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SOME ASPECTS OF THE FOREIGN RELATIONS POWER OF THE EUROPEAN ECONOMIC COMMUNITIES

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The subject of this article is a substantial one, bursting with theoretical and practical problems, but it is of course much narrower than the survey of the Communities in the spring of 1966 which Mr. Thompson presented to the conference. That survey was made in the light of the six months crisis created by the absence of the French from the work of the institutions of the Economic Community. The resistance of the French to certain central aspects of the development of the Community institutions, particularly to what they described as the developing "style" of the Commission, was set out in a memorandum of ten "proposals" that soon came to be called, irreverently, the decalogue, of which the fifth, sixth, and seventh proposals, set out below, were concerned with Foreign Relations.[1]

> 5. In 1959 the Council enacted provisional rules for the recognition of diplomatic missions accredited to the Community (letter sent by Mr. G. Pella, President of the Council to the President of the Commission on July 27, 1959). These rules divided the prerogatives between the Council and the Commission. In particular, letters of credence are to be presented to the Commission President who has established for this purpose a ceremony patterned on national state practice, though the Rome Treaty states that only the Council can make Community undertakings to non-member countries. An end should therefore be put to the current mistaken procedures, and all its prerogatives should be restored to the Council.
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> 6. It follows that diplomatic approaches by foreign representatives to the Commission should be brought, as soon as possible, to the attention of Council or the representative of the State who is currently President of the Council.
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> 7. The treaty lays down rules, which vary with the organization involved, for the procedure under which the Community maintains relations with other international organizations. It appears that the Commission has overlooked these facts and seems to believe that it has a genuine power of discretion in this area. The Council should assess, case by case and purely in terms of Community interests, the form and nature of links to be established.

It is not the purpose here to discuss these specific problems which

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[1] French Affairs, No. 187, Jan. 1966.

the French raised in the field of foreign relations nor to comment on their significance in the overall French resistance to the supranational trend in the development of the Community institutions but rather to suggest how large a part they play. To that end points three and four of the heptalogue of the final settlement among the Six at Luxembourg follow:[2]

> 3. The Council and Commission shall inform each other, promptly and comprehensively, about representations made to them regarding matters of substance by representatives of non-Community countries.
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> 4. The Council and the Commission shall hold consultations, as called for in Article 162, on the advisability, details, and nature of the contacts that the Commission could establish under Treaty article 229, with international organizations.

Any description of discussion of the foreign relations power of the Communities immediately raises several basic questions. Is it a general power? Or is it a group of specific treaty delegations of power? Is it rather a power limited to what is necessary and proper to the accomplishment at the international level of the purposes and objectives of the treaties at the national and community level?

The more traditional method of approaching the subject is under the headings: (1) the problem of legal personality or international personification, (2) the nature of the power to exercise the international rights and duties established by the treaties, more particularly the right of legation, whether active or passive, and the treaty making power.

Before turning directly to the question of the legal personality of the Communities, two general points should be made:

1. The treaties[3] create three communities with stated common interests and common institutions as instruments for the accomplishment of certain ends and purposes. The grant of certain powers and capacity to the common institutions involves a corresponding incapacity of the member states.

2. The stated aims or "mission" of the particular community (*e.g.*, articles 3 and 4 of the European Economic Community or articles 2 and 3 of the European Coal and Steel Community such as the creation

[2] Le Monde, Jan. 31, 1966, p. 1.

[3] Treaty Establishing the European Economic Community, signed March 25, 1957; Treaty Establishing the European Atomic Energy Commission (Euratom), signed March 25, 1957; Treaty Establishing the European Coal and Steel Community (ECSC), signed April 19, 1951.

of the Common Market, the establishment of common customs, the development of a tariff and common commercial policy, the development of this, or the inauguration of that) by their very nature establish the necessity of technical and economic contacts with external states and organizations and thereupon require the creation of the appropriate and necessary legal relations. For example, the customs union with its common external tariff inescapably requires commercial rules and regulations between the economic unity of the community and the outside world.

