The purpose of this paper is to take stock of the current situation in the European Union during the Spanish Presidency in the first half of 2002, and to review, in this context, the position of Jersey, taking into account almost 30 years of experience under Protocol 3 which provides the Island's special link with the European Community (EC).[1] The paper addresses in particular the legal, institutional, political and economic changes which have taken place within the European Community since UK accession and examines the impact of these on the unique situation of Jersey under Community law. Most, if not all, the major developments in European integration are influenced or even driven by external events. The Single Market programme in 1985 (arguably the most important development in European integration since the foundation of the Community in 1951) was prompted by Europe’s lack of competitiveness compared with the United States and Japan. Today, despite the aspiration of the Union to be a model for “global governance”, Union and Community policies are dominated by the trans-Atlantic relationship and by the events of September 11th, 2001 in particular. It is appropriate therefore to describe briefly the international context in which the Union finds itself, the dominant feature of which is the changed foreign policy of the United States.

The cataclysmic events of September 11th, 2001 galvanised political thinking and action around the world. Six months after the destruction of the World Trade Centre in New York, it is clear that although the apocalyptic outcome feared by many has not materialized, the world order has undergone a seismic shift, the effects of which will continue for years to come. The global hegemony of the United States has been reinforced as a result of "11 September". New political, economic and military relations have been established with countries such as Afghanistan, Uzbekistan, Tajikistan, Kyrgyzstan and Georgia. The perceived threats to United States' interests at home and around the world have put US bilateral and multilateral relations (including its approach to international organizations such as the UN, NATO and the WTO) into a different perspective.

Old assumptions are no longer taken for granted. Autonomy or unilateralism – exemplified not only by US military actions but also by the imposition of protective tariffs on steel – characterize US foreign policy and raise questions about the effectiveness of international law, procedures and organizations. The review of US foreign policy, with security being the dominant concern, has had a profound effect in "downstream" areas of economic policy such as trade and development. A new significance is given to strategic relations with countries such as China (recently admitted as a WTO Member) and Putin's Russia (soon to be admitted as a WTO Member).[2] American frustrations with the difficulties of dealing with a Europe
which is in an imperfect and incomplete process of integration in most key policy areas, may have the effect of downgrading the bilateral relationship, with important long-term consequences. The global nature of the perceived threat from terrorism has also given importance to US relations with smaller countries around the world – in the Middle East, Latin America and Central Asia, but also with jurisdictions such as the Channel Islands and the Isle of Man in the fight against international crime. Against this background, the need for the EU to “put its house in order” is urgent if the partnership with the US is to provide an element of stability in an uncertain world.

US relations with European countries (even the UK) and with the European Union are relatively less important today than one year ago. "Europe" tends to be perceived by the United States (particularly the Bush administration) as economically weakened by its continued adherence to social market policies with excessive State interventionism, politically divided and militarily unwilling or unable to share the burden of global peace-keeping with the US.

For the United States in 2002 there is still no adequate answer to Kissinger's question "When I want to call Europe, who do I call?". The identity or legal personality of the integrated (or integrating) Europe is still unclear. The distinction between the Union and the Community remains un-reconciled. There is no clear division of legal or practical competence between the Union/Community and the Member States. "Variable geometry" continues to characterise the Union, particularly in EMU. The prospective enlargement of the Union will increase the disparities in levels of legal obligation for Member States.

Although the European Union has been endowed for over ten years with competence in foreign and security policy, as well as "law and order" issues, the challenge to world order which has emerged in the last six months has tended to highlight the absence of an effective counter-weight to the United States on this side of the Atlantic, particularly in political and military terms. Whether the European Union can produce the quantum leap forward required for effective and equal partnership with the United States (at the same time as doubling its membership and reforming its constitution) is doubtful. At the same time, as the recent Barcelona Summit has shown, the volume of unfinished business in the Community and the Union is greater than ever.

As far as Jersey is concerned, the EC customs union to which the Island became attached in 1973, has changed virtually beyond recognition. It is as if Protocol 3, with its focus on the free movement of goods, has become caught in a time-warp. This does not of course mean that the Protocol has out-lived its usefulness or that it should necessarily be re-negotiated or abrogated altogether. The future constitutional or legal status of Jersey is a matter going well beyond the nature of the relationship of the Island with the European Union. As Jersey seeks to build its future in a changed world, a far wider perspective is necessary. Jersey is of course not alone in this respect. In Europe and in the wider world, there are many legally disparate small jurisdictions which – whatever their formal status – share the challenge of ensuring their economic prosperity and political stability in a world dominated by large sovereign states and international organisations.

Jersey's success in establishing itself as one of the world's leading financial centres has brought with it an involvement in international law and policy in areas such as tax and crime, which were certainly not envisaged in 1972 when the terms of Jersey's relationship with the EC were first defined. Under UK constitutional law, Jersey is a dependent territory of the
UK, with almost complete autonomy as far as Insular law and policy are concerned. Formally, the UK is responsible for the Island's defence and external relations. Developments over recent years – particularly in areas such as tax and law enforcement – have led to a higher profile for Jersey (as for other comparable jurisdictions) in international and European affairs, greater interest in Jersey around the world (especially in the EU, the OECD, the United Nations and the United States), reflections on the nature and scope of Jersey's constitutional relationships with the UK and the EC and a greater involvement for the Islands' politicians and officials, *de facto*, in Jersey's "external" relations.

**Continuity and change in the EU.**

Since UK accession in 1973, the EU has been in a state of constant change. The Union has been enlarged four times and there have been four IGCs where significant Treaty changes have been negotiated. Taking into account the "leads and lags" associated with accession negotiations and Treaty modification (the time to prepare, negotiate, ratify and implement the relevant Treaties), the political and economic development of the Union has had a "stop-go" character over the last 50 years. There has never been a moment in the last 20 years when major constitutional change was not in the pipeline. Even today, when the EU above all needs to focus clearly on meeting the twin challenges of enlargement and constitutional reform, the Nice Treaty remains unratified, EMU and the euro are "running in", thirteen applicant States are on the doorstep, and preparations are underway for a further constitutional conference in 2004. All these developments will have an impact on Jersey which is at present un-quantifiable. The EU has seen periods of intense activity and progress, followed by periods of consolidation or stagnation. Progress in European integration has tended to reflect (or at least to be determined by) economic conditions. External pressures (most recently the collapse of the Soviet Union and the terrorist attacks of September 11th, 2001) have also tended to give impetus to European integration.

The changes which have occurred within the EU since UK accession in 1973 have had the effect that the Union and its institutions (as regards their activities if not their formal structure) are today barely recognisable. The geographical scope, as well as the cultural mix of the Union today is bigger, richer and more diverse than was the case thirty years ago. Hellenic, Iberian and Scandinavian traditions mix with civilian and common law systems. The monetary union which exists following the introduction of the euro on January 1st, 2002, is built upon the customs union (achieved in 1968) and the Single Market (achieved at least legally with the abolition of internal frontiers on January 1st, 1993). The blueprint for EMU itself was set out in detail in the Treaty changes introduced (largely under UK guidance) in the Maastricht Treaty in 1992. As a lesson on the pace of change in the EU, it is instructive that it took around 12 – 13 years from the initiation of drafting the Treaty changes needed for EMU for citizens to have the euro in their pockets. This is a factor which should be kept in mind when assessing the probable timescale of even more momentous events such as the fifth EU enlargement.

Despite the formidable backlog of unfinished business and the apparent slowness in making and implementing reforms, this is a time of intense activity and change in the Union, in virtually all areas of policy, internal and external. Despite the institutional difficulties affecting formal decision-making, the Union (and the Community) have shown a remarkable flexibility in adapting to policy challenges, which should not be under-estimated. Thus, any temptation to evaluate Jersey's relationship with Europe exclusively in terms of the common market (or even purely in economic terms) should be resisted. With all its deficiencies,
today's Union continues to fulfil the purpose for which it was originally conceived (the reunification of Western Europe) and is now committed to the more heroic task of reuniting the continent itself.

