

RECENT DEVELOPMENTS

EUROPEAN COMMUNITY—LUXEMBOURG COMPROMISE— COUNCIL OF THE EUROPEAN COMMUNITY IGNORES BRITISH AT- TEMPT TO EXERCISE IMPLIED VETO POWER OF LUXEMBOURG COMPROMISE

On May 18, 1982, the Council of the European Community adopted a proposal for a 10.4% farm price increase, disregarding an attempted British veto of the measure.¹ The British voted against the proposal primarily as a means of protesting the separate, unresolved issue of the United Kingdom's budget contribution² to the European Community (EC).³ The British claimed authority to exercise *de facto* veto power under the Luxembourg Compromise,⁴ a seventeen year-old joint statement on EC Council

¹ See 15 BULL. EUR. COMM. (No. 5) 7-9 (1982).

² See *The Day Britain's Bluff Was Called*, ECONOMIST, May 22, 1982, at 77 [hereinafter cited as ECONOMIST]. Disagreement over the United Kingdom's budget contribution to the EC has been a perennial problem from the time the United Kingdom joined the Community. The British feel they have not received a fair return on their contribution to Community operating expenses. A temporary settlement of the issue was made a week after the May 18 majority vote, with further agreement that the question of a more permanent settlement would be taken up later. [Euromarket News] COMMON MKT. REP. (CCH) No. 699, at 1 (June 9, 1982).

³ European economic cooperation was formalized in the Treaty Establishing the European Economic Community (Treaty of Rome), done March 25, 1957, 298 U.N.T.S. 11 (unofficial English version) [hereinafter cited as EEC Treaty].

⁴ Arrangements made in Luxembourg between the Foreign Affairs Ministers of the Six on January 31, 1966, 5 I.L.M. 316 [hereinafter cited as Luxembourg Compromise]. The Luxembourg Compromise sets forth four important provisions with regard to Council decision-making:

1. In the event of decisions that can be adopted by majority on the proposal of the Commission, when very important interests of one or several partners are at stake, the members of the Council will attempt, within a reasonable period of time, to arrive at solutions that could be adopted by all members of the Council in respect of their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.
2. With regard to the preceding paragraph, the French delegation considers that, when very important interests are concerned, discussion must be continued until unanimous agreement has been reached.
3. The six delegations acknowledge that a difference of opinion remains on what should be done in the event that conciliation cannot be fully attained.
4. The six delegations nonetheless consider that this difference of opinion does not prevent the resumption, according to normal procedure, of the Commu-

decision-making formulated by the original six EC Member States⁵ in 1966. The Council's adoption of the proposal surprised the British, who had relied on the veto power the Compromise was thought to lend a Council Member's "no" vote on any important issue.⁶ Ignoring this British appeal to the Luxembourg Compromise, the Council utilized the majoritarian voting scheme codified in article 148⁷ of the EEC Treaty, and adopted the proposal over strong British protests. This Recent Development will review the status of the Luxembourg Compromise in EC decision-making in the aftermath of the Council's action in May 1982. 15 BULL. EUR. COMM. (No. 5) 7-9 (1982).

By the qualified majority voting procedure prescribed in article 148,⁸ the Council may enact certain EC Commission proposals which then become binding EC legislation.⁹ Beginning in 1966, however, an unofficial practice of seeking unanimity developed alongside the official procedure set forth in article 148.¹⁰ This una-

nity's work.

Id. at 317.

⁵ The original six signatories of the EEC Treaty, *supra* note 3, were France, Italy, Federal Republic of Germany, Belgium, the Netherlands, and Luxembourg.

⁶ See *ECONOMIST*, *supra* note 2, at 77.

⁷ EEC Treaty, *supra* note 3, art. 148. Article 148 sets out the "qualified majority" concept of majoritarian voting for the Council's adoption of EC Commission proposals. Under the article 148 formula, a qualified majority is obtained by gathering the determined amount of weighted votes necessary to enact a Commission proposal. *Id.* The voting scheme has been reformulated to accommodate the increased membership of the EC over the last decade; the most current reformulation appears in the Act Concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties, 22 O.J. EUR. COMM. (No. L 291) art. 14, at 19 (1979), which provides that:

Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as follows:

Belgium	5	Greece	5
Denmark	3	Italy	10
Germany	10	Luxembourg	2
France	10	Netherlands	5
Ireland	3	United Kingdom	10

For their adoption, acts of the Council shall require at least: —45 votes in favour where this Treaty requires them to be adopted on a proposal from the Commission, —45 votes in favour, cast by at least six members, in other cases.