The institutional integration which the six states established in the treaties in order to achieve the common aim of economic integration immediately raised the question of the representation of the interests so institutionalized and so integrated. If this problem is regarded from the standpoint of the will or purpose of the Six then the will to be so represented is the expression of the balance established among the community institutions and their constitutional interaction, *i.e.*, the proposal-dialogue relationship between the Commission and the Council and more generally the Commission-Council relationships with the parliamentary Assembly, the Economic and Social Committee, and the Court of Justice.

Regarded analytically, the very *logic of the system* requires the international representation of the particular community, *i.e.*, the establishment of communication and diplomatic cooperation, the negotiation and conclusion of treaties and international agreements, the defense of common interests, and the incorporation of the Community into the international legal system.

The well known analysis of the International Court of Justice in the advisory opinion of *Reparation for Injuries to United Nations Personnel* is very much in point:[4]

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the inter-

[4] Reparation for Injuries Suffered in the Service of the United Nations, 1949 I. C. J. REP. 174; 43 AM. J. INT'L L. 589 (1949). For a full analysis and the statement at one point that the European Economic Community should be considered a form of organization of states sui generis, see E. WOHLFARTH, FONDEMENTS JURIDIQUES DES RELATIONS ENTRE LES COMMUNANTÉS EUROPÉENNES ET LES ETATS-TIERS 4 (Institute of European Studies, University of Brussels 1963).

national plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable....

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it were devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person.

Before proceeding further the specific treaty dispositions concerning the foreign relations power should be set out. Article 6 of the Treaty of Paris establishing the Coal and Steel Community states:

The Community shall be a legal person.

In its international relationships, the Community shall enjoy the legal capacity necessary to exercise its functions and to achieve its purposes.

In each of the member States the Community shall enjoy the most extensive legal capacity pertaining to legal persons in that country. Specifically, it may acquire and transfer real and personal property, and may sue and be sued in its own name.

The Community shall be represented by its institutions, each one of them acting within the framework of its own powers and responsibilities.

Article 93 of the same treaty reads:

The High Authority shall maintain whatever relatonships appear useful with the United Nations and the Organization for European Economic Co-operation, and shall keep these organizations regularly informed of the activities of the Community.

Section 14 of the Convention containing the Transitional Provisions of the same treaty provides:

Immediately upon the High Authority's assumption of its duties, the member States shall undertaken negotiations with the governments of third countries, and particularly with the British Government, on general economic and commercial relations concerning coal and steel between the Community and such countries. The High Authority, acting upon

instructions adopted unanimously by the council, shall act as joint representatives of the member States in these negotiations. Representatives of member States may be present at these negotiations.

The relevant provisions of the Treaty of Rome establishing the European Economic Community is much briefer. Article 210 in full reads:

> The Community shall have a legal personality.

Article 211 reads:

> The Community shall in each of the member States possess the most extensive legal capacity accorded to legal persons under their respective municipal law; it may, in particular, acquire or transfer movable and immovable property and may sue and be sued in its own name. For this purpose, the Community shall be represented by the Commission.

The Euratom treaty articles are identical.

In the Coal and Steel Treaty there are no specifics after article 6's grant of international capacity to exercise the functions and attain the indicated purposes except for the noted provision of article 93 whereby the High Authority "shall maintain ... useful relationships" with various international organizations. On the other hand there are many specific grants of power in the EEC treaty, as for example, article 3 (b) concerning policy with third states, and article 3 (k), association with overseas territories. Article 9 provides that the member states will adopt an external common tariff. Articles 18 through 23 are to the same affect. So also article 111 with respect to quantitative restrictions on trade.

It should be particularly noted that articles 113, 114, and 116 provide for agreement or action "in the name of or on behalf of the community" rather than for the member states.

Finally and most importantly, article 228 of the Treaty of Rome reads:

> Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.
>
> The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility

> of the contemplated agreements with the provisions of this Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.
>
> Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.

