

## BOOK REVIEW

### THE EUROPEAN COMMON MARKET AND THE WORLD.

BY WERNER FELD. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1967. Pp. 183. \$2.45.

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The foreign relations provisions of the Rome Treaty, the charter of the European Economic Community (EEC),<sup>1</sup> have occasioned enthusiastic comment throughout the first decade of the Community's existence.<sup>2</sup> They appear on their face to endow the EEC with powers over external relations that significantly outpace those of other international organizations.<sup>3</sup> Under these provisions the EEC may enter into tariff,<sup>4</sup> commercial,<sup>5</sup> and association<sup>6</sup> accords with outside states and international organizations, and establish other "needful" ties with the latter groupings.<sup>7</sup> In addition, the foreign relations provisions

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<sup>1</sup> There are three European Communities: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC). Respectively, they were established under the ECSC Treaty, April 18, 1951, 261 U.N.T.S. 140; the Euratom Treaty, March 25, 1957, 298 U.N.T.S. 169, entered into force Jan. 1, 1958; and the EEC Treaty, March 25, 1957, 298 U.N.T.S. 11, entered into force Jan. 1, 1958. Throughout this review, references to the "Community" and to the "Rome Treaty" or "Treaty" should be understood to designate the EEC and the EEC Treaty. All quotations from the EEC Treaty are from the unofficial translation provided by the Publishing Services of the European Communities.

<sup>2</sup> Representative appraisals include, e.g., Dupuy, *Du Caractere Unitaire de la Communauté Economique Européenne Dans Ses Relations Exterieures*, 1963 ANN. FRAN. DR. INTL. 779; Feld, *The Competences of the European Communities for the Conduct of External Relations*, 43 TEX L. REV. 891 (1965); G. GIARDINA, *COMMUNITA EUROPEE E STATI TERZI* (1964); Megret, *Le Pouvoir de la Communauté Economique Européenne des Accords Internationaux*, 1964 R.M.C. 529; Pescatore, *Les relations extérieures des Communautés Européennes*, 103 REC. DES COURS 134 (1961) [hereinafter cited as Pescatore]; P. RAUX, *LES RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* (1966).

<sup>3</sup> For a careful comparison of the treaty-making powers of the EEC with those of other international organizations, see Pescatore 53-67. For a treatment of the treaty-making powers of international organizations generally, see, e.g., Dupuy, *Le Droit des Relations entre Les Organisations*, 100 REC. DES COURS 461 (1960); Parry, *Treaty-Making Power of the United Nations*, 26 B.Y.I.L. 108 (1949); J. SCHNEIDER, *TREATY-MAKING POWER OF INTERNATIONAL ORGANIZATIONS* (1959); H. SOCINI, *GLI ACCORDI INTERNAZIONALI DELLE ORGANIZZAZIONI INTERGOVERNATIVE* (1963).

<sup>4</sup> EEC Treaty art. 111.

<sup>5</sup> EEC Treaty art. 113.

<sup>6</sup> EEC Treaty art. 238.

<sup>7</sup> EEC Treaty art. 229-31. See also, *id.* art. 230, 231.

charge the Community with administering a common external tariff for third-state imports into the six member states,<sup>8</sup> with developing a common commercial policy governing patterns of trade between the Six and the outside world,<sup>9</sup> and with coordinating the positions of the member states in other international economic organizations in which they participate.<sup>10</sup>

Notably, these provisions seem to assign to the Community organs a role of partnership with, if not dominance over, the member states in discharging these responsibilities. Particularly striking in this respect are the procedural rules established by article 228 for the exercise of the Community's treaty-making powers.<sup>11</sup> The charters of the few other international organizations that possess a foreign relations competence generally assign only the negotiating function to the inter-governmental organ and require the approval of the national parliaments of member states as a condition precedent to the effectiveness of the negotiated accord.<sup>12</sup> In contrast, article 228 confers overwhelming responsibility for conducting the EEC treaty-making function upon the Community organs, leaving the member states with a seemingly marginal role in this area. Naming the EEC Commission—the organ charged with furthering the “general interest” of the Community<sup>13</sup>—as the negotiator of Community accords, article 228 also provides that these accords directly bind the member states upon conclusion by the EEC Council. In addition, the article requires the Council to consult

<sup>8</sup> EEC Treaty art. 18-29.

