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AN INVESTIGATION OF THE FORMATION
AND DEVELOPMENT OF THE EUROPEAN
ECONOMIC COMMUNITY

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CHAPTER I

INTRODUCTION TO THE STUDY

I

No study of international law and international institutions in the postwar period would be complete that did not take into account the efforts of Europeans to create a new supranational Economic Community. Its success is already an established fact, its influence is worldwide and it has become the rallying point around which it is hoped Europe can be united politically. The distinguishing mark of the Community has been its growth — in population, production and prosperity. In the field of law the Community postulates that legal decisions can no longer be considered in an exclusively national framework any more than can economic decisions. Thus by introducing this new dimension into jurisprudence the Community challenges the spirit and imagination of the legal profession everywhere.

Purpose of the Study

It was the purpose of this study to examine the historical background of Europe, to analyse the influences that have been at work since the end of World War II, to explore the nature of the problems posed by the European Economic Community and to assess the progress that has been made towards the achievement of its goals.

It has been suggested¹ that the student of international law and institutions can at this point make a contribution of his own by analysing the specific nature of the European Economic Community, the dynamic element in its evolution and the contribution that law will make to the process of integration. In a word this study is a critical analysis of a new and developing international organization, which since its inception has been one of the brightest hopes of the Western World.

The Importance of the Study

The early years of the 20th century in Canada were characterized not only by the opening up of the wheat growing areas of the Western Provinces but also by an enormous increase in population. Agricultural products were sold to the United Kingdom which was also the source of the manufactured articles needed to satisfy the demands of an expanding economy.² Following World War I a great industrial expansion took place in Canada with the result that agriculture tended to become a relatively less important segment of the economy. At the same time Canada's trade with the United States, particularly

¹ G. W. Keeton and G. Schwarzenberger, "Current Legal Problems 1963", p. 17.

² R. Warren James, "Wartime Economic Co-operation", p. 1

in forestry and mineral products increased. Thus, influenced not only by the strong geographical pull of the United States but also by the historical trading pattern with the United Kingdom, Canada has developed into a leading international trader and as trade expanded the affairs of Canadians became involved increasingly with those in other parts of the world. These international transactions affect not only government officials but also those engaged in primary industries, in manufacturing, in finance, as well as those in the practice of law called upon to advise clients with interests abroad. The assumption that everyone can be relied upon to speak English and that it is no longer necessary to have any knowledge of civil law systems may have to undergo some serious re-thinking. But law alone is not enough. It is also necessary for corporate counsel to have an understanding of international business and economics as well as some knowledge of international arrangements for controlling world trade. In a word it is hoped that this study will give to the Canadian practitioner a useful insight into the complex problems posed by the new Community.

The Present situation

In 1965 Western Europe's gross national product of more than \$400 billion was second only to the \$600 billion produced by the United States. In the first six years the Common Market's industrial production rose 41 per cent compared with 35 per cent in the United

States and 19 per cent in Great Britain. Steel output in the Community has more than doubled since 1953.³ Everywhere there is a new economic confidence. European business enterprises have expanded their investments. At the same time, non-European companies have also sharply increased their investments within the Community, lest they be left behind. The United States Department of Commerce estimates⁴ that the total value of direct United States investments in the Community was \$3.7 billion at the end of 1962 compared with \$1.7 billion five years earlier and only \$0.6 billion at the end of 1950. It is generally accepted that the Community offers big opportunities to foreign firms. Nevertheless the European movement is troubled by quarrels and strains and the very rise of prosperity in the economic field has led to a slowdown in the move towards political unity. Europe today stands at the crossroads.

Methods Used

The Treaties establishing the three Communities were the greatest source of material. Texts of other treaties, official publications as well as reports of speeches and privately printed material also proved fruitful. The bibliography lists only a few

³ "Western Europe's New Look", p. 7

⁴ Anthony Edwards, "Investment in the European Economic Community", p. 4

of the many critical and historical books that have been printed for general consumption. If, in any area, this study appears sketchy or unbalanced this small excuse is offered: the different fronts of the Community are moving ahead at varying rates of speed thus making it difficult to gain perspective. This study is therefore set out for what it is: on the one hand a snapshot of a new and developing organization, on the other a projection of things to come.

CHAPTER II

BACKGROUND TO THE ESTABLISHMENT OF THE COMMUNITY

Much of the economic and political and legal development that is taking place in Western Europe today owes its origin and its impetus to the Roman Empire of antiquity and to the Holy Roman Empire founded by Charlemagne. At the height of its power the Roman Empire ruled that part of Western Europe which today includes Portugal, Spain, France, Italy, parts of Belgium and the Netherlands, and most of England and Wales. The Holy Roman Empire which included much of the Western part of the Roman Empire was founded by Charlemagne who was crowned Emperor by Pope Leo III on Christmas Day, 800. By creating a strong central administration by standardizing laws and by patronizing letters Charlemagne gave Western Europe cultural and political ties that enabled it to withstand the 200 years of invasions that followed his reign.

Today we are witnessing in Western Europe a new territorial grouping. While the political form is not clear and the degree to which European States will yield up their sovereign powers has yet to be determined, nevertheless, in 20 years Western Europe has moved towards a measure of unity not achieved since the days of the Roman Empire and the time of Charlemagne.

Economical and Political Factors

Between 1914 and 1945 Europe suffered World War I, the Great Depression of the 1930's, the resurgence of nationalist Germany, and World War II. From these events the conviction grew that the root of the trouble lay in the sovereignty of nation-states and that if the countries of Europe could be joined in a common government, wars between them could be prevented and many of the chronic economic problems could be resolved.¹ If the primary aim was to put an end to the conflicts that had for so long divided and ravaged Western Europe, Europeans were also concerned with raising their living standards. It was apparent that the nation-state was no longer an adequate economic or political apparatus to meet the immediate and pressing problems which Europe faced.

It was perhaps natural that not only visionaries but also men of hard, practical concern should seek some form of political unification which would at once suppress old jealousies and unite the powers of Europe in a spirit of co-operation and democratic government. If the internal strength of Europe was the first goal then the restoration of the weight and importance of Europe in world affairs must be regarded as the second.²

¹ John Pinder, "Europe against de Gaulle" p. 5

² H. I. Macdonald, "The European Economic Community", p. 1

Even though it was evident that the postwar world was to be dominated by Russia and the United States and that small states could exercise very little influence outside their own borders, nevertheless, there was a desire on the part of many Europeans to contribute to the economic security and the political evolution and harmony of the world. From the Depression Europeans had learned that economic fragmentation was no longer in their interests and that in an age of large scale industrial production the home markets of Europe were individually too small to allow them the full benefits of modern industrial techniques. In new areas of technological endeavour, such as atomic research where costs were immense, small states would be unable to find sufficient resources for their development.

The opinion was also held that Franco-German rivalry could only be transcended by their joining in the creative task of building a united Europe, thus weaving together the vital interests of France and Germany and providing a wider arena for the energies of their peoples. With loss of empire and forced withdrawal from other parts of the globe, many European States were faced with the problem of finding new perspective in the world and new political and economic associations.

The "Europeans"

So it was that men like Jean Monnet in France and Paul-Henri Spaak, the Prime Minister of Belgium, committed themselves to a new

vision. The new Europe, they were convinced, could not rest merely on co-operation among sovereign states. That classic method was not sufficient for their more ambitious ends. These demanded a firmer base. But such a vision clearly had its price. It would call ultimately for a European entity with the power to govern within major but limited areas. Member nations need not be absorbed or disappear, but they would have to transfer substantial authority in selected fields to new institutions. It was acknowledged that so radical a break with the past could not be easy since nationalism was by no means dead and sectional interests were strong.

In essence these were the aims which inspired political thought in post-war Europe: to reconcile France and Germany; to bury the past; to restore Europe's role in a world of superstates; and to open a wider market in Europe as a basis for rising living standards and growing industries. No timetable was fixed, but the ultimate goal was proclaimed and those who were willing to start towards it were invited to participate. The plan was to work together in specific sectors trusting that such experience would lay the foundation for step-by-step progress towards a federated Europe.

The Marshall Plan

Looking back on the immediate postwar years the joint action required for the implementation of the Marshall Plan marks the first

beginnings of effective co-operation.³ Following hostilities a number of emergency measures including military relief, programs under United Nations Relief and Rehabilitation Administration, and loans and credits from the United States had provided a stop-gap. By early 1947, however, an especially severe winter had served to underline the fact that the economic ills bequeathed by the war were too deep-rooted to be solved by relief measures. The most pressing problem was a balance of payments crisis; European reserves of gold and dollars had all but run out and the gap between the imports that were needed to stave off economic collapse and those that could actually be paid for was widening. While the crucial Moscow Conference on Germany which opened on March 10, 1947 failed to bring any agreement among the deputies it convinced Secretary of State George Marshall that the Soviet Union was counting on a total collapse in Western Europe. Mr. Marshall stated on his return that the critical differences were for the first time brought into the light and now stood clearly defined.⁴

It was against this background that Dean Acheson, Under Secretary of State, in a speech at Cleveland, Mississippi, on May 8, 1947, said that the United States would have to undertake further

³ Barbara Ward, "The West at Bay", p. 125 and "Canada in World Affairs, 1946-1949", p. 188. For the background to the Marshall Plan.

⁴ "Canada in World Affairs", Vol. V, p. 39

emergency financing of foreign purchases until such time as the ravages of war could be repaired. Three weeks later in an address at Harvard University, George C. Marshall, Secretary of State, developed the same idea when he asked the nations of Europe to consider their needs jointly and to find out how by working together, they could establish not only the scale of their need but the extent to which they could satisfy it themselves by individual and collective action.⁵

Convention for European Economic Co-operation

The response from Europe was immediate⁶ and representatives of 16 nations assembled in Paris on July 16, formed the Committee of European Economic Co-operation and set to work to prepare a balance sheet of Europe's resources and needs. Throughout the discussions the United States laid great emphasis not only on the need for vigorous self-help but also on the idea of full European co-operation. This insistence on co-operation was the really new element in the Marshall offer. The General Report of the Committee outlining a four-year programme of economic recovery was completed on September 22, 1947. Based on this report a plan was sent to the United States Congress in December and on April 3, 1948, President

⁵ Appendix A.

⁶ Francis Williams, "Ernest Bevin", p. 264. For view that Bevin's chief claim to greatness may well prove to be his instant response to Mr. Marshall's speech.

Truman signed the Economic Co-operation Act which authorized appropriation of \$5.3 billion for the first year. On April 9, the Economic Co-operation Administration was established under Paul G. Hoffman.

The 16 nations which participated in the Committee on European Economic Co-operation, once their report was accepted, realized that there were advantages to be obtained from establishing a permanent arrangement, leading to closer co-operation between Member States. This desire found expression on April 16, 1948 in the Organization for European Economic Co-operation (OEEC). Ernest Bevin, then British Secretary of State for Foreign Affairs, in a speech recorded for the British Broadcasting Corporation in July, said,

"I believe that we and our friends who now make up the Organization for European Economic Co-operation have played our parts well. For several months we and the other participating countries have worked together in a great co-operative effort. Now our task is defined, our mutual undertakings have been settled and we can go forward to achieve that economic stability in Europe which alone can make enduring peace possible."⁷

The immediate goals of OEEC were reconstruction of Europe with American aid and liberalization of trade among the European countries. Gradually the scope of OEEC broadened to include the encouragement and the promotion of trade and the liberalization of payments between members.

⁷"Europe Since the War"

Since it was apparent that trade could not function without effective arrangements for payment and currency exchange, the European Payments Union (EPU) was founded July 1, 1950 as an international banking agency. EPU acted not only as a clearing house for intra-European payments but also as an institution for financing the foreign trade of EPU members.

In 1950 the question was no longer what sort of a course Europe was going to take, but what sort of a united Europe there was going to be. There was the Paul G. Hoffman thesis, roughly speaking the Marshall Plan thesis: integrate or else. The British view had been put forward by Churchill; the idea of political unity by Monnet, Adenauer and Schuman. The view that prevailed was a mixture of the Hoffman thesis of an integrated market and the Monnet thesis that you could not have an integrated market and a plan for economic development unless you had some political powers.

Council of Europe

At Westminster College in Fulton, Missouri, on March 5, 1946⁸
and at the University of Zurich in Switzerland on September 19, 1946

⁸"What is this sovereign remedy? It is to recreate the European family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living."

Churchill issued a call for a world alliance to encircle the Soviet Union and establish Western democracies in Eastern Europe. He appealed to France and Germany to establish a partnership as a means of pushing Russia out of those countries.⁹

In May 1948, largely as a result of the initiative and influence of Winston Churchill and Paul-Henri Spaak nearly 1000 private citizens from 24 European countries met at the Hague. In every way it was a remarkable gathering. It included many of Europe's best-known and influential statesmen. It produced concrete proposals for unifying Europe,¹⁰ and it has the satisfaction of seeing one year later what seemed to be the essential part of those proposals adopted. On May 5, 1949, the Statute of the Council of Europe was signed by 16 European countries.¹¹ The Statute

⁹ D.F. Fleming, "The Cold War and its Origin" Vol.1, p. 350. In criticizing Churchill for this thesis Fleming says that if there is a third World War, Churchill's Missouri speech will be the primary document in explaining its origin since it launched the United States upon a policy of dealing with Russia as an incorrigible menace.

¹⁰ "Europe Since the War". At the final plenary session of the Hague Conference the following resolution was adopted: We desire a United Europe throughout whose area the free movement of persons, ideas, and goods is restored. We desire a charter of human rights guaranteeing liberty of thought, assembly, and expression. We desire a court of justice with adequate sanctions for the implementation of this charter. We desire a European assembly where the live forces of all our nations shall be represented.

¹¹ Appendix B

stressed the devotion of the countries of free Europe to those spiritual values which are their common heritage and to the conviction that a closer union between those countries was necessary particularly in order to ensure economic and social progress. The Council¹² is a political institution composed of a Committee of Ministers representing the governments of member countries, and a Consultative Assembly consisting of 138 representatives of national parliaments, who act in purely personal capacities. While this body is political in aspect, its meetings in Strasbourg are mainly get-togethers of European parliamentarians. In practical terms, its work has been limited to a variety of proposed conventions in the fields of human rights and social welfare, an example of which is the European Social Charter approved on July 7, 1961.

Benelux Customs Convention

European regional economic development began on January 1, 1948 with the effective economic integration of the Netherlands, Belgium, and Luxembourg into a custom union known as "Benelux". The convention had been signed in London on September 5, 1944 by the three governments in exile. Tariff adjustments were not difficult because each had been historically low-tariff, however, there were divergent economic policies and differences in wage levels that had

¹²"The Council of Europe and its Work", p. 5

to be overcome. Overcoming those difficulties and complexities required careful and detailed planning — lessons that were subsequently not to be wasted on the creators of the Rome Treaty.

North Atlantic Treaty Organization

In 1949 there was little cause for optimism: the Communist advance in China had carried all before it and the People's Republic had been established in Peking. There was evidence that an atomic explosion had occurred in Russia. Consolidation in the North Atlantic presented a new and pressing urgency.¹³ Previously Britain, France, Belgium, Luxembourg, and the Netherlands had entered into a treaty in Brussels on March 17, 1948 calling for "collective self-defence and economic, social, and cultural collaboration". Now these countries together with other North Atlantic nations entered into a treaty on April 4, 1949 in Washington for "collective defence and for the preservation of peace and security". The new defence structure, while somewhat more elaborate than the Brussels predecessor, followed a similar pattern: Council of Ministers, defence committee at the ministerial level advised by chiefs of staff, a financial and economic committee, and five regional planning groups. Speaking in New York on February 10, 1950 Louis St. Laurent, the Prime Minister of Canada, reminded his audience that the purpose

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Harrison, "Canada in World Affairs", p. 152

of NATO was not only to prevent war but it also had as a goal the restoration of economic security to the European partners.¹⁴

When war broke out in Korea in June 1950 the United States demanded assistance from Germany in the defence of the European front. The dilemma was France refused to consent to German membership in NATO whereas the Germans, if they were to be rearmed, demanded equal rights. There was but one way of reconciling these three demands: a European army to which each State would contribute its European forces.

On October 24, 1950 Rene Plevan, the French Prime Minister proposed a new defence community. The plan called for a high authority, a council of ministers, a common assembly and a court of justice, around which other institutions for dealing with activities in the fields of agriculture, transport and power would be developed. The project was launched with great promise but died aborning on August 30, 1954 when a coalition of Communists and Gaullists refused to debate its ratification.

In an address to the English speaking union in London on July 3, 1951, General Eisenhower underlined the political and economic barriers that divided Europe when he said: "(these barriers) cannot be attacked successfully by slow infiltration, but only by direct and decisive assault, with all available weapons."¹⁵

¹⁴Ibid., p. 318

¹⁵"The New York Times", July 4, 1951.

