LEGAL PRINCIPLES OF NON-SOCIALIST ECONOMIC INTEGRATION AS EXEMPLIFIED BY THE EUROPEAN ECONOMIC COMMUNITY

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I. INTRODUCTION

"Economic integration" is an ambiguous term. Bela Balassa[1] notes several different forms of economic relationships between states that represent varying degrees of economic integration. In particular, he mentions categories representing five different levels of relationships: a free trade area, a customs union, a common market, an economic union, and complete economic integration.[2] This analysis distributes different types of integration along a continuum without suggesting that the lines of demarcation between the different categories are clear. All of the non-socialist regional economic organizations fall somewhere along the continuum, but at any particular time they may be moving to a greater level of integration or be in the process of shrinking to less.[3]

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1. B. BALASSA, THE THEORY OF ECONOMIC INTEGRATION 2 (1961).

2. Balassa explains, *id.*, that:

> In a free-trade area, tariffs and quantitative restrictions between the participating countries are abolished, but each country retains its own tariffs against nonmembers. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with nonmember countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supra-national authority whose decisions are binding for the member states (footnote omitted).

3. The main ones are:

   a. European Communities. Treaty Instituting the European Coal and Steel Community, *done* 18 April 1951, 261 U.N.T.S. 140 (effective 23 July 1952); Treaty Establishing the European Economic Community, *done* 25 March 1957, 298 U.N.T.S. 11 (effective 1 Jan. 1958) (hereinafter Treaty of Rome); Treaty Establishing the European Atomic Energy Community, *done* 25

Indeed, as a legal, political, or merely descriptive concept, "integration" is commonly used to refer not only to the dictionary meaning of integration as the combination of two or more units or

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March 1957, 298 U.N.T.S. 167 (effective 1 Jan. 1958) (these three Communities represent in Balassa's terms at least a common market, with tendencies toward an economic union).

b. European Free Trade Area. Convention Establishing the European Free Association, *done* 4 January 1960, 370 U.N.T.S. 5 (effective 3 May 1960) (free trade area).

c. Latin American Free Trade Area. Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, 18 February 1960, *reprinted in* INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS RELATING TO THE ECONOMIC INTEGRATION OF LATIN AMERICA 207 (1968) (free trade area).

d. Central American Area. General Treaty on Central American Economic Integration, *done* 13 December 1960, 45 U.N.T.S. 3 (effective on ratification), *reprinted in* INSTRUMENTS RELATING TO THE ECONOMIC INTEGRATION OF LATIN AMERICA, *supra* at 23 (seems to be a free trade area, in spite of the more grandiose sounding title).

e. Central African Area. Treaty Establishing a Central African Economic and Customs Union, *done* 8 December 1964, *reprinted in* 4 INT'L LEGAL MAT'LS 669 (1965) (seems common market, perhaps more). Charter of the Union of Central African States, *done* 2 April 1968, *reprinted in* 7 INT'L LEGAL MAT'LS 725 (1968) (vague, perhaps customs union or even common market or economic union). It is unclear as to the extent to which the second of these supersedes the first and to the extent to which both are superseded by the Economic Community of West African States, para. i. *infra*.

f. Australian-New Zealand Free Trade Area. New Zealand-Australia Free Trade Agreement, *done* 31 August 1965, 554 U.N.T.S. 169 (effective 1 Jan. 1966) (free trade area).

g. Andean Subregion. Agreement on Andean Subregional Integration, *done* 26 May 1969, *reprinted in* 8 INT'L LEGAL MAT'LS 910 (1969); as amended by Andean Group: Treaty Establishing the Andean Parliament, *done* 25 October 1979, *reprinted in* 19 INT'L LEGAL MAT'LS 269 (1980); and Andean Group: Agreement Establishing the Andean Council, *done* 12 November 1979, *reprinted in* 19 INT'L LEGAL MAT'LS 612 (1980) (common market, perhaps economic union). *See generally* F. GARCIA-AMADOR, THE ANDEAN LEGAL ORDER: A NEW COMMUNITY LAW (1978). With the recent treaties creating additional organs, the Andean Group appears to have the most sophisticated organization apart from the European Communities.

h. Caribbean Community Treaty Establishing the Caribbean Community, *done* 4 July 1973, *reprinted in* 12 INT'L LEGAL MAT'LS 1033 (1973). *See* discussion and documents in H. GEISER, P. ALLEYNE & C. GAJRAJ, LEGAL PROBLEMS OF CARIBBEAN INTEGRATION: A STUDY OF THE LEGAL ASPECTS OF CARICOM (1976).

i. West African Area. Articles of Association for the Establishment of an Economic Community of West Africa, 4 May 1967, 595 U.N.T.S. 287 (1967). Treaty of the Economic Community of West African States, 28 May 1975, *reprinted in* 14 INT'L LEGAL MAT'LS 1200 (1975). The latter agreement, which has a broader membership, appears to supersede the former and may also do the same to the Central African items in para. e, *supra*. *See generally*

of some of their functions, but also to the dynamic process involved.

The movement towards economic integration proceeds on the basic assumption that increasing the size of the unit will improve the processes of production and distribution, through more efficient use of existing resources, and also through greater development—the creation of more resources. This supposition is nicely encapsulated in article 2 of the Treaty of Rome, the agreement which established the European Economic Community in 1957. It provides that:

> [I]t shall be the aim of the Community, by establishing a 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 standard of living and closer relations between its Member States.[4]

Zagaris, *The Economic Community of West African States (ECOWAS): Analysis and Prospects*, 10 CASE W. RES. J. INT'L L. 93 (1978).

4. Treaty of Rome, art. 2. Article 3 goes on to provide:

For the purposes set out in the preceding Article, the activities of the Community shall include under the conditions and with the timing provided for in this Treaty:

a. the elimination, as between Member States, of customs duties and of quantitative restrictions on the importation and exportation of goods, as well as of all other measures with equivalent effect;
b. the establishment of a common customs tariff and a common commercial policy towards third countries;
c. the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital;
d. the inauguration of a common agricultural policy;
e. the inauguration of a common transport policy;
f. the establishment of a system ensuring that competition shall not be distorted in the Common Market;
g. the application of procedures which shall make it possible to co-ordinate the economic policies of Member States and to remedy disequilibria in their balances of payments;
h. the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market;
i. the creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising of their standard of living;
j. the establishment of a European Investment Bank intended to facilitate the economic expansion of the Community through the creation of new resources; and
k. the association of the overseas countries and territories with a view to increasing trade and to pursuing jointly their effort towards economic and social development.