⁸ See *supra* note 7.

⁹ See EEC Treaty, *supra* note 3, art. 189; see generally E. NOEL, WORKING TOGETHER 3-13 (1977) (explanation of the relationship between the Council and the Commission in the EC).

¹⁰ On most proposals, voting is theoretically to proceed on the "qualified majority" principle as set forth in article 148. Since 1966, however, unanimity has been required when a Member State holds a very important interest in the proposal then before Council. See J. GRENVILLE, THE MAJOR INTERNATIONAL TREATIES 1914-1973, at 393-94 (1974). For a detailed explanation of the Council's highly complex majoritarian voting scheme, see 2 COMMON

nimity practice was the historical offspring of an EC decision-making dispute in June 1965, which deteriorated into one of the gravest political and institutional crises ever faced by the EC.¹¹ Sharp disagreement over a 1965 agricultural proposal¹² then before Council led to a walk-out by the French delegation.¹³ After a six-month absence of that delegation from the Council,¹⁴ the crisis was finally resolved by two special Council meetings held in Luxembourg in 1966.¹⁵ These meetings produced the Luxembourg Compromise,¹⁶ a joint statement by the six EC Council members which advanced the principle of decision-making by unanimity for the Council when important interests were at stake.¹⁷

Although the Luxembourg Compromise was never a legally binding enactment,¹⁸ the principle of unanimity which it introduced gradually supplanted the Council's majoritarian voting procedure.¹⁹ Except for proposals concerning the EC's budget or administration of its internal affairs, all important Council decisions since 1966 have been reached by informal, unanimous consent and not by qualified majority voting.²⁰ While remaining the product of informal accord, the unanimity practice had become so pervasive within the Council in the following years that at the Paris Summit in December 1974, the EC Heads of Government issued a communiqué²¹ acknowledging and addressing the role of the unanimity

MKT. REP. (CCH) ¶ 4416.

¹¹ E. STEIN, P. HAY, & M. WAELBROECK, *COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 63 (1976) [hereinafter cited as E. STEIN].

¹² The 1965 agricultural proposal was part of a package that included a financing measure that would have expanded the powers of the European Parliament. France was opposed to this expansion of power, while the other five Member States favored it. See Thompson, *The European Economic Community After the 1965 Crisis*, 16 INT'L & COMP. L.Q. 1-3 (1967).

¹³ The French walk-out was a demonstration of the "empty chair" policy. This term does not indicate a secession. Rather, it means that the vacating member will abide by existing agreements, but will not participate in producing new legislation from that point on. See E. STEIN, *supra* note 11, at 63.

¹⁴ In the interim period between the walk-out and the extraordinary Council meetings in Luxembourg, the remaining five Member States of the EC continued to meet in the Council. Thompson, *supra* note 12, at 3.

¹⁵ *Id.* at 4.

¹⁶ See Luxembourg Compromise, *supra* note 4, at 316.

¹⁷ *Id.* para. 2, at 317.

¹⁸ See 4 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC 5-120 TO 5-121* (1976).

¹⁹ *Id.* at 5-122.

²⁰ *Id.*

²¹ Final Communiqué of the Meeting of the Heads of Government, Paris, December 9-10, 1974, COMMISSION OF THE EUROPEAN COMMUNITIES, 8 GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES, point 6, at 298 (1975).

principle in EC Council decision-making.²²

Frequent appeal to the Luxembourg Compromise has come about despite incipient disagreement over its precise scope and application. As a result of intentional ambiguity written into the Luxembourg Compromise,²³ the scope of the veto power which the unanimity practice implies is difficult to define. Chronicling the EC Council's application of these procedures is also a difficult task because the EC Council follows a principle of confidentiality which prevents disclosure of its actual voting patterns.²⁴

²² The Communiqué expresses the opinion that the unanimity practice need not always be resorted to in EC Council decision-making. *Id.*

²³ Paragraph 1 of the Luxembourg Compromise states that Members of the Council will attempt, "within a reasonable period of time", to arrive at solutions which could be adopted by all members of Council, while paragraph 2 states the French position that discussions must be continued however long it takes to arrive at unanimous agreement. Luxembourg Compromise, *supra* note 4, at 317.