European Coal and Steel Community

As a result of a plan¹⁶ put forward by Robert Schuman, French Foreign Minister, the European Coal and Steel Community Treaty (ECSC) was signed at Paris on April 18, 1951 by France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg. The concept was simple: if the coal and steel economies of the member countries could be thoroughly integrated, the resolution of the struggle between France and Germany would be a step in the gathering of the nations of Europe.¹⁷

"The solidarity in production thus established," said Schuman, "will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible." While Schuman proposed to free coal and steel of customs duties it was not principally an interest in free trade that was the central idea. Everyone was conscious of the larger issues at stake¹⁸ and that this

¹⁶ Appendix C.

¹⁷ Appendix D.

¹⁸ At the first meeting of the Assembly, Dr. Konrad Adenauer said: "Your first task is to work within the framework of the treaty establishing the Coal and Steel Community. But being convinced of your dynamism, the Council of Ministers has thought it right to ask you to undertake, over and above your functions under this treaty, another task of very great importance so as to speed up Europe's political development. In the spirit of the principles of Article 38 of the treaty establishing a European Defence Community and notwithstanding the provisions of this treaty, the

initial impetus towards economic integration was political in character is clear from the declaration. By setting up a new High Authority, whose decisions would be binding on France, Germany, and other member countries Schuman proposed the creation of a body with powers independent of national governments. By this Treaty the signators agreed to develop a common restriction-free market for coal and steel; to encourage the modernization and integration of production facilities; to co-ordinate capital investment; to prevent unfair competition and discriminatory practices; to improve the conditions of the workers; and to expand and develop foreign trade.

members of the Coal and Steel Assembly are requested to work out the draft of a treaty providing for the creation of a European Political Community."

CHAPTER III

THE TREATY OF ROME

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Despite the failure of the European Political Community which was the wider aspect of the Plevan Plan, the leaders in France, Italy, and Germany were undaunted. Dutch, Belgian, and Luxembourg ministers were pressing for a new effort to revive European ideals and to perfect European institutions. Instead of pursuing the political field it was decided to further co-operation on the economic side.¹ In June 1955 at a conference at Messina in Sicily the foreign ministers of the 6 countries signatory to the European Coal and Steel Community resolved to achieve a united Europe through the development of common institutions, the progressive amalgamation of national economies, the creation of a common market, and the gradual harmonization of social policies. A committee, set up under Paul-Henri Spaak, then Belgian Foreign Minister, to investigate the problems involved, reported so favourably in April 1956 that a convention was convened in Brussels on June 26 to draft the European Economic Community Treaty.

¹ Text of the statement made by Paul-Henri Spaak, Belgian Foreign Minister at the Messina Conference, in June 1955: "The failure of the European Defence Community proved that it was premature to try to unite Europe by the direct constitutional approach. Other methods of reaching this ultimate goal must be tried. If no progress could be made on the political front then the more indirect approach via functional methods of co-operation must be attempted."

James Eayrs suggests that the unexpected seizure in July of the Suez Canal Company by Colonel Nasser gave a sense of urgency to the negotiations emphasizing the dependence of the Western European industrial complex upon the whims of the Egyptian dictator. "By September 1956", writes Mr. Eayrs, "the Common Market, though as yet unborn and lacking many of its final features, gave every promise of healthy delivery the following spring."² The negotiations were difficult and complicated but such was the determination of the representatives that after much hard bargaining a treaty establishing a European Community was signed at Rome, on March 15, 1957. The Treaty establishing the European Atomic Energy Community (Euratom) was signed at the same time and both treaties came into force on January 1, 1958.

The Common Market

The Treaty of Rome and the Euratom Treaty together with the Treaty establishing the European Coal and Steel Community form the basis of what is commonly known as the Common Market.³ The preferred official designation of this new arrangement, however, is the European Economic Community (EEC).

It shall be the aim of the Community, by establishing a

²

James Eayrs, "Canada in World Affairs", p.175

³Unless otherwise stated, references to the Treaty of Rome are taken from the text set out in "Common Market Law", by Campbell and Thompson.

Common Market and progressively approximating the economic policies of Member States to promote throughout the Community a harmonious development of economic activities... a continuous and balanced expansion, an increased stability, an accelerated raising of the standards of living...and closer relations between its Member States.⁴

The words "Common Market" suggest to some an economic arrangement that is concerned with industry and trade, agriculture, and transportation, whereas to others the words suggest something political - more than a trading arrangement less than a political union. In reality it is three organizations: the Community itself, the European Coal and Steel Community, and Euratom. Although basically economic, these organizations provide the solid foundation on which a political union can be constructed; consequently their establishment represents the most important steps Europe has ever taken towards unity.

Common Market means trying to establish not only a customs union over the whole territory of member countries but also as many as possible of the economic conditions normally found in any one country. The logic of this was especially clear in the case of the coal and steel industry where the raw materials of coal and iron ore lay in mineral seams which were criss-crossed by scores of man-made frontiers. Economists were quick to point out that the Community with its population of nearly 170 million would be equal to the Russian or American market and that a country with a large home market

⁴"Article 2, EEC Treaty"

can achieve a degree of prosperity which it is impossible to attain in a small market.

Trade Barriers

It is suggested⁵ that while this Treaty deals with matters in the field of economics the means by which they are to be carried out invoke political concepts. The fact is that the signatories to the Rome Treaty were motivated not only to form a closer form of co-operation than the rest of Europe, but also to break away from the old inter-governmental relationships which had never operated successfully. At the same time the reduction of national disagreements which had led to two major wars was a factor uppermost in the minds of many.

The Treaty of Rome is an international convention, a constitution and a code of rules. A series of institutions are established to work out the policy. Throughout the Treaty there is a pervading difference of language and in many cases it will be necessary for the Community itself, either through the acts of the Commission, the Council or the Court to state what the meaning in precise legal terms will be, or it will be necessary to reduce the legal obligations to precision by means of implementing regulations. The field of the Treaty is vast and its framework provides for

⁵ Campbell and Thompson, op. cit., p. 1.

international legislation on a plane which has never been seen before.⁶

Any European state may apply to become a member of the Community and the Council grants admission by unanimous vote after taking the opinion of the Commission.⁷ Countries may also enter into an agreement of association with the Community.⁸ Such associations may be concluded by the Council and do not require to be ratified by member states. On March 30, 1961, for example, Greece was associated with the Community. The agreement provides for a customs union to come into force over a period of from 12 to 22 years, and the eventual accession of Greece to full membership is envisaged.

Transitional Period

The Treaty which came into force January 1, 1958, provides for a transitional period of 12 years⁹, during which time internal barriers will be removed and a common outer tariff established. The transitional period is divided into three stages of four years each, and Articles 13 to 17 of the Treaty lay down the matters which have to be decided and completed during each stage. The first stage may be extended two years and the whole period may be extended to 15 years.

⁶ Ibid., p. 9

⁷ "Article 237, EEC Treaty".

⁸ "Article 238, EEC Treaty".

⁹ "Article 8, EEC Treaty".

However, member states are agreed that whenever possible the tempo of the Treaty should be accelerated; consequently the Council acting on a recommendation of the Commission agreed on May 12, 1960 to a program of acceleration as follows: firstly, advance the program for reducing internal tariffs; secondly, reduce the common outer tariff and speed up discussions under the General Agreement on Tariffs and Trade (GATT); thirdly, remove the internal industrial quotas by December 31, 1961; and finally drive towards a common agricultural policy.

External Tariffs

The core of the Treaty is free trade within the Community and a common external tariff. The elimination, as between Member States, of custom duties and restrictions springs from the classical theory of free trade expounded by Adam Smith: that the unhampered entrepreneur would ultimately work for the good of all and that trade expands as goods move from the efficient producer to market. The Great Depression, the preparation for war, and the maintenance of the war effort had engulfed all aspects of European economics. In Europe, as in other countries, governments became the biggest employers, the biggest customers and in Europe like everywhere else became responsible for full employment, monetary stability, and sustained growth; consequently markets were often divided up by subsidies granted to home industries, by preferential tax systems, by customs

tariffs and quota restrictions, and by special legal requirements. In addition restrictions placed on currency dealings prevented capital from moving where it could obtain the greatest return. U.W. Kitzinger says that the whole economic theory of the Community is based on recognition of the economic importance of the political frontier, behind which totally different national policies are being pursued. It is thus not only State intervention at the frontier — custom duties and quantitative restrictions — which must be eliminated: *pari passu* with opening of frontiers, differences in national policies, laws and regulations, and all forms of discrimination according to nationality behind the frontier, must be ironed out in so far as they affect inter-state commerce: and instead of the different component areas playing the economics game by totally different sets of rules, there must be a common set of rules for the whole market.¹⁰ Since building a market meant eliminating internal barriers a large part of the building was really a job of knocking down. Knocking down, however, cannot be done all at once or confusion and disaster would follow; therefore, to avoid these dangers a transitional period was written into the Treaty.

Agriculture

In the field of agriculture the Community seeks to establish

¹⁰

"The Challenge of the Common Market" p. 19

a common agricultural policy throughout the internal market. Articles 38 to 47 of the Treaty lay down the exceptions to the general rules of the Common Market made in favor of agriculture. In a broad way while the objects of the Treaty are to balance supply and demand, to provide farmers with a fair income, and to stabilize prices, details are not laid-down and only the framework and the procedures are set out. At the same time it is the intention to create a common import-export policy for world trade in agricultural commodities. The part of the Common Market program which has given rise to the greatest difficulties is that which relates to this field of agriculture. Most farms in Europe are small — two-thirds are less than 25 acres in size — and because they are in need of modern techniques and up-to-date equipment they are not highly productive.¹¹ In the countries that make up the Community the internal market prices of agricultural commodities are supported by such devices as levies, duties, and quantitative restrictions on imports. Support prices differ widely and it is this question that has been a key problem particularly between France and Germany. For example, Germany is the biggest importer of wheat and the price there is the highest in Europe. France on the other hand is an exporter and it is in the interests of French farmers to have the German price support lowered thus reducing the incentive of the German farmer to produce.

¹¹ Sol Sinclair, "Common Agricultural Policy of the EEC", p. 45

Prolonged and difficult bargaining has finally resulted in the establishment of a single support price for wheat. For the 1964 crop year the various support prices in U.S. dollars per metric ton were as follows: France \$100.22; Belgium \$104.60; Netherlands \$104.83; Italy \$113.60; Luxembourg \$117.00; Germany \$118.88.

Now as a result of negotiations between member states a single price of \$106.25 will prevail throughout the Community. This will come into effect July 1, 1967. Agreement on this difficult question of a common agricultural policy was also a factor in de Gaulle's veto of British entry. Of total wheat moving in international trade the Common Market takes 15 per cent and the United Kingdom 20 per cent. In 1962 Canada supplied 24 per cent of the wheat imported by the Common Market and 25 per cent of the wheat imported by the United Kingdom. Wheat from Canada enters the United Kingdom free of duty but if Britain had joined the Common Market she would have been ultimately forced to tax Canadian wheat in order to protect French farmers.

Free Movement of Persons, Services and Capital

Articles 48 to 73 of the Treaty are concerned with ensuring the mobility of people and enterprises throughout the Community by the end of the transitional period. As a result of the high level of business activity unemployment has ceased to exist as a major problem. Actually the national manpower problem is still one of

shortage. In West Germany over 800,000 foreign workers were recruited during 1963 and in some of the French industries more than 40 per cent of the workers are foreign.

Ideally a Common Market should have a single currency and while the Treaty says nothing about this or about a single monetary policy, restrictions limiting the movement of services¹² and capital¹³ are to be progressively abolished during the transitional period. This improved climate for finance and business has resulted in the establishment of many new businesses throughout the Community by American, British and Japanese interests. In the last three years more than 100 foreign companies have established plants or agencies in the Ruhr industrial area alone. Over 60 top Japanese financial, industrial, and trading concerns are represented, and it is reported that the Japanese business community in the Ruhr is the largest of any non-German group doing business there. Since 1960, eight new American companies have established in Luxembourg alone and these include Dupont, Texas Oil, and Monsanto all of whom have plants presently under construction.

Co-ordination of transportation by road, rail, inland waterways, air, and pipeline is difficult enough within a national economy but by the terms of the Treaty a common policy towards transport is to be adopted.¹⁴ Without defining the methods to be employed the

¹⁴ "Article 74, EEC Treaty"

Treaty lays down broad principles for the elimination of discriminatory practices.

Under the Treaty, restrictive trade practices and monopolies are barred as not being in the best interest of the Community.¹⁵ While these provisions are far-reaching it will be some time before their effects are felt. Nevertheless, setting out the rules of competition will make for a general improvement in business.

In sum the Common Market means more than the abolition of trade barriers. The words "closer relations" in Article 2 forecasts not only a knitting together of markets but also the joint pursuit of economic policies which used to be pursued separately. While no mention is made of planning, in the light of French experience it is impossible not to come to the conclusion that the question of a plan for the Community must sooner or later be taken up.¹⁶ While planning is the basis of most European economies it is anathema to a few such as Germany where there is still strong belief in the free market.

European Atomic Energy Community

"None of our countries", the Spaak Committee reported, "can by itself afford the vast resources needed for the research and

¹⁵ "Article 85, EEC Treaty".

¹⁶ Appendix E

basic investment required for the technical revolution of the atomic age." On March 25, 1957, Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands signed the Treaty establishing the European Atomic Energy Community (Euratom). The business of Euratom is the peaceful use and development of atomic energy in the European Community. This includes research aimed at the efficient production of atomic energy, the supply of raw materials for Member States, and the establishment of a common market for the free circulation of nuclear materials and equipment. The military uses of nuclear energy are excluded from the Euratom Treaty: the French insisted on this, while the Germans under the Paris Treaty of 1954 renounced the right ever to manufacture atomic weapons, and the remaining four countries have never developed ambitions to do so.

In its first five-year program (1958-62) Euratom was pre-occupied with the job of recruiting and training staff. These now number 2000 in research and 700 in administration. During this period a total of \$215 million was appropriated to research. Euratom's program for the second five-year period (1963-68) which began January 1, 1963 provides for almost double this expenditure and calls for an enlargement of the research staff to 3200. Money will be spent to expand the four joint research centres at Ispra, Petten, Gell, and Karlsruhe. The Petten installation is on the Dutch coast 40 miles from Amsterdam where research is centered on liquid fuels. Ispra at the southern end of Lake Maggiore, Italy,

is the largest and its staff, now over 1000, is expected to exceed 1700 by the end of 1967. At Gell, in Belgium, a staff of 100 will be expanded to 180 by 1967. The plant and equipment here is engaged in specialized measurement research. Karlsruhe, in West Germany, is engaged in the development of fuel for future power reactors.

Since half of the power demands of the European Community are presently filled by coal oil and gas and half by power generated by water, the preoccupation of Euratom with nuclear power research reflects Europe's realization that if growth is to continue additional sources of energy must be developed.

CHAPTER IV

INSTITUTIONS OF THE COMMUNITY

33

Since the flow of decisions that were required in the European Community could not be handled by the existing mechanism of Member States, the program of economic integration has created a new set of institutions. A new political reality has been developed: that on economic matters the absolute control of policy no longer lies with separate national institutions, and that under the new arrangement a community viewpoint emerges distinguishable from an amalgam of the various national points of view. This principle is important because the criteria by which policy decisions are made is community rather than national.¹

The institutions for which the Treaty laid the basis were four: a Commission of 9 members, independent of any government and acting in the interests of the Community as a whole; a Common Assembly, modelled on the Council of Europe's Common Assembly, which by a two-thirds vote of censure, could force the Commission to resign; a Council of Ministers representing the Member States; and a Court of Justice to ensure the rule of law in the interpretation of the Treaty.

The institutional method of the EEC has developed into a

¹Mayne, "How the Common Market Works".

dialogue between an independent European body, the Commission, responsible for suggesting solutions to common problems, and governments of member countries which put forward national viewpoints in the Council of Ministers. This is a completely new approach. While it does not create a central government, it does result in community decisions being taken within the Council of Ministers. In this way it is possible to give up the national veto.² Previously international decisions broke down because nations could always withdraw their commitments whenever it suited them. This happened repeatedly in the League of Nations, and also in the United Nations where exercising the veto is a favourite occupation of the great powers.

When the Commission makes a policy proposal it is discussed by the Council of Ministers and sometimes by the European Assembly. Appeal from any decision can be made to the European Court. In this way it is possible to get a greater public discussion of fundamental issues affecting large numbers of countries than has ever been possible in the past. The policy discussions on tariffs, and energy, and agriculture, for example, have revealed to Europeans more of the basic facts of the policies of their own countries than they ever knew before.

