wolf, *supra* note 4, at 40. For an examination of the Community public procurement policies and how they will likely have to be changed to comply with the SEA, see Hartley, *Public Procurement and Competitiveness: A Community Market for Military Hardware and Technology?*, 25 J. COMMON MKT. STUD. 237 (1987). See also *Where Habits*

These, of course, are stiff prices to pay, as is well recognized by the leaders of the 1992 movement. As a result, they have attempted to sell EC members on the idea that in return for giving up their political independence, cultural values, and ability to protect key industries, they will be rewarded with increased economic growth and decreased unemployment. Yet, even the SEA itself recognizes that the growth which is likely to be experienced will be uneven and may benefit some countries at the expense of others,<sup>113</sup> while the drop in unemployment will, at least initially, be slow or non-existent.<sup>114</sup> While in time the imbalance in the exchange between what individual countries have been forced to give up and what the EC as a whole has gained will correct itself (for if it does not, the SEA will be judged a failure and will be scrapped) in the short run the imbalance will be both large and politically explosive. That this is true is seen in the strong backlash against the SEA which has begun to develop in almost every member of the EC<sup>115</sup> and which from the beginning has been spearheaded by the United Kingdom.<sup>116</sup>

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*Are Dying Hard*, THE ECONOMIST, July 9, 1988, at S29.

113. See *supra* notes 92-95 and accompanying text.

114. Unemployment actually will increase in some EC countries as a result of the internal market, because employers will find it profitable to relocate to those countries in the EC which have the lowest production costs, principally Spain and Portugal. As a result, "jobs will disappear in the north to reappear in the south, and countries with better working conditions or worker protection will have to lower their standards to compete. . . . The motor industry has already seen companies like Ford invest heavily in Spain as an export base for the European market." *But What About the Workers?*, THE ECONOMIST, July 23, 1988, at 46.

115. For a review of the backlash movement in the various countries of the EC, see Markham, *supra* note 104 (reporting that "anti-1992 backlash" has been "incorporated into [the] workday jargon" of the Commission and its staff and that striking turnarounds have taken place in both France and West Germany). See also Markham, *When Europe's Walls Tumble, Who'll Rush In?*, N.Y. Times, Mar. 21, 1989, at 4, col. 3 (reporting on the anti-1992 efforts of Alain Minc, a French businessman who has written a book entitled "The Grand Illusion," which argues that the creation of the internal market will provide vast flights of capital and a weakening of northern welfare systems as businesses relocate to the poorer regions of the EC, particularly Portugal and Spain).

116. For a detailed look at why the British are so deeply worried about 1992, see Campbell, *The Single European Act and the Implications*, 35 INT'L & COMP. L.Q. 932 (1986). Prime Minister Margaret Thatcher's opposition to the SEA reached a high point on September 20, 1988, when, in a speech at the College of Europe in Bruges, Belgium, she declared that: "We have not successfully rolled back the frontiers of the state in Britain only to see them reimposed at a European level, with a European superstate exercising a new dominance from Brussels." See Sullivan, 'Genghis Kahn' in Belgium, NEWSWEEK, Oct. 3, 1988, at 34, and *Just One Big Open Family*, THE ECONOMIST, Sept. 24, 1988, at 61. Mrs. Thatcher's remarks were prompted by the midsummer remarks of Jacques Delors, the president of the European Commission, in which he predicted that: "in ten years' time 80% of economic, and perhaps social and tax, legislation will be of Community origin." See *Whoa, Europe*, THE ECONOMIST, Nov. 5, 1988, at 11. Nevertheless, in a report released at the beginning of 1989, the pro-1992 Centre for European Policy Studies in Brussels has called



In order to maintain the momentum towards 1992 and to stave off the potentially crippling effects of the backlash movements, the leaders of the internal market movement have had no choice but to find something else to offer to their member countries so as to make the exchange more palatable.<sup>117</sup> Because appeals to European pride have never been successful,<sup>118</sup> the leaders of the internal market movement have had to look elsewhere. The sweetener, it has turned out, is a pledge that foreign investors and traders will be kept out of the internal market for at least as long as it takes for every member of the EC to realize advantages from the internal market. Thus, the leaders of the internal market have guaranteed that Western Europe will become a fortress.<sup>119</sup>

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for the Council to evolve into a "provisional government of Europe." *See To Be Precise, We Don't Know*, THE ECONOMIST, Jan. 28, 1989, at 48.

Since her Bruges speech, Mrs. Thatcher has tied her personal political future to maintaining Britain's independence within the EC, thereby making the 1992 movement into a domestic British political issue. *See Interesting at Last*, THE ECONOMIST, Feb. 18, 1989, at 59. Although this has caused many pro-internal market forces to denounce Mrs. Thatcher as a roadblock to 1992, others believe that she is merely a symptom of the deep misgivings which the EC's members have about the SEA. *See, e.g., Excuse Me, Is This The Right Bus?*, THE ECONOMIST, Dec. 17, 1988, at 51, 52 ("Those who berate Mrs. Thatcher for her hostility to European integration have missed this point. If Mrs. Thatcher were not there somebody else would be: less shrill, perhaps, but driven by the same homegrown imperatives.").

