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The Emerging Concept Of Supranationality In Recent International Agreements

By REUBEN EFRON* and ALLAN S. NANES**

A TERM THAT has been used a good deal in connection with recent international agreements is "supranationality." This concept keynoted the European Defense Community Treaty. When that treaty was rejected by the French Assembly, and the London and Paris agreements were substituted, some writers stated that all supranational features had been eliminated from the new agreements.¹ It will be the purpose of this article to make a short analysis of the significant supranationality clauses of the European Defense Community treaty, the International Wheat and International Sugar Agreements, and to compare these with similar clauses of the London and Paris Agreements to discover to what extent, if any, the principle of supranationality is retained in the latter.

It would be appropriate, at this point, to establish the meaning of supranationality in accord with the views of leading authorities. It has come to be recognized that there is a basic difference between the concepts of supranational and international organization. Until the acceptance of the Schuman Plan creating the European Coal and Steel Community, all international political organizations such as the League of Nations, the United Nations and the specialized functional agencies, as well as the regional organizations such as the Organization of American

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¹ Kunz, Joseph L., *The London and Paris Agreements on West Germany*; 49 AM. J. OF INT. LAW 216 (1955).

States, the Arab League, etc., were "based on the 'sovereign equality' of their members, on nonintervention in domestic affairs; the sovereignty may be more or less restricted but never transferred by the basic treaty which forms their constitution."² The governing bodies of such organizations cannot bind states legally, that is, their decisions are not self-executing in the territories of the member states. "It is always the sovereign member states which have the last word."³

On the other hand, the European Coal and Steel Community, the now defunct European Defense Community, the High Authority envisioned under the Baruch atomic arms control plan, and the International Wheat and International Sugar Agreements contain a new idea, the idea of supra-national organs, that is organs based not on a mere restriction of the sovereignty of the member states, but on a transfer of sovereignty in a particular area only.⁴ There is a similarity between organizations with supranational features, and a federation of states, as van Raalte notes: "In the case of a federal state where the component parts—which were once sovereign states—have transferred their original powers to a higher body—that of the federal state—a new entity is created to take the place of the former units. In other words there has been a merger of sovereignties—and not merely coordination or collaboration. This is what the [The Coal and Steel Community] Treaty provides, to a considerable extent, in the domain to be covered by the community."⁵ Van Raalte further notes that ". . . In making a comparison with federalism, it may be said that the Community is in effect more federal than international and that it represents a real transfer of sovereignty such as none of the member states has ever accepted before." In sum, a supranational organization represents a legal entity in which the member states surrender their sovereignty in certain areas, but retain it fully in others. There is thus created a form of organization which stands between the rather loose conception

² Kunz, Joseph L., *Supranational Organs*; 46 AM. J. OF INT. LAW 696 (1952).

³ *Ibid.*

⁴ *Ibid.*, p. 697. As Professor Northrop states: "The supranational power in this instance [EDC] was power to order men to battle coming not from one's own President and general staff, but from a command of five other nations as well.", EUROPEAN UNION AND U.S. FOREIGN POLICY, p. 2 (New York, 1954).

⁵ Van Raalte, E., *The Treaty Constituting the European Coal and Steel Community*, 1 INT. & COMP. LAW Q. 74 (1952).

of traditional international organization and the broad surrender of sovereignty implied in a federation.

With an understanding that the authors are touching only a few basic points of this problem, let us turn first to the main clauses embodying the supranational character of the EDC treaty.

To begin with, the preamble to that treaty includes the intent of the signatories to bring about "as complete an integration as possible within a supranational European organization." This intent is further emphasized by the statement that the present treaty constitutes "a new and essential step on the road to the formation of a united Europe."⁶ Further, Article 1 explicitly states that the contracting parties "institute among themselves a European Defense Community supranational in character, consisting of common institutions, common armed Forces and a common budget."⁷ In Article 7 the intent to create a supranational legal entity is manifested through the provision that "the Community shall have a juridical personality" and that it shall enjoy the juridical capacity necessary to exercise its functions and attain its ends.⁸

In defining the organs composing the new community, Article 8 emphasizes the transitional character of EDC by declaring that it is to remain in effect until replaced by a proposed federal or confederal organization, i.e. an even stronger supranational structure.

Another important feature of the EDC treaty was the provision for the formation of the European Defense forces, which were to be "composed of contingents placed at the disposal of the Community with a view to their fusion."⁹ While each member state was allowed to retain its own army, the creation of a common armed force signified a limitation of sovereignty, inasmuch as the treaty seemed to subordinate the military planning of the individual members to the common defense effort of the whole community.

The executive body of this community was known as the Commissariat. Article 20, which defines the composition and

⁶ U.S. Congress. Senate. Executives Q and R. *Convention on Relations with the Federal Republic of Germany and a Protocol to the North Atlantic Treaty*, p. 167. Contains text of the EDC Treaty, among others. 82d Cong., 2d sess. Washington, U. S. Government Printing Office, 1952.

⁷ *Ibid.*

⁸ *Ibid.*, p. 168-169.