The Treaty then is implemented by acts of the Community which

² Monnet, "The New Unity in Europe", p. 1

consist of successive action by the Commission³ the Economic and Social Committee⁴ the European Parliament⁵ and finally the Council.⁶ The Commission has the responsibility of not only formulating and proposing measures to be decided by the Council but also proposing joint action with the Council. Proposals are first sent to the Economic and Social Council for advice, then they are deliberated by Parliament and finally brought before the Council.

The Council of Ministers

The three components of the Community — European Coal and Steel Community, European Economic Community, and Euratom — are governed by separate executives but not by common parliamentary and judicial divisions. In each case there is a Council of Ministers consisting of six members: one from each country. Power lies in the Council which differs from most other international councils in that it is not inter-governmental. Councils are responsible for the formation of policy, for negotiations and for relations with other institutions and countries. Decisions of the Council have the same

³"Article 155, EEC Treaty". It is important to emphasize the vital role of the Commission. Since it is independent of national control it gives the Community its essential momentum. Thus it is the operational key to the whole range of the Community's activities.

⁴"Article 193, EEC Treaty".

⁵"Article 137, EEC Treaty".

⁶"Article 145, EEC Treaty".

force and effect as municipal law and are immediately applicable throughout the Common Market. The majority in Council depends on the importance of the measure. Majority vote is not always the rule: sometimes unanimity is essential. However, the need for unanimity decreases as the transitional period set out in the Treaty progresses from one stage to another. Most decisions require a qualified majority. To preserve the interests of the smaller Member States votes are allotted as follows: France, Germany, and Italy four votes each; Belgium and the Netherlands two votes each, and Luxembourg one. For a decision to be taken which requires a qualified majority twelve votes are needed. Where the measure has not been proposed by the Commission besides the qualified majority at least four Member States must vote for it. The Council is responsible for achieving the objectives laid down in the Treaty and as such acts as an executive. The basis of its acts is the "proposal" which originates with the Commission.

Commission

On the administrative side, day-to-day operations are in the hands of the following bodies: for ECSC a High Authority which includes nine members independent of national governments; for EEC a Commission of nine similarly independent members; and for Euratom a Commission with the same structure and autonomy but composed of only five members. The Commission is the permanent executive body res-

possible for the application of the Treaty and its essential characteristic is that it is independent of the Member States. No more than two of its nineteen members can be from any one country and each is appointed for four years. The Commission formulates and proposes the measure to be decided by the Council. In addition the Commission also has the right to propose joint action with the Council and in this area the Commission possesses certain powers of decision. Finally as "guardian of the Treaty" the Commission sees that its provisions are obeyed. Decisions of the High Authority and the Commission are reached by a majority vote, while members themselves are responsible to the European Parliament.

European Parliament

The democratic governing body is described as the European Assembly and is composed of 142 members appointed by and from national parliaments: 36 each from France, Germany, and Italy; 14 from Belgium and the Netherlands; 6 from Luxembourg. As a deliberative body the Assembly debates and directs matters pertaining to all three of the Communities. It can pass a vote to censure by a two-thirds majority requiring the resignation of a Commission. Members sit in political groups rather than in national delegations and broadly speaking represent Christian Democrats, Socialists, and Liberals. It is anticipated that there will eventually be direct elections by universal suffrage throughout the whole Common Market.

The Assembly meets at Luxembourg.

Court of Justice

The legal system established by the Rome Treaty is created around the European Court of Justice at Luxembourg.⁷ The Court is composed of seven judges appointed for six years by the governments of Member States. These sit as a supreme court of appeal in all matters involving the interpretation and application of the Treaties which govern the Community. Since it is a court of original jurisdiction for settlement of disputes between Member States as well as a constitutional court under the Treaty it acts in many respects like the Supreme Court of the United States. Member States may be brought before the Court on complaint of the Commission; it has jurisdiction over private persons; can hear disputes between EEC and Euratom; can act as arbitrator under contracts to which the Community in question is a party. It also possesses the sole power to uphold or annul decisions of the executive. As a law-making body there is an opportunity for the Court to develop something in the nature of a "European Law".

Committees and Special Agencies

The Economic and Social Committee consists of 101 members drawn from various sections of economic and social life and its function is consultative.

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"Article 164, EEC Treaty".

CHAPTER V

INTERNATIONAL PERSONALITY OF THE COMMUNITY

39

In order to explore the nature of the legal problems posed by the European Economic Community some examination of the international personality and its relationship with other countries and other international organizations is necessary. Schwarzenberger says that international personality is the capacity to be a bearer of rights and duties under international law. The question is: does the Community possess international personality?

Subjects of International Law

The usual subjects of international law are States, and whether or not a State exists is a question of fact. Problems usually arise in three typical situations: revolution, territorial change, and war. By and large international law assumes that revolution is a matter within the exclusive jurisdiction of a sovereign state and therefore does not affect its international personality. In the case of belligerent occupation short of complete collapse, changes are only temporary while the war lasts and do not affect the territorial status quo. In the case of territorial changes the legal consequences of such changes are usually settled by way of treaty, recognition, or acquiescence. Opinion is divided as to the point in time that a state acquires personality, the part in the

process that recognition plays, and the part that intention and assertion plays. Is the statement in the treaty that the Community shall have legal personality a sufficient assertion?

To determine this question of "existence" some criteria governing a number of situations exist: When a community acquires with reasonable probability of permanence an organized government, a defined territory, and such a degree of independence that it is capable of conducting its own external relations it can be said to "exist".

Capacity to Conduct External Relations

Does the Community meet the criterion of being capable of conducting its own external relations? The Community has certainly expanded its relations with non-member countries and other international organizations. Over 60 countries have established diplomatic relations with the Community, and the Community for its part has established an External Relation General Directorate responsible to the Commission for carrying out its external relations. Article 228 of the Treaty gives the Commission power to negotiate agreements between the Community and non-member countries. Under this authority important trade agreements have been reached with Iran and with Israel. An agreement has also been entered into with the United Kingdom for the suspension of customs duties on several products exported from India.

The Community has also expanded its relations with other multi-lateral organizations. Article 230 of the Treaty requires that suitable co-operation be established with the Council of Europe and as a result joint meetings between the Consultative Assembly and the European Parliament have taken place. Article 231 requires the Community to collaborate with the Organization for European Economic Development (OEED), and as a result permanent representatives from the Community to OEED give effect to this requirement. Similarly the closest possible relations exist between the Community and Euratom.

Under Article 229 the Commission is responsible for relations with organs of the United Nations, their specialized agencies, and with the General Agreement on Tariffs and Trade (GATT). The principal activity of the Community under this article has been the participation in the United Nations Conference on Trade and Development held in Geneva from March to June, 1964. But it is with GATT that the Community has been most concerned. In establishing its common external tariff it was necessary that the Community obtain the agreement of the GATT parties. These agreements were completed in the 1962 GATT negotiations first proposed in 1958 by Douglas Dillon then United States Under Secretary of State. The net result of the Dillon round was the adoption of a common external tariff for the Community and a liberalization of tariffs throughout GATT. These accomplishments improved the prospects for success at the Kennedy

round which took its name from the United States Trade Expansion Act of 1962. About 50 countries were involved and the aim was an even greater liberalization of world trade. It is significant that in all of these negotiations the Commission was the single spokesman for the Community, which clearly demonstrates that it was the intention of Member States to endow the Community with the capacity to work out a common commercial policy in that area of international law dealing with international arrangements for controlling world trade.

Comparison with the United Nations

Since the Treaty has provided the Community with a structure to formulate, administer, and supervise its common rules and policies, the Community appears to meet the further criterion of international personality: a permanent organized government. Here, a comparison can be drawn with the United Nations. In examining a claim for injuries suffered in the service of the UN, the International Court of Justice in an administrative opinion decided that the UN possessed international personality.¹ Since no mention was made by the Court as to whether international personality could be acquired by recognition it can be assumed that the Court gave weight to intention and declaration. The Court in examining whether the UN was an entity capable of availing itself of obligations incumbent

¹ Sohn, "Cases on United Nations Law", p. 249

upon its members observed, "...that the Charter equipped the United Nations with organs and has given it special tasks". It has already been pointed out that the Rome Treaty has provided the Community with a quasi-federal structure whose principal organs are Parliament, Council, Commission, and Court. In other words, by entrusting certain functions to the Community with attendant duties and responsibilities, and by establishing organs to enable these functions to be effectively discharged it was the declared intention of the Member States to give the Community some measure of international personality. In fact Member States had the power, in conformity with international law, to bring into being an entity possessing objective personality, and not merely personality recognized by them alone.

In applying a functional test to determine what rights and duties the UN possessed the Court said:²

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the (UN) Organization must depend upon its purposes and functions as specified or implied in its constituent document and developed in practice.

By analogy, the exercise by the Community of functions and rights can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane.

²
Ibid., p. 252

CHAPTER VI

ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE DEVELOPMENT OF THE COMMUNITY

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A European Court was originally instituted by the Treaty of Paris, April 15, 1951 which established the European Coal and Steel Community. The Treaty of Rome, March 25, 1957, establishing the European Economic Community and the European Atomic Energy Community likewise provided for a Court. However, by a convention ^I concluded on the same date as the Rome Treaty, the creation of a single Court of Justice for all three of the European Communities was agreed upon.

It is customary in a constitution to vest in an appropriate body jurisdiction concerning questions involving the interpretation of the constituent agreement. In the case of the European Communities the vesting is to be found in Article 164 of the Treaty which provides that the Court shall ensure observance of law and justice in the interpretation of the Treaty. Judicial interpretation of a Constitution of an international organization is, however, the exception rather than the rule. Sometimes, as in the case of the International Monetary Fund the technical nature of the organization renders it unsuitable for judicial control.² More often there is a need for informal and

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Campbell and Thompson, Ibid., p. 373

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Fawcett, J.E.S., "The Place of Law in an International Organization." (British Year Book of International Law, 1960), p.321

expeditious methods of interpretation which permits the quick settlement of different opinions. Again the very authority of a Court rules out the settlement of important political questions. With the result that autonomous states are unwilling to commit themselves in advance to submit political questions for judicial decision. Nevertheless since the words used in the drafting of any document are not always precise, the necessity of interpretation always exists.

The Treaty of Rome was drafted at great speed, and contains for that reason both vague and ambiguous phrases and contradictions. There are also many points at which the purposes attributed to the Community are not wholly contradictory, but in which there is undoubtedly an area of contradiction, within which the Court must read its own decisions by whatever criteria it thinks appropriate, if the matters come before it. In a word, if a constitution is to prove effective, it must inevitably develop a life of its own, often totally different from the concept of its founders.

To what extent is the Court an international Court, possessing international jurisdiction? Many factors may be advanced supporting its international character. First, the origins, powers, and objectives of the Communities are to be found in an international treaty, and the function of the Court is to interpret that treaty. Secondly, the Economic Community is an international person, possessing

international personality and is a recognized subject of international law. Thirdly, autonomous states may be parties before the Court and the Court has jurisdiction in "any dispute among Member States"³ concerning the application of the Treaty.

In reality, however, the Court is primarily an administrative tribunal. While it may have international facets it is not an international court in any way comparable with the International Court of Justice. The subjects of the European Court, the grounds of its competence, and its sources of law all tend to reflect municipal rather than international law.

Jurisdiction of the Court

The jurisdiction of the Court is wide and varied. Its principal task is to review the legality of acts of the ECSC High Authority, the two Commissions, and the three Councils of Ministers. But the control of the Court is limited by the Treaty: it may not look at the merits of a decision but only consider whether a measure was ultra vires, in violation of the Treaty, without regard to procedural matters or whether one of the organs had committed a *detournement de pouvoir*. The Court acts as a Council of State and it has been compared with the French *Conseil d'Etat*.

The ex officio power of the Court is merely to consider the

³ Article 182

grounds of invalidity which could have been alleged by the plaintiff, not to act as a general guardian of the rule of law or of natural justice. There are, however, two vital implications: firstly the Treaty intends to impose a role of law upon the organs of the Community; secondly the intention is clear that there should be developed a unified jurisprudence as between the Member States, and that this objective should be insured by vesting the ultimate power of interpretation in the Court.

Much of the Court's work is concerned with "decisions" and "recommendations". By a provision of the Treaty the Commission is required to take decisions, formulate recommendations and issue opinions. The difference between these is that decisions are binding in every respect, recommendations are binding with respect to the objectives which they specify, whereas opinions are in no-wise binding. The Court in dealing with what constitutes a decision has defined it in the following terms: "An act constitutes a decision when it establishes a rule which will be applied in future when certain conditions come into existence."⁴

Many writers have pointed out that the four grounds of appeal granted by Article 33 of the Treaty are the same as the grounds which may be alleged against administrative action under the civil

⁴ Societe des Usines a Tubes de la Sarre vs The High Authority, (British Year Book of International Law, 1960) p. 181

law system.⁵ These are: firstly incompetence which means a lack of competence to deal with a matter. In a decision⁶ the Court held that if the object of the Treaty was to be implemented and this could only be achieved by direct intervention of the High Authority, yet there was no express power permitting this direct intervention, then it must of necessity be implied. Apart from express powers conferred on it by its constitutive agreement, it is inevitable that any international organization will require a certain measure of implied powers in order to discharge its functions effectively. In another case⁷ the Court had to determine whether an enterprise engaged in making iron castings was an enterprise within the terms of the Coal and Steel Treaty. While it was agreed that iron castings fell outside the definition of "steel", the Treaty did not mention "raw pig iron". The Court held that the making of liquid pig iron was within the meaning of the Treaty. Secondly, violation of a substantial

⁵ Behr, G., "Judicial Control of the European Communities", (London 1962, Stevens) p. 40; Valentine, D.G. "The Jurisdiction of the Court of Justice to Annul Executive Action" (British Year Book of International Law, 1960) p. 185; Feld, Werner, "The Court of the European Community: New Dimension in International Adjudication", p.67.

⁶ Dispute Between the Belgian Coal Federation and the High Authority of the ECSC examined in an article by McMahon, J.F. "The Court of the European Communities" (British Year Book of International Law, 1961) p. 342.

⁷ Societe des Fonderies, "Le Pont-a-Mousson vs Haute Autorite" (McMahon, Ibid.) p. 344.

procedural requirement. In the case of *Merlonie et Cie, Industrie Metallurgique, SPA vs Haute Autorite*⁸ the Court allowed an enterprise to appeal against a general decision under which an individual decision had been passed. The intention of the Treaty was to provide a legal right of appeal against executive action. A decision or recommendation not supported by reasons gives such a right of appeal. Again, the Court held that a "letter" of the High Authority to the Belgian government came within the definition of a "decision".⁹ While formality was important the Court felt obliged to look at the "spirit" of the procedural requirement. Thirdly, a violation of the Treaty, and here a distinction must be drawn between a violation of a procedural requirement. In the case of *Merlonie & Co. vs Haute Autorite* it was held that a delegation of power by the High Authority to a subsidiary organization constituted a violation of the Treaty. The Court observed that the delegation would have been valid if the control and responsibility had still remained with the delegating authority. Fourthly, a *detournement de pouvoir* which is applied to a situation in which an organ of the Community has exercised its power to achieve an end not envisioned in the grant of power. An example of this would be where action would objectively be valid

⁸ 56 A.J.I.L. (1962) p. 726

⁹ "Federation Charbonniere de Belgique vs Haute Autorite", 56 A.J.I.L. (1962) p. 725

within the terms of one article of the Treaty, yet it would be vitiated because the provisions of that article were not intended to be used in a situation which was expressly provided for in another section. An attempt was made to distinguish between "coal" and "steel" enterprises in the sense that only coal industries in certain problems of the coal industries could appeal to the Court. Thus a steel company even affected by such an act, would have no right of appeal. However, the Court refused to restrict the appeal of enterprises by nature of the subjects involved in the dispute.¹⁰ This ground of appeal required the Court to judge whether when fixing maximum prices by virtue of one article of the ECSC Treaty, the High Authority sought not so much the objectives which it declared, particularly a lowering of prices, but in reality sought to act against agreements and concentrations of enterprises. It would thus have used the powers which were given to it by one article of the Treaty for a purpose other than the one for which those powers were given.

It is a generally recognized principle of law that an administrative authority can only exercise its powers by taking clear, coherent, sensible, and comprehensive decisions. By using its powers to take an obscure, contradictory or unintelligible decision an authority misconstrues the legal purpose behind its powers. An additional power of the Court is to prevent a patent misconstruction

¹⁰ Gouvernement des Industries, Siderurgiques Luxembourgeoises vs Haute Autorite, (Valentine, Ibid.,) p. 190.

of the Treaty. The term "patent" implies that the legal provisions have been misconstrued to such an extent that this misconception when compared with the provisions of the Treaty appears to follow from an obvious error in the evaluation of the situation in the light of which the decision was taken.

