LEGAL PROBLEMS OF THE ACTIONS OF THE EUROPEAN COMMUNITIES IN INTERNATIONAL ENERGY CO-OPERATION

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The three treaties which constitute the legal body of the European Communities have basic objectives which are not always the same, and mechanisms which are markedly different.

By mechanisms I do not mean institutional structures: the Commission, the Council and the Court and the Parliament are common to them all (although in the Coal and Steel Treaty the Commission was originally called “the High Authority”) and the institutions were indeed unified by the Fusion Treaty in 1970. I mean rather the manner in which the respective Communities operate, so as to achieve their desired ends. The subject I have chosen illustrates this difference of approach very clearly.

Perhaps the most striking illustration of the difference of approach is that of the 3 treaties, 2 are sectorial and devoted wholly or partly to energy, while the 3rd is all-embracing and yet does not mention energy.

So it is that whereas the roles of the Community and its Member States—and the relations of both with third countries—are fully-de-

fined in relation to coal and nuclear fuels, in relation to oil and gas they are simply what they are in all other matters coming within the scope of the EEC Treaty.

Again, as between the two sectorial treaties there is a marked difference between the Coal and Steel Treaty and the EURATOM Treaty. The former does not include external relations among the tasks of the Community, and has no heading devoted to them. To the extent that they are dealt with, it is in Chapter X, entitled "Commercial Policy", that the relevant provisions are found. The general principle enunciated there (Article 71) is that the powers of the Governments of Member States in matters of commercial policy shall not be affected by the Treaty. There are exceptions to this rule but they do not provide material for examination in this address, and I do not propose to deal with the ECSC Treaty further.

In the EURATOM Treaty—which is the only treaty to include international relations in its duties (Article 2 (b))—, on the other hand, the Community's powers in the field of external relations are very extensive. This is because external powers are conferred on the Community by Article 101 "within the limits of its powers and jurisdiction". As the central concept of the Treaty is the exercise by the Community of a monopoly in the field of supply, of the power to control nuclear materials and of the right of ownership of special fissile materials, the corresponding powers to enter into international agreements cover a wide field.

The effective contrast is between the EEC Treaty and the EURATOM Treaty, and I propose to look first at the general treaty—that of the E. E. C.

LEGAL PROBLEMS IN INTERNATIONAL ENERGY CO-OPERATION (ALLEN)

The EEC Treaty has 2 omissions which are at first sight rather surprising: despite the fact that the task of the Community is stated to be.....(Article 2) there is no reference in it to energy, and there is no reference in the list of activities of the Community to relations with third countries. The latter omission is remedied to some extent by the provisions of Articles 113 et seq. on commercial policy, and Article 228 provides a mechanism for the negotiation and conclusion of agreements when the treaty provides for them.

Yet there is no international agreement by the EEC in the energy field, despite the manifest interest of the Community in energy and even more surprisingly despite the effect that an international agreement concluded by a member state in this field must necessarily give rise to questions of compatibility with the treaty.

An illustration of the problems which such agreements can raise is to be found in the question of participation of the Member States in the International Energy Agency.

The structure of the international energy programme and of the International Energy Agency alike presented problems. [You will remember that] the Washington Conference of February 1974 resulted in the creation of a Group of "Twelve" which, in October 1974, proposed the setting up, within the framework of the Organization for Economic Co-operation and Development of an International Energy Agency, and drafted an international agreement on an international energy programme.

The agreement provided inter alia for common measures to enable supply difficulties to be dealt with, viz. a system of compulsory minimum stocks, measures intended to reduce consumption of oil and

petroleum products in case of supply difficulties, and a supplysharing system to be operated in the same situation. It contained a clause providing that the adhesion of the European Communities would not obstruct the further application of the treaties.

The decision of the Council of the O. E. C. D. set up the Agency as an autonomous institution in the Organization, responsible for the execution of the agreement. It refers expressly to the Convention on the O. E. C. D., which deals with the participation of the European Communities, and it provides for the adhesion of the Communities to the decision at the same time as they accede to the Agreement.

The Agreement fitted into the general lines of the energy strategy of the Community at that stage (and as subsequently developed) with its emphasis on the establishment of stocks, the reduction of consumption, and the development of alternative sources of energy. The requirement that participating states should maintain certain minimum oil stocks did not involve any conflict with the Community requirements—the levels of stocks were minimum levels, and nothing in the Agreement provided for them to be used under conditions other than those set out in the Council's Directives. Equally, the provisions relating to the reduction of consumption involved no conflict with the obligation of Member States and were compatible with the Council Directives.