⁹ *Ibid.*, Article 9, p. 169.

functions of the Commissariat, is careful to state that, "in the discharge of their duties the members of the Commissariat shall neither solicit nor accept instructions from any government. They will abstain from all conduct incompatible with the supranational character of their functions." Although its phraseology is obviously borrowed from Article 100 of the United Nations Charter, which sets forth the independence of the Secretariat staff from national direction, the given provision goes further, and asserts unequivocally the supranational nature of this key organ. Further it should be noted that the functions of the Commissariat were broader than those of the U.N. Secretariat, and its decisions were to be taken by a majority vote, without the restriction of any individual veto.

The European Defense Community treaty also provided, in Article 52 that the Court of the European Coal and Steel Community would also serve as the judicial organ of the Defense Community. In this way the Defense Community was to be linked to the most important supranational structure extant in Europe, and it became yet another building block in the structure of any future European federation.

A crucial supranational feature of EDC was found in Article 80, which provided that the Community was to have with respect to the European defense forces and their members, the same rights and obligations as national states possess with respect to their own forces. The intent of this article was quite obviously to emphasize the similarity between the sovereign national state's control of its armed forces and that of the EDC's control over its forces.

Finally, Article 121, which states that the members will not enter into any international agreement incompatible with the present treaty, seemed to emphasize the primacy of EDC with its supranational structure over considerations of pure national policy.

The principle of supranationality is applied as well in some of the lesser known, but hardly unimportant, international instruments. For example, the International Sugar Agreement, which has as its broad objective the stabilization of the world sugar market, is administered by an International Sugar Council. Ac-

ording to Article 27, paragraph (6) of this treaty, the Council is to "have in the territory of each participating Government, and to the extent consistent with its laws, such legal capacity as may be necessary in discharging its functions under this Agreement."¹⁰ An elaborate numerical voting scheme is applied in this Council, but within it, decisions are by majority vote of the exporting and importing countries, provided that this majority includes the votes of at least one third of the importing countries present and voting.¹¹ However, when decisions of the Council involve the reduction of export quotas to prevent the price of sugar from falling below a minimum established in the agreement, they may be taken by a simple majority of the countries present and voting.¹² Under article 40 of the agreement, any dispute concerning interpretation, which is not settled by negotiation, shall at the request of any participating government that is a party to the dispute, be referred to the Council for decision. The Council may benefit from the advice of an advisory panel, but it alone makes the binding decision. Furthermore, if there is any complaint that a participating government has failed to fulfill its obligations under the Agreement, that complaint, if made by any other participating government, is referred to the Council, which makes a decision in the matter. A majority vote of both importing and exporting countries is necessary before any participating government can be found to have committed a breach of the agreement. Certainly all of these features strengthen the supranational aspects of the sugar agreement. The five year duration provided in article 42 however, can only serve to weaken the authority of the Council as the deadline nears, and, by indirection, to mitigate the Agreement's supranational qualities.

Another international agreement with supranational features is the International Wheat Agreement, last revised in 1953. Unlike the Sugar Agreement, this agreement contains an obligation on exporters to export and importers to import. Article III, paragraph 1, states that the quantity of wheat prescribed in Annex A

¹⁰ U.S. Congress. Senate. Committee on Foreign Relations. Hearing before a subcommittee of the Committee on Foreign Relations on Executive B, the International Sugar Agreement, p. 21 contains the text of the agreement. 83rd Congress, 2nd session. Washington, U.S. Government Printing Office, 1954.

¹¹ *Ibid.*, Article 36, p. 23.

¹² *Ibid.*, Article 36, p. 24.

of that article for each importing country shall be called that country's "guaranteed purchases" and shall represent the quantity of wheat which the International Wheat Council established by Article XI shall require the importing country to purchase, or the exporting country to sell. Article III, paragraph 2 provides that quantities to be exported, under Annex B of that article, shall be called the exporting country's "guaranteed sales," and shall represent the quantity of wheat which the Council may require what country to sell, or the importing countries to purchase. While similar to the Sugar Agreement, the Wheat Agreement here emphasizes supranationality to a greater extent, by restricting the sphere of independent government action, and imposing fixed obligations prescribed by an international body on the sovereign parties to the treaty.

Further, Article XIII, defining the functions of the International Wheat Council, states in section 21, that "each importing and exporting country undertakes to accept as binding all decisions of the Council under provisions of this agreement." Under the same article, which also prescribes the voting procedure and distribution of votes in the Council, it is stated that "except as otherwise specified in the agreement, decisions of the council shall be by a simple majority of the votes cast." One must bear in mind in this connection that as in the Sugar Agreement, the votes are distributed in proportion to the guaranteed purchases and sales of the countries concerned. However, these provisions actually strengthen the supranational principle, by sidetracking the principle of sovereign equality of states, and imposing binding obligations on states with smaller import or export quotas. Indeed this procedure runs counter to ordinary international intercourse, for smaller and less powerful states may exercise greater and perhaps decisive influence in the deliberations of the Council solely because of their position with respect to a particular commodity.