117. An important factor which is helping to keep the SEA alive is the enormous amount of energy, time, and prestige which Jacques Delors, who some call "the father of 1992," has invested into making the internal market a reality. A recent profile of Mr. Delors stated:

The president of the European Commission, Mr Jacques Delors, has set himself up as Mr 1992. The way he doled out the jobs among his 16 colleagues [there are 17 commissioners] in the new commission which takes over on January 6th [1989, for a term of four years, or through the end of 1992] leaves him with no rival. The task of creating the seamless EEC market by the end of 1992, previously held by Lord Cockfield [the author of the White Paper] of Britain, [who was not returned to the Commission on the orders of Prime Minister Thatcher] has been split three ways. Responsibility for it all lies with Mr Delors.

*The Team 1992*, THE ECONOMIST, Dec. 24, 1988, at 56. As such, Mr. Delors will do whatever is necessary to move 1992 along. As an example, the same profile noted:

Mr Delors's toughest fight was to keep Mr Manuel Marin, the senior Spanish commissioner, away from control over the Community's budget. Mr Marin . . . had set his heart on the post . . . as a way of directing Community spending towards programmes of interest to Spain. . . .

Mr Delors bought off Mr Marin. In exchange for the budget portfolio, Mr Marin settled for overseas development plus fisheries. . . . Spain has the EEC's largest fishing fleet, and Spanish fishermen are considered more than a bit cavalier about rules by their Breton, Irish and British colleagues. For them, giving fisheries to Mr Marin is like putting a robber in charge of the crown jewels.

*Id.* at 57. For a further discussion of the importance of fishing matters to Spain, *see Recent Developments*, *supra* note 2, at 252-53.

118. The Luxembourg Compromise, discussed *supra* note 89, is just one example of how appeals to pan-European unity have failed in the past. For a further discussion set in the context of 1992, *see Lee*, *supra* note 44.

119. This, in fact, is already the official line of the Commission: "The European Commission itself, when it drafted its blueprint for 1992, said that EEC firms, not outsiders,

#### IV. THE SHAPE OF FORTRESS EUROPE

Fortress Europe is beginning to take shape. Its moat is being filled, its drawbridge is being lifted, and its walls are being cemented together. Even as the Commission proclaims that foreigners will not be prejudiced after 1992,<sup>120</sup> disturbing signs of protectionism are in evidence everywhere throughout the EC.<sup>121</sup>

Because the White Paper sets a timetable for proposals which does not end until 1991,<sup>122</sup> it is not yet possible to measure the extent to which Europe will be closed to outsiders. It is also impossible to say exactly how foreigners will be kept out, due to the wide latitude which is given to member countries under the EC's directive system.<sup>123</sup> It is possible, however, to sketch out the various op-

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should be the main beneficiaries." *The Back Door Is Still Open*, THE ECONOMIST, Feb. 13, 1988, at 46. Similarly, it has been written that:

As the 1992 deadline approaches, the Europeans are likely to move further to protect their own companies and penalize outsiders. The reason: Politicians and business leaders in nearly all 12 EC nations believe that the early winners of 1992 could be U.S. and Japanese multinationals with global marketing and manufacturing clout. To prevent that, the Europeans are developing complex rules to keep foreign business at bay. . . .

Rierner, Heard & Peterson, *Laying the Foundation for a Great Wall of Europe*, BUS. WK., Aug. 1, 1988, at 40. Even observers inside the EC admit that such a quid-pro-quo is in the works:

Individual EEC countries now realise that they will have to make traumatic concessions of sovereignty to put the mighty market together. It is tempting for the European Commission to overcome their reluctance with "transitional" European protectionism. Later, the Commission will explain that these measures must, alas, remain permanent because of the weight of the political interest vested in them.

*The Shape of Europe's Trade*, THE ECONOMIST, Sept. 3, 1988, at 13. See also Meyer, *Storming 'Fortress Europe': U.S. Companies Brace for the Fallout of '1992'*, NEWSWEEK, Nov. 7, 1988, at 82 (reporting on the largely unsuccessful efforts of the Reagan Administration to keep the EC from erecting trade barriers as part of its drive to 1992).