<sup>9</sup> EEC Treaty art. 111-16.

<sup>10</sup> EEC Treaty art. 116.

<sup>11</sup> EEC Treaty art. 228 provides:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on the Member States.

<sup>12</sup> See, e.g., EFTA Treaty art. 41-2, which provides:

The Council may negotiate an agreement between the Member States and any other State, union of States or international organization, creating an association embodying such reciprocal rights and obligations, common actions and special procedures as may be necessary or appropriate. *Such an agreement shall be submitted to the Member States for acceptance and shall enter into force provided that it is accepted by all the Member States.* Instruments of acceptance shall be deposited with the Government of Sweden which shall notify all other Member States.

(Emphasis added). See generally, authorities cited in note 3 *supra*.

<sup>13</sup> EEC Treaty art. 157-2.

with the European Parliament prior to concluding association accords and empowers the Community Court to pass on the compatibility of a proposed accord with the Rome Treaty. Article 228, in conjunction with articles 236 and 238, restricts the participation of the member states as such in the Community treaty-making process to requesting a Community Court ruling on the compatibility of the Rome Treaty with a proposed accord and to amending that Treaty to cure any incompatibility declared to exist by the Court.

Writing some three years after the formation of the EEC, Professor Pescatore, presently a member of the Community Court, appraised the Community's treaty-making provisions as a "veritable transfer of powers to the Community in the domain of external relations."<sup>14</sup> In the same study he concluded that "in the sphere prescribed by the Treaty, it is the Community which from now on will act in the place and service of the States, and it is the [Community] which will bind the States by its undertakings."<sup>15</sup> In the absence of substantial Community practice under the relevant Treaty provisions, Professor Pescatore's projections were largely based upon an analysis of the bare texts of the Rome Treaty and the underlying political and economic objectives of that document.

The months and years following Professor Pescatore's appraisal have provided a rich vein of material for students of the Community's foreign relations powers. Invoking article 238, the Community concluded association agreements with Greece, Turkey, a group of eighteen African states (most of which were former French and Belgian colonies) and Nigeria.<sup>16</sup> Utilizing its powers under article 111 to negotiate tariff accords with third states and groups of states, the Community participated in the Dillon and Kennedy Rounds of tariff bargaining in the GATT, and concluded bilateral tariff accords with Israel and Iran.<sup>17</sup> In addition, it has completed negotiations with Lebanon on a commercial accord under article 113 entailing an exchange of tariff concessions and the provision of technical assistance by

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<sup>14</sup> Pescatore 134.

<sup>15</sup> *Id.*

<sup>16</sup> The Community has contracted the following association accords under article 238: Accord Creating an Association Between the EEC and Greece, [1963] E.E.C.J.O. 294 [hereinafter cited as the Greek accord]; Accord Creating an Association Between the EEC and Turkey, [1964] E.E.C.J.O. 3687 [hereinafter cited as the Turkish accord]; Convention of Association Between the EEC and the African and Malagasy States Associated with this Community, [1964] E.E.C.J.O. 1431 [hereinafter cited as the Yaounde accord]; Agreement Establishing an Association Between the EEC and the Republic of Nigeria, 1966 INT'L LEG. MAT. 828-58 (unratified) [hereinafter cited as the Nigerian accord].

<sup>17</sup> Tariff accords that have been concluded at the time of writing (February, 1968) include the Commercial Accord between the EEC and the State of Israel, [1964] E.E.C.J.O. 1518; Commercial Accord between the EEC and the Imperial Government of Iran, [1963] E.E.C.J.O. 2555; the "Dillon Round" agreement entered into by the EEC with the partners of the Six in GATT, General Agreement on Tariffs and Trade, July 16, 1962, [1962] 13 U.S.T. 2889, T.I.A.S. No. 5253; and the "Kennedy Round" agreement entered into on the same basis, *see* *Le Monde*, 1 Jul. 1967, at 17.

the Six to bolster the Lebanese economic development program.<sup>18</sup> In its first decade, the Community has also established numerous ties with international organizations<sup>19</sup> and has taken important steps in the design and implementation of a common commercial policy linking the Six with the outside world in economic matters.<sup>20</sup>

Though unavailable to Pescatore as a source for his appraisal of the EEC's foreign relations powers, the Community practice described above provided a basis upon which subsequent commentators could re-evaluate his earlier conclusions. Later writers too, however, have largely restricted themselves to the bare text of the Treaty and to general principles and, not surprisingly, have arrived at even more enthusiastic conclusions.