Differences of interpretation existed not only among the original members in 1966, but continued to be a problem when the United Kingdom joined the EC in the following decade. According to historians of the 1970-71 negotiations of the United Kingdom's accession treaty to the EEC, succeeding British governments enthusiastically endorsed the Luxembourg Compromise and its implied veto power as part of Britain's pro-accession campaigns of that period. A misconception arose among the British public, however, that the veto power was Community law, and not the matter of generally respected custom that it is. EUROPEAN COMMUNITIES COMMISSION, BACKGROUND REPORT, No. ISEC/B24/82, June 3, 1982, at 2-3.

²⁴ The Luxembourg Compromise is an informal accord, not a binding legal document. See A. PARRY, EEC LAW 37-38 (1973). It espouses a principle that encourages negotiation towards unanimity, (Luxembourg Compromise, *supra* note 4, para. 1, at 317), and thus, by implication, circumnavigation of the article 148 majoritarian voting process. An appeal for unanimity chiefly affects the negotiating phase of Council decision-making, rather than the voting phase. The Council's actions throughout this process, however, are cloaked by a principle of confidentiality, which does not allow disclosures to be made. See 4 H. SMIT & P. HERZOG, *supra* note 18, at 5-123. Information which might mention use of the unanimity practice is "difficult to obtain." *Id.*; cf. ECONOMIST, *supra* note 2, at 78 (simply stating that the veto has been used "four or five times" since 1966, without further elaboration). The historical application of the Luxembourg Compromise in EC Council decision-making is difficult to chronicle, but in the case of the veto power, lack of information should not necessarily be construed as lack of use. First, being a political negotiating tool rather than a legal procedure, it can affect EC decision-making in the form of a mere threat during the negotiating phase, (4 H. SMIT & P. HERZOG, *supra* note 18, at 5-123), a phenomenon which does not lend itself to empirical analysis. Second, owing to the Council's avowed general acceptance of the unanimity practice, (see *supra* text accompanying note 20), and the application of the confidentiality rule in Council decision-making, (see 4 H. SMIT & P. HERZOG, *supra* note 18, at 5-123), it may be inferred that no news from the Council simply confirms that the unanimity practice is being used.

The importance of the Luxembourg Compromise is not confined solely to procedural matters. It is equally significant as a political statement in the context of EC historical development. According to one authority, the Luxembourg Compromise may be seen as one practical expression of the unwillingness of EC Member States to submit themselves fully to the EC "integrating process." *Id.* at 5-124. The concept of integration refers to the process by

Estimation of the effects of the Council's 1982 action upon the future status of the Luxembourg Compromise is, however, facilitated by a review of available information on the appeals to the unanimity principle in 1966 and 1982.²⁵ In 1982, when the Council ignored a British appeal to the unanimity practice and approved a proposal by majority vote,²⁶ a presumption was raised that the Luxembourg Compromise had been abandoned in favor of article 148 for Council's decision-making. Other facts, however, indicate differences between the 1966 French and 1982 British appeals for unanimity. These differences suggest that, in 1982, the Council was not rejecting the Luxembourg Compromise, but instead was rejecting an inappropriate British use of the Compromise's unanimity principle, which exceeded its original bounds delimited by the 1965 crisis. For example, the French in 1965 were prepared to walk out of the Council to underscore their opposition,²⁷ and ultimately did so; in May 1982 it was clear to all of Britain's fellow members that historical exigencies²⁸ made a British walk-out impracticable. More importantly, the French opposed the 1965 agricultural proposal because it was linked²⁹ to a revenue measure which carried strong implications for the whole EC;³⁰ the British only opposed the 1982 proposal after linking it with an outside issue of immediate political concern only to the United Kingdom.³¹

which EC Member States gradually yield sovereign authority to the EC. See Rosenthal & Puchala, *Decisional Systems, Adaptiveness, and European Decision-Making*, in *THE EUROPEAN COMMUNITY AFTER 20 YEARS* 60, 61 (P. Laurent ed. 1978).

²⁵ Compare Thompson, *supra* note 12, at 1-9 (narrative of the 1966 crisis), with 15 BULL. EUR. COMM. (No. 5) 7-9 (1982) (action of Council majority in 1982).

²⁶ See 15 BULL. EUR. COMM. (No. 5) 7-9 (1982).

²⁷ If the French had waited to bring about a crisis *after* they had been outvoted on the 1965 proposal, they might have found themselves in an untenable legal position in the Community. S. HOLT, *THE COMMON MARKET* 69 (1967).

²⁸ In May of 1982, Britain was waging war in the Falklands and was in no position to walk out or levy retaliatory sanctions upon the members of the Council majority because the EC Council was, at that time, honoring British-requested sanctions against Argentina. 15 BULL. EUR. COMM. (No. 4) 7 (1982).

