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# THE EUROPEAN COMMUNITY'S PLACE IN WORLD AFFAIRS: LEGAL COMPETENCE AND POLITICAL REALITY

*Francis G. Jacobs\**

WHEN EUROPE SPEAKS WITH ONE VOICE: THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY. By *Phillip Taylor*. Westport, Conn.: Greenwood Press. 1979. Pp. xxi, 235. \$22.95.

The subject of the foreign relations of the European Community has emerged in recent years as an important theme in world trade and in world politics. In its external trade, the Community, as the largest trading unit in the world, has forged a common commercial policy. In the wider political arena, the member governments have progressively adopted a common stance in international negotiations and have evolved a common position over a wide range of foreign policy issues. The external achievements of the Community have not been matched by internal development, however.

The principal steps to the establishment of a common market within the European Economic Community had already been taken by the end of the 1960s. The Treaty establishing the E.E.C. provided for a twelve-year transitional period expiring at the end of 1969. At the expiry of that period many of the principal provisions ensuring and regulating the free movement of goods, workers, and services were in force. In some respects the achievement of the customs union anticipated the Treaty timetable: the chief mechanisms were in place by July 1, 1968.

The 1960s were a decade of achievement; in retrospect, the 1970s are likely to be regarded as a decade of consolidation. The change in the economic climate, from expansion to recession, was accompanied by a change of political mood; political sentiment became more nationalistic, governments more inward-looking, policies more protectionist. The political decision to enlarge the Community beyond the original six member states was made at the end of 1969, and the succeeding years were substantially devoted to absorbing the new outlying states: Denmark, Ireland and the United Kingdom, all of

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which entered the Community in 1973. The time was not propitious for major political developments within the Community, although there was progress in some directions: the establishment of the Community's own financial resources; the first steps toward the European monetary system; and the institution of direct elections to the European Parliament. Elsewhere progress was slow. The controversial common agricultural policy remained the single most substantial achievement, yet its basis is now threatened by budgetary constraints and by the accession of three new states with a strong agricultural sector: Greece, Spain and Portugal. The new accessions are likely to impose a further period of consolidation. The development of urgently needed new policies in such fields as energy and the environment has been slow. Even at the conceptual core of the common market — the removal of internal nontariff barriers — progress has been disappointing. And the prospect of political unification has receded rather than advanced.

Yet, in the external sphere, "political cooperation" in the shape of the coordination of member states' foreign policies has made remarkable headway. Governments have been able, often outside the framework of the Treaty, to take a common position on such major and diverse issues as the United Nations Conference on the Law of the Sea, the Conference on Security and Cooperation in Europe, the Cyprus problem, and the Middle East.

But, even in the external sphere, the picture is not as clear as it seems. How adequately can the member states, through the machinery of political cooperation, represent the Community interest in the absence of the Commission, which, according to the Treaty structure, is the proper spokesman for the Community interest? For, underlying the apparent progress of the past two years, there has been a recurrent and still unresolved conflict over the respective competences of the member states, even acting collectively, and the Community, represented by the Commission. This chronic ailment is in urgent need of diagnosis and cure; yet even informed discussion, much less analysis, has hardly begun.

At the risk of over-simplification, the starting point for analysis should be the fact that, unlike the "internal" relations between the Community and the member states (which are governed exclusively by Community law), the "external" relations of the Community with the rest of the world are governed in part by international law, and in part by the Community Treaties. And while nonmember states have increasingly been prepared to deal with the Community collectively, the member states themselves have been reluctant to recog-

nize the Community's external competence and the corresponding limitations on their individual freedom of action.

Remarkably, the EEC Treaty leaves the general question as to the scope of the Community's treaty-making powers unanswered; in particular, it fails to specify the dividing line between the treaty-making powers of the Community and those of the member states. The Community's internal squabbles over participation in the Tokyo round of the GATT, the most important international trade negotiations of the 1970s, are symptomatic of the chronic difficulty resulting from this lacuna. Reporting from Brussels, Peter Norman wrote:

The Council of Ministers tonight approved the European Community's ratification of the Tokyo Round of trade liberalization measures due to come into effect at the beginning of next year.

After a long and gruelling session, the ministers reached compromises that should ensure that the multinational trade agreement negotiated over the past six years in the context of the General Agreement on Tariffs and Trade can come into force as planned.

Considering the importance of the new Gatt package, the sticking points in today's talks must appear to anyone not steeped in the extraordinary theology of the European Community as remarkably trivial.

The Ministers of the Nine and the Commission argued for hours over a question of "competence", that is whether the nine member states or just the Commission should sign the codes making up the Gatt agreement.

The most difficult negotiators were France, adamant as always to defend national sovereignty, and the Commission, anxious not to see its power chiselled away. In the end, compromise was achieved whereby the Commission will sign the codes and the member states will add their signatures to two codes concerning aeronautics and standards and a tariff protocol, in so far as it affects the products made under the Community coal and steel treaty.<sup>1</sup>

What then is the EEC's position? In the absence of any generally accepted formula, the elements for an answer to this question have to be constructed from scattered provisions in the Treaty. There are only three relevant articles. First, article 113 of the Treaty provides for a "common commercial policy" governing the Community's trade with nonmember states and covering in particular "changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping and subsidies." By article 113(3), where agreements with third countries need to be negotiated, the Commission is to conduct

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1. *The Times* (London), Nov. 21, 1979, at 19, col. 2.

the negotiations under the general supervision of the Council. Second, article 229 instructs the Commission to ensure the maintenance of "all appropriate relations" with the United Nations, with the GATT, and with international organizations generally. Lastly, article 238 empowers the Community to conclude association agreements. Here the outstanding achievement has been the conclusion of a succession of agreements with African, Caribbean, and Pacific States, currently under the title of the second Lomé Convention.

The division of competences between the Community institutions is governed by article 228. According to that article, where the Treaty provides for the conclusion of international agreements by the Community, the Commission generally negotiates and the Council concludes the agreements. It might be thought, from a reading of article 228, that the treaty-making powers of the Community are limited to those enumerated in article 113 (common commercial policy), article 229 (relations with international organizations) and article 238 (association agreements). That view has been roundly rejected by the Court of Justice, which has progressively expanded the Community's external competence over the past ten years. In the *ERTA* case<sup>2</sup> the Court held that the Community had the capacity to establish treaty relations with nonmember states over the whole field of objectives specified in Part One of the Treaty. In order to determine whether the Community has such capacity in a particular case, the Court looked to the whole scheme of the Treaty, as well as to its specific provisions. The capacity was found to arise not only where it was expressly conferred, as by articles 113 and 238, but also from other provisions of the Treaty, or from measures taken by the Community institutions within the framework of such provisions. In particular, whenever the Community implemented a common internal policy, member states were deprived of the right to undertake separately any obligations in their external relations which might affect the Community's common rules. As the Court said in the *ERTA* judgment: "As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations toward third countries affecting the whole sphere of application of the Community legal system."<sup>3</sup>

The Court has developed its expansionist jurisprudence in a suc-

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2. *Commission of the European Communities v. Council of the European Communities*, [1971] C.J. Comm. E. Rec. 263, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8134.

3. *Commission of the European Communities v. Council of the European Communities*, [1971] C.J. Comm. E. Rec. 263, at 274, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8134.

cession of cases,<sup>4</sup> usually at the instigation of the Commission, and often in the face of opposition from the member states. The progressive development of the Community's external competence, and the parallel emergence of common action, outside the Treaty, in foreign policy, are subjects of the greatest importance and interest; yet these subjects have been largely neglected or ignored, especially in the English-speaking world. The stage is set for a major treatise.

In his book *When Europe Speaks with One Voice: the External Relations of the European Community*, Phillip Taylor seeks to explain, as a political scientist, the Community's progress in external relations in the 1970s; although it must be said that the sources date for the most part from no later than 1976. The book's objects and methods are best indicated by the author's own words in his preface:

The work combines structure-process case studies and behavioral analysis (elite interviewing) to explain the reasons for political and economic stagnation in the European Community and simultaneous success in its external relations. It also offers a prognosis for continued political and economic integration in the Community. Based on extensive field work in the Community's institutions in Brussels and Luxembourg with three classes of participants — foreign ministry officials of the nine member states, major interest-group representatives to the Community, and officers assigned to the U.S. Mission to the European Community — this project addresses efforts to achieve European union in general and movements toward the attainment of common foreign and development (vis-à-vis Third World countries) policies in specific. Each of these major sections is divided into a chapter providing a brief history and some illustrative cases and a chapter reporting findings based on elite interviews and public opinion in the nine member states. The cases discussed include the Conference on Security and Cooperation in Europe (Helsinki Conference), the Eur-Arab Dialogue, the economic summits at Rambouillet and Puerto Rico, the Yaounde Conventions, the Lomé Convention, UNCTAD IV at Nairobi, and the Conference on International Economic Cooperation ("North-South Dialogue") in Paris. The elite interviewing is based on a creative application of self-anchoring scaling and Likert-type scaling. As is explained in the Appendix, the analysis of elite opinion is based on a relatively small number of respondents. However, the sample is not small when compared to the total number of external relations experts in the Community. Further, the statistical tools chosen for the analysis

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4. See Opinion of the Court of Justice Pursuant to Article 228(1) of the EEC Treaty (Natural Rubber case), [1979] C.J. Comm. E. Rec. 2871, [1978-1979 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8600; Ruling of the Court Pursuant to the third paragraph of Article 103 of the EAEC Treaty (Nuclear Materials case), [1978] C.J. Comm. E. Rec. 2151; Opinion of the Court of Justice Pursuant to Article 228(1) of the EEC Treaty (Rhine case), [1977] C.J. Comm. E. Rec. 741, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8405; Preliminary Ruling, *In re Kramer*, [1976] C.J. Comm. E. Rec. 741, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8372; Opinion of the Court of Justice Pursuant to Article 228 of the EEC Treaty of 11 November 1975 (Export Credits case), [1975] C.J. Comm. E. Rec. 1355.

made working with small samples feasible and productive. Although the respondents were not chosen completely at random, the only systematic bias involved in the sample selection was the conscious effort to choose one respondent from each of the nine Permanent Representations to the Community. [Pp. xix-xx.]

The author develops three themes: European Union; foreign policy; and development policy — *i.e.*, a common policy on aid to and trade with the developing countries. On each theme he first explains what the Community has achieved; he then presents the views of the “Eurocrats.” These views are derived from responses to questions addressed to a sample of fifty high-level officials in the Community Institutions and in the member states’ Permanent Representations to the Community. Even to a reader not initiated in the methodology of political science, the author’s techniques seem remarkably unsophisticated, both in the framing of the questions and in taking the responses at their face value. For example, the first question asked is whether the respondent agrees with the following propositions: “Working steadily and very hard toward the goal of European union is the right thing to do. It is also something that must be done” (p. 218). Responses are then graded on a scale from one to six, where one means strongly agree, six means strongly disagree. These marks are next calculated by nationality of respondent, so that a “mean response” emerges from each member state. The results show that Denmark emerged with the highest grade of opposition to European union. Indeed it is possible to calculate, from the “mean response” for Denmark (5.33) and the number of respondents (three) that the Danish responses were graded six, five, and five. These figures are not altogether surprising, if a little on the high side. The lack of enthusiasm in Denmark for further European integration is well known. What is more surprising is that the greatest enthusiasm emanated from the six French respondents, who achieved a mean response of only 1.17 (presumably five of the French responses were graded as ones and one as a two). But one inevitably asks whether the French respondents were not (to put it charitably) being more diplomatic than the Danes; and that reaction puts in doubt the validity of the whole enterprise. In a text of little more than 200 pages, there are more than 100 tables of this kind. The results of such an enterprise are likely to be accepted where they confirm the instinctive hunch of the informed observer and to be rejected where they do not.

Much more could be said by way of evaluation of the author’s methods. But the reader’s principal regret is likely to be that the author has not confronted the real issues. There is very little in this

book, either for the lawyer or for the political scientist, about what has actually been achieved. There is no comparison of the procedures under the Treaty and the less formal methods of political cooperation, and no evaluation of what methods are more appropriate for different purposes. Although it may not always be fair to criticize an author for not writing a different book than the one he set out to write, the real defect of this book lies not in the questions which the author put to his respondents, but rather in the questions he failed to put to himself. The need for a thorough critique of the Community's external relations remains unfilled.