120. Former U.S. Trade Representative (now Secretary of Agriculture) Clayton Yeutter has summed up the state of affairs within the EC by saying: "My European counterparts say, 'No, no, a thousand times no—we have no desire to be protectionist,'. . . Unfortunately, people in the bureaucracy are drafting regulations that move in a counterdirection." *Id.*

121. These signs have become so clear that they have become a matter of great concern not only for the United States, Japan, and other non-European countries, but also for European countries not part of the EC. Thus, for example, talk has begun in Austria, Norway, Sweden and a number of other European countries on whether they should join the EC. See Marshall, *Europe Reaches for a Postwar Dream—Unity*, L.A. TIMES, Mar. 12, 1989, pt. 1, at 1, col. 5. Perhaps the greatest problem is faced by Switzerland, whose long history of refusing to enter into alliances, coupled with heavy economic dependence on trade with the EC, stands to make it the biggest 1992 loser of all. For an examination of Switzerland's dilemma, see Saint-Ouen, *Facing European Integration: The Case of Switzerland*, 26 J. COMMON MKT. STUD. 273 (1988).

122. See *supra* note 38.

123. Although the Council can work through regulations, directives, or decisions, it is assembling the internal market by issuing directives. A directive informs member States as to the result they must accomplish, but leaves it to the Member to determine how it will achieve the stated goal. The directive system is reviewed in Timmermans, *Directives: Their*

tions which are at the disposal of the Community. The ones most likely to be used are: 1) import quotas; 2) reciprocity requirements; 3) local content standards; 4) minimum direct investment targets; 5) market segment insulation policies; and 6) domestic company definitions.<sup>124</sup>

Import quotas, as their name suggests, will restrict access to the EC by foreign companies by permitting only a certain number of foreign-made items to enter the EC during any given period. Such quotas primarily will be used to keep out foreign-made cars.<sup>125</sup> Reciprocity requirements will restrict foreign companies from doing business in the EC to the extent that restrictions are placed on EC companies. They are most likely to be applied to foreign banks and securities houses.<sup>126</sup> Local content standards will require that each

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*Effect Within the National Legal System*, 16 COMMON MKT. L. REV. 533 (1979). For a comparison of regulations, directives, and decisions, see LASOK & BRIDGE, *supra* note 27, at 113-30.

124. A useful summary of these options can be found in Riemer, Heard & Peterson, *supra* note 119.

125. The pinch of this regulation is expected to be felt most strongly by Japan, whose automotive giants may find it more difficult to import their products into the EC after 1992. At the present time, both France and Italy drastically limit the number of foreign cars which can be imported into their markets. As a result, Japanese car makers control just 2.9% of the French and 0.7% of the Italian market. *Vrrrm for Competition*, THE ECONOMIST, Feb. 1988, at 48. In West Germany, which does not have such controls, Japanese cars account for 14.8% of the market. *Id.* As pointed out in the example given *supra* note 91, France and Italy are expected to push for a Community-wide limit on foreign cars. American car makers are expected to hold their own after 1992 because General Motors and Ford established long ago substantial manufacturing operations in the EC. For an examination of how American automobile manufacturers will fare, see CALINGAERT, *supra* note 5, at 102-04. In addition to cars, quotas likely will be imposed on textiles and footwear. *Id.* at 83-84.

126. American banks could be affected significantly by such reciprocity rules because of the EC's unhappiness with United States interstate banking laws, which generally limit banks to operating in only one state. If reciprocity becomes a reality, American banks would be frozen out of the EC because the United States banking rules would not be considered as extending reciprocal rights to EC banks. See Rockwell, *U.S. Banking Laws May Draw EC Fire*, J. COM., Mar. 15, 1989, at 3A, col. 5 (reporting that Francisco Fernandez Ordonez, the current president of the Council, has said that reciprocity should be denied to the United States unless the licenses given to European banks permit them to operate throughout the United States). Although reciprocity has not yet been adopted by the EC, it is clearly moving in that direction. The so-called Second Banking Directive, which was proposed by the Commission on June 24, 1988, and which currently is before the Parliament awaiting comments, contains strict reciprocity requirements. For discussions about the Second Banking Directive, see Fine, *The Second EEC Banking Directive: A Practical Overview*, 3 J. INT'L BANKING L. 53 (1988); Zavvos, *The Integration of Banking Markets in the EEC—Second Banking Co-ordination Directive*, 3 J. INT'L BANKING L. 197 (1988); Note, *Toward A Single European Capital Market: The European Economic Community's Directive to Liberalize Capital Flows*, 20 L. & POL'Y INT'L BUS. 139 (1988). See also CALINGAERT, *supra* note 5, at 104-06 (concluding that a failure to extend reciprocity to American banks would place their competitive position at risk).