In the case of the *Gouvernement du Royaume des Pays-Bas vs Haute Autorite*¹¹ the Court held that when interpreting the Treaty the Court will pay particular attention to its general objectives and adopt an efficacious approach. In this way gaps in the Treaty can be filled in and the text expanded, or supplemented. So long as the interpretation is consistent with the objects and purposes in question. An interpretation which deals with the design or purpose is referred to as a teleological interpretation and is one frequently used by the Court.

Procedure

The general organization of the Court is laid down in Part V of the Treaty, supplemented by the Protocol¹² on the Statute of the Court and the rules of procedure established by the Court. We have seen that the Court consists of seven judges appointed for a term of six years. In addition the Court is assisted by two court advocates

¹¹ 56 A.J.I.L. (1962) p. 727

¹² Campbell & Thompson, *Ibid.*, p. 364

who are neither judges nor prosecutors but whose sole function is to prepare opinions for the Court on the legal aspects of questions, submitted to it. While these "conclusions" are always published with the judgements they are neither part of the judgement, nor is the Court bound to accept them. The deliberations of the Court are secret and there is no provision for a dissenting opinion. There is no law of precedent and the Court, being a Court of last instance, is at liberty to change its opinions. The Court always sits in plenary sessions and has its seat in Luxembourg.

The emphasis is on written rather than oral presentations but if there are unresolved disputes of fact the Court will hear witnesses directly. Since the Court is common to all the Communities it takes the position that in the discharge of its responsibilities the rules of evidence as we understand them do not apply and that it can hear anything. The Court can call its own witnesses and the whole direction of the examination of witnesses is not exclusively in the hands of the counsel. While expert witnesses may be asked for they are appointed by the Court. In contrast to the adversary procedure of common law courts, the European Court dominates the course of the procedure and the degree of participation by the parties or by their counsel is always subject to the control of the Court.

The full version of the issues are set out in the pleadings and these include all the necessary surrounding facts and relevant evidence. Copies of all the appropriate documents are not left for

discovery but are annexed in the first instance. The pleadings also contain the written legal arguments the parties intend to use to support their position or desires to adduce.

Parties to a dispute appear through the intermediary of an agent, a legal advisor or are represented by counsel. Member States and organs of the Community are represented by the holder of a power of attorney assisted by a practicing member of the bar of one of the Member States. Professors and law teachers whose domestic laws give them the right to appear before their own courts, have the same right before the European Court as members of national bars.

Subjects of the Court's Jurisdiction

The subjects of the Court's jurisdiction includes Member States, the Commission and the High Authority, the Council of Ministers, enterprises, associations, and individuals. On July 15, 1960 the Court pronounced its first judgement on a decision of the Commission. The judgement concerned three joint complaints¹³ brought against the Commission by employees appealing for the annulment of a decision to terminate their services and for an award of damages. In its judgement the Court established principles applicable to the nature of the recruitment of staff by the institution of the Community. While it rejected the claims that the dismissal decision

¹³Heil, Ibid., pp. 459-60

should be declared null and void it voted that no proper statement of the reasons for dismissal had been made and awarded each plaintiff damages. In a fourth case¹⁴ decided on December 16, 1960 the Court confirmed the principles laid down in the earlier judgement but rejected a complaint of abuse of power put forward by the plaintiff. However, the Court fixed compensation by way of severance payment.

In the case of Societe Commerciale, Antoine Vloeberghs vs High Authority¹⁵ the plaintiff, a Belgian importer, brought American coal into Belgium, cleared it and attempted to export it to France for sale, but France refused to grant the necessary import license. Plaintiff appealed to the Court for damages charging the High Authority with the commission of an official fault resulting from its failure to compel the French Government to adhere to the principle of the free movement of goods established in the ECSC Treaty. Plaintiff also sought the annulment of the High Authority's decision rejecting as admissible the plaintiff's petition, whereas it had requested the High Authority to compel the French Government to permit the plaintiff's French customers to purchase the imported coal as soon as it was released for trade within Belgium. On the question of annulment the Court held that the plaintiff had no standing to

¹⁴Heil, *Ibid.*, p. 460¹⁵

56 A.J.I.L., p. 1083

institute such an appeal because it was neither a coal nor steel producer and consequently not "an enterprise" within the meaning of the Treaty. Turning to the damage action, the Court ruled that it was admissible, since such an appeal could properly be instituted by anyone alleging to have been injured by an official fault of the Community committed in the execution of the Treaty. However, the appeal was rejected on the grounds that the principle of the free movement of goods was adopted primarily in the interests of producers within and not outside the Community.

In another case¹⁶ the Plaintiff a Belgian citizen and an official of the ECSC lodged an appeal against Belgium in the European Court alleging that Belgium had violated the terms of the ECSC Treaty by considering his income from the Community in determining the Belgian supplementary tax rate. Plaintiff sought an annulment of the tax assessment and an order compelling Belgium to refund the tax which had been paid. The Belgian tax authority took the position that while the plaintiff's salary from ECSC was tax exempt it had to be considered in determining the tax rate upon "other taxable income" subject to the supplementary tax. In the plaintiff's case, the "other taxable income" referred to private income received by his wife. The Court rejected the argument that it lacked jurisdiction because the dispute did not involve the interpretation of

¹⁶ Humblet vs Belgium, 56 A.J.I.L. (1962) p. 540

the Treaty but rather the proper application of Belgian law and the income of the plaintiff's wife.

In examining its power the Court concluded that it lacked the power to annul legislation or administrative enactments of a Member State. The Court pointed out that its judgements were enforced through the provisions of the Treaty which required Member States to not only correct illegal acts but also compensate for damages done. The Court upheld the plaintiff's contention that he had the right to file an appeal in his own name and that it was not necessary that he first exhaust his remedies under Belgian law before appealing. On the merits of the case the Court found that the use of the plaintiff's Community salary to determine the supplementary tax rate was an indirect tax inviolation of the Treaty and pointed out that under the Treaty the Belgian authorities are accordingly bound to remedy the effect of their acts.

Decisions of the Court

There can be little doubt that the Court which is responsible for interpreting all three constitutive treaties, all of which are concerned with closer European integration, will seize the opportunity to strengthen such effort towards integration by the unity of its jurisprudence in interpretation and its formulation of a Community Law.¹⁷

¹⁷ J. F. McMahon, "The Court of the European Communities" (Journal of Common Market Studies, 1962) p. 1

During the years 1952 to 1960 the Court handed down 62 opinions¹⁸. Of these 60 dealt with issues arising out of the ESCC Treaty and two from the EEC Treaty. Complaints launched by employees of the governmental agencies of the Community accounted for nine decisions; 53 dealt with the validity of measures taken by the organs of ECSC in the performance of their regulatory functions; two opinions dealt with the legality of proposed amendments, to the Coal and Steel Community Treaty. Most of the opinions during these years dealt with the difficulties of the High Authority and the Council of Ministers of ECSC in bringing about a Common Market for coal and steel. One source of litigation grew out of the efforts of the High Authority to curb the excessive power of the Ruhr coal sales cartel.

Efforts to eliminate special and protectionist rail freight rates and the prevention of discrimination in the motor transport industry account for seven of the opinions. Several cases involved the legality and enforcement of the regulations governing pricing practices. In proceedings for the annulment of decisions of the High Authority, the Court may not review the economic or political judgments upon which the High Authority has based its action but must confine itself to strictly legal issues except where "abuse of power" or a "patent misconception of the Treaty provisions" is alleged .

¹⁸ For a review of the first six volumes of the "Reports of the Decisions of the Court of the European Communities" see the article by Riesenfeld, 56 A.J.I.L. (1960) pp. 724-28

The Court decided at an early stage that it would not use this jurisdictional clause as a gate to an enlarged scope of review.

During the years 1961 to 1963 the Court handed down fifty-nine decisions.¹⁹ Of these forty-eight were contentious, including six cases initiated by employees because of discharge, denial of further employment, or discontinuation of service benefits. Three were decrees involving authorization by the Court of garnishment or assignment of claims held by private parties against the Community. Many cases arose out of the imposition and collection of the equalization tax, designed to compensate for the disparities in the competitive positions of various steel-producing enterprises flowing from the scrap shortage during the late 1950's. Most of the complainants were private enterprises.

The judgement in the case of *Gouvernement du Royaume des Pays-Bas vs Haute Autorite*²⁰ involved the powers of the High Authority over transport rates for coal and steel within the Community. Under the Treaty discriminatory freight rates were prohibited and since the Authority was dissatisfied with the compliance by States in the implementations of these uniform rates it adopted a recommendation setting out the measures that States were to take. The Dutch Government

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For a review of the decisions of the Court from 1961 - 1963 see article by Stefan A. Riesenfeld, 59 A.J.I.L. (1965), pp. 325-35

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59 A.J.I.L. (1965), p. 331

claimed that the adoption of this recommendation was not authorized by the Treaty and brought suit for its annulment. The Court sustained the High Authority by holding that it was entitled to resort to the recommendation procedure in order to safeguard the observance of the rules specified by the Treaty.

Because of the high production costs of the European coal mines, the Community coal producers faced increasing competition from not only coal imported from the United States but also other energy sources such as gas and oil. Accordingly the High Authority and the Council of Ministers of the ECSC proposed a modification to the prohibition in the Treaty against certain restrictive practices. But the Court ruled that the amendment which proposed a greater liberalization towards cartelization exceeded a mere "adaption" of existing powers and as a result violated the primary object of the Treaty.

Sources of Law

Unlike the International Court of Justice which is required by Article 38 of the Statute to apply international conventions, international customs, "general principles of law recognized by civilized nations," in deciding disputes submitted to it, the Treaty of Rome makes no mention of the source of law the Court must apply in dealing with questions referred to it.

Of course, the three constitutive Treaties implemented by regulations, decisions, and directives form the fountain head of the

Court's law. Reference is also made to "travaux preparatoires" to ascertain the intention or meaning of provisions, but this is not too satisfactory. However, there are a number of such preliminary documents such as the proceedings of the Spaak Committee to which reference has been made.

Municipal laws though not applied directly also form a vital source. Article 215 of the Treaty provides that the Community shall be governed by "the general principles common to the laws of the Member States". In essence this means that the civil law system as the common denominator tends to become the Community law.

International law is rarely cited and neither is the law of municipal systems other than that of Member States. The Court often refers to its own jurisprudence in previous judgements even though it is not bound by them. Although the decisions of the Court are of great interest to students of international law particularly because of light which they shed upon the processes involved in the interpretation of treaties, it must be noted that so far the Court has not seen any necessity for a direct reliance on international law. Only twice has the Court referred to "recognized principles of classical international law".

In theory, the Court reaches its decisions by reference to purely judicial criteria calling upon the law and practice of Member States if necessary. In practice the available criteria of

a purely judicial character are very few. More often than not decisions will inevitably be based on economic or political rather than judicial criteria.

Emergence of Community Law

The impact of the Treaty on national legislatures and administrative agencies will undoubtedly be a most fruitful source in the development of Community Law. The application by analogy of principles of municipal law to international law is by no means a new phenomenon. Many of the legal concepts of the Treaty are borrowed from the civil law systems of Member States. In a broad sense "Community Law" will dominate the Treaty, regulations of the organs, and previous decisions and jurisprudence of the Court. Community law also means the principles of law common to the Member States. For example, Article 215 of the Treaty provides that concerning non-contractual responsibility, the Community must, "in conformity with the general principles common to the laws of Member States" make good any damage caused by its institutions.

Articles 169 to 184 of the Treaty sets out the type of proceedings with which the Court of Justice is competent to deal. Such jurisdiction is exercisable where the Community itself, a Member State or one of the organs of the Community is a party. Since the Court will sit in review on the constitutionality of the acts of the common institutions and will be interpreting the obligation which the Member States have agreed to accept this will give rise to a

whole new body of European legal knowledge.

Again, the Treaty contains a code of common rules. For example: Article 58 of the Treaty enables companies to establish in any of the Member States even if they are not legally recognized as companies there; Article 79 abolishes discrimination by carriers in matters of rates and conditions of transport; Article 85 prohibits practices which affect trade between Member States or tend to restrict free competition with the Common Market; Article 99 seeks the harmonization of turnover taxes and excise duties. Needless to say, this listing is not comprehensive.

Since Member States have created common institutions and given them the necessary powers to apply the rules and define the common policies, the impact of their procedures will have an effect on the development of Community law. Article 189 of the Treaty sets out the ways in which the Council and the Commission can act through legal instruments: "Regulations" define and extend the Treaty and since they are of general scope they are applicable to all Member States; "Directives" are binding on Member States as far as purpose is concerned but leaves States free to choose the means; "Decisions" are only binding on the addressee which it names.

While the Court shares the jurisdictional supervision of Community law with the domestic courts and tribunals nevertheless its influence is great because as one of the common institutions it takes the overall view of the development of the Community. Thus

its jurisdiction is wide and varied. Perhaps its most important powers are contained in Article 177 of the Treaty which makes the Court the exclusive judge of the legality of the jurisdictional acts of the common institutions, of the non-contractual responsibilities of the various Communities, and of disputes concerning officials and agents of the Community. This section implies not only that the Treaty intends to impose a rule of law upon the organs of the Community but also that there will develop within the Community a unified jurisprudence as between members. This concept is insured by vesting the ultimate power of interpretation in a court which for this purpose at least, is placed firmly above the courts of the various Member States. In imposing a rule of law on the organs of the Community the Court will have the opportunity of establishing a balance between regard for autonomy and efficiency on the one hand and the rule of law on the other. In the fluid political situation which exists there is a great opportunity for the Court to make law rather than simply follow it. But its effectiveness in this area requires the court to take the initiative.

Article 77 sets out that national courts may request rulings. But apart from that, since the Treaty of Rome is now a part of the domestic law of each Member State it thus falls within the competence of the domestic courts as defined in the rules governing the organization of justice in each Member State. In attempting to forecast the main line of development of the Court the Treaty does not

seek to reduce the competency of domestic courts. Their competency with regard to Community law is limited by two sorts of provision in the Treaty: those which attribute exclusive competence, and those which make it obligatory to refer preliminary questions to the Court. These provisions thus avoid any denial of justice in cases where domestic courts would not be competent. But even more important they insure unity of views in the interpretation and application of Community law.

Judges both of the Court of Justice and of domestic courts can make a direct contribution to the growth and development of the Community as it is envisaged in the Rome Treaty. First the Constitution of the Community imposes on judges the role of guardian of the law. As we have seen this law is embryonic because it serves and economic and political experiment which has no precedent in its scope and method. Second the emergence of a Community law opens a new creative period of law in which the function of the judge takes on extreme importance.

Relation of the Court to National Courts

While the European Court is the last word in the interpretation of the Treaty at the same time national courts also are required to resolve such questions; thus it is important to see how possible conflicts are to be avoided. By virtue of their ratification of the Treaty, its provisions now form a part of the municipal law of each

Member State and thus fall within the competence of domestic courts. This competence is, however, a limited one.

Article 177 of the Treaty draws a distinction between national courts of last resorts and courts from which an appeal lies: a court of last resort must refer questions of Treaty interpretation to the Community Court, lesser courts have a discretion. This competence of the Community Court to give final judgement on the interpretation of the Treaty is an exclusive one.

The Treaty makes frequent references to municipal law, and there is no doubt these various provisions involve a substantial penetration into the municipal sphere.²¹ Domestic Courts are also led to apply Community law. This process by which principles of law common to Member States becomes part of the law of the Community also affects the domestic courts. The ratification of the Treaty brings a new body of law to national jurisprudence limited by only two sorts of provisions: those which make it obligatory to refer preliminary questions, and those which attribute exclusive competence. These provisions were intended to avoid any denial of justice in cases where domestic courts are normally incompetent, but more importantly to insure unity of views in the interpretation and application of Community law.

²¹ See Article by Gaudet, "International & Comparative Law Quarterly", (1960) Supp. No. 1, p. 15

Two judgements which have attracted attention, both inside and outside the Common Market are the opinions in the cases of Robert Bosch,²² and of Van Gend and Loos.²³ Both cases came to the Court from State Tribunals by way of the procedure established by Article 177 of the Treaty.

The first decision settled the effects of Articles 85-89 of the Treaty governing competition. The issue arose in conjunction with a damage action brought in the Dutch courts by a German manufacturer and his sole Dutch distributor against a Dutch retailer who had obtained in Germany merchandise manufactured by the plaintiff and imported it into the Netherlands in contravention of an export provision in the plaintiff's dealership agreement. Defendant pleaded that the non-export clause contravened the Treaty. The Court of Appeals of the Netherlands referred the case to the Community Court which decided that existing restrictive agreements could still be valid if registered or exempted from registration as provided for. This decision clarified a controversial subject matter and marked the beginning to a new European anti-trust law. Later this was followed by the German Supreme Court.