Articles 229, 230, and 231 provide for "suitable contacts and cooperation" between the Community and particular international organizations with 229 referring to the Commission and 230 and 231 referring to the Community. Article 238 concerns agreements of association concluded by the Community with third states, a union of states or an international organization. Article 16 of the Protocol to the Treaty on Privileges and Immunities provides that, "the Member State in whose territory the Community has its seat shall grant the customary diplomatic immunities to the missions of third countries accredited to the Community." Almost identical provisions appear throughout the Euratom Treaty.

Thus throughout the two Treaties of Rome, EEC and Euratom, there is no uniform conception as to external powers, but throughout there is personification, that is, the Communities are subjects and the institutions are instruments. The Court of Justice of the Communities in *Flaminio Costa v. E. N. E. L.*[5] assessed the legal affect in these words:

> in instituting a community of unlimited duration, endowed with its own institutions, with personality, with juridical capacity, with a capacity of international representation and more particularly with real powers of limited authority or of a transfer of powers from the state members to the community, the former have limited even though in restricted areas, their sovereign rights.

But international personality is a two faced coin. A bootstraps effort may create what might be termed an internal recognition of international capacity. The reverse of the coin is the recognition of that capacity by others. An entity is a subject of international law from the moment it so acts and is recognized as so acting. The two principal evidences of such action-recognition of international capacity are the power of legation, active or passive, and the treaty making power.

Traditionally the exercise of the power of legation has been de-

[5] Case 6-64, 10 Recueil de la Jurisprudence de la Cour 1159 (1965) (author's translation).

scribed as the diplomatic function but that function has in recent years included more and more technical and economic contacts and cooperation. From the beginning the European Coal and Steel Community has received a whole series of diplomatic representatives engaged in regularized economic and technical relations with the Community although there is no provision whatsoever in the Treaty of Paris. Similarly some seventy diplomatic missions are accredited to the European Economic Community and as we have seen the Privilege and Immunities Protocol of the Treaty of Rome requires the host country to grant the customary diplomatic immunities to the missions.[6]

As to active legation the practice is limited. The Coal and Steel Community High Authority mission to London was accredited in the first year of the Community and numerous special missions have been received by third states and international organizations. The three Communities now maintain common press and information services in a number of capitals, and a proposal for official diplomatic missions in London and Washington was agreed upon in principle but has not been carried out due to French resistance.[7] The representation of the EEC as a member of other international organizations is provided for in article 116 which reads:

> As from the end of the transitional period, Member States shall, in respect of all matters of particular interest in regard to the Common Market, within the framework of any international organizations of an economic character, only proceed by way of common action. The Commission shall for this purpose submit to the Council, which shall act by means of a qualified majority vote, proposals concerning the scope and implementation of such common action.
>
> During the transitional period, Member States shall consult with each other with a view to concerting their action, as far as possible, adopting a uniform attitude.

The progressive shift from the "uniform attitude" during the transitory period to "common action" thereafter is significant evidence of the intention of the parties for the development of the diplomatic function by the Community. The practice of the EEC representative in international organizations, for example in the O. E. C. D., has been the use of the *portes paroles communs* or common spokesman technique. After caucus, the representative of the member state whose fellow national is presently President of the Council or occasionally

[6] See R. PINTO, LES ORGANISATIONS EUROPÉENNES 290 (1963).
[7] EEC, THIRD ANNUAL REPORT 350 (1960).

the representative of the member state with a particular interest in the subject matter, speaks for the Community, and the other members of the mission support his initiative but otherwise do not formally participate.

As for being a party before an international tribunal the only limitation would be the provisions of the basic instrument which may provide, as in the case of the Statute of the International Court of Justice, that only states may be parties.[8]

The means and organization of the diplomatic representation are not too clear in the treaties, and practice has intervened to resolve some of the problems. In the ECSC, missions to the Community from the beginning have been accredited to the High Authority. In the EEC, as we have seen, the French established their point at Luxembourg in January of 1966 to have the diplomatic missions accredited to the Presidents of the Council and of the Commissions meeting together for the purpose.

In the treaties of association with the eighteen African states,[9] with Greece,[10] and with Turkey,[11] the EEC participates in the Council of the Association as governments of the six member states. The functions of the EEC Commission and Council are not too well defined in this area. The commercial agreements (treaties) with Iran[12] and Israel[13] provide for a "mixed commission" which on the EEC's side if fixed by a decision of the Council. On each occasion the delegations consist of representatives of each government and a representative of the Commission as chairman.

There is thus a division in the international representation of the Community between the Council and the Commission, or to put it another way, between the intergovernmental element and the Community element.

Let us now turn to the treaty making power. In passing it is intriguing to note that the English words constantly appear as a phrase

[8] Statute of the International Court of Justice, art. 34(1). Art. 31 (5) of the Statute permits a collective action. Presumably the Community could so qualify.

[9] Convention of Association of July 20, 1963 between the EEC and the African and Malagasy States, associated in that community. 7 Journal Officiel des Communantés Européennes 1431 (1964).

[10] Treaty of July 9, 1961 establishing an association between the EEC and Greece. 6 Journal Officiel des Communantés Européennes 294 (1963).

[11] Treaty of September 12, 1963 establishing an association between the EEC and Turkey. 7 Journal Officiel des Communantés Européennes 3687 (1964).

[12] Commercial Agreement of Oct. 14, 1963, between EEC and Iran. 6 Journal Officiel des Communantés Européennes 2555 (1963).

[13] Commercial Agreement of May 9, 1964, between the EEC and Israel with Protocol annexed. 7 Journal Officiel des Communantés Européennes 1523 (1964).

of art in the French and German literature on the subject. As we have already seen in the area of the foreign relations power, the Community treaties are most precise in granting to the Community specific authority to make treaties in particular areas, *e.g.*, (1) tariff and customs matters, EEC articles 111 and 114; (2) commercial policy, EEC articles 113 and 114; (3) nuclear cooperation, Euratom article 101; and (4) association with third states, EEC article 238 and Euratom article 206.

Perhaps the principal problem is whether these specific treaty provisions establishing treaty making power are to be interpreted strictly, or broadly, so as to extend a treaty making power to additional subject matter. Put another way, can the Communities enter into treaties in the sphere of their general interests and purposes without having an express grant of authority in the treaty as tariff, commercial, nuclear, or the like. Pescatore, the principal authority, claims that extensive interpretation is not necessarily to be ruled out and notes that the EEC has already broken out of the limits of the strict interpretation by concluding commercial agreements in the period of transition during which its specific treaty power was limited to tariff agreements.[14]

A practical difficulty in assessing this general question, not theoretically but as a matter of state practice, is that many arrangements and understandings entered into by the Communities have not been published, *e.g.*, arrangements and understandings with the ILO, UNESCO, the other specialized UN agencies, the Regional Commissions of the United Nations and the Council of Europe.[15]

On the theoretical level it seems generally agreed that the ECSC and Euratom have a general external treaty power in the degree and extent of their corresponding internal Community powers. The internal authority of the Community thus serves as the measure for the external treaty power.

There is some specific support for this generalization in the treaties. Article 101 of Euratom, for example, is very clear: "The Community may, within the limits of its competence, enter into obligations by means of the conclusion of agreements or conventions with a third country, an international organization or a national of a third country."

[14] In particular the Iranian and Israeli commercial agreements, *supra* notes 12 and 13. See Pescatore, 2 RECUEIL DES COURS 1-9 (1961).

[15] For a list of international agreements and other acts relating to the European Economic Communities see Doc./T. M. P. /5 of the Institute of European Studies of the University of Brussels, March 15, 1965.