As one of the first (if not the first) battle between the EC and the United States in the move to establish the internal market, the fight over reciprocity should be studied carefully by all American businesses for it is likely to be a harbinger of things to come. As one com-

foreign-made product sold in the EC either contains a certain percentage of EC-component parts or is assembled in the EC, or both. Such standards could be applied to a wide variety of consumer items.<sup>127</sup>

Minimum direct investment targets will obligate foreign companies to locate at least some operations within the EC if they wish to do business in the EC. The computer industry is expected to feel the brunt of such targets.<sup>128</sup> Market segment insulation policies will place certain key industries beyond the reach of foreigners by prohibiting such industries from dealing with non-EC businesses. Such policies are likely to be applied to the telecommunications industry.<sup>129</sup> Finally, domestic company definitions will classify com-

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mentator has put it:

The lesson to be learned by non-EEC companies and banks from the Commission's foray into banking liberalization is a prosaic one: The true objectives and effects of 1992 are not revealed in the vaguely reassuring press releases of the Commission, but rather, in the fine print of the legislative proposals themselves. For third country manufacturers, banks and other businesses, this is where the battle for a piece of the EEC internal market will be fought.

Fine, *EEC Banking Liberalization: Who Are the Real Beneficiaries?*, 7 INT'L L.Q. 5, 7 (Mar. 1989)(newsletter of the International Law Section of The Florida Bar).

127. Cars will be among the chief targets of such rules:

[E]C auto makers insist that Japanese cars made in Europe should have 80% local content. French authorities are already blocking imports from the Nissan Motor Corp. plant in Britain because the local content is only 60% to 65%. Says Umberto Agnelli, vice-chairman of Fiat: "What we wouldn't like is to have our outside competitors take advantage of the unified market before the European [auto] industry takes advantage of it."

Rierner, Heard & Peterson, *supra* note 119, at 41. Part of the motivation for local content standards comes from a desire to see an end to so-called "screwdriver plants." For years, Japanese companies have operated factories in the EC whose sole purpose is to assemble non-EC component parts into finished products. Since these operations do not add any materials to the final item, they are said to do no more than twist a screwdriver. The EC has strongly denounced such plants. *See To 1992, By Fur Means or Foul*, THE ECONOMIST, Apr. 23, 1988, at 52, 53.

128. The EC is expected to insist that American and Japanese computer companies increase the size and scope of their EC-based research and manufacturing operations. *See Rierner, Heard & Peterson, supra* note 119, at 41.

129. The telecommunications industry generally is divided into four sub-fields: network equipment (transmission and switching); terminal equipment (customer access); basic services (principally voice communications); and enhanced services (manipulation of information, such as data processing conducted through telephone lines). CALINGAERT, *supra* note 5, at 113-14. Because of the massive investment needed to provide such services and to keep them competitive, in almost every country in the EC, but particularly in West Germany, the telecommunications industry is heavily regulated and subsidized by the government. *Id.* at 115. The idea of releasing such a large sector to private forces has caused great concern within the EC, and in 1987 led the Commission to release a Green Paper which called for a common market in the EC for services and equipment. *Id.* at 114. Although the members of the EC have accepted the importance of eliminating barriers within the telecommunications industry in order to end the widespread market fragmentation which now exists (and which is costing the EC \$20 billion), they have done so only with great reluctance. *Id.* As a result, American firms are likely to find that the EC will not accept American testing and certification procedures and will adopt standards which are different from those in use in the United

panies located within the EC as being either EC or non-EC firms. Following such categorization, preferential treatment to the latter will be given. Almost any type of business could find itself subject to such classification schemes.<sup>130</sup>

## V. STRATEGIES FOR DEALING WITH FORTRESS EUROPE

At the outset, it should be noted that there are comparatively few successful strategies which American businesses can adopt in attempting to develop a coherent plan of action. The reason for this is simple. Since the decisions affecting the internal market are taking place at the highest levels of the EC, American businessmen have little, if any, opportunity to influence directly the policymakers whose choices will shape the workings of the internal market.<sup>131</sup>

Because American businesses lack the ability to reach the very people to whom they wish to make their views known,<sup>132</sup> they will

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States, thereby forcing American companies to engage in lengthy and costly research and development programs. *Id.* at 117. This is already beginning to occur in the television industry, where the EC is calling for the adoption of high-resolution television, a form of television different from that in use in the United States.

130. This could have a significant effect in the aviation industry, where suggestions have already been made that only EC airlines should be allowed to fly between points within the EC. *See further* Mifsud, *New Proposals for New Directions: 1992 and the GATT Approach to Trade in Air Transport Services*, 13 AIR. L. 154 (1988). *See also* CALINGAERT, *supra* note 5, at 123, and *Fly The American Way*, THE ECONOMIST, Feb. 4, 1989, at 16.