The second decision is *N.V. Algemene Transport en Expeditie Onderneming van Gend and Loos and Administration Fiscale Neerlandaise*, one of the most important judgements that has been rendered by the

²² 59 A.J.I.L. (1965), p. 333.

²³ *Supra*, p. 334.

Court. It has been widely reported and discussed. The controversy came before the Court under Article 177 of the Treaty. The subject of the litigation involved the legality of customs duties levied by the Dutch Government on goods imported from Germany. As a result of the Rome Treaty certain tariffs had been increased and the plaintiff charged that Article 12 of the Treaty which enjoined Member States to refrain from increasing tariffs had been contravened and as a result his individual rights had been affected. The importer maintained that the Dutch government had violated Article 12 of the Treaty in that it had reclassified the product in question with the result that the product was subjected to an import duty of eight rather than three percent of its value. The governments of Belgium and the Netherlands contested the Court's jurisdiction on the ground that the question did not involve an interpretation of the Treaty but rather its application within the framework of Dutch law. In its submission the Dutch tribunal asked the Community Court to decide whether Article 12 created rights which private parties could enforce directly - the Courts of Member States and whether the tariff increase resulting from a product reclassification necessarily amounted to a violation of Article 12.

In its judgement the Court emphasized that the purpose of the Treaty was to create a Common Market with a direct impact on the Community subjects. In addition the role given to the Courts by Article 177 confirms that the Member States have attributed to the

Community law an authority which permits it to be invoked by their subjects before the national tribunals. The Court said:

It must be concluded that the Community constitutes a novel juridical order of international legal character for the benefit of which the States, though only in limited areas, have limited their sovereign rights and the subjects of which are not only the Member States but also their Nationals; consequently, Community law, independent of the legislation of the Member States, creates not only burdens upon the individuals as such, but, conversely, is also apt to entail rights which enter into their legal patrimony.

It follows that Article 12 is to be interpreted in the sense that it produces immediate effects and endangers individual rights which the international jurisdictions must safeguard; consequently, Article 12 must be considered as being directly applicable law which individuals may invoke in the Courts of Member States.

On the one hand the Court attached to the Community the character of an independent and new legal order of international nature with sovereign rights of its own and direct operation upon its subjects, so as to vest them with individual rights and duties capable of being asserted before national tribunals. On the other hand the Court emphasized that it dealt with the scope of Treaty solely within the framework of Community law.

The Court also noted that, unlike the Commission of the Community, and the Member States individuals may not appeal to the Community Court if they believe that a Member State is violating the Treaty to their detriment. By enabling them to challenge

governmental action in national courts on a violation of Article 12, the Court emphasized, the Treaty established an effective guarantee of the rights of individuals supplementing the remedies available to the Commission and the Member States under Article 169, which provides that the Commission may refer to the Court any failure of a Member State to fulfill any of its obligations under the Treaty and Article 170 which provides that a Member State which considers that another State has failed to fulfill any of its obligations under the Treaty may refer the matter to the Commission and the Commission may refer the matter to the Court. As to the legality of the tariff increase the Court ruled that it was illegal under Article 12, whether it was caused by a product reclassification or by an actual increase of the customs duty.

Shortly after the decision in the van Gend and loos case the Netherlands Tariff Commission referred a similar set of circumstances to the Community Court.²⁴ The Commission moved to have the submission dismissed on the grounds that it had lost its purpose. The Court denied this motion on the theory that even if a prior decision appeared to deprive a submission of its purpose it refused to consider this factor as a basis for holding an appeal under Article 177 to be inadmissible. In doing so, the Court emphasized

²⁴ De Costa & Scharke N. V. et al vs Netherlands Fiscal Administration, 58 A.J.I.L., p. 197

that the function it performs under Article 177 is limited to the interpretation of Community law by looking to the spirit and text of the Treaty. The application of this law to the actual facts which gave rise to the request for interpretation of the Treaty by the Community Court, however, is a task left to the national courts. Its own function under Article 177, the Community Court noted, is to assure the uniform interpretation of Community law in all six Member States.

One judgement concerning the application and interpretation of the ECSC Treaty deserves special mention because of its impact in questions of broader political and economic interest. In the case of *De Gezawenlyke Steenkolenwijken in Limburg vs Haute Autorite*²⁵ the Court was called upon to determine the conformity with the ECSC Treaty of the "miners' premium" paid by the Government of Germany to workers in German mines as additional incentive for underground work. The Dutch complaint requested the High Authority to issue a decision that the premium was a prohibited subsidy within the meaning of the Treaty. The German Government claimed that the premium was offset by the discontinuance of its contribution to the miners' social insurance fund.

²⁵ 59 A.J.I.L. (1965) p. 330

The Court held that the premiums constituted a prohibited subsidy and did not lose this character by reason of the fact that the government's discontinuance of its contribution to the miners' social insurance fund resulted in a comparable increase of the contribution to that fund by the mining enterprises.

Comparison with the Supreme Court of the United States

The United States Constitution is a specific legal document -- the Constitution of 1788 -- together with subsequent amendments. It is this Constitution which defines the legal rights and duties of the United States, but over the years its many provisions have been modified by judicial interpretation. Lawyers and judges play an important part in this interpretation, and as the supreme law of the land it is the Court which delineates the powers of the executive, Congress, and the states. At the Constitutional Convention of 1789, delegates of the 13 original states created the Federal government more or less in the image of their own states. They also agreed to subordinate some of their most important sovereign powers to the Federal government. While states kept authority over many functions over the years the Federal government has extended its power into many of these functions. From a small nation of farmers, the United States became a land of massive cities, suburbs, and urban sprawl, and a vast continental area of 50 states struggling to keep up with change not the least of which is the intricate relationship between

the states and the Federal government.

Because the Supreme Court is the guardian of the Constitution it has been possible for the American system of government, without violating the terms of the original charter, to develop over the course of time in response to the changing conditions. Reversal of the separate-but-equal rule of Plessy vs Ferguson has caused the Federal government to abandon a hands-off attitude of seventy years' standing and harden its attitude of total commitment against racial segregation; the Court has declared religious prayer and Bible-reading in public schools unconstitutional; it has ordered the reapportionment of the national House of Representatives and of both houses of state legislatures on an approximate one-man, one-vote, basis; it has enlarged the right of the accused in criminal trials; and in Miranda vs Arizona it has laid down whole sets of new rules to govern the conduct of police throughout the country towards persons arrested on suspicion of crime. In a word the function of the Court has taken on political overtones.

In the same way the Court of Justice of the European Community will not discharge its office by merely doing what most Europeans think is right or necessary, it must persuade by reasoned argument why they thought their action is right and necessary. This philosophy of course would carry the Court into the area of political decision. However, if a constitution is to prove effective it must inevitably develop life of its own, often totally different from

the concept of its founders.

Increase in Private International Law

The transactions involving the Community, Member States, individuals, and business enterprises have created a whole complex of legal problems which obliges a judge sitting in one Member State to examine the law of another in order to solve a dispute laid before him. Thus the growth of trade and particularly the greater movement of persons within the Community will give rise to an increase in the problems of private international law. For example the question of nationality for both natural and legal persons will take on new importance. Again the very increase in the volume of goods and merchandise moving between Member States and in and out of the Community will result in an increase in international trade contracts. This will require a greater knowledge on the part of the practicing lawyers of the various controls and regulations dealing with tariffs and licencing, to say nothing of the various taxing regulations. Knowledge in this area will become increasingly important because international traders will expect a high degree of competence so that their goods will move quickly and cheaply. This will also require study in the area of common customs and usage, since whole areas of trading, particularly in international commodities, must have regard to this area of jurisprudence. We have already seen something of the problems that relate to companies whose legal capacities and roles vary from country to country.

Conclusion

It is obvious that the breadth of the Court's jurisdiction enables it to exercise control over most of the activities of the Community. The dynamic of developing a Common Market imposes on both Community and domestic judges the role of guardians of the law. This law is new since it serves a venture in economic integration which has no precedent in its scope or method. The obligations of the Treaty which have been undertaken by the Member States presents the features of an international convention, an international charter and a code.

The emergence of Community law and the impact of the Treaty on municipal legal systems opens a new creative period of law in Europe in which the function of judge and jurist take on a new significance. It is apparent that a new body of unified European law which is the sum total of the national laws of Member States is being developed.

The extreme care with which the Court examines the various alternative interpretations of the Treaty provisions which are urged upon it is certainly discernible as a feature of the Court. A further trend is the importance that the Court places upon reasons being given to support decisions, and in one case the Court has gone to the extent of declaring a decision void and non-existent for lack of reasons.

It is frequently maintained that Britain must surrender her

sovereignty if she joins the Common Market. Sovereignty is merely a convenient term for referring collectively to a number of powers that states have traditionally claimed for themselves. Sovereignty, however, is divisible allowing states to disable themselves from the exercise of some particular power. If Britain enters the European Community she would not surrender her sovereignty. Such entry could involve many severe restrictions especially in the economic sphere. But the Treaty does not embrace the whole field of economics, nor does it purport to regulate such matters as defence, foreign affairs and many others. The role of the Courts has been only to extend the powers of the organs of the Community where such extension is required to further the progress towards a Common Market.

Finally it can be said with certainty that the judges in the Community Court are predisposed towards the concept of European unity which underlies the whole of this European experiment; consequently it is likely that there will be a strong parallel between the contribution of the European Courts towards the political integration of the Member States and the contribution of the Supreme Court of the United States in the development of national social policies.

CHAPTER VII

PROVISIONS FOR THE HARMONIZATION OF LAWS

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Those in Canada and the United States who are interested in the problems of securing uniformity of law in a federal system will watch with interest the progress of the efforts of Member States in the European Community to bring about a greater harmony between their national laws.¹

The report of the Spaak Committee which became the working document for the drafting of the Rome Treaty was concerned with the elimination of national laws and procedures which prevented the free movement of commerce. The Committee recommended that where a distortion called for a harmonization of legal regulations or procedures in different countries that the central organs of the Community would propose the required legislative changes. This recommendation led to the provisions which are contained in the Rome Treaty whereby some approximation of laws of Member States can take place.

While the terms "harmonization", "equalization", and "approximation" appear in the Treaty without definition it is left to the Commission to narrow the legislative and administrative differences without in any way seeking complete uniformity. Article 3 of

¹ Supplement to Bulletin No. 8 - 1966 of the Community lists 261 conventions, regulations, directives, and other legal acts which have as their object measures approximating legislation or creating European Law. Some have been adopted, many are in preparation. Of these 90 deal with Competition, 60 with Agriculture, 40 with Freedom of Establishment and Services, 31 with Social Legislation, 21 with Customs, 15 with Transport, 2 with Free movement of Worker, and 2 with Movement of Capital.

the Treaty provides for "the removal of differences in national laws so far as is necessary for the operation of the Common Market".

Article 100 provides that the Council acting by means of a unanimous vote on a proposal of the Commission may issue directives for approximations. Before such action can be taken, however, provisions that require approximation must "have a direct incidence on the establishment or functioning of the Common Market". Article 101 provides for a case where a state is unwilling to co-operate in harmonizing its laws. Since a directive requires unanimity, a great deal of technical work must go into its preparation; consequently even though there are more than forty committees sitting on various aspects of the laws the Commission wishes to harmonize, only a few directives under these Articles have been issued.

If new legislation is required by Member States the European Parliament and the Economic and Social Committee must also be consulted. In other words the Council alone cannot compel Member States to bring their legislative procedures into harmony. Since approximation is an invasion of the legislative authority of Member States, the provisions in the Treaty dealing with harmonization are necessarily a compromise between the rights of the Community and the Member States to legislate as they wish. It would appear that at this stage in the development of the Community, at least, the aim is not uniformity as we understand it but rather general similarity. While a great deal of legislation will be required to implement the objectives embodied in the Treaty, nevertheless, it is more correct to think in terms of

"approximation" and "harmonization" of laws to the extent necessary to establish a Common Market, than to anticipate a total and radical political transformation.²

Uniformity in the United States

In both Canada and the United States the division of legislative powers has posed problems similar to those which exist in the European Community. In the United States the "National Conference on Uniform State Laws" was the outgrowth of a special study on the desirability for uniform legislation conducted in 1889 by the American Bar Association. The first Conference on uniformity was held in 1892 and was attended by representatives from 9 States. The object of the Conference was "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." This Conference now meets annually and is made up of three representatives from each State. These are appointed by the chief executive and serve without remuneration for a three year term. These representatives are drawn from the ranks of lawyers, judges, and teachers of law.³

Since its inception about 100 acts have been recommended by the Conference and while they have not all received universal approval

²Thompson, "Harmonization of Laws", (Journal of Common Market Studies, 1965, Vol. III), p. 302

³Martindale-Hubbell Law Directory (1967) Vol. IV, p. 3559

the "Negotiable Instruments Act" has been approved in all States, the "Warehouse Receipts Act" in 51 States, the "Sales Act" in 37 States and so on. While these efforts to bring about uniformity in State laws has only been partly successful Samuel Williston who acted as a Commissioner for many years said that even though United States uniformity procedures were slow and difficult, they were "...preferable to the creation in Washington of a bureaucracy, legislating upon and administering so large a portion of private law as would be necessary to meet the evil. Indeed, one reason for providing uniform State legislation has been to prevent enlargement of the scope of federal control that the evils of diversity would be likely to bring about if no other remedy was applied."⁴

Uniformity in Canada

In Canada Section 94 of the British North American Act enables the Parliament of Canada to make provisions for the uniformity of provincial laws relative to property and civil rights, with the proviso that no law should have effect unless adopted and enacted by a provincial legislature. While uniformity of provincial laws was generally agreed to be a desirable objective no action was initiated until the subject was taken up by the Canadian Bar Association. Discussions led to a meeting in Montreal in 1918 when a "Conference of

⁴Williston, Samuel, "Life and Law", (Boston: Little, Brown, 1941)

Commissioners on Uniformity of Laws" throughout Canada was organized. Like its American counterpart the Canadian Conference meets annually. In most provinces statutes have been passed providing for the appointment of Commissioners to represent the province. Two or three lawyers usually represent each jurisdiction. Since its inception the Conference has been responsible for drafting more than 75 model acts dealing with such subjects as Assignment of Book Debts, Bills of Sale, Bulk Sales, Conditional Sales, and Company Law.⁵

The Problem in Europe

To have varying rules govern transactions alike in every respect except that they take place in different States is cause for expense and annoyances. The situation would be impossible were it not that the legal thought and underlying structure of the European Community was fashioned by six of the leading European States governed by the civil law system. In view of the rather limited success of uniformity in Canada and the United States the European Community poses the problem as to how successful it will be in overcoming the difficulties that stand in the way of harmonization. It was apparent to the Spaak Committee that the only politically feasible method of achieving desirable uniformity in any other way than by throwing the burden on

⁵Report of the Conference of Commissioners on Uniformity of Legislation in Canada, (1962)

the Community was to induce Member States to legislate harmoniously on portions of the law where uniformity was particularly desirable. However, among the Member States there is a sense of urgency which acts as a powerful motivating force to move things ahead. This sense of urgency is expressed in the following excerpt from the "Sixth General Report of the Commission on the Activities of the Community." (June, 1963) :

Progress on the road to economic integration increases the inclination towards complete political union, and it provides increasingly cogent reasons for establishing such union. If these Communities should fail, the political Community would also be lost for our generation. On the other hand, as long as the Communities maintain their dynamism undiminished, there will still be a real chance for complete European Federation.

There is this general pressure of achievements, and thus harmonization is insisted upon as part of the general Community program.

It is apparent from the terms of the Rome Treaty that there are three basic categories in terms of the objectives of the Community scheme. First a national treatment throughout the Community for nationals and companies of Member States, their goods and services, and for capital. Second to put into effect common policies, and common rules and regulations in such segments of the economy as agriculture and transport. Progress will be made in these segments either by compliance with self-executing provisions of the Treaty, or by a federal-type Community regulation which changes national laws directly or by a Community decision or directive which compels national states to

adjust national laws through national law making bodies. Third, approximation to the extent necessary for the functioning of the Common Market.⁶

The reduction of differences among the national laws of Member States is an integral part of the plan for the progressive coalescence of the national economies of the six Member States. The dynamic is that the common institutions have the legal power to order national governments to bring about adjustments in national legal systems. In the case of *Humblet vs Belgium*⁷ in examining its power to annul legislative or administrative enactments of a Member State the Court concluded that it lacked such power:

The ECSC Treaty is governed by the principle of strict separation of powers between institutions of the Community and of the Member States. Community law does not grant to the institutions of the Community the power to annul legislative or administrative acts of Member States. Thus if the High Authority, believes, for example, that a Member State has violated the Treaty, it lacks the power to annul or void these provisions. Instead, the High Authority can only proceed in accordance with Article 88 of the Treaty by noting its violation and in conjunction therewith instituting the proceedings therein provided for, in order that the State involved repeal the acts in question.