The detailed application of goals like this varies between developed and developing countries, and there is at least some dispute about the extent to which integration theory applies to developing countries. Balassa, the leading economic theorist on integration, asserts that:

> [E]conomic integration in Europe serves to avoid discrimination caused by trade-and-payments restrictions and increased state intervention, and is designed to mitigate cyclical fluctuations and to increase the growth of national income. In underdeveloped countries, considerations of economic development are of basic importance; further contributing factors are imitative behavior and the endeavor to protect these economies from possible adverse effects of European economic integration.[5]

A further theoretical position espoused by some proponents of economic integration is echoed in the final words of article 2 of the Treaty of Rome which promote closer relations between the States belonging to it. This is the position that economic integration is only a stop on the road to political integration. Some supporters of this approach assert that gradually increasing economic integration will lead inevitably to political integration and some kind of federal structure. Once enough progress has been made with "technical matters," political unity will follow by some process of alchemy.[6] I confess to considerable skepticism about this notion, and the practical performance of existing organizations of economic integration does little to support it.

The remarks that follow are devoted primarily to an examina-

The leading treatise in English on the Community is H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY (1976). A casebook crammed with useful material is E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES AND READINGS (1976). The introductory chapter of P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS: PATTERNS FOR NEW LEGAL STRUCTURES (1966) is an excellent discussion of the concept of integration and the whole book is full of thoughtful material about our subject in general. A useful introductory work is D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (3rd ed. 1976).

5. BALASSA, *supra* note 1, at 6.

6. I have in mind such works as E. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-1957 (1958) and the same author's BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964). For a critical account of the Haas "spill-over" theory and of related theories together with some doubts about the relevance of United States analogies see Warnecke, *American Regional Integration Theories and the European Community* 1971 INTEGRATION 1.

tion of the principles and processes involved in the most developed of the non-socialist regional economic groupings, the European Communities. There are three overlapping Communities composed of the same ten states: the European Coal and Steel Community (ECSC), the European Atomic Energy Agency (EURATOM), and the European Economic Community (EEC). Most of the specific remarks apply to the EEC but the general remarks are applicable to all three. This paper will review three of the most important features of the European Community viewed as an exercise in integration: first, the effort to create supranational institutions; second, the creation of a distinct legal order; and third, the treaty-making power of the Community. These are by no means the only features that one might discuss. One distinguished commentator[7] has suggested, *inter alia*, two other crucial features, the automatic dismantlement of intra-community trade barriers by means of a series of compulsory linear reductions,[8] and the inclusion of agriculture within the Treaty regime.[9] The scope of this paper will be confined, however, to the three features indicated above. It will be noted that each of these three points is related to the concept of the EEC as an example of "supranationality," a term (like "integration") of slippery meaning. but a suggestive one nonetheless. As Inis Claude, Jr. says:

> The concept of supranationality has not been precisely defined. Some observers stress as crucial the capacity to make binding decisions on important matters by majority vote, while others emphasize the substantial authority conferred upon organs composed of persons other than governmental representatives, and still others stress the competence of the agencies to deal directly and authoritatively with firms and individuals within member states.[10]

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7. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415 (1974).

8. Referring to Treaty of Rome arts. 12-17, Riesenfeld, *id.* at 418, says "[t]he Treaty wisely avoided the pitfalls of periodic product-by-product negotiations and utilized the initial integrative momentum to achieve a fixed course of progress." (footnote omitted).

9. *Id.* at 419-420.

10. I. CLAUDE, JR., SWORDS INTO PLOWSHARES–THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 109 (4th ed. 1971). While dealing with definitional matters, it should perhaps be noted that the term "community" itself carries connotations of integration and supranationality. *See* HAY, *supra* note 4 at 39-42.

To these three instances of the use of the term "supranationality" must be added a fourth—the transfer of power formerly exercised by a sovereign state to an organization formed by a collectivity of states. Even if the organ of the entity that exercises power is composed of governmental representatives, the dynamics of the exercise of power shift when it is the entity that is functioning rather than the organs of constituent states. In what follows, whenever the term "supranationality" appears, it will be used with at least one of these four connotations, a theme which shall be summarized in the conclusion of this paper.

It is worth noting the influence of United States thinking on the political and jurisprudential bases of economic integration. Both in Europe[11] and elsewhere[12] the United States has encouraged integration as a path to economic growth. Whether this encouragement has been for altruistic reasons, such as the recovery of Europe from the devastation of war, and the lessening of Franco-German rivalry, or for more cynical reasons of profit, may be argued. As has been remarked in terms that are as applicable to Europe as to the area to which they were addressed, "it may be that [the United States'] warmth towards a Latin American Common Market was due to its belief that the chief beneficiaries of the market would be the United States transnational corporations rather than the Latin American countries."[13] Whatever the reason for political support, United States jurisprudential thinking on the nature of federalism, and in particular the role of a court having power to make binding decisions on matters affecting the "federal" power and structure, are apparent.[14] This is not to suggest that the structure of the EEC has reached a point similar to that of the thirteen original States after the adoption of the United States Constitution in 1789. The point is that analogies, and perhaps hopes and aspirations, derived from the American ex-

11. Anthony, *Comments on the Common Market*, 41 WASH. L. REV. 423, 424 (1966).

12. Vargas-Hidalgo, *The Process of Integration in Latin America*, 15 COMP. JUR. REV. 105, 130-132 (1978).

13. *Id.* at 131.

14. *See, e.g.*, P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATION: PATTERNS FOR NEW LEGAL STRUCTURES (1966); Schoenbaum, *The Growth of Judicial Power in the European Economic Community*, 48 N. CAROLINA L. REV. 32, 33 (1969), discussing the "recent history of the Court of Justice as involving quasi-constitutional crises strikingly similar to those faced by the Supreme Court of the United States in its early history."

perience have been present in the minds of proponents of regional integration.