The legal and institutional changes introduced through successive IGCs and through daily practice has resulted in a significant shift in the balance of power between the institutions and between the institutions and the Member States. The power of the Commission has waxed (under Hallstein, Rey and Delors) and waned (under Santer and Prodi). The influence – both in legislative, budgetary and policy terms – of the Parliament has grown consistently since 1986 and continues to do so. Successive enlargements, the extension and legalisation of inter-governmentalism at Maastricht in 1992 and widespread euro-scepticism in public opinion has tended to support a shift of power from the "federal" institutions (the Commission and the Parliament) towards the Council and (perhaps above all) the little-understood Council Secretariat. The creation and legal recognition of the European Council in 1972 as the main policy-making body of the EU and the EC, has confirmed this tendency.

The Court of Justice (reinforced since 1989 by the Court of First Instance) has been perhaps the most consistent of all the institutions in interpreting and applying Community law in support of the integrationist goals set out by the "founding fathers" in the 1950s. The importance of the European Courts in developing the constitutional and substantive law of the Community over the last 50 years has rightly been compared with that of the United States’ Supreme Court. There is however one crucial difference between the two Courts. The European Courts have the responsibility (unlike the United States federal courts and unlike other international courts) to interpret and apply EC law functionally, so as to promote European economic and political integration in accordance with the Treaties’ overriding aims. Despite widespread political euro-scepticism and occasional ECJ/CFI rulings which appear to promote States’ rights rather than further extensions of Community competence, this continues broadly to be the case today even if the Courts in Luxembourg are approaching breaking-point in terms of the increased work-load which they are being asked to bear.\[4\]

Despite constant change, European integration has broadly followed a constant, coherent and predictable path over the last fifty years. For those who have seen European integration through the eyes of the United Kingdom and its media over the last thirty years, this may seem not to be the case. For an increasingly autonomous jurisdiction such as Jersey, it is vital (whatever the nature of the constitutional link with the UK and Europe and as a member of the European "family") to have an accurate and up-to-the-minute analysis of the pace and direction of European integration. However, the trend from Coal and Steel Community (1952)[5] to Customs Union (1957-1968) to Single Market (1985-1993) to Economic and Monetary Union (1992-2002) was clearly foreseen in the Treaties. In continental Europe therefore, there is little surprise that what was negotiated, agreed, ratified and implemented has now finally been achieved. There is no better example of this phenomenon than monetary union.

Economic growth and prosperity leading to political stability has always been at the core of the Union’s existence. This is as true today in the wake of the collapse of the Soviet Union, as it was when Europe’s main aim was to confront the aftermath of the destruction caused by the second World War. There have been many turning points in the history of European integration. In continental Europe, many would identify United Kingdom accession in 1973 as such a moment. Most would agree however that the collapse of the Berlin Wall in 1989
marked a seismic shift in the development of European integration. Coming hard on the heels of the Community's successful "single market" programme, the emancipation of Central and Eastern Europe confirmed the Community/Union system as the model for the European continent as a whole, as well (in legal terms) as its periphery. It provoked applications for EU membership from virtually all significant European states and it created a political, institutional and economic challenge for current EU members, the like of which could only have been dreamed of by the "founding fathers" in the late 1940s. More recently, the introduction of the euro has both a practical and symbolic value for the twelve participating States probably unlike any other single event in the history of European integration.

**Economic and monetary union (EMU).**

The smooth introduction of the single currency in twelve Member States on January 1st, 2002 appears to have surprised even those in favour. In many ways, the magnitude of the introduction of the euro - both in political and practical terms - has yet to be appreciated. Although the new institutional arrangements involving the European Central Bank (ECB) have now been in operation for two years, the effectiveness and adequacy of the "institutional balance" between the ECB and the other institutions has also not yet had time to "bed down".

The impact of EMU on countries and territories (such as Jersey) outside the euro-zone will now come under much sharper focus. This has already happened in the early days of January 2002 in the UK. In assessing the probable pace and direction of the European Union’s activities over the next few years, it is worth keeping in mind that UK membership of EMU (as well as that of Denmark, Sweden and possibly certain applicant States) may be almost as politically preoccupying for the Union as enlargement and constitutional reform.

The abstention of the UK, Denmark and Sweden from EMU has provided the most dramatic example yet of "variable geometry" or a multi-speed Europe. It may well be (although it is politically incorrect for EU leaders to admit it at this stage) that a Union of more than 25 sovereign states will only be able to function viably on the basis of "variable geometry". This may be particularly true in the monetary and military fields. The question arises as to whether a minimum “core” group of rights and obligations (including the Charter of Fundamental Rights) would be necessary, to which all EU Members would have to subscribe as a condition of membership.

In the monetary as in other areas of EU policy, the external dimension is also important. If, in the context of “global governance” the enlarged EU is to function effectively with partners such as the United States, China, Russia and Japan, then the “variable geometry” model has obvious drawbacks. The euro-12 grouping has already had two years’ experience in international organisations such as the IMF, working alongside the UK, Denmark and Sweden. However, it seems reasonable to assume that the most testing time lies ahead now that the euro is in circulation and more visibly present on the international exchanges. By the same token, the practical realisation of the euro, now highlights the need for increased macro-economic and fiscal measures to be taken at Union level to realise the economic as well as the monetary union. Here, the fact that “flanking” legislation would presumably be limited to euro-12 members, would obviously undermine the unity of the Union. This divisive effect would be exacerbated if the tendency of euro-12 members to go “further and faster” extended to related areas such as financial services and tax. This is clearly an important issue for
consideration in Jersey to the extent that current links with the UK are maintained and the UK remains outside the euro zone.

**The second and third pillars.**

The Union (especially at the level of the European Council) is increasingly preoccupied with non-EC business. The Union’s action following September 11th, 2001 and (perhaps above all) measures to strengthen the areas of freedom, security and justice, are examples of this. The extent to which applicant states can demonstrate their ability to implement the third pillar _acquis_ fully (especially as regards the security of external frontiers) is perhaps the key to the fifth enlargement taking place in the foreseeable future. For “off-shore” territories such as Jersey, the enactment and implementation of effective measures in areas such as money laundering, drugs, terrorism and white collar crime is also vital, notwithstanding the terms of Jersey’s formal relationship with the EU, which clearly excludes such subjects.

The “third pillar”, which was created as a framework for inter-governmental co-operation at Maastricht in 1992 provides an interesting example of "living law". Over the last ten years practice has evolved so that many core issues (asylum, immigration, Schengen related aspects) have been transferred to the Community area (the “first pillar”), while at the same time decisions in areas which remain in the “third pillar”, namely police and judicial co-operation, are now taken with a mix of inter-governmental and Community procedures. The Union has attempted to increase the level of freedom of movement across borders, while at the same time reinforcing the security dimension. The special European Council in Tampere in 1999 and the events of September 11th, 2001 have highlighted the need for significant progress in this area. Justice and Home Affairs also provides a classic illustration of the concept of “enhanced co-operation” with the limited involvement of Denmark, Ireland and the United Kingdom in different aspects of Justice and Home Affairs, while Norway and Iceland (members of the European Economic Area and not the EU) have been fully involved to ensure the continuation of the Nordic Passport Union. The extent to which action under the third pillar now is modelled on the EC’s “first pillar” activities is demonstrated by the publication of a biannual “scoreboard” to review progress on the creation of an area of freedom, security and justice in the Union. This emulates the internal market “scoreboard” which has been published annually by the Commission since 1997.

**The future of Europe.**

The EU "road map" for the next few years will revolve around two related themes – enlargement and constitutional reform. Both are political imperatives; enlargement without reform is inconceivable; without the challenge of enlargement it is doubtful if the political will for significant reform would exist. Crucial sub-themes for the immediate future are increased macro-economic convergence (including fiscal policy), increased co-operation in foreign affairs (notably to enable the Union to speak and act politically in a way which is equal to its economic weight in the world) and increased co-operation in internal or home affairs (police, judicial co-operation, visas, asylum, immigration etc.).

These themes were confirmed at the Laeken Summit at the end of the Belgian Presidency in December 2001. They have been endorsed by the current Spanish Presidency. They must however be seen against a growing backlog of unfinished business, which complicates and slows down the Union's major objectives.
Unfinished business.