In dealing with Articles 100 to 102 of the Treaty the Commission has chosen three broad areas: first the laws and regulations concerning foodstuffs, veterinary, phytosanitary matters, seeds and forestry;

⁶ "Assimilation of National Laws and European Integration", 58 AJIL (1964) P. 3

⁷ 56 AJIL (1962) p. 541

second, technical regulations to do with motor vehicles and tractors; third, laws and regulations on drugs and narcotics. Work in all of these areas is being done through working groups, and about forty of such groups are active.⁸ The only directive so far deals with colorants that may be employed in foodstuffs. However, eventually the objective is the development of a food and drug law similar to the one in the United States.

Harmonization of Tariff Regulations

The progress made by the Community in reducing internal tariffs and quotas reflects the desire of Member States to put through a program of harmonization. While the Treaty takes away from national governments the control over external tariffs and places it in the hands of the Council of Ministers, the legislative and administrative rules governing the procedure for the application of tariffs are essentially in the hands of Member States. To meet this, Article 27 of the Treaty requires Member States to approximate their legislative and administrative provisions in regard to customs matters.

As in other areas the effectiveness of steps to abolish internal frontiers depends on the readiness of national customs authorities to respect common principles and to apply the same rules in taxing goods. Acting under Article 27 the Commission has put through a program of

⁸ Supplement to Bulletin No. 8 - (1966) EEC.

harmonious rates. While the commission can do no more than make recommendations the Member States have usually been willing to carry out the suggestions of the Commission.

In its Fifth Report⁹ the Commission states that greater efforts towards approximation of customs legislation must take place. Differences in practice and procedure are being narrowed by the activities of a "Customs Committee which includes the directors of customs departments of Member Governments." In its Sixth Report¹⁰ the Commission pointed out that in order to establish an effective customs union a "body of Community Customs legislation is needed."

The fact that the Community has been able to bring about internal customs harmonization in advance of the time table laid down by the Rome Treaty is evidence of success in this area of the Community's activities. Tariffs on nearly all industrial trade within the Community have been cut by 70 per cent since the Common Market was established. Originally these tariffs were to be entirely eliminated over a three-stage 12-year transitional period but the Community has stepped up the pace and is now scheduled to end tariffs by July 1, 1967. Meanwhile the Community is achieving a single set of tariffs in goods coming into the Community by averaging custom duties of the Member States.

⁹ Weil, "A Handbook of the European Economic Community", (Praeger 1965), p. 112

¹⁰ Weil, Ibid., p. 116

Tax Laws

Articles 95 to 99 of the Treaty deal with indirect taxes and as a first step the Commission undertook a study of the national direct tax structure. Of special interest is the proposal drawn up for the harmonization of turnover taxes under article 99 which provides for the harmonization of turnover taxes, excise duties and other forms of indirect taxation. The present draft prepared by a special committee recommends an added-value tax on the French model. It is hoped that national laws replacing power systems of turnover tax by the common system shall be promulgated by 1968 and brought into force by 1970.¹¹

Right of Establishment

With the gradual reduction or elimination of tariffs and quotas it was apparent that there were other obstacles than these to the expansion of trade. One of these "non-tariff" barriers was the restrictions which prevented establishment. This right of establishment is the right of a self-employed individual to move into any of the Member States and carry on an occupation or set up a business there. Nationals and companies of other States will be treated the same way as local nationals and companies when they wish to establish

¹¹ Thompson, Dennis, "The European Economic Community" , (13 International Comparative Law Quarterly, 1964) p. 851

themselves locally in non-salaried independent activities. Several directives are underway¹² and citizens of Member States are now admitted to other Member States subject to the right of refusal on the grounds of "public policy, public security, and public health". Companies also benefit and Article 52 of the Treaty requires the progressive abolitions of existing regulations preventing free establishment and Article 53 prohibits the enactment of new restrictions.

On January 14, 1962 the Council reviewed the report of the Commission marking the end of the first stage.¹³ It was reported that first measures had been taken for progressively freeing the movement of workers, capital and services and giving effect to the right of establishment. In matters of trade, transport and competition decisions have also been taken to pave the way for more harmonious common policies.

At the same time the Commission had prepared an action program for the second stage which was submitted to the European Parliament as well as to the Council. This program outlined what steps would have to be taken if the Community objectives were to be achieved. In other words the Commission presented an overall view of the anticipated development of the Community. High on the list was

¹²Supplement to Bulletin No. 8, (1966) EEC

¹³Weil, Ibid., p. 222

the importance of harmonizing legislation governing professions and trades if freedom of establishment and freedom to supply services within the Community were to be achieved. The report underlined that fair competition among the enterprises of Member States was essential for the harmonious development of the Common Market. Rules governing competition are set out in Articles 85 and 86 where Community institutions, principally the Commission are given power to supervise and administer the system governing competition.

Establishment of European Companies

In order to foster the harmonization of legislation as it affects competition the Commission studies existing national legislation, proposes multilateral conventions, prepares directives and stimulates co-operation among the Member States. These procedures are being applied in the following areas: patents and trade marks, unfair competition, public contracts, technical and administrative obstacles to trade, recognition and enforcement of foreign judgments, bankruptcy law and company law to name just a few. Article 220 require Member States to negotiate with a view to ensuring "...the virtual recognition of companies....the maintenance of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the municipal law of different Member States to form mergers".

The Community's objectives are not only to facilitate the

activities of companies beyond national frontiers but also to encourage combinations and mergers which will enable firms to adapt themselves to the larger European market, to research and development, to technological progress, and above all to international competition.¹⁴ However, companies at present are faced with a number of obstacles which must be overcome by legal means.

The underlying problem is that the single market is not matched by a single legal system. Three possible solutions suggest themselves: first, one deriving from the Treaty. The Treaty provides for the elimination in each Member State of all differences of treatment between local and foreign companies so far as carrying on business is concerned; it further provides in Article 54 for an approximation of all laws where these prevent the functioning of the Common Market. Article 220 suggests that the problems caused by the autonomy of national systems can be solved by intergovernmental negotiations; Secondly, the creation of a European company incorporated under a uniform company act to be enacted in all Member States; and thirdly, the creation of a European company incorporated under European law by a separate convention under the Treaty of Rome.

Only two of these solutions appear to offer practical solutions: the first would be the creation of a European company by a uniform law

¹⁴ "Memorandum by the Commission of EEC on the Establishment of European Companies" Supplement to Bulletin No. 9/10, (1966)

which would improve opportunities to establish and control subsidiaries. This would require the recognition throughout the Community of companies incorporate in any one of the Member States. Rights of both creditors and shareholders would be safeguarded and underwriting of securities could be facilitated; the second would be the creation of a company under European law. This would remove the difficulties which stand in the way of mergers. Share transfer would also be simplified. This new corporate form, however, rests on the solution of problems of a fiscal, financial and social nature. On April 22, 1966 in a memorandum submitted by the Commission to the Council it was proposed that any decision on a European company be deferred pending the results of studies now underway.

Industrial Property

In the same way it is hoped that some degree of harmonization in the area of patents, trade marks and designs will be achieved, as the result of meetings of under-secretaries of Member States organized by the Commission. While the powers for protecting industrial property will probably remain in the hands of the Member Government, it is possible that a new Community convention which has been proposed by a Committee of experts will be established alongside existing or modified municipal laws. If the European patent is a success there is no reason why it should not in time become the only patent available

in the Community and thus supersede national patents.¹⁵ While conferences for the protection of industrial property have been regularly held in Europe since 1883 under the Paris Convention very little actual harmonization has taken place. However, it is possible that a change in conception in industrial property as a result of harmonization in other areas could lead to a Community convention for the protection of industrial property.

Some mention should be made of the efforts of business circles to adapt themselves to Common Market conditions. In Europe, trade associations play a more dynamic part in the determination of business policies than their counterparts in Canada do. Many new Community trade associations have been set up bringing together individual national associations. In other ways, too, industry, trade and handicrafts have applied a great many other forms of co-operation. These range from technical agreements to the establishment of new companies, and grouping together different enterprises in single countries.

Commercial Law

Harmonization of commercial law should not prevent very great difficulties. When an international contract for the sale of goods is made the parties to the contract may state the law which is to govern the transaction. However, it is the absence of such a statement which

¹⁵Thompson, "Harmonization of Laws" (June, 1965) JCM Studies, p. 306.

frequently gives rise to difficulties with regard to matters such as performance and payment. To overcome this latter difficulty a "Draft Convention of Uniform Law of International Sale of Goods" was prepared in 1956 and adopted by the European Community at The Hague in 1964. This code requires legislation in all European States where it is applicable and it is hoped that it will come into force by May 1, 1968.

Harmonization of Social Policies

The social policies of the Community are aimed at improving wages and working conditions and at maintaining a high level of employment.¹⁶ Articles 117 to 128 of the Treaty sets out the social policy of the Community. There it is agreed that the progressive harmonization of the social system of Member States constitutes an important factor in the development of the Community. The objective is not to unify the various social systems but to progressively narrow the differences between States and generally to level living and working conditions in an upward direction. By accepting the highest standards in each country there will be a levelling upwards which will ultimately produce a series of harmonized laws providing an unparalleled social welfare system.

¹⁶ Brown, E.D., "Labour Law and Social Security", Current Legal Problems. (1963) p. 178.

In the area of wages and working conditions the Commission has set up working parties drawn from employers' and workers' organizations and these assisted by government experts meet and study problems on a regular basis. In this way it is anticipated that Member States will apply, in accordance with national systems, appropriate procedures to ensure that labour legislation is harmonized. The first efforts of these working parties are being directed in the following three areas: equal pay for men and women, overtime pay, and equalization of paid holidays and vacations. Preliminary investigations revealed wide differences between Member States, and since many of these differences stemmed from national fiscal policy, harmonization of social changes will be a lengthy process.

Article 48 of the Treaty requires the free movement of workers between Member States and Article 49 gives the Council power to make regulations for effecting this policy. The achievement of this objective requires close collaboration between the national labour administrations and calls for the progressive removal of policies and procedures restricting the movement of workers. In order to assist Member States to bring their own employment policies into line the Commission has promulgated regulations on social security for frontier workers as well as regulations affecting health and welfare benefits. Similar benefits are also provided for seasonal workers. To date the working conditions of about 500,000 persons have been improved by national harmonization.

Agriculture

Progress towards the harmonization of agricultural programs has been slower, largely because of the difficulty of reconciling the interests of Germany, (the Community's factory), with those of France, (its farm). However, a great deal of harmonization has taken place even though agriculture poses some of the most difficult problems for the Community. Just before Christmas, on December 23, 1963, Member States pledged themselves to take the necessary steps to adjust their laws and regulations so that three new marketing organizations could come into being. These organizations have to do with dairy produce, beef, and rice. At the same time a resolution was approved on the broad lines of a common policy on fats and oils.

Transport

Transport in the Community is dealt with in Articles 74 to 84 of the Treaty which encompass transport by road, rail and water. Under these sections the Commission has authority to evolve a common policy. To be acceptable politically the Commission must satisfy groups pressing for "the organization of a single transport market",¹⁷ through government intervention, as well as those who desire a

¹⁷Stein, "Assimilation of National Laws as a Function of European Integration", 58 AJIL (1964) p. 1.

widening competition among the three modes of transport across national frontiers. Reconciliation is only possible, however, if a common policy includes an approximation of national regulations affecting the costs of production in the various transport industries.

The Commission's proposals in the first place call for a detailed enquiry into costs. In the second place they set a timetable for the gradual harmonization of taxes on vehicles and fuel, of certain aspects of national legislation relating to transport personnel, and certain insurance requirements. A common transport policy seeks the elimination of national discrimination in the use of transport facilities and provides for a free choice of transport facilities at the most economic rates. If Canadian, American and British experience in endeavouring to solve transport problems is any criterion, then negotiations in this area will not be easy. Harmonization is technical and as a first step the Commission began a study of existing national legislation and administrative provisions. As a result of this the Commission laid before the Council proposals outlined in a broad way a common transport policy designed to meet the Community's three main preoccupations in transport matters: integration, organization, and harmonization. However, the problem is a complex one since it affects national legislation in the fields of taxation, insurance and social policy.

Energy

In the fields of energy it is the objective to establish a common energy policy through the joint efforts of Economic Community, the European Coal and Steel Industry and the European Atomic Energy Commission. Harmonization of national legislation will be very difficult. The objective, however, is that such sources of energy as coal, oil, and atomic power will be developed in accordance with the Community's needs over the next twenty years.

Position of Britain

In the event of Britain joining the European Community, she will become a party to the Rome Treaty.¹⁸ Depending on the negotiations many of the economic obligations of the Treaty would probably be undertaken gradually according to a time table. In principle, Britain would have to accept the spirit of the Treaty and agree to be bound by the regulations in the same way as the present Member States are. At the time of the 1961-63 negotiations legal experts in Britain thought that the greatest change that would take place would be the adjustment of the British Parliamentary system into the semi-federal institutions of the Community. Since the Treaty and the regulations

¹⁸ The likely impact of Britain's membership of the European Communities on British life and Institutions is effectively examined - "Current Legal Problems 1963", Stevens.

are directly applicable to the citizens of the Community for the first time in modern history those in Britain would be subject to laws not made in Parliament. Perhaps this is too legalistic a view, for in practice parliamentary legislation particularly in commercial matters has followed the international conventions entered into by Britain. On August 2, 1962 the Lord Chancellor (Lord Dilhouse) speaking in the House of Lords summarized the situation as follows:

".....there is no possibility whatever that in the exercise of their powers, the organs of the Community could alter our criminal procedures, including the presumption of innocence or trial by jury. They could not affect our law of family relationships, of marriage and divorce, of landlord and tenant, of housing, of local government or police organization. Their effect on the ordinary law of contract and tort will be negligible. Community law does not affect the laws of the welfare State, nor does it take away the right of the legislature to nationalize industries. I venture to suggest that the vast majority of men and women in this country will never directly feel the impact of the Community-made law at all.....With few exceptions, the obligations under the Community law will fall directly only on industrial and commercial concerns, long-distance carriers, and persons or firms engaged in the export of agricultural products."

Conclusion

For the economic integration of the Community to be successful, a considerable measure of harmonization of laws will be necessary. This does not mean uniformity; it merely involves the approximation of laws to remove those areas in which disparity of laws create practical problems which impede the establishment and efficient functioning of a common market. A total and radical political transformation is not anticipated. It goes without saying that the work of the special committees set up by the Commission will bring about a gradual harmonization and the differences among the national laws of Member States will be reduced. Harmonization of laws, particularly in commercial matters, is a field, where co-operation between the Community and Britain would be particularly valuable whether or not Britain is admitted to membership.

CHAPTER VIII

IMPACT OF THE COMMUNITY ON NON MEMBER STATES

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British Reaction

In 1945 Britain's reputation throughout Europe was immense. So when the European decided to reconstruct Europe anew on lines they thought would make internecine war impossible, they naturally sought leadership from Britain. But the British preoccupied with welfare reforms at home and the dissolution of the empire overseas, with Churchill out of office and above all the Labor government unaware that a radical change was needed in an international system based on the absolute power of the nation-state, remained coldly aloof from the Europeans' ideas. At the time, those in power in Britain did not share the concept of an integrated Europe and sought to retain an independent position rather than a part in the new development.¹

By 1950 it was clear that a European organization of some sort was coming into being, but still Britain remained cool.² Many reasons combined to foster the British position. First, Britain had neither undergone the humiliation of defeat and occupation nor had

¹ John Pinder, op. cit., p. 68

² See "Appendix F" for opinions expressed by Herbert Morrison

its sovereignty been destroyed in the way it had been in most European countries. Also, the wartime victory, won by sacrifice and courage, had revived a sense of British identity and purpose. Secondly, there was the traditional isolation towards Europe, and the failure to catch the new spirit led many to believe that the new association wouldn't work — its long-term purpose seemed too grandiose. Thirdly, the view that Britain had a special relationship with the United States made other relationships undesirable and perhaps dangerous. Finally there were the Commonwealth ties, and while these were quite largely sentimental they were still important in a political democracy.