By ignoring Community practice as a clue to the scope of the Community's foreign relations powers, the commentators have left many serious questions unresolved. One notable deficiency in the literature is the absence of any systematic consideration of the extent to which the Treaty texts have in fact been interpreted to facilitate the "transfer of powers to the Community in the domain of external relations" projected by Pescatore. Is the Community master, servant or equal partner of the member states in the conduct of EEC foreign relations? Again, the articles themselves abound with fundamental gaps and ambiguities. Only Community practice can serve to complete the faltering or purposefully vague work of the Treaty's framers. It is that practice, for example, which will establish the content of the EEC's "common commercial policy" and the permissible scope of a Community "association accord," as those terms are used in articles 111 and 238 respectively.

Failure to examine the administrative machinery that has been devised for managing Community foreign relations has left obscure the relative contributions of the Community organs, the member governments, and national and Community-level private groups. To what extent, for example, is the EEC Commission subject to pressures from these sources when it negotiates tariff and commercial accords of broad economic import? Furthermore, the formalistic inquiries of the commentators have not illuminated the emerging contours of the economic and political objectives which guide the exercise of the Community's foreign relations powers. What policies influence the Community's

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<sup>18</sup> The EEC has successfully completed negotiations on an accord with Lebanon. See the Accord on Commercial Exchanges and Technical Cooperation Between the EEC and the Member States, on one side, and the Lebanon Republic, on the other, 1965 INT'L LEG. MAT. 728-32.

<sup>19</sup> The Community has not published a schedule of its agreements with international organizations. It is known, however, that it has entered into agreements with the International Labor Organization, see [1959] E.E.C.J.O. 521, and with UNESCO, see 8 GEN. REP. 305 (1965). A summary of the Community's relations with international organizations during 1967 may be found at 10 GEN. REP. 378-81, 401-04 (1967).

<sup>20</sup> See Everling, *Legal Problems of the Common Commercial Policy in the European Economic Community*, 4 COM. MAR. L. REV. 141 (1966).

relations with the United States, the "Outer Seven," the Communist bloc countries and the developing nations of Latin America, Africa and Asia? To what extent do those policies reflect Community autonomy in the exercise of its foreign relations powers?

In *The European Common Market and the World*,<sup>21</sup> Professor Werner Feld has taken a giant step past existing appraisals of the Community's foreign relations powers by rooting his study firmly in the soil of a decade of Community foreign relations practice. The holder of degrees in law as well as in political science, Feld does not minimize the significance of Treaty texts and other formal commitments of the member states as determinants of the scope of the Community's foreign relations powers. On the contrary, the introduction and first chapter of the study contain a comprehensive analysis of the guidelines found in the Treaty and in general international law for the exercise of these powers. But Feld also recognizes that the evolution of independent Community control over its external relations threatens entrenched governmental and private interests at the member state level. Sensitive to the impact of these institutional stresses upon the manner in which the formal texts have been interpreted, Feld probes many of the issues that have been largely ignored by previous commentators. His use of interviews, questionnaires and other empirical techniques further sharpens his exploration of these issues. Thanks to Feld's balanced perspective and disciplined investigative methods, the reader comes away from *The European Common Market and the World* with a sounder grasp of the gap between textual promise and actual performance, the manner in which ambiguities in the Treaty text have been resolved by hard practical decisions, and the intricate administrative system that has been devised for the conduct of Community foreign relations. The reader is also instructed in the policies pursued by the Community in its dealings with the outside world.

The format of the study reflects Feld's twin objectives: portraying the operation of the Community system in the elaboration of foreign relations policies, and setting forth the content of these policies with regard to different areas of the world. The book has two parts, the first pursuing the former objective, the second the latter. As noted above, the legal basis for Community involvement in external relations activity is recorded in the introduction and first chapter. The next three chapters deal in turn with the relative roles and contributions of the Community organs, the six national administrations, and the private, national, and Community-level elites in the formulation of Community policy. In Part II, Feld treats successively the Community's relations with European non-member states, non-European industrialized free-world states, developing countries, and Communist states. He concludes the study by speculating about the likely shape

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<sup>21</sup> (1967).

of future Community foreign relations policies, particularly as they relate to the United States, and about the probable role of the Community organs in their formulation and execution.