The preparation for further Treaty reforms in the 2004 IGC (and the recent establishment of a "Convention" under Giscard d'Estaing to prepare the IGC) is only one item on the EU’s increasingly heavy agenda. The effective management of the euro and the challenge of achieving economic and monetary union are new and onerous responsibilities, especially taking into account the new institutional structure in this area. The enlargement of the Union to almost double its present size (the most daunting task ever undertaken by the Union), whilst maintaining its integrationist momentum with a minimum of operating efficiency, carries a risk of paralysis, both internally and externally. Apart from these fundamental issues, there is however a lengthy list of more mundane items of “unfinished business”, perhaps the most important of which is the completion of a genuine Single Market.

Maintaining progress in European integration is often compared to riding a bicycle. Standing still is not an option. The enterprise must constantly be fuelled by new initiatives if it is not to go into reverse. The four enlargements and the same number of IGCs in the last 30 years - not to mention the continuing programme to complete a genuine Single Market – have certainly provided sufficient grist to keep the mill turning. Some may even argue that the growing amount of unfinished business should have dictated fewer new projects and initiatives. Commission Presidents Santer and Prodi (as well as successive UK Prime Ministers) have said "Europe should do less and do better". However, the opposite appears to be the case. The compatibility of an apparently open-ended policy on enlargement with the implicit goal of providing an effective economic, monetary, political and even military counter-weight to American global hegemony seems to have been insufficiently considered. In any event, the EU model attracted membership applications or aspirations from both Western (EFTA) and Eastern Europe and is now unrivalled as the building block or “architecture” for a European super-power (not a super-state) to rival the United States.

In international relations (even in the unique situation inside the Union where an unprecedented symbiosis exists between international and domestic policy), there are physical or material limits to what can be achieved even with optimum political will. The Community and the Union have always worked to timetables. These have been an integral part of the "roadmaps" for European integration which were in fact laid out in the founding Treaties. The customs union was set to be achieved in three stages by 1970. It was achieved in 1968. The Single Market programme adopted in 1985 and confirmed in Article 14 EC set December 31st, 1992 as the date for the abolition of frontiers in the EC. The timetable for EMU was set in the Treaty changes made at Maastricht. Since then, "timetables", "action plans" and "scoreboards" have entered into EC jargon in areas such as the internal market, financial services and justice and home affairs. The risk today is that the overloading of the system (particularly as far as enlargement is concerned) may cause deadlines to be missed, with negative political fall-out and loss of credibility in European integration on the EU (or, rather, the EC) model.

The four enlargements and IGCs which have taken place over the last 30 years have produced thirteen Treaties requiring ratification by all national Parliaments. The Nice Treaty still awaits ratification by Ireland following its rejection in the referendum on June 7th, 2001. The accession of thirteen new Members and the negotiation of a new Treaty (possibly more ambitious than all the others taken together) in the 2004 IGC will increase the number of required ratifications exponentially. At the same time, the “stop-go” tendency which these constant constitutional changes creates for the Union, is made worse by the Council.
Presidency which rotates every six months, the election of a new European Parliament in 2004, the nomination of a new Commission in 2004 to take office in 2005 and the settlement of a new budget in 2006. All of these events will inevitably have an impact on the pace and continuity with which Union/Community policies can be implemented.

Against this background, before turning to the EU’s plans for constitutional reform and enlargement, it is important to describe in outline current EC policies for increased economic integration in the Single Market (including the fiscal dimension).

**The Single Market.**

The first enlargement of the Community in 1973, with the accession of the United Kingdom, Ireland and Denmark, is rightly recalled as a turning point in the development of European integration. The political and (perhaps above all) legal impact of UK membership has marked the progress of European integration ever since. However, economically, the first decade of UK membership was characterised by recession and a failure to build on the success of achieving the customs union ahead of time. This was the background to the Commission’s White Paper of 1985 on Completing the Internal Market, notably through the removal of physical, technical and fiscal (i.e. the non-tariff) barriers which continued to fragment the European market, in contrast to the situation in the United States. The White Paper provided (and the European Council approved) a programme of some 300 regulatory measures to replace incompatible national rules, to be adopted by the Council according to a timetable expiring on December 31st, 1992 (hence the “1992 programme”).

An unprecedented partnership between the Commission (led by President Delors) and the Council of Ministers ensured that the Single Market was completed, at least in legal terms, on time. The Single European Act in 1986 had provided a definition of the Single Market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” Although it was not generally realised at the time, the total abolition of frontiers (rather than their reduction) was the step which made inevitable the development of the Community beyond a mere common market. It created the need for co-operation between Member States in areas such as crime, immigration, visa and asylum policy and judicial co-operation. This need (together with that in the field of foreign and security policy created by the collapse of the Soviet Union in 1989) was addressed in the Maastricht IGC in 1991-2. The Maastricht Treaty, in addition to creating a European Union and endowing it with a three-pillar structure, also expanded the material scope of the Community to cover policies to complement the “market-opening” four freedoms and competition policies in areas such as environmental and consumer protection, employment, health, education and vocational training. Crucially, for the longer-term development of economic integration, the Maastricht Treaty also made detailed provision (with a legally-binding timetable) for the creation of monetary union by 1999 at the latest.

The Single Market programme transformed the process of economic integration in Europe, with profound effects on industry, commerce and citizens inside and outside the Union. A “new approach” to regulation was adopted involving minimum harmonisation of law at EC level (supported by legal recognition of the principle of “subsidiarity”), with market access and integration being guaranteed not by identical rules but by the mutual recognition of equivalent national rules and procedures. This approach implied a division of authority between all levels of government (Community/Union, national, regional and municipal) and -
above all – demanded an unprecedented level of co-operation based on mutual trust, respect and confidence between national authorities.

Since the launch of the Single Market programme in 1985, the emphasis has shifted from manufactured goods to services. Already in 1985, it was realised that the potential for economic growth was greater in services than goods. It was for this reason, both in the EC and in the GATT Uruguay Round (1994) that the focus was on services. It was therefore no coincidence that the increasing dependence of the Jersey economy on services (especially financial services and tourism) made it essential for the Island’s authorities to monitor European regulatory developments closely. Already in 1992 therefore, the economic relations between Jersey and Europe bore little relationship to the terms of Protocol 3. This gap has widened in the last decade and will continue to do so as political, economic and legal integration continues inside the Union. Interestingly, although the applicability of the Protocol to many of the EC's "new approach" Directives (especially those which combine rules drawn from a number of policy areas), this does not seem to have given rise to any insuperable problems.

Today, as the Barcelona Summit (March 2002) has shown, the agenda for the completion of the Single Market centres on areas such as communications (especially internet services), energy and transportation. The aim is to make the EU the “most competitive and dynamic knowledge-based economy in the world”, in the words of the Lisbon Summit in March 2000. In addition, public scepticism about European integration and the related institutions, together with the loss of public confidence in the providers of goods and services, has given a priority to consumer protection at both national and supranational levels. Whatever Jersey’s future legal links with the process of integration in Europe, it is clear that the Island’s economy will not be immune from these far-reaching developments. Again however, the Protocol seems neither to have facilitated nor hindered Jersey’s economic relations with Europe, either in goods, services or capital movements.

Likewise, in the EC Treaty itself, new provisions, procedures and institutions have been created, notably in the field of economic and monetary union. Although the euro has now replaced national currencies in 12 Member States, the full impact of many of the changes made in the Maastricht Treaty (as amended at Amsterdam and Nice) have yet to be fully realised. This is particularly true as regards the powers of the European Central Bank and the regulatory and institutional aspects of economic (as opposed to monetary) union. These fundamental changes to the European Community in the economic sphere only underline the difference between the customs union to which Jersey attached itself in 1972 and the Union in 2002 on the brink of the fifth enlargement.