At the first meetings of the Spaak Committee, Britain was represented but withdrew when the Committee commenced serious drafting. When the report was accepted as a basis for negotiations, Britain was invited to join in working out the Treaties. But once more Britain refused. When the Rome Treaty was prepared in 1957 none of the European Parliaments were able to discuss it in detail. The Treaty had been drafted by delegates and civil servants who had spent months working out such complicated questions as the reduction of tariffs and the establishment of a single agricultural policy. The arrangements were simply too technical to be left to ordinary parliamentarians. Faced with a take-it-or-leave-it proposition, Britain reluctantly left it. In 1956-57, Britain would have been glad to see the Common Market negotiations fail: but the Common

Market went forward despite Britain. Indeed its success was the main factor in the British decision to reconsider the matter. Reginald Maudling was in charge of the Common Market talks in 1958, but the opinion was that his heart was never fully in it. Treasury officials were too slow to come to terms with Europe. They thought the negotiators would never reach agreement — particularly on agriculture — and they saw the economic ties of the Commonwealth providing insurmountable difficulties to Britain's joining. The Foreign Office saw it as a purely economic problem and up to the Treasury to deal with. Others in the cabinet were too busy with their own departments. Thus it was left to the Prime Minister to come slowly toward the Common Market and push the cabinet into it. However, negotiations broke down in December, 1958.

European Free Trade Association

Following the publication of the Spaak Report, the Organization for European Economic Co-operation in 1956 set up a study group to examine what progress had been made towards the establishment of a Common Market and to report on the possibility of other nations being included in a wider European free trade area. Protracted negotiations failed to arrive at any area of common understanding. Britain was not prepared to compromise on agriculture, to re-examine Commonwealth ties nor to accept political commitments. Negotiations were broken off in December, 1958. Failure to agree on the formation

of a wider free trade area resulted in Britain, Portugal, Austria, Switzerland, Norway, Denmark, and Sweden entering into a convention at Stockholm in November 1959 for the establishment of the European Free Trade Association (EFTA) which entered into force on May 3, 1960. The object was not only to accommodate a number of interests that could not be reconciled at the time of the Rome Treaty, but also to keep pace with the Common Market in the elimination of tariffs and other obstacles to trade. Although EFTA had a certain economic validity as a free-trade area, its true importance was that countries with different political, economic, and social structures believed that they must organize and thus ultimately induce the European Community to widen its borders.

Following the breakdown in EEC negotiations Britain took a more realistic view of her position. While Britain had been bolstering her independent role by the development of her national nuclear capabilities the special relationship with the United States which had a firm basis during the war was not turning out to be quite the same in the postwar period. The break with South Africa caused a growing disillusion with the economic future of the Commonwealth because it revealed that the Commonwealth which had seemed a substitute for a dismantled Empire was not a comparable source of strength. The performance of British industry was increasingly disappointing and many in Britain were concerned with being outside the Market. Politically the European Community threatened to dwarf any

separate role for Britain. From the beginning of 1961 arguments in Britain went on in the ministeries, but it was not until July 3, 1961 that the Prime Minister made an official statement to the Commons, announcing that "after long and careful consideration, Her Majesty's Government have come to the conclusion that it would be right for Britain to make a formal application under Article 237..." The immediate continental reaction to Mr. Macmillan's announcement was one of public enthusiasm in most European capitals. While official French opinion was lukewarm, Jean Monnet and other Europeans welcomed Britain's move. Two days later the main question approving the beginning of negotiations was passed and a few weeks later negotiations began in Brussels, with a team of civil servants headed by Edward Heath.

In balance, Britain's record left something to be desired. A mixture of equivocation and outright hostility towards the Community had engendered Continental suspicions about Britain's intentions. The 1961 application to join was clearly a milestone, but the reservation about the political commitment was subsequently to be a barrier.

Raymond Aron sums up the situation as follows:³ Britain's first attitude at the beginning of the 1950's was a polite approval without great anxiety and without great enthusiasm. The British were convinced that the future of Europe was reconciliation between France and Germany. The second phase was after the Rome Treaty was signed

³ "Europe in the Modern World" p. 92

when it became apparent that the Common Market would work: Britain was irritated. In the third phase the British were not specially pleased that there should be a political unity, but couldn't afford to be left out. She saw the advantages but mistrusted the means.

When Harold Macmillan, the Prime Minister, announced to the House of Commons that Britain intended applying for membership he added that a federal solution was unacceptable and that the only practical solution would be a confederation, "a commonwealth if you like". This ignored the fact that the European Community to which he was applying was not a Commonwealth but a federal solution for economic and political affairs; and his statement unwisely and unnecessarily challenged the deep conviction of the Europeans.⁴

Speaking at Mount Allison University in 1962, Lord Amory,⁵ then United Kingdom High Commissioner to Canada, suggested that we should remember that EEC came into existence as part of a movement for European unity, and that, although progress to date, deriving

⁴ Macmillan, "Britain the Commonwealth and Europe". The form which the political unity of the Community should take is now under active discussion in Europe, where opinions on it are strongly divided. There is a school which ardently believes in a unitary concept of a European Federation, a new European State. Here in Britain the Liberal Party Assembly voiced some strong support for his solution. I, myself, believe that the bulk of public opinion in this country, and certainly any Conservative Government, is firmly against the extinction of separate national traditions. We would, I think, favor a more gradual approach worked out by experience, instead of a leap in the dark, and this is a view shared by many leaders of opinion in Europe.

⁵ Lord Amory, "Great Britain and the Common Market", p. 69

from the Treaty of Rome has been limited to the economic field, the inspiration and aim behind it was an urge towards closer association in the political sphere. He said that while Britain was in favour of closer political association there were limits to the degree of political integration that would be accepted. In fact Britain had already accepted practical restrictions on its independent action through membership of such bodies as the United Nations, the General Agreement on Tariffs and Trade, and the North Atlantic Treaty Organization. He said that whatever forms and degrees of political association were agreed on, eventually the Community would require a new treaty. So there was no question of accepting commitments blindfolded. He didn't think that Britain would ever accept a commitment that would conflict with the monarchy or any other fundamental part of the constitution. He could not envisage forming part of a European federation as closely integrated as the United States. A looser form of the sort favoured by General de Gaulle might well be sensible.

In November, 1962 Mr. Macmillan speaking of the political implications of union said:⁶ "It is true, of course, that political unity is the central aim of these European countries and we would naturally accept that ultimate goal. But the effects of our position of joining Europe have been much exaggerated by the critics". He

⁶Ross Munro, "The New Europe", p. 4

said that signing the Rome Treaty would not involve a one-sided surrender of sovereignty on the part of Britain but a pooling of sovereignty of all concerned, mainly in the economic and social fields.

In renouncing some of its sovereignty, the Prime Minister said that Britain would receive in return a share of the sovereignty renounced by other members. The talk of loss of sovereignty became all the more meaningless when one remembered that practically every nation, including Britain, had already been forced by pressures of the modern world to abandon large areas of sovereignty and in that sense they were all now interdependent.

On January 14, 1963, President de Gaulle abruptly halted the movement towards European unity when he announced that France would oppose Britain's entry into the European Economic Community. He said: "The nature, structure and economic context of England differ profoundly from those of other States of the Continent", and that Britain could qualify as a member only by "transferring itself enough to belong to the Community without restriction and without reservation, and placing it ahead of anything else". The problem was that it was not so much economic as above all political issues that were at stake. De Gaulle's analysis was of course not a valid one since the "nature, structure and economic context" among the members of EEC show wide differences. In areas such as tariff levels, wages, gross national product, and taxation, Britain is near the average: the economic

structure of West Germany for example is closer to Britain than to France. De Gaulle, the soldier, was concerned more with military power than economics. His concern was with the British bomb and the words placing the Community "ahead of everything else" meant handing over the bomb. Mr. Macmillan, however, was not prepared to agree to the substitution of a nuclear alliance with France for one with the United States.

France's Special Position

Of the great political leaders who have dominated Europe in the past ten years only one, President de Gaulle, is still in office. (Konrad Adenauer has been replaced by Chancellor Kurt Georg Kiesinger, Harold Macmillan by Prime Minister Harold Wilson, and John F. Kennedy by President Lyndon B. Johnson.) Undoubtedly, the majority of the French electorate is for de Gaulle. He has overcome the Algerian crisis, mesmerized the Germans, baffled and frustrated the British, defied the United States, and restored order to the economic life of France. His reputation as the "sauveur" because there is "pas d'alternative" has given France a political stability it has not known for a generation. He is opposed by the workers when wages do not keep pace with the advance in prices, by the establishment which resents his autocratic use of power, by sections of the army since the Algerian settlement, and by intellectuals on democratic principles.

De Gaulle is an autocrat.⁷ His methods are to dominate the weak, attack rivals, and refuse to co-operate if he cannot dictate his own terms. Under him political life in France has been undermined: parliament is a rubber stamp, courts are no longer impartial, ministers are only heads of departments in a civil service. De Gaulle rules by personal decision, press conference, television appearance, and referendum. While de Gaulle's power in dealing with other states is limited he uses the weapons of power diplomacy: the diktat, as in his attempt to impose his own idea of political union; the veto; blackmail, by threatening to break up EEC; blandishment and insincerity, in not negotiating with Britain in good faith, and in raising hopes of German reunification; fear, of the withdrawal of the United States from Europe. His method is to use people as tools rather than as partners.

De Gaulle's attitude towards EEC flows from his concept as to the role of France: he sees France as a sovereign nation-state and he sees Europe as a union of sovereign nation-states. Transferring sovereignty to European institutions is anathema to him. In a television address on April 19, 1963 he said that: "Any system that would consist of handing over sovereignty to a supra-national assembly would be incompatible with the rights and duties of the French Republic".

⁷ John Pinder, *Op. cit.*, p. 32

De Gaulle's idea of Europe is a Europe led by France and not by the United States: EEC was not his chosen medium for establishing that leadership: the Treaty of Rome, establishing the Community, had been ratified before the General's return to power. Periodically there are indications that the General feels that France cannot fulfill her destiny while bound to the Community. Then again, there are signs that he believes Europe will come around to his concept of political unity, which is co-operation on confederal lines, and establish herself, with France in the lead, as a rival of the United States. De Gaulle opposed not only the creation of the European Coal and Steel Community but also the European Defence Community and the European Army. He has prevented the establishment of a European University. Basically he dislikes the European Economic Community but keeps it going to bring its members into the orbit of France. By his exclusion of Britain from the Common Market and his desire to eliminate the United States from Europe he displays his hostility to the desire for a larger world order.

He sees in himself the reincarnation of the national power and grandeur of France. On September 5, 1960 he said: "States are the only entities which have the right to give orders and the power to act. To imagine that something can be built up which can act effectively and be approved by the peoples outside or over and above the states is an illusion". This runs directly counter to the Community method whereby common action flows from decisions taken

within the Community institutions in the general interest and where necessary by majority vote.

In the nuclear field the basis of the French idea is that once France has developed her own nuclear striking force, other members of the Common Market will join her. De Gaulle intends to stand up to the United States and he has declared France's independence of both the United States and Britain in the creation of a tri-power nuclear force. For de Gaulle a nuclear force is primarily a political instrument and the mere possession of an independent deterrent, however small, justifies his claim to the leadership of Europe. Thus he seeks to distinguish France from Germany which undertook in 1954 not to produce such weapons and from Italy which cannot afford the resources.

European Non Member States

What kind of a Europe do Europeans want? Halvard Lange, the Foreign Minister of Norway,⁸ thinks that the supra-national political structure emerging in Western Europe is not a practical probability. Despite the pressure that comes from Germany and others who are European federalists, Lange believes it is not realistic to expect great powers today, or in the foreseeable future, to leave the answers to important political questions to supra-national organiza-

⁸
Ross Munro, Op. Cit., p. 9

tions. Political co-operation between members of the Community will therefore in practice and in all the more important issues be co-operation between sovereign governments as we see in international organizations such as NATO. There is a very special emotional resistance in Norway to full political union because it was only fifty years ago that Norway broke away from Sweden and achieved full independence.

In Brussels a spokesman for the Commission compared the development of the Community to a three-stage rocket - customs union, then economic union, then political union. While political union may be remote in most people's view, the Commission never forgets it and one of its information memos issued in November 1962 set out the case as follows:⁹

It would be unrealistic to see a distinction between "economic affairs" which would be dealt with jointly in the economic community and "political affairs", the joint handling of which remained in large part to be dealt with by the "political union". The EEC is in no way a purely economic venture. On the contrary, it can safely be asserted that with the Community's political integration has already begun in an essential field: the field of economic policy.

Sweden along with Switzerland and Austria would only seek association and not full membership in EEC. Sweden firmly believes its neutrality provides an essential military buffer in Scandinavia. If EEC were strictly an economic alliance Sweden might well join

⁹ Ibid., p. 12

Gully with it. But the feeling in Sweden is that the issue of the political union of Europe will become a live one and that any political association would negate Swedish neutrality.

Ross Munro found that political leaders in the Netherlands didn't seem agitated about the possibility of a complete political union in Europe in the ultimate. A supra-national political structure didn't hold the apprehension for them that it did for some other Europeans. The Dutch pointed out that their membership in NATO already limited their sovereignty and certainly took the complete control of foreign policy out of their hands.

Mr. Munro found criticism of EEC widespread in Switzerland and particularly a fear of the implications of political union. Switzerland is a federal state with government authorities spread broadly through 22 cantons or provinces. It also has the longest tradition of neutralism in Europe, which all makes sovereignty considerably more vital in Zurich than in Bonn, Amsterdam, Brussels or Rome where a diminution of sovereignty doesn't raise much argument. "We wish to remain a self-governing country", said an official of the Swiss Union of Commerce. "We want to go to our own capital of Berne and not to Brussels".

United States of America

Ever since the war America has given unwavering support to European unity: the Atlantic alliance provided a shield behind which

the Communities were built, and Marshall Aid enabled the economies to survive. Both the aims and the methods of the unity movement appealed to the American temper and experience. As President Kennedy said in a speech at Philadelphia on July 4, 1962:

The basic objective of our foreign policy for 17 years has been to aid the progress towards a strong and united Europe. We see in such a Europe, a partner with whom we can deal on a basis of full equality in all the great and burdensome tasks of building and defending a community of free nations.

That such a partnership would have to await the formation of a united Europe was underlined by the President in his Paulskirche speech in Frankfurt in June 1963 when he said:

Only united Europe will permit full reciprocity of treatment across the ocean, in facing the Atlantic agenda. With only such a Europe can we have a full give-and-take between equals, an equal sharing of responsibilities, and an equal level of sacrifice.

Here is the crux of the problem faced by American policy:

the Europe which would be a full partner is only emergent yet Europeans want and expect to be treated as equal partners already. Emerging Europe deeply wants a more self-respecting role in the world, but Europe's present role does not reflect the recent changes in its strength relative to that of the United States. Already the Community has surpassed America in its growth rate and its level of economic activities: its monetary surplus contrasts with the American balance of payments deficit. The sense of being a ward of the United States is also offensive to many Europeans. Much of this new self-seeking has centered on the nuclear field.

However the warning contained in the 1946 report of the Lilienthall Committee on the International Control of Atomic Energy still hangs over such discussions:

The atomic bomb made it clear that the plans which had been laid down at San Francisco for the United Nations Organization would have to be supplemented by a specific control of an instrument of war so terrible that its uncontrolled development would not only intensify the ferocity of warfare, but might directly contribute to the outbreak of war.

Europeans want a larger share in planning of NATO strategy especially in the nuclear field. With the steady growth of Soviet nuclear weapons and missiles the issue of nuclear control is not primarily military; it has become symbolic of status. Europeans' aspiration for a larger role — for greater equality with the United States — has outrun their present capacity to fulfill it. Whatever its future, Europe cannot now act as a great power, and no single Europe entity can as yet speak in such areas as defence and foreign policy. Since the new self-confidence and sense of growing power cannot find an effective outlet it is often expressed in resistance to American leadership. However, only as the Community takes on more cohesion and scope will Europeans increase their capabilities for effective action and equality.

The nuclear issue has become a sort of test of the genuineness of the Atlantic partnership and on its successful solution depends in part the political future of the European Community itself. Nowhere is the case presented better than by General Paul Stehlin,

Chief of Staff of the French Air Force who underlines that Europeans feel increasingly that sharing in nuclear control is the mark of first class status.¹⁰

Sir John Slessor, Marshall of the Royal Air Force, calls for remolding the machinery by which NATO strategy is formulated and directed.¹¹

It is hardly too much to say that the future not only of the European Community but of the Atlantic Community as a whole depends today on the ability of Western statesmanship to find a politically acceptable and militarily sensible solution to the problem of how to give the European Community a share in a common responsibility for defence of the West in the nuclear age.

Mr. Jean Monnet speaking in New York on January 23, 1963.

said:

The United States must realize that the claims of Europe to share common responsibility and authority for decisions on defence, including nuclear weapons is natural since any decision involves the very existence of the European peoples. On the other hand...Europeans must understand that the nuclear terror is indivisible and that they too must shoulder an adequate share of the common defence.