Such policies also will impact on television production companies. Concerned that too many of the television shows which EC citizens now watch are American-made sitcoms and soap operas, the EC has called for a substantial increase in the amount of European-made television shows, which would be aired over new intra-Community satellite channels under the direction of a to-be-established European broadcasting authority. For further discussions, *see* Lohr, *European TV's Vast Growth: Cultural Effect Stirs Concern*, N.Y. Times, Mar. 16, 1989, at 1, col. 1 (nat'l ed.); Montgomery, *Europe Sets Standards for TV Programs*, N.Y. Times, Mar. 15, 1989, at 27, col. 6 (nat'l ed.); *Fortress TV*, THE ECONOMIST, Sept. 10, 1988, at 19; *Interference in the Air*, THE ECONOMIST, Apr. 23, 1988, at 54. *See also* CALINGAERT, *supra* note 5, at 123 ("Although usually couched in terms of expanding the Community's cultural development, these proposals are clearly aimed at reducing the share of programming from the United States.").

131. Unlike the United States, where government departments and agencies operate in the open, and actively seek public opinion in their deliberations, the EC's institutions tend to operate behind closed doors. In a speech to the Columbia Institute in February 1989, Secretary of Commerce Robert A. Mosbacher stated that the EC's standards-setting procedures do not "provide adequate transparency or the opportunity for U.S. firms to give meaningful comments." *See Commerce Seeks Open Standards on EC Products*, J. COM., Feb. 27, 1989, at 3A, col. 1. Secretary Mosbacher urged the EC to amend its system so as to "allow U.S. business substantially the same access to its standards-setting procedures as the United States allows foreign interests." *Id.*

132. Many American companies have attempted to overcome this problem by hiring European-based "consultants" or lobbyists, who claim to have clout with the Commission, the Parliament, or both. Since the move towards an internal market began, a number of such firms have been established to lobby in the key EC centers of Brussels (the Commission) and Strasbourg (the Parliament); in Brussels alone, about 200 such firms now exist. *See Ask Us Another*, THE ECONOMIST, Sept. 23, 1988, at 51, 52. According to some estimates, approxi-

have to rely on the American government to act as their proxy. To date, the United States has taken a very active interest in the discussions surrounding the internal market,<sup>133</sup> and has voiced its qualified support for 1992.<sup>134</sup> Helping American companies respond to the internal market has been made one of the top priorities of the United States Department of Commerce (DOC).<sup>135</sup> As a result, the DOC has intensified its information and assistance program known as "Europe Now."<sup>136</sup> Among the steps taken to date as part

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mately \$200 million was spent on consultants in 1988. *Id.* Another survey has reported that there are now 2,000 lobbyists at work within the EC, representing 3,000 companies and trade associations. See Wittenberg, *In Brussels, A 'Gucci Gulch'*, N.Y. Times, Mar. 24, 1989, at 21, col. 3 (nat'l ed.). Whether the consultants actually do have influence is a matter of opinion:

For three weeks of every month, the lobbying action is in Brussels. . . . One week of every month, the whole European Community Government, with lobbyists in tow, moves to Strasbourg for the meeting of the European Parliament. . . .

The battles are titanic and continuous as the European Community passes laws on a timetable that would delight a Swiss railroad conductor.

Miss a few days of the fast-paced action, and you can come back to find that your company's product has been eliminated in the early rounds. But sometimes, presence isn't enough. Even with representatives of the world's major computer chip companies on the scene, disaster struck in February. A ruling zapped all but two manufacturers with non-European Community headquarters from stamping chips from their subsidiary plants with the desirable label "made in the EC."

*Id.*

133. Some Americans believe that the United States has taken too active an interest in the EC's internal market plans. Richard Heckert, the chairman of both E.I. duPont de Nemours & Company and the National Association of Manufacturers, has denounced the United States' government desire to be an "equal player" in the 1992 process, see *infra* note 142, and has cautioned that calls for such status could goad the EC into action designed to hurt American business. See Lawrence, *Congress Urged to Stop Fretting Over Unified EC*, J. COM., Mar. 6, 1989, at 3A, col. 4.

134. See, e.g., *Secretary Verity Urges U.S. Business to Plan Now for Europe 1992*, EUR. NOW, Winter 1989, at 1 (explaining that the United States Government's position is one of unequivocal support for the removal of internal barriers within Europe and for the completion of the Common Market "as long as the process opens the market to international trade.") While still serving as U.S. Trade Representative, Clayton Yeutter wrote a pointed letter to Willy De Clercq, the EC's trade commissioner, in which he complained about the latter's speeches on 1992: "We welcome your efforts at completing the internal market—but not if a single internal market leads to increased external barriers or discrimination against U.S. firms' interest in the Community." Riemer, Heard & Peterson, *supra* note 119.

135. During the Reagan Administration, Secretary of Commerce C. William Verity pledged that the "U.S. Government, and especially the Department of Commerce, will work closely with U.S. business to assure that we get the maximum benefit from the EC's single market." See *Secretary Verity*, *supra* note 134, at 4. Secretary Verity subsequently was replaced by Robert A. Mosbacher, who was appointed to the position as part of President-elect George Bush's decision to shuffle the Cabinet. See Weinraub, *Bush Will Retain Webster at C.I.A.: Fills 4 More Posts; Mosbacher, Hills and Boskin Join President-Elect's Economic Team*, N.Y. Times, Dec. 7, 1988, at A1, col. 1. Mr. Mosbacher, however, has continued and even strengthened Mr. Verity's policies on the internal market. See *infra* note 142.