The High Authority of ECSC has clearly acted on this basis and built up a substantial body of treaty and contract practice.[16]

The treaty practice of the ECSC and Euratom is further buttressed by the general argument that it is necessary for the efficacious execution of their declared "missions," that is, the achievement of their declared aims and purposes. May these same arguments of analysis be applied to the European Economic Community? We have already noted the specific nature of the grants of treaty power in the EEC Treaty. Moreover, some of the parliamentary reports in the ratification of the Treaty of Rome reflected the shift from the early fifties to the late fifties, taking the view that the EEC Treaty competence is limited to the cases where the Treaty expressly provides for the conclusion of treaties by the Community.

There is also the general argument that since the internal authority of the EEC is so varied and variable it cannot serve as the measure for the Community's external power. The point can be made that the basic equivalence of the internal and external power may be properly applied to the Euratom Community and the Coal and Steel Community because the internal authority is sharply defined and contained. Does the EEC Treaty meet that conceptualized test?

Let us turn from the extent of the treaty making power to the actual treaty making procedure. We have already noted article 228 above; there is no such article in ECSC.

In the EEC the Commission negotiates. It does so however under the control of the Council in that the Council generally concludes the agreements. The usual procedure is for the Commission to obtain a mandate from the Council in the form of a directive which may be modified during negotiations if the Commission so requests. Moreover, the Commission is often assisted by a Special Committee, intergovernmental in character and designated by the Council. The practice established under articles 111 and 113 in regard to tariff agreements and commercial agreements has been extended to treaties of association. As we have seen, it was agreed in the special session at Luxembourg in January of 1966 that the Council and the Commission shall hold consultations on the advisability, details, and nature of the contacts the Commission could establish with international organizations.[17] It should also be noted that although the Council

[16] *Ibid.*
[17] Le Monde, Jan. 31, 1966, p. 1.

concludes the treaties, it has in many cases associated the President of the Commission in the final act. It must be said that a clear practice is yet to be developed.

The conclusion of a Community treaty usually takes the form of a deliberation or decision by the Council. Is this the legal act putting the agreement into force and effect, or is it a formality? Whatever the answer that practice will give, it is clear that it is the act of the Council which creates the international binding obligation.

The conclusion of treaties such as the treaties of association with the eighteen African states,[18] Greece,[19] and Turkey,[20] whereby the Community and the member states were jointly, so to speak, party (or parties) of the first part, raises further interesting questions. This practice is, of course, often in response to a situation where there may be some question as to the specific competence of the Community alone, for example, in respect of financial undertakings, or as to its general competence in a matter possibly outside the accepted jurisdiction of the Community.

Finally it may be said that the Community may be bound in at least three ways, when the engagement is taken by (1) the Community and the member states, (2) the Community only, (3) by the member states only in subject matter of the Community area of competence.

At this point it is well to reiterate the clear language of paragraph 2 of article 228 and accordingly the importance of the procedure in the making of Community treaties: "Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on member states."

A final question might be raised. What of the international responsibility of the Communities? The question may at the moment seem largely theoretical; certainly there is virtually no practice as yet. The practice could however be of the greatest day-to-day significance in the treatment afforded third state nationals within the Community. For the moment it is clear that the effectiveness of the protection afforded against acts which would engage Community responsibility is largely a matter of the extent to which the member states are also party to that responsibility. The inverse of the problem is the assertion of the rights and interests of the Community in respect of the responsibility of third states or other international organizations.

[18] Convention, *supra* note 9.
[19] Treaty *supra* note 10.
[20] Treaty, *supra* note 11.

That assertion would be effective largely in the degree to which the member states of the Community associated themselves with the claim of the Community.

The author makes no apology for raising so many questions and attempting so few answers in the developing area of the law of the foreign relations power of the European Communities. May I rather conclude as Lord Denning once did: "Whatever the outcome, I hope I may say, as Holt, C. J. once did, after he had done much research on his own, 'I have studied these points which wiser heads in time may settle.' "[21]

[21] Rahimtoola v. Nizam of Hyderabad, 3 W. L. R. 884 at 914 (1957).