Professor Feld's treatment of the economic and political dimensions of his subject is skillful and persuasive. To this reader, however, Feld's most valuable contribution is his systematic, empirical appraisal of the respective roles of the Community organs and the member states in the formulation and execution of Community foreign relations policies. Summarizing his findings, Feld concludes:

As far as the making of external Community policy is concerned, the member governments generally appear to have been the masters controlling this process and to have used the EEC and the external policy instrumentalities it offers for their own purposes. On the other hand, the EEC, acting as a unit through the Commission, so far has had only limited success in directing how national economic policies are to serve the Community interest. With the exception of matters affecting the [common external tariff] or [common agricultural policy] levies, the member governments have largely chosen when to use EEC or national policies for the pursuit of their foreign economic policy objectives. They have determined the form and substance of the EEC policies. They have closely controlled and supervised the activities of the Commission when negotiating with third countries, permitting the Commission only a minimum of discretion. And they have controlled to a large extent the execution of policies, although the Commission, as guardian of the Community interest, could admonish or even complain to the Community Court in case of Treaty violation. In fact, however, the Commission has been primarily the servant of the member governments, collecting statistics, compiling information, coming forth with ideas and suggestions, and elaborating recommendations for the reconciliation of the divergent interests of the member states, but really not having more than an oblique influence on the final deliberations and judgments of the member governments. Other Community organs, such as the Parliament . . . , which also have been assigned roles in the external policy making process, have been even less influential than the Commission.<sup>22</sup>

These conclusions will touch off spirited debate among EEC scholars. They clash with the seeming import of the treaty provisions which, like article 228, accord the Community organs a dominant role

in the formulation and pursuit of EEC external policy. They challenge the consensus among Community students regarding the purportedly innovative nature of the EEC's powers in the international organizations field. And they do not seem to square with the Community's record of accomplishment over the last decade as measured by the number and significance of its international agreements and its initial steps in constructing a common commercial policy.

But this writer is convinced of the essential soundness of Feld's position. The member states have in fact been successful in systematically paring down the foreign relations prerogatives seemingly granted the Community under the Rome Treaty. This generalization applies with dramatic force to the stunted evolution of the Community's treaty-making power, a subject of special interest to the writer.<sup>23</sup> As we have seen, article 228 allocates responsibility for the conduct of the Community treaty-making process among the Council, Commission, European Parliament and Community Court, and virtually excludes the member states as such from a significant role in this process. But how has article 228 been applied over the last decade? Though designated as the Community organ that "negotiates" EEC accords, the Commission has been little more than the Council's agent or plenipotentiary in treaty negotiations.<sup>24</sup> The Parliament's influence has virtually been eliminated by the Council's insistence that the former body be consulted *after* rather than *before* signature of Community accords.<sup>25</sup> And the Court has yet to pronounce on the compatibility of a Community accord with the Rome Treaty, although seven<sup>26</sup> of the Community's nine accords<sup>27</sup> directly confronted the Community with this difficult issue.

The obvious beneficiary of the reduced influence of these Community bodies is the Council and, through it, the member states themselves. Let it not be thought, however, that the shift of control to the Council has been fortuitous. On the contrary, the members of the Council—themselves under instruction from their home governments—have engineered the shift through two basic techniques. First, they have narrowly interpreted key provisions of the Rome Treaty to enlarge the residual treaty-making powers of the member states at the expense of the delegated powers of the Community. In doing so, of course, they have displaced the Community Court as the arbiter of the scope of the EEC's treaty-making power, a circumstance that goes far toward

<sup>23</sup> See Costonis, *The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade*, 5 *COM. MAR. L. REV.* — (March, 1968).

<sup>24</sup> W. FELD, *supra* note 19, at 163.

<sup>25</sup> See, e.g., Report, Eur. Parl. Doc. No. 61, 18 Sept. 1961; Report, Eur. Parl. Doc. No. 94, 25 Nov. 1963.

