

Michigan Journal of International Law

Volume 12 | Issue 3

1991

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Recommended Citation

Franziska Tschofen, *Article 235 of the Treaty Establishing the European Economic Community: Potential Conflicts Between the Dynamics of Lawmaking in the Community and National Constitutional Principles*, 12 MICH. J. INT'L L. 471 (1991).

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ARTICLE 235 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY: POTENTIAL CONFLICTS BETWEEN THE DYNAMICS OF LAWMAKING IN THE COMMUNITY AND NATIONAL CONSTITUTIONAL PRINCIPLES

*Franziska Tschofen**

INTRODUCTION

Since the launching of the ambitious Single Market Program, the European Community's progress towards integration has exceeded all expectations. Former periods of "Eurosclerosis" have given way to widespread feelings of "Europhoria." Though undisputably positive and welcome, this development has entailed a host of new problems. One of the most pressing problems facing the European Community today is that its institutions, initially conceived by the Treaty Establishing the European Economic Community¹ to govern a purely economic association with limited powers, no longer seem adequate for a Community striving for political union.

The gradual completion of the Single European Market goes hand-in-hand with a substantial increase in Community powers, necessitating the reform of Community institutions. This need for institutional reform was recognized at the Summit Meeting of the Heads of State and Government of the European Community in Dublin in June 1990, and is presently under consideration in an intergovernmental conference formally initiated on December 15, 1990, in Rome. Such reform will have to focus on two critical aspects: first, the institutions will have to become more efficient; second, they will have to provide protection for constitutional rights and supply the emerging European political system with appropriate democratic legitimacy.² "Europolit-

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1. Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11, *reprinted in* 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 207-609 (1987) [hereinafter EEC Treaty].

2. Because it is in its initial stage, no concrete reform proposals have yet been advanced within the intergovernmental conference aimed at creating a political, economic and monetary

ics" (even more so than "Euroeconomics") needs legitimacy, transparency, foreseeability and respect for the principle of subsidiarity³ as a *condicio sine qua non* for the creation of a stable, effective and equitable economic and quasi-political system.

At present this system draws its legitimacy from successful political and economic achievements rather than from stringent, transparent democratic procedures. The Community's unpredictable forays into areas traditionally regarded as the exclusive domain of national legislatures,⁴ without the participation of either a democratically-elected Community organ or the national parliaments, is a particularly problematic aspect of the present lack of a "constitutional backbone" for Community action. Gradually, Member States, national tribunals,⁵ national parliaments⁶ and federal entities⁷ are becoming more

union. The negotiations are based on a summit document prepared by the European Council which addresses both of the critical aspects of institutional reform mentioned here. *European Council, Rome, 14 and 15 December 1990, Presidency Conclusions (Part I)*, Agence Europe, No. 5393, at 5 (Dec. 16, 1990). The conference has been asked by the Council to give particular attention to the following: "Democratic legitimacy — In order to strengthen the role of the European Parliament; . . . extension and improvement of the co-operation procedure [established by the SEA]; . . . assent to international agreements; . . . involvement of the European Parliament in the appointment of the Commission and its President; increased powers on budget control and financial accountability; consolidation of the rights of petition and enquiry; . . . development of co-decision procedures for acts of a legislative nature; . . . arrangements allowing national Parliaments to play their full role in the Community's development; . . . the adoption of arrangements that take account of the special competence of regional or local institutions; . . . the consultation of such institutions; . . . the importance of the principle of subsidiarity;" and the "effectiveness and efficiency of the Union's institutions." *Id.* at 5-6, 8.

3. Article 12, paragraph 2 of the draft Treaty on European Union defines the subsidiarity principle as follows:

Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act as long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.

Editorial Comments: The Subsidiarity Principle, 27 COMM. MKT. L. REV. 181 (1990).

4. This development particularly concerns the "borderline" areas of Community competence, such as health services, consumer protection, social security, culture, research and technology, monetary policy and education.

5. The relationship between national tribunals and the Court of Justice of the European Communities [hereinafter the Court] regarding the Court's extensive interpretation of Community law is marked by growing tensions. See *La Cour de Justice des Communautés Européennes et les Etats Membres*, ASSOCIATION BELGE POUR LE DROIT EUROPÉEN (Jan. 25, 1990).

6. National parliaments have criticized the Commission for its unselective and overly extensive policy of harmonization under article 100. See, e.g., the report published by the British House of Lords in 1978, which criticized the growth of Community law on environmental issues. Twenty-second Report of the Select Committee on the European Communities on the Approximation of Laws, [1977-1978] House of Lords, 131, 199 (July 4, 1978).

7. Federal entities, most importantly the federal states (*Länder*) of the Federal Republic of Germany, also view the Community's expanding authority with growing concern. A drastic example of extension of Community powers to areas traditionally within the domain of *Länder* competences was the request by the European Parliament for a Commission directive to implement the right of citizens in Member States of the Community to participate in municipal elections in other Member States. *Wahlrecht für EC-Bürger bei Kommunalwahlen*, European

apprehensive of this development and have begun to question its compatibility with their national constitutions.⁸

Article 235 of the Treaty has been an important factor in this development insofar as it provides for the exercise of certain powers beyond those expressly mentioned in the Treaty. This provision reads as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.⁹

Article 235, an "open" provision, is designed to supply the Community with the powers necessary to meet its objectives under changing realities. It has increasingly been regarded as an efficient instrument for solidifying the creation of the Common Market without amending the Treaty.

The purpose of this essay is to analyze the extent to which the present interpretation and application of article 235 of the Treaty appears to be incompatible with basic national constitutional safeguards such as the principles of democracy, the "Rule of Law," sovereignty and federalism and to discuss ways to reconcile potential incompatibilities. To this end, Part I will explore the scope of the authority of EEC organs under article 235 as delimited by the European Court of Justice and legal scholars. Part II will analyze potential conflicts between Community powers exercised pursuant to article 235 of the Treaty and national constitutional guarantees. The essay will conclude by proposing safeguards and suggesting remedies against such possible violations of constitutional principles.

Parliament Decision of December 15, 1987, 15 *EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT* [EuGRZ] 89 (1988).

8. The Danish government is particularly critical of the extensive use of article 235. For an overview of the discussion of this problem during the Danish accession negotiations, see Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 *COMMON MKT. L. REV.* 447 (1981).

9. See the similar provision in article 95 of the Treaty Establishing the European Coal and Steel Community ("ECSC"). Compare this to the "necessary and proper clause" of the U.S. Constitution, which empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

I. SCOPE AND LIMITS OF AUTHORITY OF EEC ORGANS UNDER ARTICLE 235

A. *The Application of Article 235*

The founders of the European Communities¹⁰ intended the Treaty to be a mere framework of rules: a *traité cadre*, not overly detailed, and flexible enough to support a continuously evolving, dynamic process of integration which would eventually culminate in a Single European Market. They recognized that it was impossible to provide for all contingencies and that consequently the projected means of the EEC organs to achieve the objectives of the Treaty would, in the process of integration, eventually prove insufficient.¹¹ The framers of the Treaty were aware of both the critical importance of article 235 and the controversy it was likely to cause once the integration process gained momentum.

1. The Growing Importance of the Provision Since 1972

Prior to 1973, Community legislation only relied on article 235 as a legal basis for provisions regarding trade in processed agricultural products and uniform customs legislation.¹² But following the political decision made in 1972 in Paris by the Heads of State and Government of the EEC Member States to apply article 235 more broadly,¹³ there has been a remarkable increase in regulatory measures based on this article.¹⁴ As a result of this shift in policy, decisions and regulations regarding free movement of workers, free exercise of a trade or profession, energy, scientific research, social policy and regional policy were increasingly enacted on the basis of article 235.¹⁵ These were followed by measures concerning the social security of self-employed persons, environmental protection, coordination of national monetary

10. The European Communities [hereinafter EC] comprise the European Coal and Steel Community, established by the Treaty of Paris on April 18, 1951, the European Economic Community [hereinafter EEC or Community] and the European Atomic Energy Community ("Euratom"), both established by the Treaties of Rome on March 25, 1957. See EEC Treaty, *supra* note 1. The following analysis is limited to the European Economic Community.

11. See Walter Hallstein's statement about the motive for including article 235 in the Treaty in W. HALLSTEIN, *DIE EUROPÄISCHE GEMEINSCHAFT* 319 (1st ed. 1973). Hallstein made a substantial contribution to the framing of the EEC Treaty and was the first president of the European Commission.

12. H. SMIT & P. HERZOG, 6 *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY* 316 (1990).

13. It was agreed upon "to use as widely as possible all the provisions of the Treaties including Article 235 of the EEC Treaty." See *Solemn Declaration of the Heads of State and Government of the Member States of the Enlarged Community*, 10 BULL. EC, Supp. 10/72, at 23 (1972).

14. Between 1962 and 1972, 13 directives, regulations or decisions were based on article 235; between 1973 and 1982, this number increased to 206, and between 1983 and mid-1990, to 209.

15. H. SMIT & P. HERZOG, *supra* note 12, at 302-08.

policies¹⁶ and, increasingly, projects in various fields of research.¹⁷

Not surprisingly, acts relating to the "accompanying policies" of the Community — *i.e.*, those actions not related to the core "four freedoms" (goods, persons, services and capital) but which are essential for the achievement of the "freedoms" — have accounted for most of the measures issued under article 235. The most important are regulations relating to monetary policy¹⁸ and environmental protection.¹⁹ Article 235 is also expected to be of increasing importance in connection with the conclusion of numerous trade accords with Eastern European countries in response to their growing ties with Western economies. Previous treaty mechanisms would have been insufficient for this task. For instance, article 113 of the Treaty, which provides for the conclusion of tariff and trade agreements with third countries, is limited to trade matters and would not encompass the regulation of financial and technical assistance. Finally, article 235 has served as the basis for establishing several legal entities within the Community itself.²⁰ For many of the projects mentioned above, the Treaty provides little other support for Community action.²¹

The increasing use of article 235 powers since 1972 has been facilitated and enhanced by the political willingness, as expressed in the Solemn Declaration of 1972, to further the development of the integration process. The key to this development, however, lies in the nature of the integration process itself. The growing conjunction of the Member States' economies and legal systems calls for further expansion of Community activities.²² Integration has thus gained its own dynam-

16. Article 235 was used as a legal basis for part of the measures necessary to establish the European Monetary System ("EMS") in March 1979, and especially for the creation of the European Monetary Cooperation Fund in 1973 (through Council Regulation 907/73, 16 O.J. EUR. COMM. (No. L 89) 2 (1973)). See Seidel, *Das Europäische Währungssystem: Rechtliche Grundlage und Ausgestaltung*, 14 EUROPARECHT [EUR] 13 (1979).

17. *E.g.*, EUREKA (information science and telecommunications), ERASMUS (exchange of workers and students) and COMETT (cooperation between universities and students).

18. See generally Lauwaars, *Art. 235 als Grundlage für die flankierenden Politiken im Rahmen der Wirtschafts- und Währungsunion*, 11 EUR 100 (1976).

19. See *infra* notes 23-37 and accompanying text.

20. See, *e.g.*, *European Center for the Development of Vocational Training*, 18 O.J. EUR. COMM. (No. L 39) 1 (1975); *European Foundation for the Improvement of Living and Working Conditions*, 18 O.J. EUR. COMM. (No. L 139) 1 (1975); *European Economic Interest Grouping*, 28 O.J. EUR. COMM. (No. L 199) 1 (1985); *European Regional Development Fund*, 18 O.J. EUR. COMM. (No. L 73) 1 (1975).

21. The particular problem connected with the creation of institutions (see *supra* note 20) is that any endowment of a new entity with legislative competences of its own would exceed the power conferred on the Community organs by article 235. See Everling, *Die Allgemeine Ermächtigung der Europäischen Gemeinschaft zur Zielverwirklichung nach Art. 235 EWG-Vertrag*, 11 EUR 16 (1976).

22. G. NICOLAYSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 47 (1979); but see D. DORN, *ART. 235 EWGV — PRINZIPIEN DER AUSLEGUNG* 13 (1986).

ics. The increasing use of article 235 is linked to this process and is therefore likely to continue regardless of changing political constellations. With the remarkable acceleration of the pace of integration — and Community legislation — following the Single European Act, increasing use of article 235 may create serious concerns as to its constitutional legitimacy.

2. A Typical Example of the Application of Article 235: Environmental Protection

The importance of environmental issues for a transborder economic enterprise like the Community became obvious soon after the entry into force of the Treaty. In addition to the growing awareness of environmental problems and the need for concerted efforts toward their solution, the Community, as a customs union striving for the elimination of all trade barriers, was faced with the problem that the environmental protection measures taken individually by the Member States had effectively created non-tariff trade barriers, thus hindering the free movement of goods within the internal market. The need for a common environmental policy was officially proclaimed in the Final Declaration of the Heads of State and Government of the Member States of the Enlarged Community,²³ and the Community organs were urged to elaborate an environmental plan of action as well as a detailed time schedule for its implementation.²⁴

Once this new commitment of the Commission had been decided upon politically, the problem arose that no legal basis for environmental policy existed in the Treaty. Therefore, such a basis had to be "invented."²⁵ In order to create a Community competence in the field of environmental protection, an expansive interpretation of the objectives of the Treaty as enumerated in article 2 was attempted.²⁶ It was ar-

23. *The First Summit Conference of the Enlarged Community*, 5 BULL. EC No. 10, at 14, 20 (1972).

24. *Council Declaration of November 22, 1973, on the Programme of Action of the European Communities on the Environment*, 16 O.J. EUR. COMM. (No. C 112) 1 (1973). The program has periodically been updated, most recently by the *Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1987-1992)*, 30 O.J. EUR. COMM. (No. C 328) 1 (1987).

25. Scheuing, *Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte*, 24 EUR 152, 158 n. 37 (1989), speaks of the "discovered" legal basis for environmental policy. Extremely critical of the asserted Community competence regarding environmental policy before the passing of the SEA are Grabitz & Sasse, *Umweltschutz der Europäischen Gemeinschaften: Vorschlag zur Ergänzung des EWG-Vertrages*, A59 BEITRÄGE ZUR UMWELTGESTALTUNG (1977).

26. See *Council Declaration of November 22, 1973 relating to the first action scheme of the Economic Communities for the Environmental Protection*, 16 O.J. EUR. COMM. (No. C 112) 1 (1973). See also *Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées*, 1985 E.C.R. 538, 549.

gued, for instance, that the effort to improve living and working conditions in the Member States (preamble, clause 3) and the harmonious development of economic activities (article 2) were possible only in a safe and protected environment. Another equally questionable way to "legalize" Community regulation of environmental issues was the Commission's use of article 100 of the Treaty, the provision for harmonizing Member States' laws having an immediate effect on the creation of the Common Market.²⁷

Not surprisingly, the potential of article 235 for providing a legal foundation for environmental regulation did not escape the attention of the ingenious engineers of European environmental policy. Indeed, most directives either were based jointly on articles 100 and 235,²⁸ or issued solely on the basis of article 235.²⁹ However, it was generally believed that "articles 100 and 235 of the EEC Treaty in conjunction with the preamble and article 2 of the EEC Treaty do not provide a secure legal basis for the development of environmental policy . . . within the framework of the Treaty."³⁰ For example, the legality of the Council's directive on the conservation of wild bird species³¹ has been challenged repeatedly on the ground that it clearly exceeded the scope of article 235.³²

Prior to the entry into force of the Single European Act ("SEA")³³ in 1987, more than 200 acts relating to environmental protection issued on the basis of articles 100 and 235 laid the foundation for the formation of a very specific Community environmental policy.³⁴ The adoption of the SEA, the first substantial amendment to the Treaty of

27. See Scheuing, *supra* note 25, at 155 (citing *Commission v. Italian Republic*, 1980 E.C.R. 1099); *Commission v. Italian Republic*, 1980 E.C.R. 1115.

28. *E.g.*, *Council Directive on the Disposal of Waste Oils*, 18 O.J. EUR. COMM. (No. L 194) 23 (1975).

29. *E.g.*, *Council Directive on the Conservation of Wild Birds*, 22 O.J. EUR. COMM. (No. L 103) 1 (1979); *Council Decision on the Conclusion of the Convention on the Conservation of Migratory Species of Wild Animals*, 25 O.J. EUR. COMM. (No. L 210) 10 (1982); *Council Decision*, 25 O.J. EUR. COMM. (No. L 38) 1 (1982) (concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats).

30. Rehinder & Stewart, *Legal Integration in Federal Systems: European Community Environmental Law*, 33 AM. J. COMP. L. 371, 400 (1985).

31. *Id.*

32. Nicolaysen, *Environmental Policy Before the Single European Act*, in *STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY* 112-15 (J. Schwarze & H. Schermers eds. 1988); Kaiser, *Grenzen der EG-Zuständigkeit*, 15 EUR 116 n. 69 (1980); Scheuing, *supra* note 25, at 156. Scheuing remarks that, surprisingly, the invalidity of the directive due to the lack of legal basis for its passing has never been mentioned by the Member States, although there have been proceedings — and judgments — against five of them for failing to implement this directive into national law.

33. 30 O.J. EUR. COMM. (No. L 169) 1 (1987), reprinted in 25 I.L.M. 506 (1986).

34. See *Kommentar zum EWG-Vertrag* (Verlag C.H. Beck) Art. 130s, at 45-264 (loose-leaf ed. 1984). See also *Council Regulation on the Establishment of the European Environment*

Rome, provided an occasion for finally supplying a sound legal foundation to the already considerable corpus of law on environmental protection which had evolved on the shaky basis of political consensus alone.³⁵ From a legal perspective, however, such a retroactive legitimation of a *fait accompli* can only be regarded as a cosmetic concealment of a legal facade.

Since the entry into force of the SEA, resort to article 235 for the implementation of Community measures has become unnecessary in several fields.³⁶ This does not, however, diminish the provision's importance, or the inherent risk in invoking it. Other, not yet envisaged, areas could very well be "conquered" by the Community through extensive application of article 235, as occurred in the area of environmental protection. Furthermore, since it has added to the existing objectives of the Community, the adoption of the SEA may even *increase* the scope of application of article 235.³⁷

B. Interpretation of Article 235

Article 235 has been labeled a provision on the border between law and politics.³⁸ Practice has shown that it offered legal justification to whatever was politically opportune. Its inherently political nature makes it difficult to explore the provision satisfactorily through legal means alone. One should nevertheless attempt to establish its concrete legal meaning and limitations in order to supply a legitimate legal framework for political decisions.³⁹ The Community itself has recently acknowledged legal limits to its power to take legislative measures according to article 235: within the new provision regarding the Economic and Monetary Union created by the SEA, it is expressly

Agency and the European Environment Information and Observation Network, 33 O.J. EUR. COMM. (No. L. 120) 1 (1990).

35. See EEC Treaty arts. 130R-130T; see also Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407 (1987).

36. These areas include: working conditions (EEC Treaty art. 118A); regional policy (arts. 130A-130E); the environment (arts. 130R-130T); and the fields now covered by SEA art. 20 (the European Monetary Cooperation Fund was formerly adopted by a Council regulation, 21 O.J. EUR. COMM. (No. L 379) 2 (1978), and was based on art. 235) and SEA art. 23 (the European Regional Development Fund was also created by a Council regulation, 18 O.J. EUR. COMM. (No. L 73) 1 (1975) and was also based on art. 235).

37. Tizzano, *Quelques Remarques Générales sur L'Elargissement des Compétences Communautaires*, in STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 47 (1988).

38. See von Meibom, *Book Review*, 7 EUR 289 (1972) (reviewing H. GERICKE, ALLGEMEINE RECHTSETZUNGSBEFUGNISSE NACH ARTIKEL 235 EWG-VERTRAG): "Eine Vorschrift auf der Grenze zwischen Recht und Politik, zwischen gesetztem Ordnungssystem und funktioneller Entwicklung."

39. The only "framework" of concern to the decision-makers in Brussels seems to be the political powerplay. Once unanimity is reached and thus political legitimation provided, legal questions become of secondary importance, if not disregarded altogether.

stated that the formal amendment provision of the Treaty, article 236,⁴⁰ is applicable to any further development involving institutional changes in this area.⁴¹

1. The Views of Academic Commentators

Commentators' views regarding the scope of application of article 235 of the Treaty differ widely. The various interpretations of the provision are strongly influenced by the authors' positive or negative attitudes towards the progressive integration of the Community itself. Thus, some authors view article 235 as a mere "gap-filling provision," limited strictly to supplementing existing competences by single powers not provided in the Treaty,⁴² while others consider article 235 to be a key provision conferring a wide-ranging "competence to create competences"⁴³ on the Community.⁴⁴

According to those authors who advocate a limited application of article 235, a matter which does not already pertain to the Community's authority or which is not at least implied by an express power cannot be regulated by means of "appropriate measures" within the meaning of article 235. Advocates of the alternative view, however, regard article 235 as conferring a singular and independent power which secures the functioning of the Common Market,⁴⁵ and which represents a flexible tool for integration in its dynamic development.⁴⁶ It seems at least questionable whether this interpretation finds support in the provision's wording. Commentators supporting an expansive

40. Article 236 reads: "The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements." EEC Treaty, *supra* note 1, at art. 236.

41. *Id.* at art. 100A, para. 2.

42. R. LAUWAARS, *LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS* 82 (1973); Riegel, *Überlegungen zum Problem EG-Richtlinien und Nationale Rahmentätigkeit*, 12 EUR 80 (1977). See also Tomuschat, *Die Rechtsetzungsbefugnisse der EWG in Generalermächtigungen, Insbesondere in Art. 235 EWGV*, 11 EUR 64 (1976).

43. See Zuleeg, *Der Verfassungsgrundsatz der Demokratie und die Europäischen Gemeinschaften*, 17 DER STAAT 27, 42 (1978); Ophüls, *Die Mehrheitsbeschlüsse der Räte in den Europäischen Gemeinschaften*, 1 EUR 216 (1966). But see Everling, *supra* note 21, at 14.

44. This broad interpretation of the provision is mainly — but not altogether satisfactorily — justified by the decision in *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, 1973 E.C.R. 897. See Meier, *Anmerkung zu EuGH 12.7.1973, RS 8/73, AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS* [AWD] 41, 42 (1974).

45. Meier, *Die Mitwirkung der Bundesregierung bei der Gesetzgebung des Rates der Europäischen Gemeinschaften*, 24 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 961, 962 (1971).

46. See G. NICOLAYSEN, *supra* note 22, at 45.

interpretation of article 235 concede only that a new policy for which an economic link can no longer be established may not be the object of a measure under article 235.⁴⁷ This "restriction," however, is clearly too elastic. The purchase of military equipment — part of national defense, a power almost exclusively reserved to the State — may serve as an example. Trade in military goods, even from a strictly economic viewpoint, can arguably be seen as part of the operation of the Common Market because it may affect the "free flow of goods,"⁴⁸ and thus would be sufficient to provide the necessary economic nexus.

a. *Analysis of the Individual Elements of Article 235*

i. "Necessary to attain"

The first prerequisite for the application of article 235 is that action taken by the Council must be *necessary* to attain the objectives of the Community. This requirement is met whenever two questions can be answered in the affirmative: (1) Has one of the objectives of the Treaty not been fully or satisfactorily attained?⁴⁹ (2) Can Community institutions rectify the situation by exercising power?⁵⁰ In other words, action is judged *necessary* whenever the actual pace of integration — *i.e.*, the degree of realization of the Treaty's goals — falls short of the objectives set out in the Treaty.

Commentators agree that this condition may almost always be fulfilled,⁵¹ thus offering Community organs nearly unlimited or at least substantial leeway.⁵² However, this interpretation appears to be problematic for several reasons. First, it can hardly be assumed that the Contracting Parties of the Treaty consented to conferring such a broad

47. Behrens, *Die Umweltpolitik der Europäischen Gemeinschaften und Art. 235 EWGV*, in DEUTSCHES VERWALTUNGSBLATT [DVBL] 462, 466 (1978).

48. Sasse & Yourow, *The Growth of Legislative Power of the European Communities*, in 1 COURTS AND FREE MARKETS 96 (1982). This is an extreme example, which suggests that the "Community's competence is ultimately what the Council of Ministers chooses to make it." Usher, *The Gradual Widening of EC Policy in Particular on the Basis of Articles 100 and 235 EEC Treaty*, in STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 36 (1988). It should be noted, however, that even authors who support an extensive interpretation of article 235 doubt whether some Community activities still could be seen as within the provision's scope. J. Usher, *id.*, mentions in this regard two Community acts relating to South Africa: the regulation suspending imports of gold coins from South Africa (29 O.J. EUR. COMM. (No. L 305) 11 (1986)) and the Council's decision to suspend new direct investments (29 O.J. EUR. COMM. (No. L 305) 45 (1986)).

49. H. GERICKE, ALLGEMEINE RECHTSSETZUNGSBEFUGNISSE NACH ARTIKEL 235 EWG-VERTRAG 108 (1970).

50. Ehring, *Art. 235*, in 2 KOMMENTAR ZUM EWG-VERTRAG 748-96 (1974).

51. Schwartz, *Art. 235 H. Ann. 170*, in 3 KOMMENTAR ZUM EWG-VERTRAG 1217-18 (1983).

52. L. CONSTANTINESCO, 1 DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFT 273 (1977); H. SMIT & P. HERZOG, *supra* note 12, at 328.

discretion on the Community organs. National legislatures, aware of the delicate problem of transfer of sovereignty, were not prepared to concede more powers than necessary to the new supranational institution.⁵³ Second, the question whether Community action is necessary ought to be regarded as justiciable and therefore subject to review by the European Court of Justice. What is "necessary" should thus be determined by judgment of the Court. Although some authors have expressed the opinion that this decision is of a merely political nature and thus not subject to the jurisdiction of the Court,⁵⁴ the more convincing view appears to be that this question involves the interpretation of the Treaty and also of secondary Community law, making the decision whether action by the Community is necessarily a matter of law subject to the Court's supervision.⁵⁵

ii. "One of the objectives of the community"

Commentators unanimously hold that the objectives of the Community include the general goals listed in articles 2 and 3 of the Treaty and the special goals named in various provisions dealing with individual subject matters.⁵⁶ It is disputed, however, whether the goals mentioned in the preamble ought to be included. While some authors maintain that those goals can at best merely offer a guide to the interpretation of the Treaty,⁵⁷ those favoring a more extensive interpretation believe that the preamble should be viewed as containing "objectives of the Community,"⁵⁸ thus representing an additional basis for Community action under article 235 if the other conditions are met.⁵⁹

Scholars are unanimous, however, in holding that the Treaty, regardless of whether the ideas set out in the preamble are included, enumerates the objectives of the Community in an exclusive manner. This means that article 235 may not be used to create any new objectives.⁶⁰

53. For an essentially similar discussion, see von Meibom, *Lückenfüllung bei den Europäischen Gemeinschaftsverträgen*, 21 NJW 2165 (1968).

54. H. GERICKE, *supra* note 49, at 52.

55. See B. BEUTLER, R. BIEBER, J. PIPKORN & J. STREIL, *DIE EUROPÄISCHE GEMEINSCHAFT* 66 (1987) [hereinafter B. BEUTLER].

56. R. LAUWAARS, *supra* note 42, at 85.

57. *Id.*

58. Schwartz, *Art. 235 Ann. 116*, in 3 *KOMMENTAR ZUM EWG-VERTRAG* 1200 (1983).

59. Behrens, *supra* note 47, at 465.

60. D. DORN, *supra* note 22, at 24 (and sources cited therein). This does not, of course, preclude an extensive or even teleological interpretation of existing Community objectives, as shown by the example of environmental protection.

iii. "In the course of the operation of the common market"

A third prerequisite for the application of article 235 is that community action must prove necessary "in the course of the operation of the common market." The German text uses the term *Rahmen*⁶¹ ("frame"), which suggests inherent limitations on the Community's actions. Some authors deduce from this that this element of article 235 represents the most important "brake-mechanism" on the powers conferred by the provision.⁶²

The French,⁶³ Italian⁶⁴ and English versions, it should be noted, differ from the German and Dutch⁶⁵ as to this aspect of article 235. Conclusions based on the use of a specific term in one of several different text versions are problematic, especially in the light of the Court's observation regarding divergences between different versions of multilingual texts.⁶⁶ It therefore seems safer and more accurate to regard the provision as inclusive of all those decisions which serve the smooth realization of the "four freedoms,"⁶⁷ as long as they are closely connected with existing powers.⁶⁸

iv. "This Treaty has not provided the necessary powers"

In order for article 235 to be applicable, the Treaty must not have provided elsewhere the powers necessary to attain one of its goals. This element of the provision makes it clear that recourse to article 235 may only be taken subsidiarily.

In order to prove that this requirement has been satisfied, every act based on article 235 must include a detailed explanation of why it could not be based on any other Treaty provision. Otherwise, the act might violate the requirement to state reasons set forth in articles 190 and 173 of the Treaty, thereby creating a relevant ground for review.⁶⁹

61. Vertrag zur Gründung der Europäischen Gemeinschaften, art. 235, at 333 ("Im Rahmen des Gemeinsamen Marktes").

62. G. NICOLAYSEN, *supra* note 22, at 46.

63. Traités Instituant les Communautés Européennes, art. 235, at 333 ("Dans le fonctionnement du marché commun").

64. Trattati che Istituiscono le Comunità Europee, art. 235, at 333 ("Nel funzionamento del mercato comune").

65. Verdragen tot Oprichting van de Europese Gemeenschappen, art. 235, at 333 ("In het kader van de gemeenschappelijke markt").

66. See, e.g., Regina v. Pierre Bouchereau, 1977 E.C.R. 1999, 2010 ("The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.").

67. Everling, *supra* note 21, at 11.

68. R. LAUWAARS, *supra* note 42, at 85.

69. See also H. GERICKE, *supra* note 49, at 61.

The question arises whether the prerequisite that the Treaty has not provided the necessary powers is met only when such power is *missing altogether* in the Treaty, or also when it is *merely insufficient*. Some authors contend that as soon as certain powers regarding the subject matter to be regulated are provided for in the Treaty, resort to article 235 is excluded.⁷⁰ Moreover, they argue that the mere inexpediency of a substantive power provided in the Treaty does not justify supplementing it with additional powers on the basis of article 235.⁷¹ This rather restrictive interpretation is supported by the argument that the intensity of every encroachment upon the national legal systems was carefully considered and deliberately calibrated in each provision at the time the Treaty provisions were negotiated, and that the Community organs do not have the power to change or disregard this established order.⁷²

The majority of commentators, however, reject this restrictive interpretation. According to these commentators, article 235 applies not only if specific powers are not provided for in the Treaty, but also if they are insufficient.⁷³ This is convincingly explained by the function of article 235, which was designed to overcome deficiencies of the specific powers in the provisions of the Treaty.⁷⁴ Furthermore, the restrictive interpretation according to which article 235 is only applicable in the complete absence of authority would lead to the implausible result that the Community organs would have more opportunities to intervene in areas where the Treaty provides no authorization than in those for which there already exist some, albeit deficient, power to take action.⁷⁵

v. "Appropriate measures"

Article 235 empowers the Council to take "appropriate measures" if action to attain an objective of the Treaty proves necessary. The nature of these measures ultimately determines the practical importance of article 235. It is commonly held that such measures could be adopted not only in all legal forms mentioned in article 189 of the

70. E. WOHLFAHRT, U. EVERLING, H. GLAESNER & R. SPRUNG, *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT* Art. 235 ann. 4 (1960).

71. See D. DORN, *supra* note 22, at 42 (and source cited therein).

72. H. RABE, *DAS VERORDNUNGSRECHT DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* 71 (1963).

73. Lauwaars, *supra* note 18, at 106; R. LAUWAARS, *supra* note 42, at 86; A. BLECKMANN, *EUROPARECHT* 146 (1985); Behrens, *supra* note 47, at 280; Schwartz, *Art. 235 ann. 48*, in 3 *KOMMENTAR ZUM EWG-VERTRAG* 1117 (1983).

74. G. NICOLAYSEN, *supra* note 22, at 47.

75. See Behrens, *supra* note 47, at 280.

Treaty,⁷⁶ but also as a decision *sui generis*:⁷⁷ *i.e.*, every measure is judged appropriate which succeeds in achieving the objectives of the Treaty either more effectively or more readily.⁷⁸

b. *Limitation of Article 235 by Article 236*

Some commentators express the view that Community institutions exercise sovereign powers of the Member States when acting on the basis of article 235. They consequently regard this article as authorizing wide-ranging, autonomous Treaty amendments, including the creation of new areas of authority.⁷⁹

The more convincing view, however, holds that the legislative organs of the Community cannot create new powers on the basis of article 235,⁸⁰ because, unlike national legislatures, they do not have the authority to create such new powers (*compétence de la compétence; Kompetenz-Kompetenz*).⁸¹ The Council is authorized only to put powers already existing in the Treaty into concrete form, *e.g.*, by supplementing existing means of action with more incisive ones.⁸² Article 235 was designed to enable Community organs to achieve goals more efficiently within the sphere of their existing authority, but not to expand Community authority *vis-à-vis* the Member States.⁸³ For this latter purpose, article 236 was conceived, requiring ratification of every amendment by all Member States in accordance with their national constitutions. Commentators have criticized the present application of article 235 for disregarding this limitation by extending Community action to subject matters which could not — at least not with certainty — be attributed to the EEC's existing powers.⁸⁴

76. However, *Hauptzollamt Bremerhaven v. Massey-Ferguson, GmbH*, 1973 E.C.R. 897, suggests that the Council has to show a real need in order to use justly the form of a regulation rather than a directive. See Sasse & Yourrow, *supra* note 48, at 101.

77. R. LAUWAARS, *supra* note 42, at 87.

78. Schwartz, *supra* note 58, at 223.

79. D. EHLE & G. MEIER, *EWG-WARENVERKEHR* 14 (1971).

80. R. LAUWAARS, *supra* note 42, at 89.

81. H. GERICKE, *supra* note 49, at 89; Everling, *supra* note 21, at 14; B. BEUTLER, *supra* note 55, at 77.

82. R. LAUWAARS, *supra* note 42, at 100.

83. See Everling, *supra* note 21, at 14. However, Everling's next point — that the difference between articles 235 and 236 consists in the fact that the former does not alter the Treaty because no additional power is created — is too apodictical: it derives an "is" statement from an "ought" statement although it is logically impossible to do so.

84. See Tizzano, *supra* note 37, at 42:

[L]e recours à l'article 235, au lieu d'attribuer des pouvoirs d'action plus incisifs dans des matières où existait déjà la compétence communautaire, a servi essentiellement à étendre cette dernière à des matières pour lesquelles elle n'existait pas, ou, à tout le moins, elle ne pouvait pas être affirmée avec certitude.

It is indeed apparent that the application of article 235 of the Treaty must find its limits in article 236; otherwise, the latter would be stripped of its meaning. Admittedly, the lengthy and cumbersome formal amendment procedure does not adequately address the urgency and importance of keeping pace with economic developments. However, the use of article 235 cannot replace amendment of the Treaty. The length of the amendment procedure simply reflects the concept that a change in the basis of the consensus on which the European agreement is founded not only requires a unanimous decision, but must be subjected to all the constitutional safeguards necessary to secure individual rights directly affected by supranational rules. It cannot be assumed that the Member States who agreed to the inclusion of article 235 in the Treaty wanted this provision to elude such safeguards. Therefore, *any* "amendment of the Treaty through the backdoor of article 235," not just those deemed "substantial," might be inadmissible.⁸⁵

2. The View of the European Court of Justice

The main question concerning the application of article 235 upon which the Court has elaborated is the condition that the Treaty "has not provided the necessary powers"; *i.e.*, the *subsidiary nature* of the provision. According to the Court, objective analysis of this condition of applicability is subject to judicial review.⁸⁶

In *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*,⁸⁷ the Court held that recourse to article 235 was justified in the interest of legal certainty. Commentators have deduced from this opinion that the Court rejected a restrictive interpretation of article 235, which would have limited its function to filling *lacunae* in a narrow sense.⁸⁸ They argue that the Court found the application of article 235 warranted for the regulation in question, even though article 113 of the Treaty was conceivable as a legal basis. It is certainly true that the Court did not follow the narrowest possible interpretation in its decision. It must be borne in mind, however, that the regulation in question, on the value of goods for customs purposes, was adopted at a time when the Common Customs Tariff did not yet exist. During the transitional period, article 113 was not yet applicable, making recourse

85. D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 75 (2d ed. 1985).

86. E.C. Commission v. E.C. Council, 1988 COMM. MKT. L. REP. 131 (Re Generalized Tariff Preferences).

87. *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, 1973 E.C.R. 897.

88. Meier, *supra* note 44, at 42.

to article 235 more a question of necessity than of choice.⁸⁹

In later decisions, the Court stated, contrary to the allegedly broad interpretation in *Hauptzollamt Bremerhaven*, that the use of article 235 as a legal basis for a Community measure was justified only where no other Treaty provision gave Community institutions the necessary power to adopt the measure in question.⁹⁰ Similarly, the Court held that article 235 could be used only on a subsidiary basis in cases where the necessary powers were not provided elsewhere in the Treaty.⁹¹ Moreover, it declared that as long as there is no *lacuna* in the Treaty, recourse to article 235 is not possible.⁹²

A question related to the element of subsidiarity in article 235 which the Court has addressed is whether article 235 applies only in the *total absence* of any specific provisions in the Treaty, or whether it is also applicable where the existing powers are merely inadequate. With respect to the narrower interpretation (supported by the argument that, otherwise, specific provisions would be superfluous or could be substantially modified), the Court held:

[A] narrow interpretation of Article 235, which finds not the slightest support in its wording, appears unwarranted. The applicability of this rule is provided expressly for those cases where the Treaty has not laid down the powers necessary to attain one of the Community's objectives. Consequently the express provision of inadequate powers does not mean that this condition is not satisfied.⁹³

The Court has touched upon the question of whether the elements of article 235 should be interpreted widely or more narrowly in other proceedings. In *In re Generalised Tariff Preferences*,⁹⁴ the Court held that in order for article 235 to apply, assistance to developing countries would have to be acknowledged as an objective of the Treaty. It found that the preamble and article 3(k) of the Treaty could be given a wide interpretation, beyond their explicit wording, in order to justify this. As to the objectives of the Treaty, the application of article 235 in that case would have required an extensive interpretation of the Treaty. On the other hand, in order to satisfy the requirement that the

89. E.C. Commission v. E.C. Council, *supra* note 86, at 147.

90. *Id.* at 131, 141 (concerning the question of which provision of the Treaty empowered the Council to adopt the regulation applying generalized tariff preferences with respect to certain products originating in developing countries).

91. *Id.* at 146. See also *United Kingdom v. E.C. Council*, 1988 COMM. MKT. L. REP. 543, 552 (Re Agricultural Hormones), where the Court stated "that the application of article 235 cannot be considered if the Community has the power to act under another provision."

92. E.C. Commission v. E.C. Council, 1989 COMM. MKT. L. REP. 870, 883 (Re Draft Budget).

93. *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, *supra* note 87, at 912.

94. E.C. Commission v. E.C. Council, *supra* note 86, at 146.

necessary powers must not be provided for in the Treaty, a restrictive interpretation of article 113 would be needed. The Court stated that it had

grave doubts whether such a method of interpretation — extensive interpretation of the objectives and hence of the jurisdiction of the Community and restrictive interpretation of its means of action and thus hindering these means — can be reconciled with the system of the Community treaties, which are designed to attain limited objectives using effective means.⁹⁵

In an earlier case, the Advocate-General had given a broad interpretation to article 235, stating that “article 235 exists precisely to vest in the Community whatever powers it may need.”⁹⁶ A misunderstanding of article 235 is reflected in the Advocate-General’s opinion in *Syndicat National des Fabricants Raffineurs d’Huiles de Graissage v. Groupement d’Intérêt Économique “Inter-Huiles.”*⁹⁷ The Council’s Directive of June 16, 1975 on the disposal of waste oils had been based partly on article 235. The Advocate-General reasoned that the directive was an “element in the Community policy on the protection of the environment, the necessary powers for the implementation of which were not provided for by the Treaty,”⁹⁸ which strongly suggests that the protection of the environment, despite the fact that environmental policies were not mentioned anywhere in the Treaty, was seen as an “objective of this Treaty.” Such an expansive interpretation of the goals of the Community represents a considerable extension of the provision’s scope.

In connection with claims involving the application of article 235, the Court has repeatedly pointed out that failure to provide exact reasoning for applying article 235 amounts to an infringement of essential procedural requirements.⁹⁹ The stringent scrutiny of this procedural requirement means that one cannot simply invoke article 235 whenever it is convenient to do so.

The two most recent Court decisions deal with the relationship between articles 235 and 128 of the Treaty, and concern the field of social policy, more precisely the area of education, which is of growing importance. In 1987, the Council issued a decision adopting the Euro-

95. *Id.* at 147.

96. *Commission of the European Communities v. Council of the European Communities*, 1971 E.C.R. 285, 293.

97. *Syndicat National des Fabricants Raffineurs d’Huiles de Graissage et Autres v. Groupement d’Intérêt Économique “Inter-Huiles” et Autres*, 1983 E.C.R. 555.

98. *Id.* at 572.

99. *E.C. Commission v. E.C. Council*, *supra* note 86, at 131. As to article 190, see *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, 1981 E.C.R. 1805; *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, 1982 COMM. MKT. L. REP. 449.

pean Community Action Scheme for the Mobility of University Students ("ERASMUS")¹⁰⁰ based on article 128 and article 235. The adoption of the Decision on the dual legal basis of these two articles followed lengthy debates within the Council due to the divergent views on this issue. The Council eventually departed from the Commission's suggestion which referred only to article 128. The Commission then brought an action for annulment against the decision, challenging the Council's use of article 235 in establishing ERASMUS. The Court adopted a view which tends to be more restrictive of the powers granted to the Community than that held by the Commission. It decided that, as far as actions envisaged by the decision concerned the sphere of research, article 128 did not suffice as the legal basis and that, as a consequence, the necessary powers had not been provided for under the Treaty within the meaning of article 235.¹⁰¹ It therefore dismissed the Commission's application for annulment. In spite of this "conservative"¹⁰² approach regarding the scope of Community powers, the Court pointed out that the SEA had enlarged considerably the Community's field of action and that if the ERASMUS decision had been adopted after the entry into force of the SEA, it could have been based on the new article 130(g) without having to rely on article 235.

In a decision rendered on the same day,¹⁰³ the Court dealt with a legislative decision (87/569/EEC) laying down an action program for the vocational training of young people on the basis of article 128 of the Treaty. The Council had brought an action claiming that the decision had been issued on an insufficient legal basis. It therefore found that article 235 needed to be added as a legal basis. Surprisingly, the Court ruled in this instance that the existing legal basis was sufficient. Reiterating his opinion in the ERASMUS case, the Advocate-General maintained that article 128 did not permit the Community institutions to undertake directly or to finance concrete action intended to implement a common vocational training policy. For this reason, and in the absence of any other provision allowing the adoption of such measures, the Advocate-General concluded that the Council ought to have

100. 30 O.J. EUR. COMM. (No. L 166) 20 (1987).

101. Commission of the European Communities v. Council of the European Communities, 1989 E.C.R. 1425.

102. The Court's view that article 235 had to be included as the legal basis for the Decision suggests that the Court adopted a cautious approach *vis-à-vis* an expansive interpretation of existing Community powers.

103. United Kingdom v. Council of the European Communities, 1988 COMM. MKT. L. REP. 789 (Re Vocational Training Program).

based its decision on article 235 as well. Having neglected to do so, the Council had acted *ultra vires*.

The Court, however, rejected this view and, adopting an expansive interpretation of the existing powers, held that the program at issue did not exceed the limits of the powers conferred on the Council by article 128 of the Treaty. In its reasoning, the Court evoked the theory of implied powers:¹⁰⁴ "The fact that the implementation of a common vocational training policy is provided for precludes any interpretation of that provision which would mean denying the Community the means of action needed to carry out that common policy effectively."¹⁰⁵

The two recent cases mentioned above are based on rather contrary lines of argumentation. The Court's reasoning in the second case suggests a return¹⁰⁶ to an expansive interpretation of the powers enumerated in the Treaty and a recourse to the theory of implied powers, thereby avoiding the need to base legal acts on article 235. This reasoning, which departs from the over-extensive interpretation of article 235 to cover Community acts on an uncertain legal basis, is particularly ingenious. Bearing in mind that the principle of teleological interpretation is increasingly relied upon by the Court, a wide interpretation of already-existing Community powers is likely to yield greater possibilities for "adapting" them to new subject matters than the more circumscribed interpretation of article 235. This new approach could also have the advantage of obviating the cumbersome requirement of unanimity laid down in article 235.

C. Conclusions

An analysis of the academic literature on article 235 reveals that those opinions prevail which, by relying either on the Court's case law or on an extensive interpretation, conclude that article 235 yields a virtually unlimited discretionary power to Community organs. Contrary to the assumptions of some authors, the Court's opinions themselves, however, do not show consistency in arguing for a wide interpretation of article 235.¹⁰⁷ In the *Vocational Training Pro-*

104. Compare Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

105. *United Kingdom v. Council of the European Communities*, *supra* note 103, at 794. See also *id.* at 789.

106. See Gaja, Hay & Rotunda, *Instruments for Legal Integration in the European Community — A Review*, in 1(2) *INTEGRATION THROUGH LAW* (1986).

107. Compare *United Kingdom v. Council of the European Communities*, *supra* note 103;

gramme case, the Court seemed to pursue a new strategy to justify the extension of Community activity, namely a teleological interpretation of already-existing Community powers. This strategy appears to be contrary to that followed in the ERASMUS case, where the Court relied on a broad interpretation of article 235. With its new approach, the Court not only avoids the burdensome amendment procedure under article 236 of the Treaty, but also the requirement of unanimity under article 235. This change in strategy by the Court may, however, pose potential offense to national constitutional principles, which is at least as objectionable as a broad interpretation of article 235.¹⁰⁸ Even if the Court's decisions sometimes seem to protect the Member States' sphere of rights, the Court's emphasis has clearly been on promoting further European integration.

Despite the fact that the Court's rulings do not unequivocally support the opinions of academic writers on this subject, the arguments of the latter are nevertheless often convincing. The Community is a dynamic arrangement whose intrinsic feature is constant evolution. Article 235 has been designed to facilitate this process. Attempts to narrowly construe article 235 in order to contain the expansion of Community activity run counter to this concept. Yet a balance needs to be struck between facilitating integration and preserving the fundamental legal and political orders of the Member States. This could be achieved by taking these fundamental parameters into consideration when interpreting and applying article 235, the same way its *telos* — the promotion of integration — is presently taken into account. Indeed, one could argue that the preservation of the constitutional principles of the Member States ought to be considered part of the objectives of the Community and therefore taken into account in every teleological interpretation. Should this ultimately prove insufficient to achieve the Community's goals, the only appropriate remedy is an amendment of the Treaty, not a hyperextensive interpretation of article 235.

II. POTENTIAL CONFLICTS BETWEEN THE EXERCISE OF POWER UNDER ARTICLE 235 AND FUNDAMENTAL NATIONAL CONSTITUTIONAL GUARANTEES

The main characteristic features of the unique supranational European regime are the transfer of extensive legislative powers from the

Commission of the European Communities v. Council of the European Communities, *supra* note 101.

108. Many of the provisions which the Court interprets expansively allow Community organs to issue acts on the basis of a majority vote.

Member States to the Community, the possibility of decision-making by majority vote within the Council,¹⁰⁹ the direct applicability of many legislative measures,¹¹⁰ the supremacy of Community law,¹¹¹ as well as the monopoly on interpretation of Community law vested in a Court of the European Communities.¹¹² Compared to membership in other international organizations, the "sovereignty sacrifice" made by the Member States of the Community is considerable. In addition, several "open-ended" provisions, such as articles 43, 103, 113 and, most importantly, articles 100 and 235, leave broad discretion to Community institutions. The apprehension has been expressed — notably in areas of a non-economic nature — that the unpredictability of an increasingly extensive use of these discretionary powers could represent a danger to the sovereign rights retained by the Member States.¹¹³

In order to determine whether the Community has an obligation to avoid or solve potential conflicts between the interpretation and application of article 235 and constitutional guarantees of the Member States, it must be established that Community organs, in their actions, are legally required to take these principles into account in some way. Before inquiring into which constitutional guarantees are potentially endangered by an extensive application of article 235, it must be shown that the interpretation of Community power on which Community decisions rely is to some extent bound by, and not detached from, these guarantees.

In conjunction with the rule of supremacy of Community law over national law, the Court has consistently held that Community law and the law of the Member States represent two distinct and separate bodies of law.¹¹⁴ The relationship between the legal system of the Community and those of the Member States is, however, more aptly described as one of constant communication and interpenetration.¹¹⁵

109. See notably EEC Treaty, *supra* note 1, at art. 100A (inserted into the Treaty by art. 18 of the Single European Act).

110. See EEC Treaty, *supra* note 1, at art. 189, para. 2.

111. See *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, 643.

112. EEC Treaty, *supra* note 1, at art. 177(a).

113. A manifestation of these concerns is the action brought in the Irish Supreme Court alleging that the SEA violated the constitutional requirement that Ireland remain a "sovereign independent democratic State." *Crotty v. An Taoiseach and Others*, 1987 COMM. MKT. L. REP. 666, 690. See Lang, *The Irish Court Case Which Delayed the Single European Act: Crotty v. An Taoiseach and Others*, 24 COMM. MKT. L. REV. 709 (1987).

114. See, most importantly, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.J. 1, 12, 1963 COMM. MKT. L. REP. 105; *Costa v. ENEL*, 1964 E.C.R. 585, 593, 1964 COMM. MKT. L. REP. 425.

115. See *Tomuschat, supra* note 42, at 62. See also *Pescatore, Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen*, 5 EUR 307 (1976).

On the one hand, the Member States have agreed to acknowledge secondary Community law as directly binding in their legal spheres (pursuant to article 189, paragraph 2 of the Treaty); on the other hand, the Court has increasingly tended to recognize the common constitutional tradition of the Member States as a source of Community law,¹¹⁶ which has resulted in the opening of the two legal systems towards each other.¹¹⁷

It has been argued that there is no qualitative difference between Community law and the law of the Member States, merely different legislative and judicial procedures dictated by needs of rationalization. If one departs from the assumption that there is no *differentia specifica* between the two legal orders, structural homogeneity plainly demands that the shared values of the Member States which have reached the status of principles of law be respected within the legal order of the Community.¹¹⁸

This opinion is, however, not undisputed. Conflicting views on how to interpret Community law frequently arise because neither the Treaty nor the case law of the Court has yet provided a coherent set of rules for the interpretation of Community provisions.¹¹⁹ Furthermore, recourse cannot be taken either to the rules of interpretation developed within the legal systems of the Member States or to the rules set forth in the Vienna Convention on the Law of Treaties¹²⁰ for international treaties, because neither is directly applicable.¹²¹

116. See *Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419, 425, 1970 COMM. MKT. L. REP. 112; *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134, 1972 COMM. MKT. L. REP. 255; *Nold, Kohlen-und Baustoffgroßhanlong v. E.C. Commission*, 1974 E.C.R. 491, 507, 1974 COMM. MKT. L. REP. 338.

117. See *Tomuschat*, *supra* note 42, at 63.

118. *Id.* (and sources cited therein).

119. The difficulties national courts face when having to interpret Community law are illustrated in the opinion of the English Court of Appeal in *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, 1974 COMM. MKT. L. REP. 91, 119:

How different [as compared to English laws] is this Treaty! It lays down general principles. It expresses its aims and purposes. . . . But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. . . . Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent.

120. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1980), *entered into force* Jan. 27, 1980.

121. Member States' rules cannot apply because they lack uniformity; compare the continental tradition of interpretation with the rules of interpretation under the common law system of the United Kingdom. The Community differs substantially from any other international regime, and article 31(1) of the Vienna Convention has been regarded as inapplicable for several reasons. Groux notes that the Convention entered into force on January 27, 1980, and that according to article 4 it applies only to treaties which have been concluded after its entry into force. Groux,

Thus, two contrary opinions exist as to the applicable rule of interpretation on this issue. One view suggests that article 235 be interpreted restrictively in view of constitutional considerations,¹²² while the other maintains that the Treaty should be interpreted teleologically,¹²³ — *i.e.*, according to its objectives and purposes — whenever the wording does not yield unequivocal results or at least sufficiently precise guidelines. The reason for this view is that the dynamic and political character of the Treaty calls for a method of interpretation which takes into account the fact that the economic process, which represents the basis of the European arrangement, is constantly evolving.¹²⁴

The use of general principles of law as guidelines for the interpretation of all Treaty provisions¹²⁵ is problematic. It inevitably entails a restrictive interpretation which, if applied as a rule or concept, would be contrary to the nature of the Treaty as *traité cadre* or instrument of integration.¹²⁶ The Treaty should not be interpreted in any way which would unduly restrict the Community's freedom of action, bearing in mind the constitutional provisions of the Member States. On the other hand, the Community legal order *does* acknowledge the "general principles common to the laws of the Member States,"¹²⁷ and the Court

Convergences et Conflits, dans l'Interprétation du Traité CEE, entre la Pratique Suivie par les États Membres et la Jurisprudence de la Cour de Justice des Communautés Européennes, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION: LIBER AMICORUM PIERRE PESCATORE* 275, 281 (1987). Furthermore, some Member States have not ratified the Convention (notably France), and the Court has never acknowledged international instruments as binding unless all Member States are either members thereof or have cooperated in their conclusion. See *Nold v. Commission*, *supra* note 116, at 507. The argument could be made, however, that the Vienna Convention has in some areas, including the rules of interpretation, merely codified existing customary law which in turn is authoritative for the EEC, being a legal entity under international law.

122. As indicated by von Meibom, *supra* note 53, at 2165.

123. See Zuleeg, *Die Auslegung des europäischen Gemeinschaftsrechts*, 5 EUR 97 (1969); Hexner, *Teleological Interpretation of Basic Instruments of Public International Organizations*, 11 EUR 239 (1964); Bleckmann, *Teleologische und dynamische Auslegung des Europäischen Gemeinschaftsrechts*, 11 EUR 239 (1976). This view seems to be supported by several statements of the Court. See, e.g., *Metallurgiki Halyps A.E. v. Commission*, 1982 E.C.R. 4261, 4268; *Polydor Limited v. Harlequin Record Shops Limited*, 1982 E.C.R. 329.

124. See Everling, *supra* note 21, at 5. Compare also the statement of the ICJ in *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (Advisory Opinion of July 20): ("When the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organization.")

125. As suggested by D. DORN, *supra* note 22, at 71.

126. Additionally, conflicts could arise between an overly restrictive interpretation of Treaty provisions and the Member State's 'obligations' to "facilitate the achievement of the Community's tasks" and to "abstain from any measure which could jeopardize the attainment of the objectives" of the Treaty. EEC Treaty, *supra* note 1, at art. 5.

127. See EEC Treaty, *supra* note 1, at art. 215, para. 2. See also B. BEUTLER, *supra* note 55,

may use them as "a curb upon Council acts."¹²⁸ It seems legitimate to assume, therefore, that in those areas where the Treaty grants considerable discretionary power to the Community institutions, these principles ought to be relied upon as guidelines for the interpretation of such power. It may accordingly be suggested that the outer limits for the interpretation of an open-ended provision such as article 235 are staked out by the fundamental constitutional principles common to all Member States.

A. *The Democratic Principle: Lawmaking in the EEC*

In order to establish whether a rule possesses the status of a general principle of law, an accurate comparative analysis of the respective legal systems of the Member States of the EEC would be needed. Short of this, it seems reasonable to start from the assumption that the principles of democracy and the Rule of Law (*Rechtsstaatsprinzip*) belong to the oldest and most deeply-rooted constitutional traditions common to all European States.¹²⁹ Apart from their quality as general principles of law common to all Member States, these concepts have been developed from within the legal structure of the Community itself by the Court's reliance upon them in several decisions during the last decade. The Court has addressed the principle of the Rule of Law through the recognition of some of its components: the principle of the protection of legitimate expectations¹³⁰ and the postulate of legal certainty.¹³¹ The Court has also recently acknowledged the democratic principle as a fundamental Community principle, without recourse to the notion of general principles of law as a source of international law.¹³² It has also stated that the principle is unequivocally expressed through the participation of the European Parliament in the legislative process.¹³³

Democratic political systems can be characterized as having the

at 181, maintaining that general principles of law are of importance in the legal order of the Community.

128. Sasse & Yourow, *supra* note 48, at 100 n.93.

129. See Klein, *Entwicklungsperspektiven für das Europäische Parlament*, 22 EUR 97, 100 (1987), relying upon A. BLECKMANN, *STUDIEN ZUM EUROPÄISCHEN GEMEINSCHAFTSRECHT* 159-84 (1986).

130. See, e.g., *Westzucker GmbH v. Einfuhr- und Vorratsstelle für Zucker*, 1973 E.C.R. 723, 731; *Compagnie Industrielle et Agricole du Comté de Loheac v. E.C. Commission*, 1976 E.C.R. 645; *S.A. Ancienne Maison Marcel Bauche v. French Customs Administration*, 1978 E.C.R. 383, 402.

131. See e.g., *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH*, 1962 E.C.R. 45; *Theo Nebe v. E.C. Commission*, 1970 E.C.R. 145, 151.

132. *Maizena GmbH v. E.C. Council*, 1980 E.C.R. 3393, 3424.

133. *S.A. Roquette Frères v. E.C. Council*, 1980 E.C.R. 3333, 3360.

following elements: lawmaking by a democratically elected parliament; an executive branch whose actions are restrained by the laws ("the binding force of the law"); and the supervision of the government by the legislative body. Plainly, the concept underlying the democratic principle is that every exercise of power needs legitimation. This legitimation can only be achieved through participation in the creation of the law by the individuals subjected to it, as well as by accountability to an elected body of those exercising public power.

At first glance, it may seem implausible that membership in the Community could in any way be detrimental to the democratic structure of a State, since membership itself presupposes a democratic structure in a potential and prospective member.¹³⁴ Yet the powers which have been transferred to the Community by the Member States in accordance with their constitutional procedures originally belonged to democratically legitimized national legislatures. The Community organs *now* exercising these powers are the Council and the Commission, which are both composed of representatives of the executive power. The Commission comprises the administrative officials of the Community, while the Council consists of members (for the most part ministers) of national governments who, according to national laws, are not endowed with the power to originate binding law (*i.e.*, to *legislate*), but only to execute such law. Also, these members of the national executive branches have, at best, indirect democratic legitimacy since they are most frequently appointed, not elected, to their offices.

Moreover, the deliberative process within the Council lacks the publicity and openness normally expected of a democratic process since, according to the Council's own Rules of Procedure, it is held *in camera*.¹³⁵ Additionally, the rising importance of organs such as the Committee of Permanent Representatives ("COREPER")¹³⁶ in the legislative process of the Community "exacerbate[s] the issue of accountability since the operation of these bodies is far less *transparent* . . . than the fully fledged political organs."¹³⁷

The Community *does* have a democratically elected body, the European Parliament. However, in spite of the undeniable increase in its

134. See Frowein, *Die Rechtliche Bedeutung des Verfassungsprinzips der Parlamentarischen Demokratie für den Europäischen Integrationsprozess*, 18 EUR 301 (1983).

135. EEC Treaty, *supra* note 1, at art. 3(1).

136. The COREPER was established by the Council under article 151, paragraph 2, of the EEC Treaty, and confirmed by article 4 of the Merger Treaty of April 8, 1965 (*Treaty Establishing a Single Council and a Single Commission of the E.C.*, 1967 O.J. EUR. COMM. (No. 152) 2 (1967)).

137. Weiler, *Community, Member States and European Integration: Is the Law Relevant?*, 21 J. COMM. MKT. STUD. 39, 50-51 (1982) (emphasis added).

importance since the SEA,¹³⁸ it still plays a patently subordinate role in the legislative process.¹³⁹ Theoretically, the Parliament has a very powerful sanction at its disposal: under article 144 of the Treaty, it has the ultimate right to dismiss the Commission. Such a vote of no confidence is, however, not likely ever to be exercised and, even if it were, it is directed only against the Commission and not the Council, which is the more influential legislative organ of the Community.

It is therefore clear that the paramount characteristic of a democratic process — that there be no legislation without democratic endorsement and public accountability — is lacking in the legislative process of the Community. Because the legislative powers of the Community are monopolized by the Council and the Commission, the Community has repeatedly been criticized as suffering from an acute “democratic deficit.”¹⁴⁰ The Community itself is well aware of the need for democratic legitimation of its efforts towards integration, integration which increasingly extend beyond the original plan of a purely economic Community.¹⁴¹

One could argue that the Member States originally accepted the Treaty according to their national constitutions and the provisions in the Treaty for the transfer of sovereign rights. For this reason, it could be said that the present “legislation by the executive” in the Community has been given democratically legitimized approval. The problem, however, does not lie with the specific provisions conferring single legislative powers, which arguably enjoy full legitimacy, but rather with open-ended provisions like article 235, whose range of potential applications could not have been predicted at the time of the Treaty’s ratification.¹⁴² Even under the assumption that the content of the Treaty, as seen at the time of accession, has been accepted by the national legislators and thereby indirectly democratically legitimized, the “creeping” change of the Treaty’s scope by the hyperextension of

138. See notably Single European Act, *supra* note 33, at arts. 6, 8 and 9.

139. It should be noted, however, that lately the Court has emphasized that consultation with the Parliament must be regarded as an essential element of Community legislation. See *Roquette Frères v. E.C. Council*, *supra* note 133, at 3360-61.

140. Zuleeg, *supra* note 43, at 40.

141. “The need for this [democratic] legitimation increases with the scope of the tasks.” *Vedel Report*, 4 BULL. EC, Supp. 4/72, at 32 (1972). See also *Tagung des Europäischen Rates der Staats- und Regierungschefs am 8. und 9. Dezember 1989 in Strassburg*, 45 EUROPA-ARCHIV D5, D10 (1990), wherein the European Council stressed that it is of essential importance that every further step taken towards an economic and monetary union be in accordance with the fundamental requirement of democratic legitimacy.

142. This argument obviously does not apply to the most recent Members of the Community. New Members are supposed to incorporate the whole *acquis communautaire* into their legal orders. See T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 219-20 (1988).

flexible provisions such as article 235 remains problematic.¹⁴³ It is evident that the unanimity requirement of article 235 which allows members of the executive to veto a decision does not adequately compensate for a lack of democratic participation.

Considerations and preoccupations such as the ones just mentioned are clearly reflected elsewhere in the Treaty. The formal amendment procedure provided for in article 236¹⁴⁴ contains all the safeguards necessary to let the Community process conform to national constitutional provisions. The amendment procedure is without doubt more cumbersome and lengthy than the one provided in article 235, but for good reasons.¹⁴⁵ It would be very problematic — and detrimental to the principle of democracy — to regard article 235 as a convenient loophole through which the Community's authority could be extended at the expense of ratification by national legislatures.¹⁴⁶

B. *The Principle of the Rule of Law*

As a general rule, individuals are not directly subject to duties and rights under rules of traditional public international law.¹⁴⁷ The Community, however — unlike other international entities — exercises sovereign powers over the subjects of the Member States to a considerable degree.¹⁴⁸

The principle of the Rule of Law is the most important safeguard for the individual subject against any exercise of public power in the modern constitutional state.¹⁴⁹ The main features of the theoretical concept of the Rule of Law appear to be common to all Member States. The formal elements of the separation of powers and the binding force of the law as well as the substantive elements of proportionality, legal certainty and the guarantee of fundamental civil and human rights can be found in the constitutions of all European states.

143. Compare Weiler, *supra* note 137, at 51, who maintains that in view of the passage of time and the profound changes in the operation and interpretation of the document since the approval of the Treaty of Rome by the national parliaments, the argument that the Treaty itself legitimizes the current European program is no longer altogether convincing.

144. See EEC Treaty, *supra* note 1, at art. 236 (*reproduced supra* note 40).

145. See Everling, *supra* note 21, at 14.

146. See Schwartz, *supra* note 51.

147. There are some notable exceptions, e.g., international instruments protecting human rights and the international law of war crimes.

148. In *Van Gend & Loos v. Nederlandse administratie der belastingen*, *supra* note 114, at 12, the Court held that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights . . . and the subjects of which comprise not only Member States but also their nationals."

149. From the German concept of "*Rechtsstaat*;" compare the French "*État Constitutionnel*."

The Court has consistently held that the Community is bound by the Rule of Law. It has derived this conclusion from the general principles of law common to the Member States.¹⁵⁰

Every institution entitled to the exercise of power must be subject to the above-mentioned limitations, whose function is to secure the rights of individuals subject to this power. The legal order of the Community directly affects the citizens of the Member States¹⁵¹ by conferring rights and imposing duties upon them. The question whether the principle of the Rule of Law is being respected within the Community is therefore crucial from a constitutional point of view. This is particularly true with regard to article 235. The inherent unpredictability of the scope of application of this provision contrasts remarkably with the main elements of the principle of the Rule of Law: namely, the notions of legal certainty, foreseeability and protection of legitimate expectations. These principles represent an integral part of the justifiable claim that those subject to the laws and their sanctions should be able to plan their actions in accordance with the laws.

Some scholars have implicitly suggested that the unanimity requirement in article 235 yields an indirect supervisory mechanism for the discretionary power conferred on the Community through that provision, rendering concerns about the Rule of Law unfounded.¹⁵² However, this argument is hardly convincing. As stated above, the inherent function of the principle of the Rule of Law is to restrain the executive power of the State by establishing safeguards and mechanisms to protect the sphere of rights of those subjected to the exercise of this power. The ability of the representatives of the national governments to exercise a right of veto hardly constitutes such an adequate safeguard.¹⁵³ One must therefore conclude that a wide and deliberate application of article 235, possibly in areas not yet determined, does directly and profoundly affect the principle of the Rule of Law.

C. National Sovereignty

Sovereignty is the ultimate, all-comprising authority reserved to the State to exercise power over its citizens and its territory subject only to limitations of law. The State exercises its sovereignty by, on

150. See *supra* notes 130 and 131.

151. Especially through the direct applicability of its regulations. EEC Treaty, *supra* note 1, at art. 189, para. 2.

152. As suggested by von Meibom, *supra* note 53, at 2168.

153. D. DORN, *supra* note 22, at 87.

the one hand, making laws and ensuring their enforcement, and, on the other hand, by ensuring its independence with regard to the international community. Most European States' constitutions contain provisions which explicitly authorize the State to surrender limited sovereign rights to supranational entities.¹⁵⁴ Other Member States have had to amend their constitutions substantially in order to render such transfer of sovereign power compatible with their fundamental laws, which in principle reserve the exercise of sovereign rights exclusively to the State.

The voluntary waiver of specific sovereign rights was the inevitable sacrifice that went with the creation of an efficient "supra-institution" with its own powers to take action. The extent of this waiver has, however, been the source of constant debate and disagreement throughout the history of integration, giving rise to some serious predicaments for the Community. A notable example among these was the crisis of 1965, initiated by the claims of France for more respect for State sovereignty within the Community. As is well known, the French boycott of Council meetings paralyzed the Community's work for several months and threatened to break up the European arrangement. In order to restore normal working conditions, other Community members consented *inter alia* to the French demands for a restatement of the Council's voting procedure and thereby instituted the "agreement to disagree,"¹⁵⁵ commonly known as the Luxembourg Compromise.¹⁵⁶

The Luxembourg Compromise, whose legally binding force has generally been denied, nonetheless led to a voting procedure based exclusively on consensus within the Council over the next two decades, and has received most of the blame for the slow pace of integration during this period. While proponents of a rapid integration have legitimately criticized the Luxembourg Compromise as being the result of an inappropriate nationalistic "protectionism," countries favoring a weak Community still expressed concern that the EEC was unduly curtailing their sovereign rights.

The entire situation regarding the voting procedure has drastically changed since the passing of the SEA, which provides for a considerable increase in majority decisions in areas regarding the realization of

154. See, e.g., GRUNDGESETZ [GG] art. 24 (Ger.).

155. A. PARRY & J. OMNAGE, PARRY & HARDY: EEC LAW 31 (2nd ed. 1981).

156. The relevant addition made by France to the Council's projected voting procedure, which provided that if important issues of particular Member States are at stake, the Council will try to reach solutions which can be accepted by all Member States, reads: "[W]here very important interests are at stake the discussion must be continued until *unanimous* agreement is reached." Luxembourg Accords, 3 BULL. EC, at 8 (1966) (emphasis added).

the Single European Market by 1992.¹⁵⁷ The procedural changes introduced by the SEA have exacerbated the problem of encroachment on national sovereignty.¹⁵⁸ Today, there is growing concern on the part of sovereignty-conscious Member States regarding plans for a wider and deeper integration, despite the recognition of the advantages of integration. The criticism of the proposed European Monetary Union and an ultimate Political Union of Europe are the most obvious examples of mounting apprehension.

The issue of State sovereignty has always been linked with the different voting procedures, and problems have always arisen with regard to a voting procedure which by majority could override the wishes of Member States. From this perspective, article 235, which requires unanimity, does not pose a serious threat to State sovereignty since no decision can be taken without the consent of *all* Member States. However, article 235 allows the extension of Community action into fields of national sovereignty to a degree that could not have been envisaged at the time of the creation of the Community. This encroachment on sovereignty can hardly be regarded as legitimized by the original ratification of the Treaty, and its extensive application is likely to arouse sovereignty-conscious States' instincts to protect their sphere of rights.

D. *Federalism*

For Members — or future Members — of the Community having federal or regional structures,¹⁵⁹ the expansive interpretation and application of article 235 poses additional problems stemming from the dual distribution of powers between the central State and the states or regions. Again, the cardinal point of departure of this analysis is the unanimity requirement provided for in article 235, aimed at protecting

157. *E.g.*, EEC Treaty, *supra* note 1, at art. 100A, para. 1. Note, however, the several substantial exceptions listed in article 100A, paras. 2-5.

158. The meaning of sovereignty in today's situation of worldwide economic and political interdependence of States is obviously completely different from the antiquated notion of sovereignty prevailing in the 19th century that contributed to the emergence of the two World Wars. To focus solely on last century's theory of sovereignty would overlook present realities and be imminently dangerous.

The concerns repeatedly expressed by the United Kingdom relating to an increasingly integrated Europe essentially reflect outdated preoccupations with infringement of national sovereignty. Compare the speech by Margaret Thatcher in Bruges, Belgium on September 20, 1988, *Agence Europe* (Doc.), No. 1527 (Oct. 12, 1988). The former British Prime Minister described the European program, just a few years before the envisaged (and unanimously approved) achievement of a Single European Market, as a "co-operation between independent sovereign States," and expressed the view that "to try to suppress nationhood and concentrate power at the centre of a European conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve."

159. Countries with federal structures include Germany, Austria and Belgium. Italy and Spain have strong regional structures.

vital interests of the Member States and often invoked in defense of the procedural impeccability of the provision.

In the case of the protection of sovereign rights of the Member States, unanimity within the Council is indeed apt to fulfill the task of securing their interests (except to the extent that Community power may be extended into areas previously reserved to the Member States). Council members, as representatives of the (central) States' executives, are well-suited to represent the interests of "the State" as a whole. When, however, the concerned entities are ones which, unlike the central State, do not have a vote in the Council, the "protecting function" of the unanimity requirement becomes illusory.

The chief source of friction in the relationship between the EEC and the states (of federal States) and regions of Europe has always been the non-participation of state or regional representatives in EEC institutions, whose legislation is nonetheless binding on them. In the Federal Republic of Germany, general provisions like articles 235 and 100 of the Treaty are particularly problematic with respect to the constitutional guarantee of legislative and executive powers of the German *Länder*. This is due to the increasing application of those general clauses in peripheral areas of the economic union, such as culture and environment, which, characteristically in a federal distribution of responsibilities, fall within the sphere of power of the *Länder*. Illustrative examples of the encroachment of Community legislation upon *Länder* competences in the "border areas" of Community power are the expansion of environmental policy¹⁶⁰ and, more recently, the passing of the directive on trans-frontier broadcasting ("Television without Frontiers")¹⁶¹ against the vehement resistance of the German *Länder*,¹⁶² which according to the German Basic Law (*Grundgesetz*) have exclusive authority in the area of broadcasting.

E. *Conclusions*

This section has shown how an expansive interpretation and application of article 235 can and has interfered with fundamental national guarantees such as democracy, the Rule of Law, federalism and, to a lesser extent, State sovereignty. The guarantees of democracy and the Rule of Law can be judged as having the quality of general principles of law which have found a firm place within the legal order of the

160. See *supra* notes 23-37 and accompanying text.

161. Council Directive, 32 O.J. EUR. COMM. (No. L 298) 23 (1989).

162. Denmark opposed the passage of the directive (which was adopted by a majority, with Belgium joining Denmark in dissent), arguing that the Community had no competence in the field of broadcasting.

Community through the opinions of the Court. The principle of sovereignty of States is an acknowledged keystone of international law. But neither is true for the principle of federalism. Although several European States do have a federal, quasi-federal or regional structure, they do not represent a sufficient majority which would justify acknowledging federalism as a general principle of law. For this reason, and also because the Court's jurisdiction with respect to the general principles of law as sources of Community law is still in an initial stage, to effectively protect constitutional guarantees it is not sufficient to rely on the common recognition of these principles. It is necessary, instead, to look for additional safeguards or remedies to secure the respect of fundamental constitutional guarantees within the European arrangement.

III. CONCEIVABLE SAFEGUARDS AND REMEDIES AGAINST POSSIBLE VIOLATIONS OF NATIONAL PRINCIPLES THROUGH THE APPLICATION OF ARTICLE 235

The unanimity requirement set forth in article 235 could lead one to conclude that the provision is "safe" from a constitutional point of view. Such an assumption would, however, prove unjustified in most cases. Where the constitutional problem of an over-extensive intervention of Community legislation into the sphere of sovereign rights of the Member States arises, the unanimity requirement within the Council can indeed be regarded as an appropriate safeguard. The Council is composed of members of the executive, and the central governments of the Member States can arguably be regarded as having the authority to decide on a transfer of powers to the Community.¹⁶³

This consideration does not hold, however, when other constitutional problems connected with an extensive application of article 235 arise. As mentioned above, the veto right of members of the executive is not able to balance the democratic deficit created by a "creeping" change of the Treaty, the potential interference with the rights of individuals or the progressive loss of powers of the constituents of federal States. National legislatures, individual subjects and political entities within federal States exercise their own rights granted to them by the States' constitutions and often need to be protected *against* their own central governments. Therefore, unanimity within the European

163. Since the original transfer of sovereign rights to supranational organizations in most States requires the approval of the State's legislature, one could also maintain that this consent is required for any subsequent abandonment of sovereign powers in favor of the Community as well.

Council, a governmental body, hardly represents an effective safeguard against an overpowering EEC.

Following is an analysis of currently existing and potential safeguards against possible violations of national constitutional principles.

A. *The Principle of "Compétence d'Attribution"*

The legislative organs of the Community — the Council and the Commission — lack the most distinctive and important power of the national legislature: the power to create powers (*Kompetenz-Kompetenz*). Community organs, much like organs of traditional international organizations, have limited power to legislate. They may take only those specific actions which the Treaty explicitly authorizes.¹⁶⁴ The implication of powers within international organizations is deemed to be restricted by this principle of "*compétence d'attribution*."¹⁶⁵

This fundamental Community concept¹⁶⁶ is apparently at variance with the broad interpretation which some have given to article 235, according to which the provision grants nearly unlimited authorization to legislate as long as there is some nexus with the Community's objectives.

Article 235 arguably represents a necessary modification¹⁶⁷ of the principle of *compétence d'attribution*, which, if rigorously pursued, would keep the Community from reacting speedily and flexibly enough to economic and political changes. Even if this is true, article 235 cannot be but a rare exception,¹⁶⁸ "an emergency clause" to the generally accepted rule of deputed powers.¹⁶⁹ It is the nature of an

164. See EEC Treaty, *supra* note 1, at art. 4: "Each institution shall act *within the limits of the powers conferred upon it by this Treaty*" (emphasis added); see also *id.* at art. 189, para 1.

165. See Advocate-General Lagrange, submissions in *Algera v. Assemblée Commune de la Communauté Européenne du Charbon et de L'Acier*, 3 Recueil 159 (1957). The principle of *compétence d'attribution* is also called the principle of conferred, attributed or delegated powers. See, e.g., Skubiszewski, *Implied Powers of International Organizations*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF S. ROSENNE* 867 (Y. Dinstein ed. 1990). H. RABE, *supra* note 72, at 70, spoke of "Prinzip der begrenzten Einzelermächtigung." Regarding the limitation placed on implied powers by this principle, see, e.g., Skubiszewski, *supra*, at 867.

166. H. IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 425 (1972); see also Tizzano, *supra* note 37, at 37.

167. B. BEUTLER, *supra* note 55, at 76. A. BLECKMANN, *supra* note 73, at 159, calls the principle a "deficiency" ("*Mangel*") which is made up for by article 235 of the Treaty.

168. See Usher, *supra* note 48, at 36: "Art. 235 was obviously intended as an exceptional measure."

169. A tendency toward a restrictive interpretation of article 235 in view of the principle of conferred powers is found in von Meibom, *supra* note 53, at 2168; H. RABE, *supra* note 72, at 156. Skeptical of this view is Everling, *supra* note 21, at 17, who claims that the existence of article 235 itself disproves that there is any such principle.

exception to a rule that it does not lend itself to an extensive interpretation.

B. *The Principle of Subsidiarity*

The concept of subsidiarity has been developed mainly with regard to entities within a federal State, where it is considered a fundamental rule of cooperation between the federal State and its constituents. It implies that where more than one institution is endowed with powers to legislate and to administer laws within a legal framework, the larger unit, *i.e.*, the one having the more general powers, may take action only after it has been ascertained that the same matter cannot be more rapidly and efficiently carried out by the smaller unit, *i.e.*, the one having more specific competences.¹⁷⁰

The principle of subsidiarity also lies at the foundation of the quasi-federal structure of the Community. It requires the Community to engage in no operation which could more appropriately and readily be undertaken on the level of the Member States. Originally invoked by the Member States in order to guard their spheres of retained sovereign decision-making against constant interference by Community regulations, the Community itself has increasingly turned to the principle of subsidiarity in an effort to cope with its burgeoning responsibilities. The subsidiarity principle, traces of which could always be found throughout the Treaty,¹⁷¹ has been expressly introduced into the Treaty by the SEA (article 130r, paragraph 4),¹⁷² and has subsequently been reconfirmed on several occasions as being a guideline for future Community activities.¹⁷³

With regard to article 235, it has been established that whenever a certain Community goal has already been attained by unilateral measures taken by the Member States (or where such action is feasible on

170. For a general analysis of the principle of subsidiarity, see STADLER, *SUBSIDIARITÄTS-PRINZIP UND FÖDERALISMUS: EIN BEITRAG ZUM SCHWEIZERISCHEN STAATSRRECHT* (1957); see also *The Subsidiarity Principle*, *supra* note 3.

171. See, *e.g.*, EEC Treaty, *supra* note 1, at art. 189, para 3: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, *but shall leave to the national authorities the choice of form and methods*" (emphasis added).

172. EEC Treaty, *supra* note 1, at art. 130(r), para. 4, reads in pertinent part: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."

173. See, *e.g.*, speech of J. Delors in 43 *EUROPA-ARCHIV* D340, D341 (1988), and more recently his address at the College d'Europe, Bruges, Oct. 17, 1989, in which he emphasized the "absolute necessity [of] . . . decentralization of responsibilities, so that we never entrust to a bigger unit anything that is best done by a smaller one." Today, "all the arguments are in favour of including the subsidiarity principle as a general principle in the Treaty." *Editorial Comments: The Subsidiarity Principle*, *supra* note 3, at 184.

the national level), action by the Community ceases to be necessary and article 235 is inapplicable.¹⁷⁴ Thus, the authority of the rule of subsidiarity has also been acknowledged with respect to this provision. Consequently, the principle of subsidiarity can legitimately be perceived as putting a curb on an expansive interpretation of article 235. The principle of subsidiarity is without doubt the most appropriate to counterbalance growing Community activity within the sphere of reserved powers of European regions and states within a federation.

C. *Participation of National Parliaments in the Legislative Process*

Could the problem of the "democratic deficit" in the Community be alleviated by increasing the participation of national parliaments in the Community's legislative process? It has been argued that it would be incompatible with the supranational character of the Community if national parliaments directly or indirectly controlled the decision-making process of the Community.¹⁷⁵ The reason for this is said to be that the Community, as an entity of limited powers defined by the Treaty, must at least have supreme decision-making power within those limits.¹⁷⁶ It would be an obvious contradiction to the spirit and nature of the Treaty to have the national parliaments play a decisive role in the Community's lawmaking process. But at least in areas where the Community competence is not unequivocally delineated and the Treaty thus does not provide the aforementioned limits within which the Community should exercise its autonomous powers, as is true of article 235, the participation of national parliaments in the decision-making process seems to be both conceivable (without contradicting the Community order) and desirable, in view of the enhanced public accountability it would provide.

There are different ways in which national parliaments could influence the Council's deliberating process. The first possibility is the exercise of monitoring powers over the members of the Council in their capacity as members of the national governments. It is apparent that the degrees and forms of answerability of the executive to the parliament will vary considerably. Yet in every parliamentary democracy the executive is ultimately controlled by, and (if one considers the possibility of dismissal of the government) to some extent also dependent

174. Schwartz, *EG-Rechtsetzungsbefugnisse, Insbesondere nach Artikel 235: Zusschliesslich oder Konkurrierend?* 11 *EuR* 32 (1986).

175. Newman, *The Impact of National Parliaments on the Development of Community Law*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION: LIBER AMICORUM PIERRE PESCATORE* 481, 484 (1987); Steffani, *Einführung*, in *PARLAMENTARISMUS OHNE TRANSPARENZ* 253 (W. Steffani ed. 1973).

176. Newman, *supra* note 175, at 484.

on, the approval of the legislature. As more and more Community decisions are taken on a majority basis, however, this indirect means of democratic control progressively loses its importance.

The second conceivable way for national parliaments to influence Council decisions has been more relevant in practice: the parliaments of most Member States have instituted monitoring and participation procedures aimed at the Council's activities. Although detailed studies¹⁷⁷ of these procedures show that they rarely ever exceed the stage of formal debates and are thus unlikely to have any notable impact on the Community's decisions,¹⁷⁸ there is scope for developing them further.¹⁷⁹ Furthermore, the indirect influence of national parliaments within the various Community committees is estimated to be of considerable importance.¹⁸⁰

However, participation of national parliaments in the legislative process of the Community would pose an additional procedural hurdle, which, even if unlikely to completely prevent any decision from being made, could undesirably protract those decisions without being very effective, and therefore without achieving the desired democratic legitimation. Such participation is also likely to water down the concept of an autonomous supra-institution with powers of its own, making its own decisions. Every expansion of the national parliaments' influence on the Community's decisions should carefully balance national aspirations for more democratic scrutiny with the interests of an independent Community. It is doubtful whether the monitoring procedures of the national legislatures are the best possible means of securing democratic legitimacy in the application of any open-ended provision of the Treaty.

D. *Amendment of Article 235: Democratic Legitimacy Through Approval, Not Mere Consultation, of the European Parliament*

In 1972 the Commission instituted a Working Party to examine the issue of enlargement of the powers of the European Parliament. The Working Group issued a Report which recognized *inter alia* the importance of enhancing the participation of the Parliament in areas

177. E. THÖNE-WILLE, DIE PARLAMENTE DER EG 134 (1984); see also C. SASSE, REGIERUNGEN — PARLAMENTE — MINISTERRAT, ENTSCHEIDUNGSPROZESSE IN DER EUROPÄISCHEN GEMEINSCHAFT (1975).

178. An overview of these procedures can be found in E. THÖNE-WILLE, *supra* note 177, at 105-34. A less comprehensive but more recent examination appears in Newman, *supra* note 175, at 485-94.

179. See Newman, *supra* note 175, at 497.

180. E. THÖNE-WILLE, *supra* note 177, at 134-35.

which are decisive for the evolution and development of the Community's "constitutional" framework.¹⁸¹ Among other recommendations,¹⁸² the Report suggested that the adoption of legislative acts under article 235 be made dependent on approval by the Parliament.¹⁸³

The main justification for the Parliament's participation in the exercise of the discretionary power under article 235 is that every time Community powers are extended, the powers of national parliaments are curtailed. For the reasons already mentioned, participation of national parliaments in the Community's decision-making process is, however, somewhat problematic. A logical "second choice" would be to entrust the European Parliament with a supervisory role. Even if the Parliament is not yet structured to replace democratic safeguards provided by national legislatures,¹⁸⁴ this should not mean that ultimate decision-making power should be left exclusively to the Council, whose structure does not bear *any* resemblance to the national legislatures.

Proposals to strengthen the role of the Parliament are, however, not unanimously supported. The important argument has been made that the Parliament does not represent a homogenous body and is just as "federal" as the Council. This is because members of the Parliament, although directly elected, are subject to the different national election procedures of the Member States. It is therefore not clear why it is a more appropriate body to determine what is binding for individuals.¹⁸⁵ However, the planned common European universal suffrage is, however, likely to diminish such concerns. As to the practical chances of an extension of the Parliament's role with respect to the application of article 235, one must presently, just as in 1972, rely on the political goodwill of the Community institutions. Statements like the one recently made by Commission President Delors¹⁸⁶ will hopefully turn from solemn proclamations into realities. The ongoing debate on the Political Union is clearly a step in this direction.

181. *Vedel Report*, *supra* note 141. See also Frowein, *Zur institutionellen Fortentwicklung der Gemeinschaft*, 33 EA 623 (1972).

182. Matters in which the Parliament should have been given power of co-decision included the revision of the Treaties, the admission of new members and the ratification of international agreements concluded by the Community.

183. *Vedel Report*, *supra* note 141, at 39, 41, 45.

184. Tizzano, *supra* note 37, at 51.

185. Klein, *supra* note 129, at 105.

186. "I know that there is a debate on the democratic deficit and I have no doubt whatsoever that, before too long, the powers of the Strasbourg assembly will be strengthened further." Address by J. Delors, *supra* note 173.

FINAL REMARKS

Since 1972, article 235 has increasingly served as the legal basis for the expansion of Community powers into areas of authority originally reserved to the Member States. Views supporting an expansive interpretation and application of this provision currently prevail, and practice has shown that anything which was politically feasible could be justified on the basis of article 235. In several instances, most importantly with respect to the environmental policy of the Community, the application of article 235 went beyond the limitations imposed on it by the Treaty. Expansive interpretation went so far as to blur the distinction between article 235 and the amendment provision of article 236.

This broad interpretation of the provision affects national constitutional principles which the Community is bound to respect as general principles of law, such as democracy, the Rule of Law and the rights of federal entities within the Member States. The unpredictability inherent in article 235 and its open-ended character affect the basic constitutional rights of the citizens of the Member States to foreseeability and stability of the law. The practice of using article 235 as a basis for the creation of new Community powers without the participation of national legislatures violates the citizen's right to laws enacted according to a democratic procedure. The increase in Community powers also curtails the powers of federal entities within the Member States.

Yet these constitutional principles are of special importance for a Europe striving for political union. The concept of democracy has gained importance in the wake of the impetuous movement for political participation in Eastern Europe, and also because of the increasing estrangement of the population of Member States from Community policies. German unification has proven the indispensibility of the Rule of Law. Through strict adherence to this principle for many decades, the Federal Republic of Germany reinstated its political credibility and its reliability as a peaceful actor on the international stage, thereby making unification possible. Federal structures and decentralization, for their part, are keystones of the preservation and furtherance of the variety, diversity and individuality of the cultures and peoples of Europe.

While it is imperative that these principles be considered in every Community decision, it would be contrary to the spirit and purpose of the Treaty to systematically narrow the interpretation of article 235 in order to protect constitutional principles of the Member States. Article 235 must be interpreted as broadly as is necessary to fulfill its function, but at the same time narrowly enough to keep it in harmony with those principles contained in the legal order of the Community which

are intended to avoid conflicts between the Member States and the Community. It has always been one of Europe's main challenges to preserve the fragile balance of powers between the Community and Member States, to reconcile integration and sovereignty. The Community has been conceived in a way that makes this balance possible if the limits imposed by its "constitution," such as the principles of subsidiarity and *compétence d'attribution*, are respected.

With regard to the preservation of the democratic principle, the participation of a stronger European Parliament would contribute a vital participatory element to Community decision-making under article 235. The ongoing institutional reform presents the opportunity to amend article 235 of the Treaty to include the approval by the Parliament of every measure taken in accordance with the provision.