However, the system of sharing gave rise to very real problems. Here, not for the first time, the practical effect of the terms of an international agreement were not entirely clear, at least as far as it concerned the Community, but the apparent meaning of the agreement was that the imports of participating states would be controlled by

reference to the amount of oil available to them and their entitlement under the scheme, and their exports would be directed to countries with a deficit. Participating states were also required not to increase their exports to non-participating states. It is evident that the application of such a system within the Community would prevent imports and exports which would otherwise have taken place, and in particular would prevent an increase in exports to Member States of the Community which were not parties to the Agreement. Such restriction clearly run counter to the principles of free movement of goods inside the Community and are therefore contrary to Articles 30-34 of the Treaty.

This sharing system also created problems in connection with the rules on commercial policy. Article 113.3 of the treaty gives to the Community exclusive competence in the field of common commercial policy, and provides that where agreements with third countries need to be negotiated the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The resulting agreements are then concluded by the Council.

It is again clear that to the extent that Member States parties to the Agreement are obliged to export to third states parties to the Agreement, or not to increase exports to third states not parties to the Agreement, also in that Member State are entitled to receive imports, calculated under the Agreement, from other states parties to the Agreement, the Agreement constitutes a measure of commercial policy within the meaning of the Treaty.

The conclusion by Member States of the Community of the Agree-

ment therefore is not consistent with the Treaty, either as regards their legal competence to conclude it insofar it involves commercial policy or as to the nature of the undertakings as to movements between Member States. It may be significant, in considering the interpretation to be given to the latter aspect of the Agreement, that the Council subsequently enacted two decisions which set out procedures respectively for the restriction of movement of oil and petroleum products from one Member State to another, and for the reduction of consumption and the sharing of resulting savings in the Member States. Thus any directed movements and restrictions on movement, which without those decisions would have been unlawful, as contrary to Articles 30-34 of the Treaty, will be lawful if done on the basis of the Council's decision which is itself based on Article 103 of the Treaty.

This provision in effect of a parallel procedure—one outside the Treaty and one inside, the latter being necessary to render the former lawful—is not the most obviously efficient method of resolving the problem of the limitation of the freedom of action of Member States (and it does not solve the problem of the lack of competence for commercial policy). Nor did the Articles of the Agreement which provided that the Agreement should not in any way impede the further implementation of the Treaties, and that the entry into force of the Agreement should be subject to the absence of any incompatibility with national law (and, by extension, Community law, the latter being necessarily part of national law) remove the obstacles to the Member States' participation in the Agreement. The obvious course would have been the simplest one: that the Community itself become a party to the Agreement and to the decision: provision was made, as we have seen, for

both.

This participation would not have been instead of that of the Member States, but alongside it: although I have not discussed then the Agreement deals with matters within the competence of the Member States as well as those outside it, and the Agreement would have been a mixed agreement, a form common in the international relations of the Community and its Member States. The Council Decision concluding the Agreement would have been based on Articles 103 and 11 of the Treaty, and would therefore have required a unanimous decision of the Council (unanimity is required by Article 103.2 and it would have been necessary to satisfy that as the strictest requirement). The fact that not all Member States might participate would not be an obstacle provided that no State voted against the decision (abstentions do not prevent the adoption of acts requiring unanimity: Article 148.3) the Community's participation would be provided for, and the absence of a Member State from the Agreement would not invalidate it. Precedents exist for such a situation (e.g. the Convention of Paris on pollution of the seas from land-based sources), the result being that the nonparticipating Member State has none of the rights and obligations of participating Member States in areas of national competence, but is bound by the Community's participation in matters of Community competence (Article 228.2). Nor would the accession of the Community to the Decision of the O. E. C. D. have presented a problem: not only was it expressly provided for, but it would have been in line with Article 13 of the Convention on the O. E. C. D. and of the Supplementary Protocol no. 1, which provide for the participation of the Communities in the activities of the O. E. C. D., and for their participa-

tion as observers in those activities which are within the competence of the Member States.