II. THE EFFORT TO CREATE SUPRANATIONAL INSTITUTIONS

It is possible to arrange international economic integration in such a way as to create no structural relationships involving supranational organs, and little or no interference with national sovereignty. Action can be taken within such a framework by means of traditional diplomatic negotiations leading to universal consent, or at least to general consent, not binding on those parties not in agreement. Decisions so reached have effect only on the international plane and require the intervention of organs of the state before any question of their domestic enforceability arises. It is, on the other hand, possible to create a structure of a different nature with organs exercising legislative, executive or judicial functions, having power to act by a majority, and having a direct effect in the legal order of member states. This latter kind of arrangement involves some loss of power (sovereignty) on the part of member states and its concomitant transfer to the international organization. The EEC is an organization of this kind. As we shall see, the transfer of sovereignty is only partial, with the issue of the extent to which it will develop in considerable doubt. The role of the organs of the EEC in the integrative process has been explained as follows by a judge of the European Court:

> The Treaties establishing the Communities, from the point of view of substantive law, have merely laid down certain elementary rules relating primarily to the solution of immediate problems. The distance remaining to be covered from these points of departure to the final objective of customs and economic union must be covered by means of legislation, the formulation of which is entrusted to the common institutions.[15]

We turn then to an examination of each of the main organs of the Community to examine its role in contributing to the lawmaking of the Community. Article 4 of the Treaty of Rome creates four "institutions" by which "[t]he achievement of the tasks en-

15. P. PESCATORE, THE LAW OF INTEGRATION: EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS, BASED ON THE EXPERIENCE OF THE EUROPEAN COMMUNITIES 58 (1974).

trusted to the Community shall be ensured": an Assembly, a Council, a Commission and a Court of Justice.[16] Following a discussion of these four organs, it will be necessary to say something about an increasingly important body not mentioned in the Treaty but developed in the practice of the Community, the European Council.

A. The Assembly

Both in respect of the powers granted it under the Treaty of Rome[17] and the role it has played in the life of the community, the Assembly or European Parliament is the least significant of the institutions in the process of integration. It consists of representatives of States Members who until 1979 were designated from among the members of the respective Parliaments but more recently have been elected by direct suffrage to a five-year term.[18] However, it does not have the legislative powers, the right of initiative or even the power of the purse normally possessed by a national Parliament.

Article 137 of the Treaty of Rome says that the Assembly "shall exercise the powers of deliberation and of control which are conferred upon it by this Treaty." Such powers must therefore be gleaned from an examination of various specific provisions of the Treaty of Rome. Thus, several articles of the Treaty confer on the Assembly the right to give advice on the formulation of Community legislation which is adopted by the Council or the Commission in the form of Regulations, Directives and Decisions.[19] The procedure

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16. Almost as an afterthought, art. 4 states: "The Council and the Commission shall be assisted by an Economic and Social Committee acting in a consultative capacity." This Committee has members selected from labor, management, agricultural, consumer and family organizations. The Committee provides some expertise as well as input from pressure groups, but it has not played a large role in the life of the Community and no further discussion of it is proposed. Such detail concerning it as the Treaty provides is in articles 193-198.

17. Articles 137-144. On the Assembly, *see generally* V. HERMAN & J. LODGE, THE EUROPEAN PARLIAMENT AND THE EUROPEAN COMMUNITY (1978).

18. *See* Council Decision 76/787, 19 O. J. EUR. COMM. (No. L 278) 5 (1976), which required adoption by Member States in accordance with their respective constitutional requirements and Council Decision 78/639, 20 O. J. EUR. COMM. (No. L 205) 75 (1978), fixing the period for the first election.

19. Articles 7 (rules designed to prohibit discrimination on grounds of nationality), 14.7 (reduction of customs duties), 43.2 (common agricultural policy), 54.2 and 56.2 (right of establishment), 57.1 (mutual recognition of diplomas, certificates and other evidence of formal qualifications). Article 189 of the Treaty describes Community legislation:

For the achievemant of their aims and under the conditions provided for in this

for major legislation is as follows: the Commission submits a formal proposal to the Council which is sent to the Assembly with a request for its opinion. In due course an opinion is sent to the Council and the Commission, but it has no binding effect. Given a modicum of good faith by the Council, the Assembly's views will carry *some* weight but the Assembly is by no stretch of the imagination akin to a house of a legislature so far as law-making is concerned. Since 1975, the impact of the Assembly's views in some areas has been increased by the Council's acquiescence in the so-called "concertation procedure." While the power of the Council has not been formally reduced, that body has agreed to meet with the Assembly to discuss differences of opinion on Community acts having financial implications. A "concertation" committee of Council representatives, members of the Assembly's political groups and Commission representatives is established to seek an accommodation.[20]

The Assembly also possesses "supervisory" powers. First, article 140 of the Treaty of Rome requires the Commission to reply orally or in writing to questions put to it by the Assembly or its members. This power to ask questions has been much used in practice and permits some policy influence akin to that exercised in national parliaments by questions from back-benchers. The practice has also arisen of asking questions of the Council which usually answers them, although there seems to be no legal requirement that it do so. Second, the Commission must submit an annual report to the Assembly, which must discuss it in open session.[21] There is then a valuable opportunity for a wide-ranging debate on the Community's activities. Third, the Assembly, by means of a motion of censure adopted by a two-thirds majority, may exercise a power akin to that granted by the motion of no-confidence procedure to a legislature in a British Parliamentary system, to force

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Treaty, the Council and the Commission shall adopt regulations and directives, make decisions and formulate recommendations or opinions.
Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State.
Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.
Decisions shall be binding in every respect for the addressees named therein.
Recommendations and opinions shall have no binding force.

20. *See* discussion in HERMAN & LODGE, *supra* note 17, at 32.
21. Treaty of Rome art. 143.

the members of the Commission to resign as a body.[22] However, the members of the Commission are appointed by the common accord of the governments of the Member States[23] and the Assembly has no direct influence on their replacements. Furthermore, members of the Commission, notwithstanding a motion of censure, continue to serve until replaced in accordance with the common accord procedure.[24] It will therefore come as no surprise that the censure procedure is largely a dead letter; as of 1979 only three motions of censure, all of them unsuccessful, had taken place.[25] There is, in fact, one overriding reason why the sanction is unlikely to be applied. Being committed, in theory at least, to the "European view," the Assembly is more likely to find itself allied with the Commission in opposition to the Council than it is to be at loggerheads with the Commission. It has no power beyond debate and publicity to make its point in any dispute with the Council.