Now let us compare the London and Paris agreements with the EDC and the commodity agreements mentioned, in an attempt to discover whether any part of the supranational principle survived in those documents. The Brussels Treaty of 1948, which is enlarged by the Final Act of the London Nine Power Conference of 1954, forms the cornerstone of the latest effort to further

the concept of European integration and German association with the West.¹³

Although the preamble to the Final Act of London states that the Nine Power Conference dealt with "security and European integration within the framework of a developing Atlantic Community," the treaty actually concerns itself primarily with defense and disarmament. In these spheres the treaty contemplates the effectuation of closer association among the states concerned, and establishes a common control over armaments and a joint defense effort.

Thus Part II of the Final Act of London sets up an agency for control of the armaments of the continental members of the Brussels Treaty Organization. It lists the functions of this agency as: (a) insuring the observance of the prohibition of the manufacture of certain armaments and (b) controlling the quantity of arms held by each member country. The Agency for the Control of Armaments (whose detailed functions are defined in Protocol No. IV)¹⁴ is under the direction of the Council of the new Western European Union which is instituted to "consider matters concerning the execution of the Treaty and its Protocols."¹⁵ It should be noted that this Council, although in certain cases it decides questions by a unanimous vote, nevertheless decides by simple majority "questions submitted to it by the Agency for the Control of Armaments."¹⁶ This provision may be compared with Article 39 of the

¹³ *London and Paris Agreements*. Department of State Publication 5659, International Organization and Conference Series II (European and British Commonwealth) 5. II. Final Act of the Nine-Power Conference Held at London September 28-October 3. II. Brussels Treaty p. 10. Washington, Nov. 1954.

¹⁴ This Agency has power over production and imports to the extent required to make the control of stocks effective. For that purpose, the Agency can (a) "scrutinise statistical and budgetary information supplied by members of Western European Union and by the NATO authorities; (b) undertake on the mainland of Europe test checks, visits and inspections at production plants, depots and forces (other than depots or forces under NATO authority); and (c) report to the Council (of Western European Union).

Furthermore, article 12 of this protocol states that "for their test checks, visits and inspections the members of the Agency shall be accorded free access on demand to plants and depots, and the relevant accounts and documents shall be made available to them. The Agency and national authorities shall cooperate in such checks and inspections, and in particular national authorities may, at their own request, take part in them." *Ibid.* Protocol No. IV on the Agency of Western European Union for the Control of Armaments. Article 7, par. 2 and Article 12, p. 52 and 53.

¹⁵ *London and Paris Agreements*. *Op. cit.*, Article IV, Protocol No. 1, Documents Relating to the Brussels Treaty, p. 29, November 1954.

¹⁶ *Ibid.*

EDC Treaty by which the Council of that body could also decide certain questions by a simple majority. Such provisions can furnish basis for a belief that when decisions are taken on certain questions by a simple majority a voluntary relinquishment of some sovereignty is involved on the part of the member states concerned, inasmuch as they must submit to the judgment of the majority on matters that might otherwise fall within the scope of internal control.

Furthermore, the Council of the Western European Union can take measures against violators of the arms control provisions, whose violations can be ascertained through the powers of inspection granted to the Arms Control Agency. The procedure for the execution of these sanctions has not as yet been elaborated, nor has the character of the sanctions themselves.¹⁷ But these powers of the Council and the Agency certainly point in the direction of the diminution of full sovereignty in favor of the Western European Union.

Article X (formerly Article VIII) of the revised Brussels Treaty, provides that all disputes of the signatories falling within the scope of paragraph 2, Article 36 of the Statute¹⁸ of the International Court of Justice, will be referred to the Court subject to any prior reservation made by any party to the Treaty when accepting the statute for compulsory jurisdiction. All other disputes are to be submitted to conciliation. In a limited sense, this may be viewed as a step toward supranationality.

As a result of the foregoing the writers are led to believe that despite the fact that the broad supranational features of EDC have been eliminated, the present London and Paris Agreements have retained some vestiges of a supranational nature in those parts of the treaties pertaining to the arms control arrangements and the settlement of disputes. There is no doubt that Part II of the Final Act of London and Article 10 of the revised Brussels Treaty, by establishing majority rule in the questions of arms

¹⁷ *Ibid.* Protocol No. IV on the Agency of Western European Union for the Control of Armaments, p. 55, Article 20.

¹⁸ This paragraph covers all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation d. the nature or extent of the reparation to be made for the breach of an international obligation.

control and the settlement of disputes arising out of these treaties, are *ipso facto* limiting the sovereignty of the signatories. Furthermore, the preamble to the Final Act indicates the intent of the signatories to retain the supranational aim of EDC even though the treaty itself has been rejected. It thus seems to the authors that the originators of this transformation from the broad EDC to the more limited London and Paris Agreements attempted to introduce some of the supranational flavor of the former into the present arrangement, if not in so readily recognizable a fashion, at least by strong implication.

In general, as the authors have tried to show, the implication of supranationality is contained in other recent international agreements. Thus whether the concept is expressly introduced as in EDC, or only implicitly, as in the London and Paris Agreements, it is becoming a matter of current international practice to include provisions of a supranational character in agreements establishing a functional community of interest.

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