<sup>26</sup> The accords in question are the Greek, Turkish, Yaounde and Nigerian association accords, the Dillon and Kennedy Round tariff accords and the Lebanon commercial accord.

<sup>27</sup> See notes 16-19 *supra*.

explaining why the Court's jurisdiction under article 228 has not been exercised since the Community's inception. The technique of narrowly construing the delegated treaty powers also legitimates direct member-state intervention in the "Community" treaty-making process. The states have been quick to grasp the opportunity. Their representatives have participated as "national observers" in most of the Community negotiating sessions. Furthermore, their executives and national parliaments have signed and ratified each Community accord adjudged by the Council to exceed the Community's competence.

In addition to construing the Rome Treaty narrowly, the Council has carefully constructed the administrative machinery for the conduct of Community treaty-making activity to guarantee a dominant role to the member states. Professor Feld provides an excellent description of this machinery in chapters 2 and 4 of his book. One might wish, however, that he had given greater emphasis to the intimate relationship between the Treaty's construction and the choice of administrative mechanisms. Only by making the threshold determination that a given matter touches upon a residual competence of the member states can the Council legitimate direct member-state intervention in the Community foreign relations process.

Is the existing trend irreversible? Feld thinks not. The development of a single internal market within the Community, he speculates, may generate pressures on the member states to relax their grip on the formulation and execution of concomitant external relations activities. Evidence of this possibility may be found in the agricultural field: as the Community accedes to greater control over internal Community agricultural policies, the member states have tended to concede it a greater role in shaping external policies in this area. Feld also conjectures that the member states may agree to coordinate their over-all foreign relations policies outside the framework of the Treaty and the Community. While this step may eliminate conflicts among the member states, however, he properly questions whether it will lead to a strengthened role for the Community.

Two other factors not explicitly treated by Feld may also portend an increased foreign relations role for the Community during the next decade. One is the growth of a habit of cooperation among the Six resulting from their efforts to coordinate national viewpoints within a Community framework each time a Community accord or external relations policy is debated in the Council. It cannot be doubted, of course, that considerably more than this habit and the machinery devised to implement it is necessary to effectuate a meaningful transfer of foreign relations powers to the Community. At the same time, however, the Community's existence is now a political fact which none of the member governments can easily disregard. To do so might antagonize the other members or, worse still, dissipate the greater

political leverage vis-à-vis third states that may accrue to a member country through coordinated six-nation action.

An even more important factor has been highlighted by Walter Hallstein, former President of the EEC Commission, in his farewell address to the European Parliament:

Europe feels deeply that her form of life today is profoundly inadequate. She continues to suffer gravely from the gap between the vocation powerfully rooted in sentiment that Europe has qualities that call her to assume a fundamental responsibility in world politics and the inability to regroup her resources and organize them to be able to fulfill this vocation. This is the true reason for the European malaise of which so much has been said.<sup>28</sup>

From hardened Gaullists to committed Eurocrats, the undesirability if not danger of the Six remaining fragmented in a world of super-powers is uniformly recognized. Whether the issues concern measures of defense to deal with a feared United States economic imperium and technical superiority, or the adoption of bargaining positions on tariff, monetary or development aid questions before international organizations, the leverage of the Six is immeasurably increased if they proceed on the basis of a truly common policy. The rub, of course, is that in pursuing policies orchestrated and directed at the Community level, the member nations surrender *pro tanto* their control over the conduct of their own external relations. Although the advantages of common action have been widely extolled in the first decade of the Community's existence, they have not proven sufficiently attractive to counter the regressive forces that have stifled the evolution of the Community's treaty-making powers. But they could easily prove overpowering should the next decade see a substantial increase in the pressures on the Six generated by international economic competition and a decrease in the hold that nationalism—whether strident or covert—exerts over the behavior of the member states within the Community.

This review commenced with a summary of a number of central issues that students of the Community's foreign relations powers have tended to overlook. It would be too much, of course, to expect that a single volume could remedy omissions of such long standing. In *The European Common Market and the World*, Professor Feld has nevertheless taken remarkable strides toward illuminating much that was previously obscure. More important, perhaps, his volume constitutes a model of disciplined inquiry and thoughtful analysis that places all students of Community affairs in his debt.

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<sup>28</sup> Speech of Professor Walter Hallstein to the European Parliament, 21 June 1967: