Chapter 5

THE EUROPEAN COMMUNITY'S 1992 PROGRAM

PANEL DISCUSSION

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MR. VICTOR: Good morning. I would like to make a few opening remarks before I introduce the panel.

The European Community has made certain that 1992 will be a year that is long noted by historians. One way or another,

do we have unless we have the threat of withdrawal of licensing?

All of this leads me to the conclusion that we are falling into the Surinam trap here; much of reciprocity is ill-considered and likely to be impractical. We may end up having to accept that reciprocity is not something that can be worked out in the structure of the GATT or a GATT-related multinational treaty, but rather is only appropriate for bilateral treaties between trading blocs.

Thank you.

MR. VICTOR: Very well put in thirteen minutes. David Kennedy.

PROFESSOR KENNEDY: Thanks very much. I share much of what David has said about reciprocity. In particular, I think it is important to look at reciprocity in the context of the political and practical back and forth among implementing countries which David described. That said, what I would like to do is leave reciprocity behind and talk for a few minutes about the general style and structure of politics which the 1992 program has developed.

I am interested in 1992, not so much as a collection of particular legislative proposals, but as a shift in governmental style and capability. My thought is that when Americans talk about "Fortress Europe" and so forth, they are expressing something—perhaps anxiety is the right word—about a shift in the site and structure of government as much as they are a reaction to specific protectionist or anti-American actions from Brussels.

I say this, and would like to focus on these more structural elements, despite the real concerns which arise from time to time over particular legislative approaches or administrative decisions such as "reciprocity" or origin rules or government procurement. There is, after all, a history of these sorts of disputes—usually, although not exclusively, about trade related issues; sometimes, although not always, in the framework of the GATT—which predates the 1992 program.

I would like to reflect, then, not on whether 1992 means a harder line in Europe or increased opportunities in the "world's largest free market." My interest lies rather in the way these [illegible] and operate now somehow under a different sign.

My sense is that the 1992 program, and indeed much of what has transpired in Brussels since the Single European Act, inaugurates a new politics as much as new policy. In many ways this new European politics is attractive as it brings flexibility, technocratic sophistication and some universality to government regulation. But the 1992 legislative program also has a down side.

The hunch I would like to explore here is that the limited nature of the governmental apparatus available for developing the 1992 program has created a political style at once opaque and narrow, a development which should, to my mind, be as important to American observers as are particular legislative proposals.

Let me offer some simple and rather obvious starting points.

It is not difficult to see why Americans should begin to focus on Brussels: a complicated legislative agenda which shifts new substantive areas to the Community places Brussels at the center of a wider range of disputes with third countries—disputes which might either not have arisen or have been resolved in one or another national state. We find issues of a regulatory nature involving a wider range of economic issues—product liability, banking and so forth. We find legislative disputes about products standards and concern about the administration of a European industrial policy as often as we find more straightforward issues of trade and commercial policy.

All these issues are the stuff of more multidimensional politicking and lobbying, more the bread and butter of a national policymaking process.

I think that our anxiety about a new more powerful Atlantic partner is sharpened, somewhat ironically perhaps, precisely because the governmental instruments available in Brussels are really quite limited.

Although the 1992 program has enhanced the image and self-confidence of the Community bureaucracy, the EEC continues to wield an extremely limited legislative authority in an environment with only the most tentative connection to the broader democratic process. The administration, for all that has been

not to mention its taxation and monetary policy is practically unknown. In the end, when we consider 1992, we are talking about a legislative program and a legislative machine which itself has only the most limited instruments at its disposal. So imagine a major federalizing initiative, with ambitions and rhetoric on the scale of our Reconstruction, New Deal or Great Society, being put together by a government with almost no taxing authority which must confront preexisting state legislation in almost every relevant field. On this score, I am reminded of the U.S. government in the days of tariff revenues.

Those who are concerned about a "Fortress Europe" should find little comfort in these limitations on Brussels' governmental authority.

The roots of American concern should lie not simply in the protectionist effects of particular legislative proposals, but in the extent to which the difficulty of pursuing a legislative program under these conditions strains the governmental process in ways which set outsiders at a disadvantage. Indeed, in this case, trying to do a great deal with very little has produced a governmental structure which is more opaque and less politically responsible than we might otherwise have expected.

I should stress that my concern is not with flexibility—the Brussels regime has developed an extremely loose and flexible approach to most issues of industrial policy. Nor am I concerned with the availability of officials, their openness to information or persuasion, or the accessibility of the legislative process. In fact it is rather easy to find out what is happening in Brussels and an appropriate forum for lobbying can usually be rather easily located.

The problem is that Brussels continues to operate as if it were an administration of delegated powers while it pursues an extensive legislative agenda. At a very general level, two sorts of results are readily visible.

Politically, this means that the legislative process responds most readily to the politics of unification. More than one Commission official has told me that Americans must learn *how* to lobby—and what they mean is that we must learn to use arguments which appeal to the goal of building a new Europe. This is certainly true. But if Brussels wants to be a government of general competence, it must also learn how to be lobbied—and that means responding to a full range of political as well as technical concerns not simply to those which advance the cause of federalism or appeal to a Member State which might dissent.

Legally, as Brussels develops political sensitivity general enough to match its legislative aims, it must also develop limits on its authority—legal doctrines and juridical procedures as much as political checks—which are commensurate with its more general legislative powers. But the 1992 program has expanded the legislative program without developing compensatory institutional, political or legal limitations. Instead, the Communities continue to work with the legal and political framework intended to limit a much more modest animal: a simple administration of delegated powers.

Let me develop these two themes: the relative poverty of reliable institutional limits and the limited range of political sensitivity. It is in these two areas that we can already see the strains of the 1992 initiative.

I would like to approach these issues by recalling the approach to integration out of which the 1992 program has grown, and which has dominated discussion about the legal and political limitations on Community legislative authority.

When a Europeanist thinks about the 1992 program's impact on the Community legislative process, his or her first reaction is likely to be a positive one—the old voting gridlock loosened, a large range of new and old proposals adopted, a great deal of successful pressure for prompt and complete implementation mobilized, and so forth. The Europeanist sees these successes, and I think rightly so, as the capstone to the integrative strategy which the Communities have followed all along—integration driven by progress in particular, politically feasible, substantive sectors—and which has been responsible for each major integrative advance.

Partly as a consequence of this functional or sectoral strategy, the European Communities—from the era of Coal and Steel through the Single Act—have defined themselves, their mandate, competence and legislative process far more intensely than other federal systems in substantive legal terms. Theirs is more

than a system of enumerated powers. In the Community, the legal definition of substantive competences is the starting point for determining even the legislative process which will apply to a given measure.

This approach reached its height in the Single European Act on which the 1992 program is being built. A more flexible—"integrated" if you will—legislative process was hooked to specific substantive areas in which Community action was thought politically desirable—the internal market, research and technology, the environment, and so forth—leaving largely behind, unintegrated, such areas of political disagreement as monetary affairs, taxation, or social and cultural policy.

This approach makes sense when a political body delegates to an administration. The politicians have general competence—and democratic legitimacy—while the administration is constrained to act within the limits of substantive delegation. In the early years, this was the situation in the Communities. The Member States had legitimate democratic legislatures of general competence and were seen to delegate to Community institutions within precise legal channels. The so-called "legal competences" could act as limits on the authority of a supranational institution which had no democratic roots of its own.

As the Community has come to pursue a general legislative program, however, this approach has found itself on shakier ground. Indeed, in most other federal systems of which I am aware, the substantive competences idea faded away as the general legislative competence at the center increased—a process which, in the United States, took the form of an increasingly liberal interpretation of the Commerce clause. Formal legal enumeration, perhaps appropriate for a bureaucracy, is replaced by the political and constitutional limits on central authority which seem more appropriate for a government.

But the Communities have so far stuck doggedly to the conceptual apparatus they perhaps correctly credit with their past successes. This has several consequences.

First, it means an awkward inability to admit or develop general governmental responsibility commensurate with the scope of their legislative program. They are, after all, only elaborating

their competences. One result is a continuing temptation to carry on public debate about Community action in legalistic terms.

For example, I recently heard the responsible Commissioner defend the Commission's prerogative to offer an "action program" on the European Social Charter, despite Member State opposition to the Charter itself, by citing the Treaty articles upon which its competence might be grounded—as if the lack of political will to adopt the Charter were irrelevant to the legislative process by which any action program would be adopted. To an American realist, however much rhetorical room to maneuver might be gained by arguments of this sort, the situation is much simpler. When there is the political willingness to accept a Community solution, the competence will be found—when there is not, the competence won't matter.

Second, a competences first approach makes it more difficult to manage the "variable geometry" which seems necessary to a truly general legislative program. The success of the 1992 "internal market" agenda is due, of course, in no small part to radically diminished expectations for complete unification or harmonization. The move to "home country" regulation, "mutual respect," "minimum standards" or variable regimes at the option of each Member State has significantly diversified the fabric of Community law. This sort of flexibility will become increasingly important as the Community works to accommodate EFTA and other non-member countries seeking participation in the Community's internal market.

Yet this sort of diversity is harder to manage when measures are proposed and adopted in sectoral terms—when, for example, the legislative process for adopting an "energy" or a "health" measure differs dramatically from that for adoption of a measure for the establishment of an "internal market" in energy products or health care.

Third, and most importantly, the sectoral competences approach makes it necessary to build administrative or technical substitutes for political and constitutional limits on Community authority. The strain of pursuing a general legislative program on the basis of "limited substantive competences" can be seen in the makeshift mechanisms which have been developed to limit Community authority now that specific substantive competences

no longer do the trick and political avenues are not yet reliably available.

In pursuing the 1992 program, the Community has repeatedly needed to define the limits of its authority—vis-à-vis both member states and the private sector. The result has been a variety of innovative efforts at self-restraint—thresholds for intervention, block exemptions, commitments to intervene only when it seems "efficient" to do so, and so forth.

Indeed, the Community institutions—led by the Commission—have adopted a remarkably deregulatory rhetoric precisely as they have developed their most ambitious legislative initiative. It may be that, as a substantive matter, harmonization in a particular field is or will be deregulatory, despite the variable geometry necessary to bring it about. I'll leave that to the experts.

From a systemic point of view, however, it is unsettling to see legal limits replaced by administrative self-restraint—even when that self-restraint is, for some period at least, legislatively compelled—particularly when the legal mechanisms for securing those limits remain undeveloped. And it is not surprising that such a shift should generate anxiety among outsiders. In the United States, after all, the history of federal jurisdiction is marked by fear about the prejudices of sister state *judges*, let alone administrators.

This problem of limits is no less difficult when it concerns the relationship between member state and Community jurisdiction. In the good old days, at least from a conceptual point of view, it was easy to determine the substantive areas which were matters, respectively, of member state, Community or "mixed" competence. Once a general legislative program has blurred these distinctions, however, we need new guidelines to determine who should or will be responsible for what.

And these are not matters which can be easily settled by numerical thresholds, as discussions about Community merger control make clear. It is not possible to draw a line at a particular monetary threshold when the substantive competences of member states and the Community differ. To the extent Community antitrust law binds private parties—to the extent it *is* a general body of legislation—it will continue to apply below the threshold, even if the merger need not be brought to the attention of the

Commission. Moreover, member states will rightly suspect that the interests they pursue in merger control—relating to national defense, or whatever—will be inadequately protected by the Community institutions above the threshold.

These difficulties, like other growing pains of federalism, might be ironed out within the Community through a combination of political compromise and judicial innovation. From an institutional point of view, however, an American observer is likely to be struck by the rather constrained possibilities for judicial review of the 1992 program. However we assess the possibilities provided by the rules on standing and jurisdiction, the opportunities for judicial management of the limits on the authority in Brussels are narrowed by the effort to carry out a legislative initiative in administrative terms.

Take review on human rights grounds. It is notoriously difficult in any system to mount a challenge to governmental nonaction. In the United States the "state action" doctrine undergirds much of our constitutional structure, but this is more difficult for goverment by administration—especially flexible, discretionary administration—which is more likely to conduct policy without the traces a legislature more routinely leaves behind. We see this in miniature in the competition area where the Commission has responded to the potential for a radical expansion in its workload by a combination of general decisions not to act and informal procedures leading to assurances, comfort letters and indications that no action can be expected which are difficult for concerned parties to challenge or rely upon as precedent.

From a doctrinal point of view, we can already see the difficulty of developing legal limits on the new European government in the jurisprudence about what is known in Community law argot as the "legal basis." Community acts may be challenged if their adoption is not motivated by the appropriate article of the Treaty—if, for example, they cite an article about the internal market in their preamble when they really concern free movement of workers, and so forth. Since different articles come with different legislative procedures, choosing the correct one is an important issue of inter-institutional power.

In principle, in a legal competence driven system, challenges

on legal basis grounds should provide a useful opportunity for general consideration of the political legitimacy of a Community action. Indeed, we can see the beginnings of a judicial correction to the legalism of the general legislative program in the Court's judgments on "legal basis."

But the Court of Justice has so far taken a rather formal approach to the issue, and has been reluctant to explore what we think of as "legislative history" or to delve into the substantive relationship between declared legislative ends and chosen means. This sort of judicial restraint makes sense—either in dealing with administrative "experts" or in a legislative system which provides other political mechanisms for checking the legislative process. But in a competence driven system, legal basis challenges are far more central to the policing of institutional boundaries.

So far, the Court has not been able or willing to scrutinize the legislative program in a way which could take up the slack left by underdeveloped political and administrative checks on the governmental process. In any event, judicial review is a rather inaccessible and archaic way to debate what might otherwise be a straightforward issue of political legitimacy. Given the standing rules for access to the Court, rules which come from an era in which the Community seemed most like an administrative agency, it seems more likely that "legal basis" jurisprudence will be primarily an avenue for resolving conflicts among the institutions of the Community over the scope of the general legislative agenda rather than an opportunity for democratic pressure from citizens or interested third parties.

In short, the rather underdeveloped judicial apparatus for developing Community law on the basis of private initiative makes it even more difficult to test the proportionality of the means chosen or the substantive legal basis in what we would think of as constitutional terms.

Let us turn now to the political consequences of this approach to the growth of a general European legislative program. The first thing to be said about the new European politics is that it often remains shrouded in legal formalism. The European institutions present themselves as simply fulfilling, implementing or administering their legal competences. Politics has somehow already happened elsewhere—in the Treaty, or the European

Summit, or in the Member States, or in the Council, and so f
The European institutions are, in this vision, legal rather
political—responsive to the politics of Member States.

From the outside, this means a more opaque legislative
cess. Even with the most well intentioned and open officia
is more difficult to understand the development of legisl
initiatives so long as the process presents itself as a legal mop
up operation for a politics carried on elsewhere. Indeed, so l
as the relevant political constituents for a federal political pro
are the member states, and the site of political activity is ne
tiation, the opportunities for outsiders to engage the polit
process depend almost exclusively upon the attentiveness of
officials involved.

And so long as the legislative system acts as if its concerns w
substantively limited by enumerated competences, public in
is more likely to take a technical than a political form. This n
offer advantages to some strategically placed players who
make their concerns known in technical language. But it a
inhibits the range of more direct political involvement—by
dustry as much as citizenry—more characteristic of develop
national legislative systems. We saw both sides of this in the pl
of pressures over the reciprocity provision of the banking
rective.

The new European politics of the 1992 program also preser
itself as a-political, or even anti-political and anti-governmenta
in an important substantive sense. I am always surprised by th
extent to which my Europeanist students think of the Cor
munity institutions in non-governmental terms. "Governmen
means the member states. The European "communities" tra
scend mere government. For example, to some it seems su
prising that we should discuss due process or other familia
procedural rights in the context of the Communities—when
is the Member States which must be limited.

The 1992 program gets a great deal of mileage out of thi
sentiment. It seems, if anything, an anti-legislation program
reducing the net number of regulations from twelve to one. An
the claim that 1992 means national deregulation as much a
European re-regulation is an appealing one. Theoretically, th
move to a general European legislative instance of general com

petence would seem to lead almost unavoidably to a reduction in the net level of regulation on the continent.

But given the variable geometry of legislation and application which characterizes the 1992 program and the unwillingness of the legislative authority to foresake its traditional legal identity for a more open European politics, at least during the foreseeable phases of enactment and implementation, the institutional result—regardless of the restrictive or liberal content of particular initiatives—will not be simpler and more politically transparent, any more than it will be kinder and gentler.

Of course, European institutions also acknowledge that their work is "political." But they have a particular image of the "political" in mind when they do so. Theirs is a politics of unification, of government building, not of government.

From the point of view of the Community, the "right" solution, when it is not determined by the technical approach of an administration, is likely to be seen through the limited political optic of Community building or "establishing the internal market." To equate this with the politics of "nation building" which characterized the development of a mass politics in the late nineteenth century and which has characterized a number of societies in the Third World since independence would be a mistake. For this is precisely *not* nation building; it is the development of a political instance freed from and outside of the institutions and pressure points of a national mass politics.

This is a technical politics, which responds to two forces—the bureaucratic imperatives of managing an industrial policy and the political wishes of Member State governments. And a technical politics is convenient, not only for the Commission, but also for member states who often find technical agreement possible or convenient—recasting difficult political choices as the functional imperatives for an "internal market."

Whether looked at from the viewpoint of the Member States, or from Brussels, the 1992 program is an executive driven package. After all, some member state governments would hardly have the authority in their home parliaments to do what can sometimes be achieved in Brussels. Indeed, in every member state, 1992 has meant a shift in power from the legislature to the executive, and often, as a result, from the regions to the center.

The narrow range of governmental authority at the Community level reinforces this narrow approach to politics itself. One result is that political compromises can be harder to strike—or must be struck exclusively in legislative terms—because packages must be developed from a narrow range of political options and be developed across legislative procedures which artificially divide initiatives by competence. The result is often—as in the case of the Social Charter—vague language enabling a variety of implementing approaches.

Taken together, the compromises which have been necessary to permit increased Community competence in a state-focused legislative apparatus mean a complex legal fabric increasingly isolated from direct political input at either the member state or the Community level. The combination of variable geometry, flexibility, home country regulation, and so forth, means, in practice, and I think this is the crucial point, two political regimes, which are each able to pose as the mere legal implementation of the other.

So far as 1992 is concerned—a moment of massive political rearrangement and institutional change—the Community is either technical, legal and administrative—responsive to a politics created elsewhere—or political only in the limited sense that it establishes itself as a legislative program and opposes the politics of government. The Member States, by contrast are either implementing Community legislation or adjusting the imperatives of an internal market to their own, largely executive, sovereignty.

If we take these trends together, it seems that the 1992 program, looked at as a legislative initiative, has, to a frustrating extent, developed a politics which, at least as of yet, dares not speak its name.

Looked at as a change in the site and structure of government, then, what is an American to make of the 1992 developments? It is often said that Americans have come to view unification in Western Europe through two different lenses. Crudely put, when we are thinking politically, we focus on East-West issues and unification in the West seems attractive—in unity our allies

will find strength. When we think economically, we are less certain—if our competitors succeed in abolishing their divisions, will we benefit fully from their new market?

To my mind, we should rearrange these sentiments. When we think politically, we should worry that a unified Western Europe may destabilize the East, or itself be shaken by new relations with Eastern countries, particularly if membership is expanded Eastward or is seen as the only and ultimate goal for Westward looking non-members. We should rather support an independent economic unit in Central Europe, which might be developed out of the current EFTA group and be associated with the EC in some complex way.

When Americans think economically, we should welcome unification, so long as it is carried out in a political structure which is open, accessible and even-handed. This means focusing on the political structure being developed to pursue the 1992 program.

It is ironic indeed that we in the West should be moving so decisively beyond the political structures of mass democracy precisely as some in the East demand a shift to more democratic political forms. Our response to those demands is oddly mixed. Of course we welcome their enthusiasm. But it seems simultaneously naive or antiquated. We are leaving the cumbersome legislative, judicial and administrative structures of national democratic government behind.

There is undoubtedly much positive in this, and Europe may yet show us the way out of the difficulties of mass democracy into a brave new world in which government is able to remain as flexible and technically sophisticated as the market. The rigidities of administrative bureaucracy or party generated legislation may be reduced, along with the need for close judicial supervision of governmental action.

My own reflection on the 1992 program, however, is that we should recognize that this is being achieved at significant democratic cost. I am concerned not simply about the role of the European Parliament or about the diffusion of the "social agenda" for a "citizen's Europe," but about the possibility for a vigorous and engaged relationship between the government and the parties affected by its regulation. As I look at the 1992 program, I am continually struck by the shift to a more legal and technical form of political engagement which has accompanied the growth of a general European legislative competence.

MR. VICTOR: I would like to thank all of the panelists for their very interesting and incisive remarks. I think it is probably only fair to give our government representatives, especially Auke, a chance to comment on reciprocity and the issues of market access, and how subtle this concept can be. Perhaps you would like a few moments to respond.

MR. HAAGSMA: I will not say too much on reciprocity because I basically have said what I wanted to say.

One of the questions which David Barnard raised was: are we doing it for the European marketplace or are we doing it for the global marketplace? David in his very interesting comments pointed out that we started out doing it for the European marketplace and it was only at the time that we were about to adopt the proposal that we said, "What about the global marketplace?"

I think that has been overtaken, the fear that what we were doing in the European marketplace did not take into consideration the external aspects. It has been overtaken by something which I have just mentioned; that is, that we are seeing reactions to our Second Banking Directive in this country, but also elsewhere, which I call somewhat market-driven, which is more appropriately described by the competitiveness aspect. I know, from the feedback we get in our office in Washington that reciprocity is working. I don't want to say more about that.

I want to say a few things about what David Kennedy just said. He said the only regulation was within the bounds of substantive competences. That is interesting. It *is* something we often say, but if you look at the way it works it is not true. One of the biggest problems I think we have in the Community—and it is something which the law recognizes and has now openly mentioned several times—is that there are no bounds.

One of the things I worked on when I was still in Brussels was this proposal of the European Parliament on voting rights in national elections. The big question was: Does the Community have the substantive competences to do that? I argued no, there must be a limit somewhere. The argument for making the proposal and I leave aside the political reasons, which were certainly

there but the legal reasoning was: If you have free circulation as one of the objectives of the Community, there are all sorts of impediments. Now, if you are a German and you are moving to Italy to find a job there, the fact that you are then losing voting rights may be an impediment. The Treaty provides the powers to do something about it.

With that reasoning nothing seems to be sacred. I find it hard to find anything at all which would not fall within those bounds. With those arguments you could even go into defense matters and you could go step by step, but it is very hard to find an argument to say, "This is clearly the bounds of our competences." It is something which we realize very well and which the law realizes very well.

That is why the law came up with the concept which is now being used more and more, although nobody knows what it is, subsidiarity. Subsidiarity is our attempt to create something which you would call in this country state autonomy. We do not have state autonomy in the Community. There is nothing which is absolutely left to the Member States. But, of course, if you want a federal system, that is what you need. Subsidiarity is our attempt at creating that. Subsidiarity is something that appeared in a Chapter in the Single Act and is now in the Treaty on Environment. Basically, it is defined as follows: the Community only does what it can do better than the Member States. That, of course, is not a very legal argument. It is very hard to legally justify that as a legally binding limitation. It is something which will be very hard for the Court to enforce.

That means that we come into a situation and this comes much closer to what David said: it is a political decision. If you want to do certain things at the Community level, you do them; if you don't want to do them, you don't.

I have one final comment. David Kennedy said basically, as an American realist, when there is the willingness to act you do it; when it is not there you do not. Then you only look at the Council because that is the way the Council works. If the Member States agree to do certain things, okay, they all do them; if they don't agree, they won't.

But our system is different from yours because of the Commission role. If the Commission decides that something needs

to be done, whether on its own initiative or asked for by the Parliament, it makes a proposal. Once that proposal is on the table, it takes on a certain life of its own and a certain meaning of its own.

What you see, and this is interesting, at the moment there is not a lot on the table of the Council, but each presidency needs certain results. So, in the end, even things which at some point seemed rather controversial may be part of what some presidency in the Council wants. For example, let's take broadcasting. There are certain Member States which said that this is culture, this is not Community competence; but, in the end, because someone wanted that proposal, it got adopted.

So, even that political system is not as easy as you just pointed out. The Commission plays a very important role. Once a proposal is on the table—and this is truer today than it was ten years ago, especially with the use of majority voting—that takes on a life of its own. It is very hard to imagine at the moment proposals which, however far-fetched they may seem when proposed, do not have a chance of being adopted at some point without any legal limitations existing.

Thank you.

MR. VICTOR: Mr. English.

MR. ENGLISH: I have a brief comment on the reciprocity issue. The Banking Directive of which this is a part is still within the legislative process; it has two or three steps, I believe, to go. I want to say that the United States is substantially more pleased with the provisions on reciprocity now included in the Directive than the original version.

I was recently in Brussels and talked about reciprocity in the context of the Investment Services Directive. I was told on a couple of occasions that that Directive will be amended to have a consistent reciprocity provision, not only because of the concerns raised, but simply because there is the desire for consistency between the two. We will continue to watch that issue.

Let me offer some general comments that I think are very important to keep in mind when we are looking at the institutions and the process of the European Community.

It is a new political and legal system developing out of events in the 1950s. It is still developing. In my judgment, I would

characterize it as an organization that is evolving from a multilateral organization, of which there are many around the world, into some form of a government. That evolution is still continuing.

In a recent speech, Jacques Delors has called for the December Summit to authorize the convening of an intergovernmental conference. This intergovernmental conference is supposed to work on the European monetary union issue. However, in fact, once convened an intergovernmental conference can rewrite any provision of the Treaty of Rome, provided that there is the political will to do it.

Another very important point in understanding the political system of the European Community is that legitimacy flows in two ways to the European Community and its institutions. First, it flows through the Member States, and that is actually the more substantial way in which it flows. However, it is now beginning to flow more directly from the people. I think that is symbolized, perhaps, through the direct election of members of the European Parliament, which first occurred in 1979.

Those are some very important general points to keep in mind. Thank you.

MR. VICTOR: Thank you very much. I would like to ask our commentators a couple of questions. Obviously, the government representatives can feel free to comment as well. I wonder whether you think that there is any sort of secret agenda going on in Brussels these days, or is there enough transparency on the issues that are evolving there? And, how can U.S. companies who are interested in this and who might well be impacted by what is going on make sure that their interests are properly covered in this ongoing debate?

MR. BARNARD: I think that everyone is ignorant, and I suspect that I am more than most—in consequence of my ignorance I believe there is a secret agenda! But I am sure that if we asked the right questions there would be answers. However, as I do not have the knowledge to ask the questions, I am sure that there is a secret agenda. It is always very nice as a lawyer to be asked a political question. I am sorry. I didn't mean to give offense to anyone from the Commission.

The question that I find fascinating, because it translates into

dollars and cents—and I do not think Americans have any exclusive right to the term realist—is "How can American companies affect the Community's political process?" I believe that the Member States are still more important than Brussels in that process. I think the Japanese use that to the best advantage.

The support of a strong Member State, for example the United Kingdom, in lobbying the Community gives an American company far more prospect of success than seeking, as an intellectual matter, to affect the Commission or any other supranational organization.

PROFESSOR KENNEDY: I guess I agree with you, how would we know if there was a secret agenda? My sense is that people are extremely open. When you ask them any question they will tell you what they are thinking. I have not had the feeling in talking to people in Brussels that there is a secret agenda.

But I agree with David that that is a very different question from the question of how can American companies or American political concerns be brought across in Brussels. There it is more difficult. I think when it is a technical question, or a question of provision of information in the process of the development of a given legislative proposal, it is relatively easy to find out who to get in contact with and how to connect with the political process.

When it comes to sort of bluntly political sorts of issues, then the question is a little trickier. It seems to me that there I agree with David, the place to start is often with the Member States as much as with the Commission.

MR. VICTOR: Would anybody on this side care to comment?

MR. ENGLISH: As far as a secret agenda is concerned, I think the more important thing to observe than the possibility of some secret agenda is that there are many, many actors involved in this process, not only in the EC institutions, but at the Member State level. When you have political actors involved in a system, they all have their own agendas, some of which may be partly secret, some of which are rather openly stated.

I think it is actually just as important, if not more important, to look at the agendas that are being articulated by various leaders in the Member States, as well as at the EC level in Brussels,

to determine what the direction of the Community is likely to be.

MR. VICTOR: Auke.

MR. HAAGSMA: Of course we have a secret agenda, but, as it is secret, I am not going to give it to you.

Let me say something very briefly on lobbying because it has come up. David Kennedy said earlier on that Commission officials say, "You have to know how to lobby." He interpreted that as meaning you have to know which kinds of arguments to bring. I would say it a little differently.

The history of the Commission civil service, which only began in 1952—still, most of it goes back to the history of our civil services in Europe. As a civil servant in Europe, if anyone creates the impression that your decision can be bought, that someone can come to you and say, "This is what I want," and then that exactly comes out—I mean, that is contrary to the way we normally think. Assume that you come with a completely written directive and say, "What do you think of this? Don't you think this should be sent to the Council?" The reaction of the official will be: "Okay, anything but that, to show that I am independent and that I cannot be bought." So, lobbying in Europe is different.

Also, in response to the secret or hidden agenda, there is so much going on in Europe that there are two problems. First of all, the Commission staff is very small; we do not even have time to think about a secret agenda. This sounds strange, but it is literally true. Secondly, we have to write legislation. We are very small. We want to know, first of all, whether what we write will work in practice. We are very much removed from the way it works in practice. Now, that is different from the competition policy lawyers, because they know how things work in practice—it is a little different for dumping, but for all of the others.

If we adopt a Directive, we do not even know exactly how it will be implemented, let alone that we shall ever know how it will work in practice, so we need the input. This is where "lobbying"—in quotes because it is a different type of lobbying than is possible here—comes in. But, if companies come to us, trade associations come to us, consumer organizations come to us, and say, "We have a problem with this because this is the way it will work and be careful," then we will be very interested, because

we need that kind of input. Without that we will never be able to do it.

The Economic and Social Committee, of course, was intended to provide that. The European Parliament provides it to some extent. Unfortunately, it is not working exactly as we had hoped. So, lobbying in Brussels I think is very easy, if you know how to do it, if you keep this in mind.

MR. VICTOR: Let me shift the direction just for a moment and ask David Kennedy and others if they would care to comment, from the United States' perspective, on the following: Would EC membership for non-NATO countries, like Austria, prove to be a political security problem?

PROFESSOR KENNEDY: I think that is a very tricky question. I was actually just in Austria last week talking with people about membership. It seems to me this is a difficult question for the United States at the moment. The idea of these border countries, that the single way to define your interest vis-à-vis the EC is to seek membership, it seems to me, is a mistake not only from the point of view of the countries concerned, but also from our point of view and the point of view of the Community.

In my own view, the debate ought to be shifted from a question of membership for Austria, for example, independently, irrespective of the question of their neutrality, which, from a public international law point of view, I think—and here I disagree with the State Department lawyers on the subject—would pose some problems.

Irrespective of that problem, it seems to me that what we ought to be doing is thinking about developing and supporting the development of some kind of an EFTA organization or some kind of central European partner structure for the European Communities. This organization could then relate to the central core of the Community, permit it to adopt the deep strategy that you suggested, while continuing to relate to these countries that—from Finland, through Hungary, to Austria—have some interest in closer association.

What I said in Vienna is, "As everyone is rushing West, you should be rushing East." That is what the United States should be encouraging—closer association, but not necessarily membership.

MR. VICTOR: State Department?

MR. ENGLISH: My comment on that is that there is already one officially neutral country that is a Member of the European Community and that is Ireland. Ireland is not a member of NATO and not a member, and this is very important, of the Coordinating Committee on Export Controls. There we have an example of a country that is not part of NATO or COCOM but is a Member of the European Community.

As far as Austria is concerned, part of the discussion of this issue has concerned the question of the application of the 1954 Austrian State Treaty. There are complications about that. Those have been looked into at the Department. We have been looking at the issue. I think it is fair to say, as a generalization, that U.S. policy is not really hostile to Austrian membership.

MR. VICTOR: Thank you. I would be happy to take questions for the panelists here from people in the audience if somebody cares to ask a question.

JUDGE VAN GERVEN: I would like to make a comment on what has been said with respect to the Banking Directive, trying to demystify even more the whole idea of reciprocity in that field. First, in the Directive, as far as I know, there is no deregulation for a bank which has a subsidiary in one of the Member countries and which wants to set up another subsidiary in another Member State, a subsidiary as opposed to a branch or to doing business. If you want to set up a subsidiary in these countries, you will have to register in the Netherlands, in Italy, in France, and so on. That is one demystification of the unique banking license or passport.

The second point is that we have a grandfather clause in it. Now, you may know that in London all the important Japanese banks, and American banks, of course, have already been registered for many, many years—and if not in London, then in Brussels, Amsterdam or Luxembourg. It is really legislation that lags far behind reality.

Let me add a last thing. Much more important, I believe, than what is going on in the Community or what is going on even in the United States in the field of banking legislation is what is going on in the so-called Cooke Committee of G-10, the Banking Practices Committee. It is in this Committee that capital adequacy

rules are coordinated between the Community members and between the United States and Japan, because they are all members of the G-10. That is on the basis of the Treaty of the Concordat of Basel, which is acting like the GATT in the field of banking services.

MR. BARNARD: I have two very quick footnotes to that. The first is that grandfathering is not an answer to anyone, because it is not an immutable financial system out there, and banks get acquired and the composition of banks changes.

Also, the first draft of the Banking Directive contemplated an unspecified date after which grandfathering would be effective. It was a matter of debate whether that would be the date of implementation of national legislation or the date of adoption at Community level. Grandfathering is helpful to people with vested interests. It is not, of itself, an answer to non-tariff barriers.

The second is that the Cooke Committee deals with capital adequacy in terms of credit risk. It does not deal with capital adequacy in terms of market risk or in terms of currency risk.

JUDGE VAN GERVEN: Not yet.

MR. BARNARD: Moreover, the issues that are before the Cooke Committee have been ten years in development. They are based on the fact that basic banking involves the taking of deposits and relending them. This is a fairly universal activity, but when you come to dealing in capital markets, when you come to trading in options, when you come to financial futures, the world is infinitely more complicated. The likelihood of achieving acceptable universal capital adequacy standards for non-banking activities via the Cooke Committee is far smaller.

MR. VICTOR: On that financial note, we will bring this morning's session to a conclusion. Thanks very much to the panelists.