Raymond Aron summarizes the American attitude as follows:¹²

In the first period American statesmen were all in favour of the Community and of the political unification of Europe. They were convinced that it was necessary for the economic recovery of Europe but

¹⁰ Appendix G

¹¹ "Foreign Affairs", (October, 1963) p. 96

¹² Raymond Aron, Op. cit., p. 93

even more for its political and moral recovery. They thought the best way to anchor Germany inside the Western world was to work out a closer co-operation between Germany and France. Americans believed that as far as the United States was concerned the political advantages of the Common Market would balance and even more than balance the economic disadvantages. Today in Washington, however, there are doubts or misgivings caused by the switches in the foreign policy of France and possibly of Germany.

The project for a nuclear force under NATO is full of complex aspects. France is determined to develop its own nuclear force. West Germany counts on playing a leading role in any European defence scheme but many NATO nations oppose moves that would give the Germans any opportunity for nuclear re-armament. The British Labor Government, pledged to drop Britain's independent deterrent, has indicated interest in merging its weapons into a NATO force. President Johnson heavily committed in Viet Nam, nevertheless must find ways to reunite the Alliance on this difficult question.

CHAPTER IX

SUMMARY AND CONCLUSIONS

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The questions that the Community poses are: how much supra-nationality have Member States accepted? What constitutional reality lies behind the new structure? Are Member States willing to carry out decisions to which they are opposed or are the sanctions and procedures merely inter-governmental? How are the Treaties to be interpreted by the Court as the Communities move forward through time? The list is far from complete.

Two things are apparent: firstly, the European Economic Community no longer offers the immediate promise of becoming the basis for a United States of Europe. Events outside of Western Europe have helped the erosion of early co-operation. Foremost among these has been the easing of Soviet pressure on Europe following the Berlin Crisis of 1961-2. No doubt, too, the Soviet-American confrontation over Cuba in the autumn of 1962 forcibly brought home to the Russians that nuclear war would mean the destruction of the Communist State. Secondly, the Community with its 170 million people that would become 225 million if Britain joins would be a continental market on the American scale.

The significance of this new political and economic concept is not that it creates a new centre of power but that it introduces a modern method for collective action. In the early discussions it

was agreed that the unanimity principle would be discarded as being too unwieldly. If everybody had to agree before anything was decided, there would not likely be many decisions, and those that were taken would be the lowest common denominator of opinions.

"Coalitioners" says George F. Kennan, "find it possible to agree, as a rule, only on what not to do. That is why their tendency is so often to do nothing at all. The Society of Friends is the only group that is known to work effectively under a system of unanimity."

Is the Community good or bad for the world outside? if the Community is less conducive to stability than the members individually then it is doubtful if it can be justified as an institution working towards world order. If the Community is largely neutral but enables members to live together under a healthy constitution then it is welcome. On the other hand, if the Community is only a first stage in a larger world development that will solve such problems as war, hunger, and poverty then it should be the focus of attention of all thoughtful people. But just as doctrinaire liberalism and laissez-faire are not enough to deal with Europe's own problem, so more organized solutions are required on the wider scale; and it is here that the Community had made its most significant mark. The power of its example and the reflexes of the men who run it have suggested to the world at large a more organized way of dealing with political and economic problems.

In the last decade the example of the Community has tended

to improve conditions under which world trade takes place: it is fair to say that the Kennedy round — the American Trade Expansion Act — is a definite result of the example of the Community. At the time of the British negotiations two proposals were discussed which certainly would have been implemented had Britain been admitted to membership: the first was a system of world commodity agreements which would have tended to stabilize the economies of some of the developing countries who depend upon primary products; the second the idea of comprehensive trade agreements that would have been negotiated with India, Pakistan, Ceylon and Malaysia.

The hope is that the Community will not merely be one more great power but rather a federation where old nationalistic attitudes would give way to new political methods. The union of Europe, and later of the West, "...is not an end in itself", said Jean Monnet at Dartmouth College on June 11, 1961, "it is the beginning of the road to the more orderly world we must have if we are to escape destruction". The idea of replacing the absolute power of the nation state with a system of international democracy on a world wide scale is so radical as to be revolutionary. The beginning must be for its extension through a wider Atlantic partnership but it is perhaps too early to talk of this until more progress is made in Europe.

Nations are discovering that by themselves they are no longer able to play a major role in world affairs. Political independence by itself does not guarantee the achievement of the social aims which

lie at the root of the dynamic movements which are motivating people in the search for a better life here and now. Western Europe since the end of World War II has been moving towards a new form of international political organization based on the recognition of the imperative need for closer unity and common action. Barriers inherited from the past are being rapidly dismantled as the Community moves along the path of economic union. But economic union now appears to be not enough as studies progress toward some form of political union even though there is no agreement between the present members of the Community as to precisely what the political end-product is to be. Political union can and does mean different things to different people. The very creation of the economic union creates problems as the external affairs of the Community are adjusted with the African nations, the United States and Britain. To date external negotiations have all been of an economic character but the overtone has been a political one. The extension of the progress made in the economic field promises relief from the disastrous political division which has torn Europe assunder in the past. Political unity gives a vision of a great and expanding tide of cultural achievement.

If it is possible for Europeans to work out a political and economic system that will correct many of the old contradictions could such a system be extended to other areas? In South America for example, the Honduras coup d'etat of October 1963 was the sixth since 1961. Governments have recently been overthrown in Argentina, Peru,

Guatemala, Ecuador, and the Dominican Republic. Hit and run raids still haunt the Caribbean; civil war continues in Venezuela; terrorism stalks Columbia, and Haiti teeters on the verge of revolution. There is still no agreement on how to meet the challenge of Cuba; and the birth pangs of British Guinea as an independent nation adds more complication. Here is an area where economic and political progress must be made. It is idle to attempt to characterize the Community as a federation or a supra-national organization. But it is clear that the course of twentieth century history is leading to a situation in which "the concept of national sovereignty, which we have hitherto accepted as the fundamental premise of international law is out of date."

Will Britain join the Common Market? By 1970 the Community will be a full customs union, with a single farm policy. The present institution will be strengthened and the beginnings of a monetary union will be seen. There is no question but that Britain will join before 1970 and that a full and explicit political commitment will be the price. The outcome of the current negotiations is not in doubt — only the time.

What will be the role of law? A great deal of legislation will be required to implement the objectives embodied in the Treaty: the establishment of a common commercial policy, the abolition of obstacles to the free movement of persons, services and capital, the inauguration of a common agricultural policy, and a common transport

policy. Modifications in private international law, criminal law, and in nationality laws will also be required. Taxation laws, labor law and social legislation will certainly be affected, as will the law relative to restrictive trade practices, companies, patents and trade marks. If Britain enters the Common Market many modifications will be required; but it is more correct to think in terms of "approximation" and "harmonization" of laws to the extent necessary to establish a Common Market, than to anticipate a total and radical transformation.

Steady progress has been made with the whole immensely complex process of implementing the Rome Treaty. Equal rights for immigrant workers have to a very large extent been assured; movement of capital has been freed as far as the present degree of monetary co-ordination will permit; anti-cartel rules which cover any agreements affecting trade across frontiers have begun to be applied; free right of establishment and supply of services are being gradually achieved. Progress has been less encouraging with common policies for transport and for energy.

The Court of Justice poses the question to what extent is it an international court, possessing international jurisdiction? Many factors may be advanced to support its international character but these only obscure its primary functions as an administrative tribunal in which has been vested jurisdiction to deal with questions involving the interpretation of a particular constitution.

What will be the role of the Court in the interpretation of these Treaties? There can be little doubt that the Court which is responsible for interpreting the three constitutive treaties, all of which are concerned with closer European integration, will seize every opportunity to strengthen such efforts towards integration. The Treaty of Rome is not a contract or a statute in municipal law and incantations concerning state sovereignty and restrictive interpretation will be totally unrealistic. The object or the purpose of the Treaty is itself not a fixed or static one, but is liable to change as experience is gained in its operation and workings. This raises the whole question of the nature and limits of the judicial function. It is not a legislative one but the choice will be that, when interpreting the constitutive treaty, the court should adopt as a guiding principle a bias in favor of higher effectiveness.

The charter of the Community organization creates something organic and permanent and would seem to demand recognition as falling into a special category of treaty. Chief Justice Marshall's statement¹ that a constitution should never "partake of the prolixity of a legal code" and Chief Justice Hughes' pronouncement, "If it is intended to say that the great clauses of the Constitution will be confined to the interpretation, which the framers, with the conditions and outlook of their time could have placed upon them, the

¹McCulloch vs Maryland 4 wheat 316, p. 413

statement carries its own refutation," point the way for the European Court.

The political conflict appears to be between two opposing groups: on the one hand the Europeans, liberal, democratic, humane, their first embodiments the three European Communities, their future prospects a European federation, an Atlantic partnership and finally a developing world order. On the other hand the reactionary forces of nationalism represented by de Gaulle, authoritarian, hostile to the United States, contemptuous of international organization of any kind. The prospects are that de Gaulle will fail -- in the same way that all reactionary movements fail -- and after a pause the forward progress of the movement toward unity will be resumed. However, not even the most dedicated European can promise that total unification will come some day. Neither can confirmed nationalists swear that it will not. But unity in Western Europe is a goal of great promise and the existence of such a union would offer at least a basis for solving some of the problems hanging over the head not only of the Atlantic Community but also of the world today.

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APPENDIX

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Appendix A.

Excerpt from an address made by Secretary of State George C. Marshall at Harvard University on June 5, 1947:

"It is already evident that, before the United States Government can proceed much faster in its efforts to alleviate the situation and help start the European world on its way to recovery, there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this government. It would be neither fitting nor efficacious for this government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of Europeans. The initiative, I think, must come from Europe. The role of this country should consist of friendly aid in the drafting of a European program and of later support of such a program so far as it may be practical for us to do so. The program should be a joint one, agreed to by a number, if not all, European nations."

Appendix B.

The Statute followed closely what the Hague Congress had demanded. It set up a European consultative assembly. Respect for human rights was made a condition of membership. Clearly the Council of Europe was something new, something which aroused great interest and enormous hopes. But in fact, the Council wasn't altogether what it seemed. It was a compromise between those who wanted a federation like the United States and those who feared to go beyond inter-governmental co-operation. The Council had its parliamentary assembly but its only powers were those of recommendation and the members of the executive body of the Council, a committee of foreign ministers, were each armed with the right of veto.

Appendix C

Text of the statement made by M. Robert Schuman, French Foreign Minister, on May 9, 1950:

World peace cannot be safeguarded without constructive efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilisation is indispensable to the maintenance of peaceful relations. In taking upon herself for more than twenty years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved, and we had war.

Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto solidarity. The gathering of the nations of Europe requires the elimination of the age-old opposition of France and Germany.

The first concern in any action undertaken must be these two countries.

With this aim in view, the French Government proposes to take action immediately on one limited but decisive point. The French Government proposes to place Franco-German production of coal and steel under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.

The pooling of coal and steel production will immediately provide for the setting-up of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting-up of this powerful production unit, open to all countries willing to take part, and eventually capable of providing all the member countries with the basic elements of industrial production on the same terms, will lay the real foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to the raising of living standards and the promotion of peaceful achievements. Europe with new means at her disposal, will be able to pursue the realization of one of her essential tasks, the development of the African continent.

In this way there will be realised, simply and speedily, that fusion of interests which is indispensable to the establishment of an economic community; and that will be the leaven from which may grow a wider and deeper community between countries long opposed to one another by bloody conflicts.

By pooling basic production and by setting up a new High Authority, whose decisions will be binding on France, Germany

and other member countries, this proposal will build the first concrete foundation of a European federation which is indispensable to the preservation of peace.

In seeking the achievement of these objectives, so defined, the French Government is ready to open negotiations on the following terms:

The task entrusted to the common High Authority will be to ensure in as short a time as possible the modernisation of production and the improvement of its quality; the supply of coal and steel on identical conditions on the French market and on the German market as well as on the markets of other member states; the development of exports in common to other countries; the equalisation in progress of the living conditions of the workers of these industries.

In order to attain these objectives starting from the very different conditions in which production actually takes place in the member countries, certain provisions of a transitional nature will have to be adopted covering the application of a plan for production and investment; the institution of price equalisation mechanisms; the creation of a reconversion fund to help the rationalisation of production. The movement of coal and steel between the member states will be immediately freed of all customs duties and shall not be affected by differential transport tariffs. The conditions automatically ensuring the most rational division of production at the highest level of productivity will be gradually created.

In contrast to an international cartel leading to the division and exploitation of international markets by restrictive practices and the maintenance of high profits, the projected organisation will assure the fusion of markets and the expansion of production.

The principles and essential undertakings defined above will form the object of a treaty to be signed between the states and submitted for ratification by parliaments. The indispensable negotiations in order to define the measure of application will be conducted with the help of an arbiter nominated by common agreement; he will have the task of seeing the agreements are in conformity with the principles and, in the case of unresolved conflict, will fix the solution which will be adopted.

The common High Authority entrusted with the working of the whole scheme will consist of independent persons chosen by the governments on a basis of equality; a president will be chosen by common agreement by the governments; its decisions will be mandatory in France, in Germany and in the other member countries. Appropriate provisions will ensure the necessary channels of appeal against the decisions of the High Authority. A representative of the United Nations accredited to this

authority will be charged with making a public report twice a year to the United Nations Organisation dealing with the working of the new organisation, particularly with regard to the safeguarding of its peaceful objectives.

The institution of the High Authority does not in any way prejudice the system of owner-ship of firms. In undertaking its task, the common High Authority will take into account the powers conferred on the International Ruhr Authority and the obligations of all types imposed on Germany to the extent that these are still in force.

Appendix D

Harold MacMillan, then in the opposition, speaking in Strasbourg at the time of the Schuman resolution expressed these views:

In spite, therefore, of much that has been done the result has some unhappy and perhaps dangerous aspects. For the conclusion of a great European agreement dealing with the broad direction of those basic industries of Europe which are of vital importance to the future of Europe both for the purposes of progress in peace and of defence in war. The conclusion of such a pact without any association direct or indirect of Great Britain is to say the least regrettable. It is for us somehow to make sure that it does not prove disastrous.

Appendix E

Pierre Masse, Director of the French Development Plan, speaking in Detroit in November 1962 said:

"Let me say a few words of a problem which, I am sure, has already occurred to your minds as you listened to me: that is, the problem of having a national plan within an international Common Market such as we now have one in Western Europe. Opinions on that matter are far from unanimous inside the Common Market. On the one hand, there are a few powerful voices within our European Economic Community, which would tend to proclaim that the French Plan is all but worthless, and that nothing of the kind is of any interest for the European Community. On the other hand, our Belgian neighbours are embarked on an experience similar to ours, and our other associates with it with a very positive interest. France, Belgium, and the

Commission of the Common Market itself hold the position that some measure of co-operative, liberal, active planning of some sort like the one we practice, is necessary for the future of the Common Market".

Appendix F

Herbert Morrison speaking before the European Consultative Assembly said:

"There are broadly two alternative approaches to this problem: the functional, and what I may call the federalist. Up-to-date the approach has been functional in character. And let us not underestimate the remarkable advances that have been made under this mechanism of the functional approach. But I would not be dogmatic. I do not say that the functional approach is necessarily the solution for all time. Nor that some collective European authority of a democratic character may not in due course develop with specific powers to decide certain matters direct. New ideas do not frighten me. I just want to know with some precision what the new ideas are and what they mean. We need the facts honestly sought for and impartially set out. The peoples of Europe need the facts. When we have them let the argument proceed, and I for one am prepared to reserve my final judgement until then.

Appendix G

General Paul Stehlin, Chief of Staff of the French Air Force, writing in "Foreign Affairs", October 1963, p. 71, said:

The peace and prosperity enjoyed today by that part of the European Continent which remained free of the Soviet yoke after World War II are the best proof that the protection generously extended by the United States has been effective. But it would be neither reasonable nor fair to perpetuate a state of dependence which places a heavy burden on the United States while representing Europe a morally and politically unjustifiable repudiation of the fundamental duties of free and sovereign nations.

If the United States is irritated when Europeans question the sincerity of its commitments to their defence, the Europeans in turn feel that American doubts of their capacity to exercise a rational control over a nuclear force betray an

underestimation - if not an outright denial - of their political wisdom.

In this way, (establish a European multinational strategic nuclear force) the United States could, he says, contribute to the realization of the grand design of the union of European nations, which represents a necessary stage on the way to a real association between the old and the new worlds, and would confer upon its allies the dignity that comes of sharing duties and responsibilities equally. Having gained the full confidence of the new partner by having confidence in it, the United States would then discover that by having dared to surrender its monopoly of nuclear arms it had greatly enhanced its own security.