A further fundamental development has changed the entity with which Jersey is linked by Protocol 3. Jersey’s link is of course with the European Community (EC) and not the Union. Legally, therefore, Jersey is not affected by the second or third “pillars” of the Union Treaty dealing with foreign and security policy and with police and judicial co-operation in criminal matters. These “pillars” have created new institutional structures and procedures, as well as binding rules in areas such as defence, foreign policy, crime (including money-laundering), visa and asylum policy, civil law, access to justice, the mutual recognition of judgements, migration and European citizenship. As a self-governing global player in the financial services industry, Jersey cannot of course ignore the need to co-operate with its partners in many of these areas, irrespective of the formal coverage of Protocol 3.
One theme in this paper is that the legal nature of Jersey’s relationship with the process of European integration is less important than the economic impact of the process on Jersey as an autonomous jurisdiction whose economic prosperity is closely linked to Europe. In fact, for areas other than those covered by the Protocol, Jersey is in the position – at least in economic terms - of a “third country”, such as Switzerland or Liechtenstein. The combined effect of the EU’s economic power and its developed legal order (the *acquis communautaire*) has made the EU an economic magnet and a legal model for virtually all European states, as well as those on the periphery of Europe or with a special relationship with the Union (such as South Africa, Mexico, Mercosur or the Cotonou group of African, Caribbean and Pacific countries). In addition, rules adopted within the EU, in areas such as services, intellectual property, consumer protection or health, are frequently adopted as a basis for international rules in the sectors in question. The GATS and TRIPs agreements in the Uruguay Round provide examples of this. Once fifteen EU Member States have adopted rules in a particular area, it is difficult for the international community (even including the United States) to change these. The effect of the fifth EU enlargement will only reinforce this tendency.

Against this background, it is not surprising that Jersey and other off-shore territories have come under pressure to adopt the EC's fiscal *acquis*. The situation for Jersey is however less “constrained” than for many third countries (such as the applicant states or those which have entered into binding treaty relations with the EU), in the sense that Jersey is legally free to select its laws, policies and procedures as it sees fit. It may draw guidance from the EU/EC *acquis*, but is not required to do so. As far as the EC is concerned, the only constraints are that legislation in Jersey should be in conformity with the Protocol where this is applicable and equivalent to any “minimum standards” applied in the EU to the extent that Jersey economic operators seek access to European markets. In this sense, it is ironical that most pressure on Jersey to adopt EC rules out with the Protocol should come from the United Kingdom!

The special situation as regards taxation

The tendency for the EU to expect or to insist that the *acquis communautaire* will be applied outside the EU has been encouraged by the growing list of states applying to join the Union. The success of the EU has even encouraged the Union to see itself as a possible model of global governance. The approach of the EU and of other OECD countries to the issue of “off-shore” financial centres or “tax-havens” has however raised the problem of “extra-territoriality” in an acute form. The problem has arisen because of the mobility of capital and the existence of different national tax rates and structures. Both the EU and the OECD have, in different ways, attempted to reach internal agreement on tax policies and then to require or compel third parties to respect these. Jersey, like a number of other “off-shore” financial centres has had to face (at least indirectly) pressure both from the EU and the OECD to adapt tax policies implemented as part of an overall economic policy designed to secure (without outside assistance) the economic and social prosperity of the Island.

Under UK constitutional law, the United Kingdom is responsible for Jersey’s international relations. Jersey’s interests in the EU and in the OECD are therefore (formally) represented by the United Kingdom. However, by convention, the United Kingdom does not generally accept international obligations on behalf of Jersey without consultation with and the consent of the Island’s authorities. At the same time, as far as the internal affairs of the Island are
concerned, Jersey is self-governing. The right of the UK to intervene in Jersey’s “domestic” affairs is not perfectly defined (there is no written constitution in the UK), although it is arguably very narrowly defined and limited to (almost unimaginable) situations where public order had broken down. In the field of international taxation, whether within the EU or the OECD, the United Kingdom has recognised this situation by acknowledging in the relevant texts that any changes in Jersey’s tax law and practice could only be made in accordance with the constitutional arrangements in force in the UK. Protocol 3 at the very least creates legitimate expectations in Jersey that EC law falling outside the Protocol (e.g. in the field of taxation) would not be applicable to Jersey.

Neither the OECD nor the EU seeks to assert that Jersey is legally required to adopt any particular tax rate or structure. There is however a perception in both organisations that certain aspects of Jersey’s tax laws should be changed, notwithstanding the absence of a legal obligation to do so. To achieve these changes, political pressure of various kinds has been exerted both directly (in the form of possible sanctions to be imposed by the OECD) or indirectly by the EU through and by the UK authorities.

In the case of the EU at least, taxation is the key remaining area to be addressed in the single market context. Although EC action on direct tax (unlike indirect tax under Articles 90-93) has no explicit Treaty base, the legitimacy of legislative action on tax is now clearly accepted by all Member States. Legislation is still subject to unanimous voting in the Council. Co-decision involving the Parliament still does not extend to tax legislation. Nonetheless, the European Court of Justice (ECJ) has recently taken an imaginative and innovative approach to national tax measures which tend to impede the establishment of a single financial services market. The Commission (with the encouragement of the Member States) has put forward a comprehensive strategy for an Internal Market without tax obstacles. Respect for the subsidiarity principle is more important in tax than in other areas. This may partly explain the gap between principle and practice in EC tax policy, as is revealed by progress (or lack of it) in the Monti package in the Council. This explains the independent action by the Commission in July 2001 in launching some fifteen investigations into alleged fiscal aids in a number of Member States, including the UK. Nonetheless, as economic convergence continues within the EMU framework, the fiscal dimension is likely to become more prominent.

At the same time, the link between EC tax and financial services law, on the one hand and third pillar rules on white collar crime and money laundering on the other, is likely to become tighter. In the same way, co-operation between fiscal, financial, regulatory, supervisory, law enforcement and judicial authorities in the EU is bound to increase.

Against this background (and given the global mobility of capital), it is understandable that the EU should seek the widest possible international level playing field, in order to avoid diversion of business and “reverse discrimination” against EU companies and individuals. This does not of course mean that the EU (or the OECD) can lawfully impose its internal rules on third parties without their consent. Nor does it justify the imposition of sanctions against third parties, unless these are clearly permitted under rules to which all the parties concerned are legally committed.

The changing Union and its impact on Jersey after the fifth enlargement and the IGC.
Considering the fundamental changes which have altered the shape of European integration since UK accession in 1973, the instrument linking Jersey to the Union has provoked remarkably little comment or controversy, at least in the Union’s institutions. Only two cases have been referred to the Court of Justice in nearly 30 years and neither has had a significant effect on practice under the Protocol. The Protocol appears neither to have impeded nor facilitated the economic development of Jersey. It has been largely irrelevant both to the daily economic relations between Jersey and its European neighbours (for example in the areas of tourism and financial services) and it was not a factor in the discussions on tax and related issues of police and judicial co-operation. If therefore changes are thought desirable in Jersey’s relationships, either with the UK, the EU or more widely, then it is not the Protocol (at least in the first instance) which should receive primary attention.

In the preceding paragraphs the developments in European integration and their impact on Jersey since 1973 have been considered. It is clear however that, immediately after the launch of the euro as the main feature of the drive towards a single European economy and on the eve of the fifth enlargement and IGC 2004, there is a continuing need for Jersey (as well as all comparable jurisdictions which are affected by European integration on their doorstep) to reflect on the most appropriate policy to preserve prosperity for the future. In this respect, a glance at the EU’s “roadmap” for the immediate future is appropriate.

The Laeken and Barcelona Summits (December 2001 and March 2002).

It is misleading only to look to European Summits in order to understand the pace and direction of European integration. The EU is like the swan; tranquil on the surface, but paddling furiously to preserve momentum. A great deal of “devil” is in the detail of the work carried on in the (literally) hundreds of committees which meet daily to co-ordinate and co-operate in all areas of Union business. Nonetheless, European Councils are occasions for stock-taking, for resolving particularly delicate political problems and for providing political impulsion at the highest level. In this respect, the final Summit of the Belgian Presidency in December agreed on the procedures for preparing the Union’s next “constitutional” conference in 2004. The Barcelona Summit showed the priority being given to the more mundane (yet indispensable) issues affecting the Single Market (for example in energy, communications, financial services and transport).

Constitutional reform

It is not clear, at this stage, how radical (or merely incremental) the next Treaty reform will be. There is an assumption that IGC 2004 will aim to conclude a Treaty amending the existing Treaties. Certainly, if further moves are to be made towards providing the Union with a more classical “constitution” – involving new “enhanced” or fundamental provisions and the reordering or simplification of existing rules – then Treaty amendments are indispensable. However, there is wide agreement that many improvements can be made to the functioning of the institutions without Treaty changes. Reforms of the Commission and of the Council are already in the pipeline[14], the latter in particular being focussed on preparing the Council for enlargement. Final decisions on the reform of the Council’s working methods should be taken under the Spanish Presidency in the first half of this year at the Seville Council. The Commission’s White Paper on governance will also continue to be discussed and the report of the Mandelkern Group on regulatory simplification is scheduled to lead to a “practical plan of action” in the first half of 2002.
The Laeken Declaration, in a ringing phrase, calls upon the Union to play its full part in “the governance of globalisation”. Although the need for the Union to play a counter-balancing role in world affairs with that of the United States is a *leitmotif* of the Laeken Declaration, the handicap which exists because most of the areas where a European role is most needed fall outside the exclusive legal competence of the Union, is not even mentioned. In this respect, although not raised in the Declaration, a key issue in the Convention and in the IGC 2004 will be the extent to which the inter-governmental or Community models will be preferred for the development and implementation of policies identified as necessary at European level and the extent to which inter-governmentalism and supranationalism will be fused.

The history of post-war European integration is marked by periods of intense development, followed by consolidation. Major events such as IGCs and European Councils combine consolidation (or stock-taking), with development. The current imperfect state of European integration makes a period of consolidation highly desirable. The political need for enlargement and the fact that technological developments outpace the regulators, mean that the Union is condemned to a constant state of flux. Thus, far from calling for a “breathing space” for consolidation, the Laeken and Barcelona Councils identified issues requiring action ranging from justice and security, cross-border crime, the control of migration, reception procedures for asylum-seekers and refugees, employment, combating poverty and social exclusion, environmental pollution, climate change and food safety to broader policy areas such as the need for a better division and definition of competence in the Union, a simplification of the Union’s instruments, more democracy, transparency and efficiency in the Union and the possibility of a constitutional text for the Union.

The intrinsic difficulty and the political sensitivity of all these issues is of a completely different order from the measures taken between 1985 and 1995, to complete the Single Market and present a formidable challenge for the Union as it faces enlargement and the 2004 IGC.

*The challenge of IGC 2004*

Despite three IGCs to discuss constitutional reform (at Maastricht, Amsterdam and Nice), Heads of State and Government have been unable to decide whether to use the term “Community” or “Union” to label or identify the European project. It may be wondered therefore whether sufficient political will exists now to achieve more ambitious goals than the mere “labelling” of the European institutions! The most radical (though least understood) Treaty reforms were made in the Maastricht Treaty in 1992. The extensions of competence, changes in decision-making and institutional reforms made at Amsterdam and Nice were important but incremental. At Maastricht there were twelve Member States. At Amsterdam and Nice there were fifteen, with sharply increased divergences and difficulties in securing agreement. If the current accession timetable is kept and as many as ten new Member States have joined the Union by 2004, then agreement in the IGC and on the resulting Treaty will have to be agreed between as many as 25 parties.

Against this background, two possible outcomes can be envisaged for the 2004 IGC. The first is that radical Treaty and institutional reform will follow a “Big Bang” entry of ten new Member States in 2004. A more likely scenario – to judge from earlier IGCs – is that the Union/Community will continue to be reformed pragmatically and incrementally, moving at the pace of the slowest (or least integrationist) unless the unanimity rule for Treaty ratification is removed.
The agenda for IGC 2004 - towards an EU “constitution”?  

At least, since the inclusion of the “subsidiarity” concept in EU doctrine in 1992, progress in European integration has not been synonymous with a greater centralisation of power in the European institutions. In fact, one of the major obstacles to a clearer identification of the Union or Community is the fact that, in virtually all policy areas (and notwithstanding the notion of “exclusive competence”), power is shared between the institutions and national authorities. The constant ebb and flow between EU, EC and national competence complicates the task of legitimising the Union, of increasing its credibility and of securing public support for the venture.

A better division and definition of competences[15]

Whether or not a clearer division of competence is legally feasible, it seems inevitable that this issue will be a priority for several Member States in IGC 2004. Germany, a federal State with a written constitution which allocates responsibility for specific policy areas to the Länder and the Federation respectively, has led the calls for a clearer definition and division of powers between the Union and its States. Widespread ignorance and scepticism about the Union’s institutions (not only in the United Kingdom) has meant that the demand for a clearer definition of the Union’s powers tends to hide a desire for these to be reduced or at least strictly curtailed. At Maastricht, a Treaty article on subsidiarity was adopted. This was expanded by a political text adopted at the Edinburgh European Council in 1992 and converted into legal form in a Protocol attached to the Amsterdam Treaty. There has been little judicial interpretation of this text to date. In practice, the subsidiarity principle does not appear to have stemmed the tide of matters being dealt with at Community or Union level. This is, of course, as already mentioned, because of technological developments which have significantly reduced the relevance of frontiers and national sovereignty - a phenomenon which has also had its impact on Jersey!

In addition, there are several reasons why any rigid delineation or demarcation of competence would be difficult to achieve in practice. First, as the history of most international organisations has shown, their constitutive Treaties tend to be “living law”, with their scope and meaning evolving gradually over time. The functional nature of the EC/EU Treaties and, above all, their interpretation by the European Courts has reflected this phenomenon more than any other international organisations[16]. The Community’s competence in external relations has evolved (and continues to develop) through the doctrine of implied powers. In 1971 the ECJ ruled in the ERTA[17] case that the Community’s competence in external relations did not depend only on Treaty provisions such as Article 133 (on the common commercial policy), but also on the extent to which the Community had occupied the field by enacting legislation to replace national laws in particular areas such as road transport. As the cases currently before the Court on Community competence in the field of air transport show, this process is ongoing. An area which is today legally outside Community competence may tomorrow move within the Community domain.

Globalisation and the growing irrelevance of national frontiers (especially in a world economy increasingly dominated by invisibles, services and electronic communications) are other factors which are pushing matters into the international domain which hitherto would have been of purely national concern. This process is hardly likely to stop and therefore any attempt at defining policy areas which are “reserved” or “entrenched” for the Member States will be difficult.
Simplification of the Union’s instruments.

It was clearly recognised at the Laeken Summit which set the scene for IGC 2004 that the EU/EC decision-making procedures - both for legislative and executive measures - has now become incomprehensible except to a few “insiders”. The distinction between the instruments themselves (regulations, directives and decisions) has also become blurred. In the interests therefore of transparency, legal certainty and (ultimately) democracy, the issue will be addressed once again in IGC 2004.[18]

Some of the more specific aspects of “simplification” which are to be addressed are consideration of possible “framework” or primary legislation, allowing Member States greater freedom in implementation. This is of course the present system with directives which are the principal legislative instrument for the single market. There is a legitimate question however whether - in a Union of more than 20 States - more frequent use should not be made of directly applicable Regulations. The political objections to this are obvious. Directives allow Member States, in effect, two bites at the cherry. They also allow national parliaments a role in Community law-making, although only in implementing what has already been decided at EU level. A more serious problem with directives (and, a fortiori, with “framework” measures requiring national implementing measures) is that the need for national implementing measures tends to perpetrate or create new national obstacles to trade or investments. In the present political atmosphere however, where subsidiarity and de-centralisation are key - any move towards greater use of regulations can be ruled out.

More democracy, transparency and efficiency in the European Union

This issue is addressed under three headings. First, how to increase the democratic legitimacy and transparency of the present institutions; secondly, the role of national parliaments in the institutional framework; thirdly, decision-making and efficiency in a Union of some 30 Member States. At Laeken, heads of governments raised a series of questions on this issue which is crucial if the EU is to gain democratic support and credibility. These questions included how the Union could set its objectives and priorities more effectively and ensure better implementation; whether there is a need for more decision-making by qualified majority; how the co-decision procedure between the Council and the Parliament could be simplified and speeded up; the future role of the European Parliament; the six-monthly rotation of the Presidency of the Union; the future role and structure of the various Council formations; how to enhance the coherence of European foreign policy; how to reinforce the synergy between the High Representative and the Commissioner for external relations; whether to extend further the external representation of the Union in the international sphere? No answers were of course provided. It will be one of the tasks of the recently-convened Convention on the Future of Europe to draft solutions to these issues.

Towards a European Constitution?

Most of the questions raised above have been debated at length in the Amsterdam and Nice Summits, with incremental rather than radical progress being made. It is hard to be more optimistic if the IGC 2004 comprises 25 or more sovereign participants. Even more ambitious are plans for a “European Constitution”. This is of course partly a semantic issue.[19] As early as the 1960s, the ECJ confirmed the unique nature of the EC's legal order.[20] The issue of whether the EU already has or needs a formal "constitution" has therefore already been partly addressed by the Court.
At Laeken EU leaders put the question of a constitution as follows:

“The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of the citizens, the relationship between Member States in the Union?”[21]

It is clear that, apart from the controversial political connotations of adopting a “constitution” for the Union, the legal and technical aspects of drafting, negotiating, agreeing and ratifying a new comprehensive Treaty would be formidable, even without the ongoing enlargement process. A preliminary unresolved set of issues is whether the Charter of Fundamental Rights (which was “proclaimed” at the Nice European Council) should be included in the basic Treaty and whether the European Community (not the Union) should accede to the European Convention on Human Rights.[22]

There is clearly a degree of overlap between the simplification and reorganisation of the Treaties and the possibility of creating (largely from existing provisions) a division between a “Basic Treaty”, containing the fundamental or entrenched rights and obligations of the Union, and a separate Treaty (perhaps capable of modification by majority vote) containing the remainder of the Treaty provisions of a more sectoral or operational nature. The European University Institute in Florence has already produced, at the request of the Commission, a draft of a Treaty split along these lines. The introduction to the draft makes it clear however that, even in a text (or texts) which purport not to change existing rules, but merely to recast them in the form of a “basic” or “constitutional” text, serious problems would arise if the “new” document(s) were not ratified or only ratified by some Member States. The political gamble involved in launching such an exercise would obviously be great even with the present fifteen Member States. The risks involved with nearly 30 Members probably make the project unrealistic for the foreseeable future, especially if significant “constitutional” modifications were envisaged, such as the reform of the “three pillar” structure of the Union or the related issue of the use of terms “Community” and “Union”.

**The Convention on the Future of Europe.**[23]

The Laeken European Council agreed to establish both a Convention and a Forum to prepare the next IGC. The purpose of the Convention is to bring together the main parties involved in the debate on the future of the Union – Member States, national parliaments, the European Parliament and the Commission. The Economic and Social Committee, the Committee of the Regions, the European Ombudsman and the Presidents of the European Court of Justice and the Court of Auditors participate as observers or have been invited to address the Convention. The Forum is to represent “civil society” (the social partners, the business world, non-governmental organisations, academia etc.) and takes the form of a “structured network of organisations” which will receive regular information on the Convention’s proceedings and make input on this basis. The inaugural meeting of the Convention under former President Giscard d’Estaing was held on March 1st, 2002 in Brussels. The ultimate aim is to draw up a final document – to provide a starting point for discussions in the IGC - which may either comprise different options or firm recommendations, depending whether a consensus is reached or not. The Laeken Declaration provides that “the accession candidate countries will be fully involved in the Convention’s proceedings”, although not, it seems, on the same basis as the Member States.
It is clear that the 2004 IGC will dominate Union/Community politics for the foreseeable future, at least until 2006 or 2007. Even assuming a successful conclusion, with an agreed Treaty, in 2005, experience shows that ratification by all national parliaments is likely to take at least eighteen months. Perhaps even more crucial to the Union's long-term future than the IGC 2004 (although the two issues cannot be separated) is the fifth enlargement. The increase in EU membership to 25 or more States will have a profound effect on the internal and external operations of the Union, with or without the "constitutional" reforms described above.\(^\text{[24]}\) For many of the Union's partners – whether in bilateral relationships or within international organisations – the Union is likely to become even more difficult to deal with.

The effects of a virtual doubling of the Union's membership on smaller States or territories on the Union's Presidency are unpredictable. As far as Jersey is concerned, neither the IGC nor the Treaty changes caused by the next enlargement(s) need provoke any change in the present arrangement with the EC under Protocol 3. In practice, the hegemonial tendencies of the enlarged EU (for example on taxation or the fight against international crime) are likely to be reinforced. Applicant States are already required, as a condition of membership, to apply the principles in the Code of Conduct on business taxation. They will also be required to apply the tax on savings interest Directive and to respect EC law on fiscal state aids. The determination with which the EC is pursuing negotiations with non-member third countries such as Switzerland to extend its fiscal rules to these jurisdictions shows that pressure on jurisdictions such as Jersey to conform to EC norms and practice in this area is unlikely to diminish after enlargement.

**The fifth enlargement**

The EU has made no binding commitment (at least of a legal nature) regarding the timing of the next enlargement. Commissioner Verheugen (responsible for enlargement negotiations) said in the European Parliament on March 13th, 2002 that:

"Our aim is to allow all those candidate countries that are sufficiently prepared to become members of the Union early enough in 2004 to take part in the European elections in the summer that year."

The crucial test therefore is which (if any) applicants will be "sufficiently prepared". With negotiations on issues such as agriculture, regional policy and the budget still ongoing, it is premature at this stage to guess whether the political goal of achieving enlargement during the present Commission "mandate" will be achieved. If it is not, there may well be a considerable delay, pending the completion of IGC 2004. In addition, if the applicant States do not participate fully (as members rather than observers) in IGC 2004, then the EU's "democratic deficit" will be increased and disillusionment in the applicant States exacerbated.

Two further facts are worth recalling as regards the timing of the next enlargement. First, the EFTA countries which became EU members in 1995 took approximately ten years from the launch of the Single Market project in 1985 to prepare themselves for membership. These were advanced, industrialised countries with sophisticated institutions and administrations (actually well above the EU average), which could easily adapt to the existing EU acquis. Secondly, the present enlargement process has already been underway for more than twelve years since the collapse of the Berlin Wall in 1989. Against this background, as hinted above, the Council’s assessment that accession negotiations with the candidate countries should be brought to a successful conclusion by the end of 2002, so that the
candidate countries that are ready can take part in the European Parliament elections in 2004 as members, may be optimistic.

Even if question marks can be raised about the timing of enlargement, it is now clear that, for all Member States, it is a politically irreversible process. In addition (and this is often overlooked by those more concerned with dates, timing and appearances), the process has already had the effect of modernising and upgrading the legal systems and public administrations of all the applicant States without exception. They have accepted (sometimes grudgingly) their need to accept the EC/EU acquis in its entirety. The EU’s success in "exporting" its law and policy, not only to the thirteen applicant States, but also to over 100 countries around the world[25] needs to be kept in mind by European jurisdictions such as Jersey, which face pressure from the EU to conform to rules and practices despite the absence of a legal basis for this.

The enlargement process (unlike any of the four preceding enlargements) has also forced the Union itself to order its own affairs better. The definition of the acquis communautaire and its division into some 30 “chapters” for the purposes of negotiations with applicant States, is one example. There is now almost too much preoccupation with “scoreboards” and “action plans” (following a device invented in the first Delors Commission), although in an ever-enlarging Union, some benchmarking of progress is undoubtedly beneficial. In the same way, the regular assessment by the EU of progress made by the applicant States towards fulfilling the criteria for membership is a necessary exercise.

Whatever criteria are used by the Union to measure progress however, it is clear that in the next year or two, the Union will have to take one of the most crucial (and potentially divisive) decisions in the history of European integration. Currently, accession negotiations are conducted on the basis of “differentiation”. A consensus now seems to be emerging in Brussels whereby the next enlargement is more likely to be by way of a “big bang” involving as many as ten applicants, rather than by a succession of small groups. At Laeken in December 2001, the Council gave a clear indication that ten applicants are moving ahead of Romania, Bulgaria and Turkey. With all applicants, problems exist not with the transposition of the “written acquis” into national law so much as with the administrative and judicial machinery for its implementation and enforcement, together with the ability to co-operate (increasingly by electronic means) with other Union partners in the day-to-day management of the Community/Union under all three “pillars”.

As the Laeken and Barcelona conclusions confirm and as recent international events clearly demonstrate (September 11th and the war in Afghanistan), the Union today is - at least politically - more concerned with activities under the second and third pillars than under the EC Treaty (e.g. as regards the Single Market). Recent EU documentation on enlargement (for example the Progress Reports for 2001) clearly show that the security of the enlarged Union’s external borders combined with co-operation between police, customs and tax authorities in the fight against all forms of international crime, are likely to be the most difficult areas of the acquis for the applicant States to implement to the EU’s satisfaction.

Even if the mood in Brussels remains broadly optimistic concerning enlargement, unspoken questions clearly exist (in Member and applicant States alike). In addition, even if all chapters of the existing acquis are satisfactorily negotiated and “provisionally closed”, it must be remembered that substantial volumes of new acquis are being agreed and implemented by Member States up to the day set for membership. In some of these areas
there may very well be significant difficulties for applicant States in avoiding this new acquis becoming an additional obstacle to membership.

**Jersey and the European Union – thirty years on.**

Protocol 3 to the UK Act of Accession is now almost thirty years old. It is *sui generis* in nature and provides for Jersey, Guernsey and the Isle of Man a relationship with the EC (not the EU) which is unlike any other. The precise scope of the Protocol is not entirely clear, partly because the language used in its drafting - whilst reflecting Community law concepts such as the free movement of goods - is markedly different from that used in the original Treaties. In addition, on only two occasions has the ECJ had the occasion to interpret the Protocol and then only as regards its "non-discrimination" provision. Whether the Protocol is viewed from Jersey, London or Brussels, there is no doubt that the relationship which it reflects has worked satisfactorily, has broadly met the aims of its authors (notably as regards the free movement of goods), and has certainly not been seen as being in need of amendment.

As this paper demonstrates however, the Union of 2002 (and even more the probable Union of 2010) is very different from the Community which existed on the eve of UK accession in 1972. Jersey has also emerged over the last three decades as a financial centre with an international reputation. The economic reality of the Island’s situation combined with globalisation and the increasing irrelevance of national frontiers has caused attention to focus on Jersey’s international relationships and those with the UK itself. As far as the EU is concerned, it is true that Jersey is now on the “radar screen” more than was the case in the past, but this in no way implies the need for change in the present Treaty relationship.

A constant theme in this paper is that, over the last five years or so, the development of EC law and policy on direct taxation (against the background of the introduction of EMU) has had an impact on Jersey and other non-EU jurisdictions quite independently of the legal links between them. The experience of the non-OECD jurisdictions "targeted" both by the 1998 OECD Report on harmful tax practices (as well as by the OECD Financial Action Task Force programme on money-laundering) is similar. In international tax and related matters, legal rules and procedures have come to take second place behind "power politics". As far as Jersey itself is concerned, it is doubtful if the Protocol has been mentioned at all in any of the discussions concerning Jersey's application of the principles in the Code of Conduct on business taxation or in the context of the tax on savings interest Directive. Similarly, linked to the discussions on tax policy, the Channel Islands and other non-EU jurisdictions have come under close scrutiny by the EU and OECD on their enactment, enforcement and international co-operation in various fields of international crime, particularly (but by no means exclusively) "white-collar" crime and money-laundering. Again, the rules and procedures established in the Protocol have been irrelevant in this context.

In considering Jersey's political and economic future, in the context of relations with Europe, it would be a mistake to focus exclusively on the Protocol. Jersey's relationship with the UK and with the EU has recently been considered in the Clothier Report.[26] It is interesting that many of the recommendations of the Clothier Report mirror the measures currently being implemented in the EU to ensure greater openness, transparency and democracy. Likewise, the Edwards Report in 1998 provided a comprehensive and broadly positive assessment of Jersey's financial regulation. Although Jersey's external relations were in principle covered...
by both Reports, there were no specific recommendations on the subject in the Clothier Report, whilst Edwards recommended (in this matter) only that the Island authorities should "reach a position where they can and do co-operate fully with other countries in the combating of crime of all kinds, including tax evasion and lesser frauds as well as money-laundering."[27]

Formally and constitutionally, Jersey's international relations are the responsibility of the UK government, notably the Foreign and Commonwealth Office, acting in consultation with other relevant departments, in particular the Lord Chancellor's Department. In practice however, and particularly taking into account the recent international focus on issues at the centre of Jersey's economic and political life, it is legitimate to question whether the present arrangements have worked to ensure the best possible defence of Jersey's legitimate interests.

In a world of electronic communications, geographic size and formal legal status tend to be less important than economic and financial interests. By these standards, Jersey is (and is generally perceived by the international community as) an important actor in the international financial community. Constitutionally and (perhaps more importantly) in practice, Jersey is wholly responsible for enacting and enforcing financial, fiscal and criminal legislation up to or above international standards. It is difficult to expect politicians or officials who have no direct experience of Jersey laws and practices to defend or even adequately to explain these in international meetings. In 1997, the UK accepted obligations in the EU and in the OECD to extend tax measures agreed in these institutions to dependent territories "within the framework of their constitutional arrangements". Experience over the last five years tends to show that the division of responsibility between the dependent territory and the UK authorities creates difficulties, especially where the economic interests of the two parties may not coincide.[28] There is therefore a case for considering the possibility of allowing dependent territories a greater measure of international legal personality commensurate with their internal legislative, executive and judicial autonomy.

Against this background and given the unprecedented developments currently taking place in the European Union (notably the IGC 2004, enlargement and the development of EMU), it would be strange indeed if there were to be calls for amending an uncontroversial Protocol to the Accession Treaty of one Member State. This is quite simply not on the agenda, either of the institutions or of any Member State. The issue, in my view, is not so much whether or not the Protocol continues to provide an appropriate framework for Jersey’s relations with the EU. The Protocol is, in any event, not a "framework": it is in essence, merely an elemental legal text addressing the free movement of goods and ensuring non-discrimination as between Community nationals. The Protocol is a form of "umbilical cord", linking Jersey (rather tenuously) to the EC. With or without the Protocol, by virtue of its economic situation in the world of international finance, the Jersey authorities (like their counterparts in other comparable jurisdictions) are faced with the challenge of managing relations with a variety of international authorities (the OECD, EC and United States may be mentioned), taking into account Jersey's constitutional relationship with the United Kingdom.[29]

The recent discussions on EC tax law and policy have highlighted - quite irrespective of the terms of the Protocol or indeed of Jersey’s constitutional relationship with the United Kingdom - the fact that Jersey’s financial and fiscal laws are not a matter of indifference for the Community authorities. Experience with the OECD points in the same direction. In one sense, both the EC and the OECD make no secret of their desire to achieve the extra-territorial extension of their tax rules. However, for a number of sovereign States outside the
OECD and the EU, this has serious implications in view of the principles of sovereignty and consent under public international law. Although the situation of Jersey, as a Crown Dependency, is legally different from that of a sovereign State such as Switzerland, Liechtenstein or Barbados, the problem of defining an appropriate reaction to these attempts at extra-territoriality is similar.

Finally, even if concerns have been expressed by the EC authorities about the international implications of Jersey’s tax laws, it should not be assumed that this hides a covert attempt to force an amendment of Jersey’s current Treaty relationship with the EC. A popular misconception - particularly in the UK - is that the EC/EU is bent on centralisation at all costs. This is emphatically not the case. Genuine consideration is being given to the “subsidiarity” concept and to the extent to which policies currently managed at EC/EU level can better be handled nationally or even regionally. This process will be reinforced, not weakened, by the fifth enlargement. Somewhat paradoxically, in my view, particularly as regards the Single Market, there is even a risk that the decentralisation process - if carried too far - may be inimical to guaranteeing to private enterprises the economies of scale on a level-playing field enjoyed by Europe’s American competitors.

In conclusion therefore, there is little risk that Jersey will find itself "press-ganged" into membership of international organisations which it has not wished to join. Jersey's economic success does however mean that the Island has acquired an international profile, irrespective of its legal status, population and size. The international community (including the evolving European Union) will expect such an important actor to be in a position to conduct an efficient, effective and reliable dialogue on issues of common concern. The "internal" constitutional arrangements which are put in place to achieve this are of secondary importance to the international community (provided the system works well in practice) although – in my submission – of considerable significance for Jersey (as well as other dependent territories and regional authorities) and the United Kingdom. The extent to which devolution has already occurred in the United Kingdom (in particular in Scotland, Wales and Northern Ireland) underlines the topicality of this issue.

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[1] In this paper, the terms European Union (EU) and European Community (EC) are used in their precise legal sense. The EU is the creature of the Treaty on European Union (TEU) signed at Maastricht on February 7th, 1992. The EC is the legal entity created by the Treaties of Paris and Rome in 1952 and 1957 respectively and developed by the Single European Act (1986) and the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (1999). The latter Treaty is of course still unratified following rejection in an Irish referendum on June 7th, 2001.

[2] The extent to which Chinese and Russian membership will change decision-making and negotiations in the World Trade Organisation cannot be over-stated. Over 50 years of US-
EU domination of the management of international trade law and policy will gradually disappear as China and Russia begin to assert their presence.

[3] The four inter-governmental conferences held so far for the purpose of considering reforms to the Treaties were in 1986 (the Single European Act), 1992 (the Maastricht Treaty), 1997 (the Amsterdam Treaty) and 2001 (the Nice Treaty). The legal basis for IGCs is Article 48 of the Treaty on European Union (TEU), which provides that any Member State or the Commission may submit to the Council proposals for amendment to the Treaties on which the Union is founded. IGCs are convened by the President of the Council, after consultation with the Commission, the Parliament and the European Central Bank (on monetary issues). Amendments unanimously agreed enter into force after ratification by all Member States in accordance with their constitutional requirements.

[4] A number of reforms to the Courts’ procedures were discussed during the Nice IGC. Not all of these required Treaty changes and many have already been implemented. The management and conduct of litigation in the European Courts already compares favourably with any national jurisdictions, yet further reforms are indispensable if the present system is not to collapse after the fifth EU enlargement.

[5] The Treaty establishing the ECSC was (uniquely amongst EC/EU Treaties) concluded for a limited period of 50 years. It will end on July 1st, 2002 and coal and steel will thenceforth be regulated by the EC Treaty.

[6] There is no equally short English version of the term *acquis communautaire*, which has gained currency in the fifth enlargement negotiations. The term refers to the body of EU/EC law and practice which applicant States must adopt and apply as a pre-condition of EU membership. It comprises principally the Treaties, “secondary” legislation (Regulations, Directives and Decisions), administrative and quasi-judicial decisions of the Commission and other institutions, the case-law of the Community and national courts and the practice of Union/Community institutions (including more than 1,000 Committees which meet regularly to manage Union/Community business).

[7] "Constitutional reform" includes, in this context, Treaty changes, procedural changes not involving Treaty changes and internal institutional reforms which are already being implemented in the Commission and the Council.

[8] The role played by the successive Council Presidencies in promoting European integration is important. It is interesting to note that, with the exception of Denmark for the second half of 2002, the Union Presidency will be taken between now and the scheduled conclusion of the 2004 IGC by Spain, Greece, Italy, Ireland, the Netherlands and Luxembourg. Most of these could be termed “integrationist” Member States, at least compared with the UK. The next UK Presidency is in the second half of 2005.

[9] Some say that a better analogy for sustaining forward movement in European integration today (given the over-loaded agenda and unrealistic timetables) is like changing a wheel on a car whilst it is being driven.

[10] It is arguable that the legal model and economic magnet to which more than 20 applicant states have now been drawn was the Community rather than the Union. It is, for example, an open question as to how long the "three pillar" structure of the EU will survive; the "third
pillar” on police and judicial co-operation has already substantially been transferred to the EC “first pillar”.


[12] Two cases brought by the Commission against the UK involve Gibraltar’s exempt and company legislation. It is interesting to note that these cases could only be brought because of the fact that (in contrast to the situation with the dependent territories) most EC internal market law, including direct tax and state aids, applies to Gibraltar. Secondly, it is interesting (though not legally relevant to the constitutional position of Jersey), that the UK officially confirmed to the Court of First Instance (CFI) in the action brought by the Government of Gibraltar against the Commission (cases T-195/01 and T-207/01), that direct taxation was a matter falling exclusively within the competence of the Gibraltar Government under the Gibraltar Constitution.

[13] It is paradoxical (and even unjust) that sovereign states such as Switzerland and Luxembourg can, as OECD Members, formally dissociate themselves from the OECD Report of 1998 on harmful tax competition. Equally, as sovereign independent states, Switzerland and Liechtenstein can negotiate (or not) as they see fit with the EC on the possible extension of the Code of Conduct on business taxation and the tax on savings Directive to their jurisdiction. The position of jurisdictions which are autonomous but which are not sovereign States, is more difficult and vulnerable.

[14] Council General Secretary Solana presented the first draft of a paper on Council reform to the Barcelona European Council in March this year.

[15] The Secretariat of the European Convention has produced a note describing the current system for the allocation of competence between the European Union and the Member States, providing helpful background for the discussion in this paper. (Document CONV 17/02, Brussels March 28th, 2002).

[16] Three of the fundamental principles of Community law which distinguish the unique legal order of the EC (direct effect, supremacy and the right to damages for breach of Community law by a Member State) were enunciated by the ECJ and are nowhere to be found explicitly in the Treaties. They are, par excellence, judge-made law.


[18] Simplification of EU/EC instruments and decision-making procedures has been on IGC agendas before. At Amsterdam in 1997, at least 25 different decision-making procedures were identified, yet - for political reasons - little progress was made towards simplification. Vested political interests (“sovereignty” in other words) are the reason for this.

[19] Commission President Prodi said in his speech to the European Parliament on December 11th, 2001 that "what is essential is not the name given to the text, … but that the text [which emerges from IGC 2004], by virtue of its content and thanks to the open and democratic nature of the process that generated it, should be regarded by everyone as having the force of a constitution."


(22) The ECJ has already held that the EC cannot currently accede to the ECHR, without amendment to the existing Treaties: Opinion 2/94 on Accession of the Community to the ECHR [1996] ECR I – 1759.

(23) The secretariat of the European Convention has produced a note on the Convention’s working methods. (Document CONV 9/02 of March 14th, 2002).

(24) Even if radical streamlining is agreed for EU and EC decision-making, the fact is that the effective operation of the Union depends largely on political will, rather than legal procedures. Political and economic disparities in the new Union will obviously be far greater, with inevitable effects on efficiency.

(25) Over 100 WTO Members have preferential agreements with the EU. Many of these require the EU’s partners (at least as a matter of "best endeavours") to adopt the EU/EC acquis as much as possible.


(27) It is noteworthy that, at least as far as the EU authorities are concerned (notably in the Commission’s Justice and Home Affairs Department and in the European Anti-Fraud Office (OLAF)), Jersey’s reputation as an efficient and cooperative jurisdiction in international criminal matters is exemplary.

(28) There is precedent for the UK and its dependent territories taking different (or even opposing) views in international organizations. Until reunification with the Peoples’ Republic of China, Honk Kong formally sat as part of the UK Delegation in the WTO, yet participating entirely independently.


(30) The absence of a written constitution in the UK clearly does not help international understanding of the relationship between Jersey and the UK. As the recent litigation involving the Government of Gibraltar in the CFI demonstrates however, even written constitutions such as Gibraltar’s are not always free from ambiguity.