The Assembly lacks other supervisory powers that might be expected of a parliament. No budgetary functions were given to the Assembly under the Treaty of Rome; the power of the purse is, of course, the classic way in which a legislature can assert itself. Of recent years tentative steps have been taken to give the Assembly some power in this respect but it is too soon to tell how significant those developments will prove to be.[26] Again, the Assembly plays no part in the appointment of the members of the Court of Justice. The judges, like the members of the Commission, are appointed by common consent of the governments.[27]

In sum:

> At present, the Parliament contributes little toward the legitimation of the exercise of sovereign powers by the other institutions of the Community. Although it represents most directly the ideal of people's sovereignty, the Parliament is granted very limited powers to participate in decision-making. Moreover,

22. Treaty of Rome art. 144.

23. Treaty Constituting a Single Council and a Single Commission of the European Communities (1965) art. 11 [hereinafter Merger Treaty].

24. Treaty of Rome art. 144.

25. Muller-Graff, *Direct Elections to the European Parliament*, 11 CASE W. RES. J. INT'L L. 1, 26 n. 119 (1979).

26. See the Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, July 22, 1975, 20 O. J. EUR. COMM. (No. L 359) (1977) (effective 1 June 1977).

27. Treaty of Rome art. 167.

> the Parliament has only a very weak authority to supervise the activities of the Commission.[28]

Whether direct elections of Assembly members will lead to pressures for a larger supranational role for the Assembly remains to be seen. In principle, direct elections by the people ought to result in greater legitimacy for the Assembly. In practice, given the fact that the membership was elected by different procedures in different states and that the voting turnout was extremely low in some cases (32% in Britain and 47.8% in Denmark),[29] the new composition of the Assembly may exacerbate national differences, rather than enhance the integrative process.

B. The Council of Ministers

The Council consists of representatives of Member States.[30] Each government is to delegate to it one of its members (typically this is the Minister of Foreign Affairs). The general functions of the Council are rather tersely defined in the Treaty. Article 145 provides:

> With a view to ensuring the achievement of the objectives laid down in this Treaty, and under the conditions provided for therein, the Council shall: ensure the co-ordination of the general economic policies of the Member States, and dispose of a power of decision.

In fact, the power to take decisions is representative of much broader specific powers found elsewhere in the Treaty of Rome which make the Council the chief legislative body of the Community—a legislative body with authority over quite a large area of activity directly affecting Member States. Acting on a proposal by the Commission, the Council has power to make Regulations, issue Directives, take Decisions, make Recommendations or deliver Opinions.[31] In numerous law-making contexts the Council has power under the terms of the Treaty to act on a Commission recommendation by means of either a simple or a "qualified"

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28. Muller-Graff, *supra* note 25 at 27-28.

29. See the analysis of election results in Keesing's Contemporary Archives 29893 ff (26 October 1979) entitled "European Communities—Direct Elections to European Parliament—National Campaigns and Results—Elected Members—Inaugural Session."

30. Merger Treaty art. 2.

31. Treaty of Rome art. 189, *supra* note 19.

(weighted) majority.[32] The Council, however, has normally tried to ensure unanimity. Indeed, following a crisis in Community relations in 1965, an agreement was reached among the then six members of the Community, the effect of which was that decisions were only to be made unanimously.[33] A later Delphic statement by the Heads of Government of the nine members in 1974[34] pulls back some from the understanding reached at Luxembourg in January 1966, but the search for unanimity continues, to the occasional point of paralysis, and the provisions of the Treaty of Rome containing power to act by a majority are not fully invoked. Thus, the powers of the Council to act in the field of law-making by majority vote have remained more in the area of theory and potential than of actual application. Nevertheless, as we shall see in the section on the Community as a distinct legal order,[35] the Council's law-making activities have had a profound effect upon the juridical order of the Community and of its Member States.

C. The Commission

The members of the Council are representatives of states. The Commission is plainly designed to add an element of supranationality into the Community, in the form of officials who are not representatives of governments. The Commission consists of thir-

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32. In a weighted majority vote France, Germany, Italy, and the United Kingdom have ten votes each, Belgium and the Netherlands, five each, Denmark and Ireland, three each, and Luxembourg has two. Treaty of Rome art. 148. Forty-one votes in favor are necessary which prevents the "big four" from ganging up on the smaller states. *Id.*

33. *See* BULL. EUR. COMM. 3-1966, point 3.9:

> b. Majority voting procedure
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> I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.
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> II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.
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> III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.
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> IV. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.

34. BULL. EUR. COMM. 12-1974, point 1104.

35. See text accompanying notes 56-71 *infra*.

teen members chosen on the basis of "general competence" and whose "independence is beyond doubt."[36] "Their duties," in the words of a distinguished writer, "are primarily to adopt a European posture."[37] In the performance of their duties Commission members are forbidden to take instructions from any government or from any other body. Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in their tasks.[38] Commission members hold office for a renewable term of four years. They act by majority vote. They have at their disposal a very large staff, the major bureaucracy of the Community. It is organized into departments called directorates-general. These directorates prepare proposals for the Commission and may consult experts from national governments, or trade, management, agriculture, or labor pressure groups. The Commission's stock-in-trade is information.

The general powers of the Commission are set out in article 155 of the Treaty of Rome. First, it must ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. Under this general rubric, it may even bring a member before the Court of Justice if it considers that the member has failed to fulfill an obligation under the Treaty, including Regulations, Directives and Decisions made pursuant thereto.[39] Typically, it tries to exercise its powers of persuasion before taking such a drastic course and it is usually able to get compliance without litigation.[40] Second, it is *required* to make

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36. Merger Treaty art. 10.

37. Thompson, *The Common Market: A New Legal Order*, 41 WASH. L. REV. 385, 387 (1966).

38. Merger Treaty art. 10.

39. Treaty of Rome art. 169.

40. The Commission's 13th General Report on the Activities of the European Communities 1979 (1980) at 279 records that:

> The upward trend of the past few years in the number of infringement procedures under Article 169 of the EEC Treaty against Member States accelerated during 1979 with 180 new cases being opened. The number of cases reaching the subsequent stages of the procedure also showed a marked increase; 79 reasoned opinions were delivered and 18 new cases were brought before the Court.
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> The breakdown by subject matter of the infringements presents a slightly different picture from previous years. The dominant sector remained that of the free movement of goods, including agricultural products, these infringements accounting for half of the new procedures in 1979. Increased Community activity in certain sectors, however, has led to a wider spread of the remaining cases, which cover right of establishment, social affairs (particularly equal pay), the environment, transport, taxation and fisheries.

various recommendations pursuant to specific provisions of the Treaty of Rome and it also has a general *power* to make recommendations on matters dealt with in the Treaty if it considers such action necessary.[41] Third, it is given some powers of decision,[42] and participates in the legislative process by submitting proposals.[43] Finally, it exercises power conferred upon it by the Council for the detailed implementation of rules laid down by the Council. In volume, a significant quantity of the "secondary," *i.e.*, non-treaty, law of the Community is in the form of instruments adopted by the Commission acting on authority delegated by the Council.