²⁹ The proposal was packaged in such a way that Council approval of the agricultural measure would have automatically included approval of a general revenue scheme which was attached, or "linked," to the original proposal. See S. HOLT, *supra* note 27, at 69-70. France was opposed both to the agricultural proposal, and to the revenue measure linked to it.

³⁰ Acceptance of the revenue scheme would have yielded more power from the Member States to the European Parliament, a result which France strongly opposed. See Thompson, *supra* note 12, at 1-3. Approval of this linked measure would have constituted a further step towards EC "supranationalism" in the eyes of the French. *Id.* at 2. Theoretically, every Member State, not just France, would have been affected by such a political shift of power to Parliament away from the Member States. *Id.*

³¹ See *ECONOMIST*, *supra* note 2, at 77.

Thus far, the consequences of the 1982 Council action bear out the inference that the British veto was ignored because, in the eyes of the other Council members, the circumstances were inappropriate for appeal to the Luxembourg Compromise. After the adoption of the 1982 agricultural proposal by a formal vote, no formal statement amending or disavowing the Luxembourg Compromise's unanimity principle was issued.³² Certain political considerations may account for the apparent willingness of the Council to leave the Compromise in its informal, but important, posture alongside article 148.³³ Historically, the EC Council has sought to balance the concern that a codified veto could paralyze Council decision-making³⁴ with the opposing concern that, in the absence of some kind of veto power, individual national interests would be suppressed by majoritarian voting.³⁵ In the coming years, as the membership base of the EC expands,³⁶ and national interests diversify correspondingly,³⁷ an implied veto power allowing occasional majority voting could avoid the predicted increase in deadlocks that a codified veto would precipitate.³⁸ Alternatively, the implied veto power might place pressure on the Council for a thorough conciliation of interests before reaching a decision.³⁹

The future success of the Luxembourg Compromise in satisfying these opposing concerns depends upon the scope of operation the EC Council allows the unanimity practice in the decision-making process. While the precise scope of operation intended for the Luxembourg Compromise has never been clear, the Council's 1982 ac-

³² The Genscher-Columbo proposal for a European Act, (14 BULL. EUR. COMM. (No. 11) 100 (1981)), asks only for a "clarification" of the process of appeal to the Luxembourg Compromise, but does not call for formal amendment of article 148 of the EEC Treaty, (*supra* note 2), or for disavowal of the Luxembourg Compromise. EUROPEAN COMMUNITIES COMMISSION, BACKGROUND REPORT, No. ISEC/B24/82, June 3, 1982, at 3. For a short discussion of some proposals for changing EC Council decision-making procedure, see Kitzinger, *Problems of a European Political Economy*, in *THE EUROPEAN COMMUNITY IN THE 1970's* 29, 48-50 (S. Warnecke ed. 1972).

³³ France and West Germany insisted that the unanimity rule still stands. *ECONOMIST*, *supra* note 2, at 78. French President Mitterand remarked that it was "up to Great Britain to determine the nature of its continued role in the EEC." *The Times* (London), May 20, 1982, at 10, col. 2.

³⁴ See Final Communiqué of the Meeting of the Heads of Government, Paris, December 9-10, 1974, *supra* note 21, point 6, at 298.

³⁵ See Thompson, *supra* note 12, at 1-3.

³⁶ Spain and Portugal are currently negotiating accession to the European Community. 15 BULL. EUR. COMM. (No. 7/8) 56 (1982).

³⁷ P. DAGTOGLOU, *BASIC PROBLEMS OF THE EUROPEAN COMMUNITY* 224 (1975).

³⁸ *Id.*

³⁹ See *supra* note 24.

tion has suggested limitations upon the application of the Compromise which move towards defining, by implication, an acceptable scope of operation for the unanimity practice in Council decision-making. First, the implied veto power of the Luxembourg Compromise may now be considered an inappropriate means for fashioning linkage to an outside issue⁴⁰ that directly concerns only the vetoing party.⁴¹ Second, the threat to veto a proposal may not succeed when it is perceived by other Council members that the member calling for unanimity is not prepared to offer resistance⁴² to the majority after the decision. Despite these limitations on the Luxembourg Compromise, however, the 1982 Council action has not ended the utility of this informal accord in promulgating European Community law.⁴³

Kevin Mason

⁴⁰ See S. HOLT, *supra* note 27, at 70.

⁴¹ See ECONOMIST, *supra* note 2, at 77.

⁴² See *supra* note 28.

⁴³ See E. NOEL, *supra* note 9, at 3-13.