136. This program is administered as part of the DOC's U.S. and Foreign Commercial Service (USFCS), which is a component of the DOC's International Trade Administration (ITA). For descriptions of the ITA, which has overall responsibility for strengthening the international trade and investment position of the United States, and the USFCS, which is

of the Europe Now program are: 1) establishment of a separate "Single Internal Market Information Service;"<sup>137</sup> 2) distribution of copies of EC directives relating to the internal market to interested American companies as they become available;<sup>138</sup> 3) running business seminars throughout the United States to disseminate information about 1992;<sup>139</sup> 4) holding "Matchmaker Trade Delegations" in cities throughout the EC;<sup>140</sup> and 5) promotion of American products through catalogs, videos and exhibitions.<sup>141</sup> The most important action, however, has been the DOC's continuous attempts to monitor and, where possible, influence EC action on matters relating to the internal market.<sup>142</sup>

Of course the foregoing programs largely are passive. In the future, the United States government may be forced to shift to more aggressive policies. Generally speaking, two courses of aggressive action are open to the United States. First, it could seek to bring the EC to task by charging that it was engaging in activities which are prohibited by the General Agreement on Tariffs and Trade (GATT).<sup>143</sup> Although the United States already has raised this ar-

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designed to assist American businesses by providing marketing information, see OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 1988/89, 149-50 (1988).

137. The Service's address is: United States Department of Commerce, Room 3036, Single Internal Market Information Service, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone (202) 377-5276.

138. To date, the DOC has distributed 40,000 copies of EC directives to interested U.S. firms. See *Heading Towards 1992*, EUR. NOW, Winter 1989, at 1.

139. In February 1989, such seminars were conducted in Minneapolis and Chicago, while in March, St. Louis, Kansas City, Seattle, Portland, and Spokane hosted seminars. Additional seminars are planned for Philadelphia, San Diego, and Atlanta. See *These Events Can Help You Succeed in the European Market*, EUR. NOW, Winter 1989, at 3.

140. The purpose of the delegations is to bring American exporters together with European importers. During 1989 such delegations will be held in The Hague, Paris, Hanover, Brussels, Amsterdam, Zurich, Vienna, and London. *Id.*

141. Catalogs of American products prepared by the DOC are sent to more than 100,000 European agents, representatives, and buyers, while the exhibitions of American products occurs at shows held in the spring and fall at various sites within the EC. *Id.*

142. Shortly after taking office in January 1989, Robert A. Mosbacher, the new Secretary of Commerce, began to apply pressure on the EC and called on it to give the United States "a seat at the table," meaning that the United States should be accorded observer status at EC deliberations on the internal market. See Auerbach, *Mosbacher Seeks Place in EC Talks*, Wash. Post, Feb. 15, 1989, at D3, col. 1. This suggestion, which some called "two-by-four" diplomacy, and so far has been flatly refused, shocked the EC. See Hoagland, *Euroqualms*, Wash. Post, Feb. 28, 1989, at A23, col. 1. See also Marshall, *supra* note 121. For a profile of Mr. Mosbacher, a Texas oil millionaire and lawyer, see Hayes, *Bush's Selections for the United Nations, the C.I.A. and Top Economic Posts*; Robert Adam Mosbacher Sr., *Commerce Secretary*, N.Y. Times, Dec. 7, 1988, at B14, col. 1.

143. See General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948). GATT, of course, is the 40 year-old system which regulates the international trade policies of nearly 100 countries which collectively account for approximately four-fifths of the world's

gument informally,<sup>144</sup> future events may require more active use of this tool.<sup>145</sup> Second, the United States could threaten to retaliate by closing certain segments of the American market to EC companies. Given the relative importance of the United States as a trading partner of the EC, such threats could be an important weapon.<sup>146</sup>

The DOC has encouraged American companies to contact it immediately if they believe their business will or could be adversely affected by any of the EC's internal market directives. However, it is clear that the DOC will not be able to solve all of the problems which are brought to its attention. Thus, in addition to maintaining communication with the DOC, individual American companies must seek other ways of coping with the internal market.<sup>147</sup> Among

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trade. For general discussions about the workings of GATT, see K. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* (1970); L. GLICK, *MULTILATERAL TRADE NEGOTIATIONS, WORLD TRADE AFTER THE TOKYO ROUND* (1948); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969). For a perspective on where GATT stands in the world today, see Thompson, *GATT's Fortieth Birthday*, 22 J. WORLD TRADE L. 5 (Feb. 1988).