The Commission is designed as the prime catalyst in the integrative process and as an independent voice to speak for the wider interests of the Community, as opposed to those of its Member States. Nevertheless, it is at the mercy of the Council of Ministers so far as substantial norm-creating activities are concerned. In practice, it spends much more of its efforts than one might have expected simply from reading the Treaty in seeking to obtain consensus by political means.

D. The Court of Justice

The decisions of the Court of Justice and their acceptance by national courts and governments constitute a remarkable example of supranationalism.

The Court consists of one judge from each Member State appointed by agreement of the governments to a term of six years, but eligible for reappointment.[44] Article 164 describes the general function of the Court—to "ensure observance of law in the interpretation and application of this Treaty." It has jurisdiction in five main areas relevant to the legal order of the Community.[45]

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41. Treaty of Rome art. 155.

42. Particularly the power of derogation from Treaty obligations in case of emergencies which was exercisable during the transitional period before the Treaty of Rome came fully into effect. *See* Treaty art. 226. Article 189 of the Treaty, *supra* note 19, perhaps gives the impression that the Commission has more independent legislative power than is really the case. Most of its legislative output is based on power delegated by the Council.

43. See, *e.g.*, *supra* note 19, for examples, all of which require a proposal from the Commission, as well as the opinion of the Assembly before the Council may act.

44. Treaty of Rome art. 167.

45. It also has other minor areas of competence including that under art. 179 of the Treaty of Rome in employment disputes between the Community and its servants. On the Court as integrator, *see* A. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE (1969).

First, article 169 of the Treaty of Rome provides that if the Commission considers that a Member State has failed to fulfill an obligation under the Treaty, the Commission is to deliver a reasoned opinion on the matter after giving the state concerned an opportunity to submit its observations. If the state does not comply with the Commission's opinion, the Commission may bring the matter before the Court. The Commission has used this power several times.[46]

Second, in a similar fashion, under article 170, if a Member State considers that another Member State has failed to comply with its Treaty obligations, it may bring the matter before the Court after first having taken it to the Commission. As is the case with other state-against-state enforcement procedures, (for example, in the human rights area), states are reluctant to make use of the article 170 procedure. However, the Court last year rendered its first decision in an article 170 case, finding in favor of France in a case in which that country alleged that the United Kingdom was in breach of the Treaty of Rome in adopting certain fishing regulations.[47]

The Court's decisions under both articles 169 and 170 are not merely advisory. Article 171 provides that if the Court finds that a Member State has failed to fulfill an obligation under the Treaty, the Member State shall be required to take the necessary measures to comply with the judgment of the Court.

Third, article 173 of the Treaty of Rome empowers the Court to review the legality of the acts of the Council and the Commission other than recommendations or opinions, the latter having no dispositive legal effect. For this purpose it has jurisdiction in actions brought by a Member State, by the Council, by the Commission, or in the case of any person, against a decision which, although in the form of a Regulation or a Decision addressed to another person, is of direct and individual concern to the former. The grounds for which nullity may be alleged are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty of Rome or any rule of law relating to its application, and misuse of powers. If one of these grounds is established, the Court must declare that the act concerned is void.[48]

46. Thirteenth General Report, *supra* note 40.
47. *Id.* at 281.
48. Treaty of Rome art. 174.

Fourth, article 177 of the Treaty of Rome grants the Court jurisdiction to make "preliminary rulings" concerning matters arising in proceedings before national courts concerning (a) the interpretation of the Treaty, (b) the validity and interpretation of acts of the institutions of the Community, (c) the interpretation of the statutes of bodies established by an act of the Council where those statutes so provide. According to the third paragraph of article 177, when such a question arises before an inferior tribunal in a Member State and that tribunal considers a ruling on the point necessary to reach a judgment, it may request the European Court to give a ruling thereon. A domestic court of last resort must so request. Procedurally, matters referred to the European Court under article 177 will usually arise in a national court either in cases between private parties or between a private party and a government (usually that of the forum state) in which one of the parties relies upon the Treaty or an act of the Community as the basis for its legal position. Sovereign sensitivities of domestic courts are protected by the reference to "*preliminary* rulings" in article 177. The European Court does not reach down and decide the case as such. It leaves it to the national court to apply its rulings to the facts of the particular situation. Needless to say, those preliminary rulings will often be determinative of the result in domestic litigation.

In terms of the Court's caseload and its contribution to the ongoing process of integration, article 177 is the most significant of the bases of the Court's jurisdiction. As Judge Pescatore has noted in his excellent work on *The Law of Integration*:

> The really original innovation of the Treaties of Rome has been to set up for the application of Community law a direct relationship between judicial powers, a relationship which is much more than mere consultation: a relationship on the basis of jurisdiction and powers. Henceforth, it is the exercise of the judicial office itself that is shared, following well-defined conceptions, between the Community level and the national level. From this flows an integrating effect, the scope and depth of which experience alone can measure.[49]

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49. PESCATORE, *supra* note 15, at 91. *See also* Raworth, *Article 177 of the Treaty of Rome and the Evolution of the Doctrine of the Supremacy of Community Law*, [1977] CAN. Y.B. INT'L L. 276.

Nonetheless, the integrating tendencies of article 177 may be sabotaged by domestic tribunals at two stages of the process—by failing to make requests for rulings to the Court of Justice or by finding some way to avoid applying its rulings once they have been made. Both kinds of evasion have taken place. Professor Buxbaum noted in 1969 that there were significant numbers of cases where a request might have been expected but was not made.[50] This problem has perhaps diminished but it has not vanished with the passage of time. The most recent Report of the Commission of the Communities notes that, although in several other instances the French Conseil d'Etat has made referrals to the Court, it had with its decision in the *Cohn Bendit* case of 12 December 1978, failed to fulfill its obligation to do so under article 177 of the Treaty.[51] The Conseil had furthermore disregarded case law of the Court which gave "direct effect" (so that individuals could rely upon it in national courts) to a Council Directive on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. The Commission's report[52] states that "[t]he Commission has informed the French Government of its grave concern on this matter." More shall be said about the problem created when national courts ignore the Community Court's advice in a later section of this paper dealing with the Community as a new legal order.[53]

Fifth, the final jurisdictional base of the Court which should be mentioned is article 178, which gives the Court jurisdiction over damage actions against the Community based on non-contractual (tort) liability for the acts of Community institutions, officials, or employees. Suits for the tortious acts of the supranational organs thus come before a supranational Court.