144. The GATT operates in what are known as "Rounds," with the Kennedy Round having taken place from 1964 to 1967 and the Tokyo Round having been carried on from 1973 to 1979. In 1986, the Uruguay Round was begun, and continues to be in session. As part of its negotiating strategy at the Uruguay Round, the United States has sought to use the GATT as a counterweight to various moves within the EC. See Tarullo, *The US - EC Trade Relationship on the Uruguay Round*, 24 COMMON MKT. L. REV. 411 (1987). This is particularly true in the area of services, a subject not currently covered by the GATT but which the United States managed to have placed on the agenda of the Uruguay Round, despite considerable opposition from the members of the Third World. See generally Gibbs, *The Uruguay Round and the International Trading System*, 21 J. WORLD TRADE L. 5 (Oct. 1987), and Nayyar, *Some Reflections on the Uruguay Round and Trade in Services*, 22 J. WORLD TRADE L. 35 (Oct. 1988). Many observers fear that the EC might attempt to block any agreement on expanding the scope of GATT to include services "so as not to give up the bargaining chip of controlling access to the EC." CALINGAERT, *supra* note 5, at 124. While this has not happened to date, it should be remembered that the Uruguay Round is not scheduled to end until 1990 (a date which now seems overly optimistic), thereby leaving the EC with a large amount of time in which to act for its own purposes. As has been written elsewhere, "to the extent there is a conflict between completing the internal market and the Uruguay Round or it becomes necessary to set priorities, the integrated market will come first for the Community." *Id.*

145. Ultimately, the United States could bring a complaint against one or more members of the EC and seek to have it adjudicated under the GATT's General System of Conciliation and Dispute Settlement. Among the items to be studied during the Uruguay Round are means for reducing the fragmented nature of the GATT's adjudication mechanism, which is divided between the General System and various specific settlement procedures embodied in most of the Tokyo Round agreements. For a useful overview see Bael, *The GATT Dispute Settlement Procedure*, 22 J. WORLD TRADE L. 67 (Aug. 1988).

146. While United States' exports to the EC amount to \$53 billion per year, EC exports to the United States total almost \$76 billion per year. See U.S. DEPT. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1988*, 820 (108th ed. 1987). Thus, the EC stands to lose more than the United States should an all-out trade war develop over the internal market. For a further discussion on this point, see CALINGAERT, *supra* note 5, at 77-79, who points out that when the value of services are added to the value of goods, the total value of U.S.-EC trade jumps to approximately \$150 billion per year.

147. A critical aspect of coping, of course, will be keeping up with the latest directives.



the options which exist are the following: 1) creating or increasing a direct presence within the EC; 2) establishing a link with an EC partner; or, 3) locating new markets outside the EC.

For businesses which can afford to do so, it makes sense for them to immediately create or increase their presence within the EC.<sup>148</sup> Since it is unclear how the internal market ultimately will affect foreigners, establishing or beefing up an existing presence may be vital to remaining within the EC after 1992. For American companies which do not currently have a branch office, factory, or distribution center in the EC, now is the time to open one up. Similarly, for American companies which do have a presence in the EC, now is the time to expand that presence not only by increasing the number of such facilities but also by increasing the number of EC nationals who are on the payroll.

American businesses which cannot afford to establish or expand an EC presence should seek to create links with EC companies in the form of trading relationships.<sup>149</sup> An American company which

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One observer has written, "It is critical for U.S. firms to know details and current status of proposals, their prospects, the differing interests involved, and the balance of strength between them." CALINGAERT, *supra* note 5, at 99. In order to partially fill the information gap, the Bureau of National Affairs in Washington, D.C. has begun a bi-weekly newsletter entitled, "1992—The External Impact of European Unification," with a one year subscription available for \$697. Similarly, the Economist Intelligence Union, located in London, is touting its "European Trends" quarterly summary as providing a competitive edge for businesses who want to keep abreast of developments concerning the internal market. For an annual price of \$225, subscribers receive four 50-page reports as well as an annual supplement which provides background information. Finally, Graham & Trotman Ltd., also of London, has released a new reference work titled "Completing the Internal Market of the European Community: 1992 Legislation," an eight volume looseleaf service compiled and edited by two British barristers, Mark Brealey and Conor Quigley. Volumes 1-3 cover the same subjects as the White Paper: removal of physical, technical, and fiscal barriers. Volumes 4-8 are devoted to specific market sectors: Transport, Customs and Travel; Financial Services and Capital Movements; Veterinary and Phytosanitary Controls; Business; and Technical Standards. The set sells for \$2,049 and the publisher promises to keep the volumes current through quarterly supplements.

148. Many American businesses are already attempting to do so. The Coca-Cola Company has started construction on one of the world's largest canning plants in Dunkirk, France; Shearson Lehman Hutton Inc. recently expanded its investment banking offices in Milan and Madrid; AT&T has just completed a \$220 million semiconductor plant in Spain; and Citicorp has strengthened its retail banking presence in the EC by introducing credit cards in West Germany, Belgium and Greece. See Greenhouse, *U.S. Corporations Expand in Europe for '92 Prospects*, N.Y. Times, Mar. 13, 1989, at 1, col. 6 (nat'l ed.). See also Uchitelle, *Trade Barriers and Dollar Swings Raise Appeal of Factories Abroad: American Companies Turn Away From Exports*, N.Y. Times, Mar. 26, 1989, at 1, col. 1 (nat'l ed.) ("Many American companies are eager to operate factories in the 12-nation European Community, which by 1992 is to be free of internal barriers. The concern is that the Europeans might then halt many imports from outside this huge marketplace.").

149. Once again, many American companies are already attempting to do so. The Whirlpool Corporation recently announced that it had entered into a \$2 billion joint venture with Philips N.V., the Dutch electronics giant. The International Paper Company has made

is not itself in the EC, but whose operation is closely tied with that of an EC company, is likely to receive better treatment after 1992 than an American company whose activities are not integrated with an EC company.

Finally, some American companies may be able to shift their trading patterns so as to concentrate more heavily on non-EC markets. This undoubtedly will not be an option for many American businesses because of the difficulty of giving up such lucrative markets as France, the United Kingdom, and West Germany. However, important markets in the Far East will be unaffected by 1992. At the same time, the recent enactment of the United States-Canada Free Trade Agreement<sup>150</sup> may provide new opportunities for increased sales within Canada, while other American companies may benefit by taking another look at the currently under-utilized United States-Israel Free Trade Agreement.<sup>151</sup>

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a \$350 million bid for a French paper maker. The General Electric Company has formed joint ventures in major appliances and electrical equipment with Britain's largest electronics concern and has acquired France's largest medical equipment maker. The Sara Lee Corporation recently paid \$250 million to buy a Dutch coffee and tea company; it also has acquired the Paris-based Dim company, Europe's largest maker of pantyhose. Finally, AT&T has entered into a \$25 billion program with Italtel, Italy's telephone equipment company, to upgrade Italy's telecommunications system. See Greenhouse, *supra* note 148.

150. The Agreement became a central issue in the Canadian national elections held on November 21, 1988 as the opposition parties, particularly the Liberals, attempted to portray Prime Minister Mulroney and his Progressive Conservatives as having sold out to the United States. Mr. Mulroney was able to turn back the opposition, however, and the Agreement was approved by the Canadian Parliament and obtained the royal assent just as the year ended. For a review of the election, see *The Ups, Downs and Ups Again of Brian Mulroney*, THE ECONOMIST, Nov. 26, 1988, at 43. The text of the Free Trade Agreement can be found at 27 I.L.M. 281 (1988). For a useful discussion of what the pact will and will not achieve, see McLachlan, Apuzzo & Kerr, *The Canada-U.S. Free Trade Agreement: A Canadian Perspective*, 22 J. WORLD TRADE L. 9 (Aug. 1988). For a discussion of the state of United States-Canadian trade relations prior to the agreement, see Battram, *Canada-United States Trade Negotiations: Continental Accord or a Continent Apart?*, 22 INT'L LAW. 345 (1988).

151. See Agreement on the Establishment of a Free Trade Area, Apr. 22, 1985, United States-Israel, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat. 61), reprinted in 24 I.L.M. 653 (1985). For general examinations of the Agreement, see Herzstein, *A New Departure in Trade Policy: The U.S.-Israeli Free Trade Area*, 32 FED. B. NEWS & J. 132 (1985), and Note, *The U.S.-Israel Free Trade Area: Is it GATT Legal?*, 19 GEO. WASH. J. INT'L L. & ECON. 199 (1985). To date, the Agreement has not resulted in a significant increase of trade for either country. In the future, however, American companies may find dealing with Israel to be an expedient means of trading with the EC, since the 1985 United States-Israel Free Trade Area, when coupled with Israel's 1975 Free Trade Agreement with the EC, see *supra* note 2, has converted Israel into what may be thought of as a "bridge for trade." The full extent of the bridge will not be appreciated, however, until 1995, when the final phases of the 1985 Agreement become operative. For a further discussion of Israel's unique status, see Sawyer & Sprinkle, *U.S.-Israel Free Trade Area: Trade Expansion Effects of the Agreement*, 20 J. WORLD TRADE L. 526 (1986).

## CONCLUSION

The passage of the Single European Act has altered forever Western Europe's trading patterns. As discussed in this article, it is likely to mark the beginning of a new era of stiff protectionism. American companies therefore have many challenges ahead of them, and do not have even a moment to lose in preparing for 1992.