E. The European Council

A body not envisaged by the Treaty of Rome has been playing an increasing role in the work of the Community. This is the meeting of Heads of State or Government referred to as the Euro-

50. Buxbaum, *Article 177 of the Rome Treaty as a Federalizing Device*, 21 STAN. L. REV. 1041 (1969).

51. 13th General Report, *supra* note 40, at 278.

52. *Id.*

53. See notes 64-71 *infra*.

pean Council, a name which causes some confusion between it and the Council of the Communities. The European Council had its origin in the need to hold periodic high level meetings to consider matters which were of common concern to the members of the Community but which did not come strictly within the ambit of the Treaty of Rome. Heads of State or of Government had met irregularly throughout the life of the Community, and this practice was formalized in December of 1974.[54] Establishing the position of this new body perhaps represents the entrenchment of another rival for the Commission, another political rather than supranational power center. The President of the Commission has put about the best appearance he can on the matter in these words:

> In this way [meetings of the European Council] the Heads of Government are being closely identified with the construction of Europe; this, in turn, enhances the significance of Europe in the eyes of the Community citizen. The distinction between matters falling strictly within the Community's competence and those concerned with foreign policy is now being played down, rather than, as at one time, emphasized. This must be the correct approach, because we are looking at two sides of the same coin; at the end of the day, political and economic union become inseparable.[55]

III. THE CREATION OF A DISTINCT LEGAL ORDER

Article 164 of the Treaty of Rome, as has already been mentioned,[56] provides that the Court of Justice is to ensure that what is tantalizingly called "the law" is observed. One might reasonably ask which "law" is to be observed and what is its juridical nature. Some answers can be given to these questions on the basis of the Treaty itself and practice pursuant to it.[57] What is involved is not

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54. See discussions in Jenkins, *The European Community as It Faces Its Second Enlargement*, 18 VA. J. INT'L L. 381, 384 (1978).

55. *Id.* at 384-385.

56. See text *supra* note 45.

57. *See generally* PESCATORE, *supra* note 15, at 74-76. Pescatore suggests that:

> [t]he English version of Article 164 does not precisely convey the sense of the original, and especially the French and German texts. A fully adequate translation would have said that the Court of Justice is entrusted with the task of 'ensuring observation of the rule of law' in the interpretation and application of the Treaty. This would have opened a much deeper insight into the fundamentals of the Community than the present version which, alas, has become authentic. *Id.* at 74, n. 12a.

merely the law of Member States, or some general doctrines of international law, but the law of a new regime, "Community law." So far as its formal sources are concerned, the primary source is the law laid down in the Treaty of Rome, which not only sets out rights and obligations of an international nature, but also amounts to the basic constitutional document of the organization. The second major source of Community law is often described as "Community secondary law," that is to say, the Regulations, Directives and Decisions made by the Council of Ministers and the Commission. A third source, perhaps of increasing importance, is that of general principles common to the Member States.[58] In one instance, at least, this source is specifically mentioned in the Treaty of Rome. This is in article 215 where the relevant tort rules in the case of suits against the Community are said to be "the general principles common to the laws of Member States." The jurisprudence of the Court of Justice had indicated, however, that such general principles may be available in other contexts also, such as the protection of human rights, and to provide the content of "the law" as understood in article 164.[59]

So far as the juridical nature of Community law is concerned, this involves looking at the way in which it differs from domestic law or from international law and its place in the legal order of a particular Member State. These matters have been dealt with from various points of view in the Community Court and the courts of the Member States.

The first important consideration by the Community Court was in the *Van Gend en Loos* case in 1963.[60] The plaintiff, a Dutch company, imported a quantity of a chemical into the Netherlands

58. Recall in this context the reference amongst the sources of law which the International Court of Justice is to apply to "the general principles of law recognized by civilized nations." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38. The general principles of the Community states are not necessarily the same as those of the whole spectrum of "civilized nations."

59. *See, e.g.*, Nold v. Commission, Case No. 4/73 [1974] E.C.R. 491, 507-08. PESCATORE, *supra* note 15, at 74 also gives as sources of Community law (a) "comparative law" and (b) the "growth of custom," for example, methods of cooperation between the Commission, the Council and the Parliament. It is difficult to see how his comparative law is different from other writers' general principles. The kind of custom he mentions is close to the British notion of the customs or conventions of the constitution—for example, the rule, not laid down in statute, that a Minister defeated by a motion of no-confidence must resign.

60. Van Gend en Loos v. Netherlands Inland Revenue Administration, Case No. 26/62 [1963] E.C.R. 1.

from Germany. It was required, pursuant to a statute which brought into force for The Netherlands a modification of the BENELUX tariff resulting from the acceptance by the BENELUX nations of a new customs nomenclature, to pay duty at the rate of 8% *ad valorem*. The plaintiff later claimed back the duty paid in the appropriate administrative tribunal, the Tariff Commission in Amsterdam. It argued that the imposition of the duty at 8% infringed article 12 of the Treaty of Rome. The reasoning was that before the date of the entry into force of the Treaty of Rome, the import duty on the chemical from Germany to The Netherlands was 3%, and article 12 prohibited Member States from increasing customs duties on imports from other Member States after the Treaty came into effect. The issue was referred to the Community Court pursuant to article 177 of the Treaty. The Court of Justice held that the provisions of article 12 were self-executing, in the sense that no further action such as a Regulation or Directive by Community organs was necessary to give effect to them, and that they could be invoked by the private party in the Dutch proceeding. Most important for the present discussion, the Court referred as follows to the nature of Community law:

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[61]

Implicit in the Court's analysis in the *Van Gend* case is a notion of the supremacy of Community law in a conflict with national law, even a national law later in time, and an expectation that Community law would be applied by national courts in the event of a conflict. The Court made this explicit when it returned to the special nature of Community law the following year in *Costa v.*

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61. *Id.*

E.N.E.L..[62] That case concerned the compatibility of the nationalization of an Italian electricity company with certain provisions of the Treaty of Rome. The Court strongly supported the view that Italian laws subsequent to the Treaty must give way if they are inconsistent with the Treaty and ought not to be applied by Italian courts. It again asserted that members of the Community have limited their sovereign rights permanently. "Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise."[63]

It is only fair to add that national courts are not always as enthusiastic about the supremacy of Community law as is the Community Court. Several members of the Community have constitutional or other legal rules that afford supremacy to Community norms;[64] others do not. A provision in the French Constitution which arguably gives supremacy to treaty norms over subsequent legislation, has not always been so interpreted by French courts, especially the administrative courts headed by the Conseil d'Etat.[65] In the *Costa v. E.N.E.L.* proceedings, the Italian Supreme Court ultimately succeeded in avoiding applying the European Court's opinion by the familiar device of finding that Costa, a shareholder in the nationalized company, had no standing to sue.[66] (The lower court which had requested the preliminary ruling had followed the Community Court's reasoning to find the nationalization void.) Later in the *Frontini* case,[67] the Italian Constitutional Court upheld the supremacy of Community law in light of article 11 of the Italian Constitution, which enables Italy to consent equal-

62. Case No. 6/64 [1964] C.M.L.R. 429.

63. *Id.*

64. See material in STEIN, *supra* note 4, at 94-108; Warner, *The Relationship Between European Community Law and the National Laws of Member States*, 93 L.Q. REV. 349 (1977). The Netherlands Constitution contains such a provision. In theory, therefore, the plaintiff in *Van Gend* should have had no difficulty in succeeding when the case went back to the Tariff Commission following the European Court's preliminary ruling. However, the situation was confused because there was also a BENELUX obligation involved and the Constitution does not seem to give a ready answer to the question of primacy of conflicting *treaty* obligations if, as it appears, that was the case. I have not noticed anything in the literature that says what the Tariff Commission did next.

65. See Warner, *supra* note 64, 361-632; the Commission's complaint, *supra* note 40; and E. BERGSTEN, COMMUNITY LAW IN THE FRENCH COURTS: THE LAW OF TREATIES IN MODERN ATTIRE (1973).

66. STEIN, *supra* note 4, at 211.

67. [1974] C.M.L.R. 372.

ly with other states to limit its sovereignty "in so far as this may be necessary to enable the creation of any organization assuring peace and justice among nations." In a subsequent judgment, however, the Constitutional Court, while affirming the principles of *Frontini*, held that only it had power to declare an Italian statute void on the ground of its incompatibility with Community law. The fly in the ointment here is that another rule of the Court's constitutional jurisprudence is that a decision of the Court voiding a statute has only prospective effect. It does not apply in the particular proceedings. This is, of course, of little consolation to the litigant in the particular case and is far from what the Community Court had in mind.

In short, the Community Court has spoken of a new legal order, distinct from general rules of international law and from the old legal orders of Member States. It has asserted and reiterated[69] its position on the supremacy of Community norms bluntly and clearly. On the other hand, its views are sometimes ignored or side-stepped by national courts. The European Court's strategy is apparently to concede that it may lose a few rounds in the near future, and to hope for a little moral support from the Commission,[70] and hope also that in the long run the integrative process will take hold and its view will prevail in all Member States. In an extra-judicial statement, Judge Pescatore, referring to the problem of national courts, has suggested that "[t]hey [national courts] must face up to the difficulty, and it is hard to see how in the long term they could remain impervious to a logic which has been so clearly and imperatively put before them."[71]

IV. TREATY-MAKING POWER

The last of the "supranational" aspects of the European Communities to be reviewed is that of the treaty-making power of the

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68. I.c.I.c. v. Ministero del Commercio con l'Estero, case 232/75, II, Consiglio di Stato, 1975, No. 10, Pt. II, p. 1104, *as cited* in Warner, *supra* note 64, at 363.

69. *E.g.*, Italian Finance Administration v. Simmenthal S.p.A., Case No. 106/77 [1978] E.C.R. 629, where the Court attacked the Italian practice referred to in the case cited *supra* note 68, in these words:

> [T]he national courts must protect rights conferred by provisions of the Community legal order and . . . it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules.

70. As in the incident described in notes 51-52 *supra*.

71. PESCATORE, *supra* note 15, at 98.

EEC. This matter has recently received some prominence in the context of efforts to draft a new Law of the Sea Convention.[72] The members of the Ten have been arguing, amidst a chorus of skepticism from certain other participants in the Law of the Sea Conference, that in some fields covered by the proposed Convention, Member States have transferred their legal powers to the Community. The latter must therefore be permitted to become a party to the Convention in order that all the objectives thereof may be fulfilled. On another front, in 1979, the Commission of the Communities produced a widely-discussed memorandum entitled *Accession of the Communities to the European Convention on Human Rights*.[73] The memorandum argues that it may be desirable for the Communities to become a party to the Convention on Human Rights in order to fully protect human rights from infringement by Community organs. An amending Protocol by the present parties to the Convention would be necessary to change its final clauses so as to make accession by the Community possible. The Commission's memorandum makes the rather telling point that "[a]ccession of the Community to an international mechanism of legal control would underline its own personality."[74] Perhaps the discussions concerning the Law of the Sea and the European Convention should both be seen in light of assertions of supranationality by the Community and the attempt to have that position recognized by other international actors.

To understand these two initiatives, it is necessary to look back at developments on the wider international plane as well as practice within the Community itself. That international organizations may be subjects of international law, and may in particular be parties to international agreements, has been generally accepted since the Advisory Opinion of the International Court of Justice on Reparation for Injuries Suffered in the Service of the

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72. *See* Koers, *Participation of the European Economic Community in the New Law of the Sea Convention*, 73 AM. J. INT'L L. 426 (1979). Note that the Community also exercises foreign affairs power by means of legation. Representatives of over 100 states are accredited to the Community. The Community has observer missions at the U.N. and Specialized Agencies. On the treaty-making power in general, *see* Kuznetsov, *Possibilities for Cooperation Between COMECON and the European Economic Community*, 17 SOVIET L. & GOV'T. 47 (1978-79); Leopold, *External Relations Power of EEC in Theory and Practice*, 26 INT'L & COMP. L. Q. 54 (1977).

73. BULL. EUR. COMM. Supp. 2-1979.

74. *Id.* at 12.

United Nations.[75] For the most part, such personality in general, and treaty-making capacity in particular must be gleaned from somewhat ambiguous constitutional documents of international organizations with the aid of such principles as implied powers, necessary intendment and functional necessity. The Treaty of Rome is unusual among the treaties creating international organizations in that it contains a provision, article 210, which asserts that "[t]he Community shall have legal personality." In context, this provision is clearly referring to *international* personality because the following article goes on to provide also for the Community's legal capacity within its Member States.[76] There is still plenty of room left open for interpretation of the precise extent of such legal personality.

Specific provisions of the Treaty of Rome take the matter further. Articles 111(2), 113 and 114 confer clear power to conclude tariff and trade agreements. Article 238 permits the Community to "conclude with a third country, a union of States or an international organization, agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures."

Negotiations for agreements are conducted by the Commission. The Council of Ministers concludes the agreements after consulting the European Parliament.[77] In terms of the Treaty of Rome, a qualified majority will suffice for the conclusion of trade and tariff agreements[78] although this is not standard practice; as in other areas of the operation of the Treaty, it is usual to seek consensus.

So much for the Treaty provisions on international agreements. Practice of the Community has both expanded and limited the provisions. Decisions of the European Court have made it apparent that the treaty-making powers of the Community are not limited to the cases explicitly mentioned in the Treaty

75. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 74. (The Court's reasoning relied heavily on the treaty-making power of the United Nations.) And note the ongoing efforts of the International Law Commission to produce a codification of the law on Treaties Concluded Between States and International Organizations or Between International Organizations.

76. Treaty of Rome art. 211.

77. Treaty of Rome art. 228. At least this is what the Treaty says. In practice, the Council participates more actively in the negotiation than the Treaty might suggest.

78. Treaty of Rome art. 114.

of Rome. In the *ERTA* case,[79] it was held that the reference in article 210 to the "legal personality" of the Community indicates that "in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives" laid down in part one of the Treaty. (In the *ERTA* case the objective was the "Common Transport Policy" governed by title IV of the Treaty.) According to the Court in *ERTA*, treaty-making power may be exercised "in particular each time the Community, with a view to implementing a common policy provided for in the Treaty has laid down provisions by which common rules are introduced in one form or another."[80] Subsequent decisions have held that it is not necessary for the Community to have actually laid down common internal rules for the treaty making power to come into play.[81] Further, the Court has held that in many instances the Community's foreign relations power is exclusive, and Member States may no longer be able to act unilaterally. In the *OECD* case, involving negotiations on a local cost standard in respect of export credits, the Court remarked that:

> To accept the contrary were true would amount to recognizing that in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.[82]

What is plain from all of this is that the activity of treaty-making is one that is subject to pragmatic expansion in the life of the Community. It is only fair to add that the membership of the

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79. Re the European Road Transport Agreement, Commission v. Council, Case No. 22/70 [1971] E.C.R. 263, 274.

80. *Id.*

81. The existence of the *power* to lay down internal rules is sufficient. Opinion of the Court Given Pursuant to Article 228(1) of the EEC Treaty, Opinion No. 1/76 [1977] E.C.R. 741. A source of treaty-making authority beyond even this was suggested by the Commission in its Memorandum on Accession of the European Communities to the European Convention on Human Rights, *supra* note 73, at 20, when it argued that particular action might be based on art. 235 of the Treaty of Rome which permits appropriate provisions to be adopted if such action appears necessary to achieve the objectives of the Community.

82. Opinion of the Court Given Pursuant to Article 228(1) of the EEC Treaty, Opinion No. 1/75 [1975] E.C.R. 1355.

Community, so far as its views are reflected by the Council rather than the Commission or the Court, has shown some ambivalence about exercising the Community's powers to the hilt. One manifestation of this ambivalence has been the use of the so-called "mixed procedure," where not only the Community becomes party to the agreement but also the Member States individually. The most striking use of this procedure is the Lomé Convention, an association agreement concluded with a number of developing Asian, Pacific and Caribbean States.[83] Article 238 of the Treaty of Rome, which permits the conclusion of association agreements, appears to be broadly worded enough to make participation by the Member States unnecessary, although unanimity is required in the Council. Nevertheless, they were included. The Council, in determining to act this way, seems to have narrowed the scope of the solo treaty-making powers of the Community to tariff and commercial agreements that come within the precise terms of articles 111 and 113 of the Treaty, rather than the much broader approach that is supported by the language of article 238 and the Court's decisions. Then there is the case of the negotiations concerning the European Road Transport Agreement. In spite of its ringing support for Community power once action had been taken to harmonize Community laws on certain areas of road transportation,[84] the Court found it necessary to acquiesce in a *fait accompli* whereby the Council had agreed that the Member States acting in concert (and not the Community) would carry on negotiations with other European countries and become parties to the final agreement. Again, in the case of the OECD Understanding on a Local Cost Standard,[85] notwithstanding the Court's 1975 opinion as to the exclusivity of Community power, for a lengthy period, France, West Germany, Italy and the United Kingdom entered into what amounted to individual understandings with Canada, Japan and the United States, until an informal "arrangement" was eventual-

83. The current Treaty (Lomé II) is reproduced in 19 INT'L LEGAL MAT'LS 341 (1980). On the previous agreements with the developing countries, *see generally* THE LOMÉ CONVENTION AND A NEW INTERNATIONAL ECONOMIC ORDER (F. Alting von Geasu ed. 1977); Simmonds, *The Lomé Convention: Implementation and Renegotiation*, 16 C.M.L. REV. 425 (1979).

84. *Supra* note 79. For another recent example of the Court's support for the Commission's position about Community power against the Council's denial of power, *see* Re the Draft International Agreement on Natural Rubber, Opinion 1/78 [1979] C.M.L.R. 639.

85. *Supra* note 82.

ly reached in 1978 between the Community and those three countries.[86]

V. CONCLUSION

This paper has focused on what are arguably three of the most important juridical features of the European Community when that entity is viewed as an example of integration. Each raises issues of supranationality in one or more of the four senses of that term outlined above:[87]

- Power to make decisions by majority vote (Council in certain law-making and treaty-making roles)
- Substantial authority conferred upon organs composed of persons other than governmental representatives (Commission and Court of Justice)
- Competence of agencies to deal directly and authoritatively with firms and individuals within Member States (Commission, Council and Court roles in the Community legal order)
- Power formerly exercised by sovereign states transferred to the new entity (Council in its law-making and treaty-making activities, Court, Commission in law-making and law-enforcement roles).

But the situation is not one of unrelieved progression towards greater supranationality and greater integration. Any complete assessment of European integration has to place alongside these examples of the development of the integrative process the many examples of reluctance to give new powers to Community organs and even a reluctance to allow them to exercise fully the powers that seem to have been given them by the Treaty of Rome.

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86. BULL. EUR. COMM. 2-1979, point 2.2.35.

87. See text accompanying *supra* note 10.