In view of the clarity and simplicity of such a solution, you will perhaps ask why the Member States participated (with one exception) and why the Community did not. I cannot tell you. I speak only for myself, and outline the law as I interpret it. The Commission has not brought before the Court a case against the Member States which participated in the Agreement, nor asked the opinion of the Court as to whether the Agreement is compatible with the Treaty (as provided for in Article 228). It did not propose to the Council that the Community become a party to the Agreement or the Decision. We must assume that the Commission weighed all the considerations—the possible differences of interpretation, the possibility of resolving internal problems by parallel subordinate legislation, the political aspect introduced by the fact that one Member State had preferred to remain aloof from the whole exercise, perhaps even the possibility that a reference to the Court might not be fruitful—and exercised its judgment and decided that the best was to enable the Member States of the Community to prepare themselves against a shortage was to allow them to conclude this Agreement. I only comment that the Treaty, without mentioning energy, provided the means for the Community to do so neatly and comprehensively on behalf of the Member States.

Despite the fact that the Community's exclusive competence in the field of commercial policy was not insisted on in this case, it might be thought that the conferring of wider and explicit powers on the Community would ensure a more substantial role for the Community in international agreements. Experience with the EURATOM Treaty

does not bear this out, however.

That treaty, as we have seen, confers the most extensive powers on the Community and, in relation to supply, exclusive powers. Not only does Article 52 provide for a monopoly in internal supply, but Article 64 expressly confers on the Supply Agency, the body created by the Treaty to exercise the supply monopoly, the exclusive right to enter into agreements or contracts whose principle aim is the supply of nuclear materials coming from outside the Community. That right is to be exercised, where appropriate within the framework of agreements concluded between the Community and third countries as international organizations. The exclusivity of the Communities powers, both internal and external, was analysed and confirmed in Ruling 1/78 of the European Court of Justice. Suffice it to say here that as the exclusive power of the Agency is expressed to be subject only to Community international agreements that power cannot be subordinated to or restricted by agreements entered into by the Member States. In that Ruling the Court also held that the Member States had no power to enter into agreements providing for the physical protection of nuclear materials without the participation of the Community on a full and equal footing. The Court did not treat physical protection as an exclusive Community competence, recognising also responsibilities of the Member States for it. Yet supply agreements are agreements "concerning supply" (the language Article 52 uses to describe contracts), and the physical protection of nuclear materials is now a condition imposed by all supplying states (see, e. g., the London Guidelines). So paradoxically it appears that nuclear co-operation agreements, which now all contain provisions relating to physical protection and which

set out the conditions of supply are of exclusive Community competence because of the latter but must more specifically be concluded by the Member States as well because of their interest in physical protection. In effect, that is, they are mixed agreements.

However, another practical problem arises when one contemplates even the proposition that the competences are mixed: many such agreements are reciprocal in form, i. e. they provide for nuclear transfers to and from the third State concerned, and this reciprocity is in practice illusory: it is agreed for political and perhaps presentational reasons, but the effective aim is a one-way flow of equipment and material from the Member States of the Community to the third State. No other Member State may have an interest. Is it reasonable, or even practical, to insist on Community participation in such agreements, and to require the Member State concerned to await directives of the Council to the Commission for the negotiation, and conclusion by the Council afterwards? It is true that in the two mixed safeguarding agreements concluded between the two nuclear weapon states of the Community, the U. K. and France respectively, the Community, and the International Atomic Energy Agency, they accepted this. But there is a clear difference between the absorption of those States into a safeguarding network which has been developed for the rest of the Community and the addition of the Community to an agreement which essentially concerns only one Member State, and in which the Community itself has no practical interest.

Yet if a system of bilateral supply agreements is built up—as it has been—what inducement is there to Member States to prefer the slower and more difficult procedure of the Community agreement? How in

those circumstances could the Community then develop a coherent supply policy—even if the illegality were overlooked?

It might be reasonable to attempt to distinguish between agreements with third States which were of no obvious interest to the Community, and those which were, leaving the former to the Member States and reserving the latter to the Community, and perhaps between those which were of interest to the Community and of special interest to particular Member States (e. g. Brazil, with which the Community has an agreement but with which one Member State has an agreement concluded in view of a particular commercial relationship).

These distinctions, however, have no foundation in the Treaty, and both strike at the coherence of its philosophy and weaken the Community in its actions. For a further result of the existence of such a dual system would be that the Community's engagements in matters of supply to the Community would be encompassed by wider-ranging engagements by the Member States e. g. on nuclear exports, technology and equipment. The Community's activities would have to be inserted into a wider range of Member States responsibilities, and the Community's international partners might well question the practical value of such an intervention.

Moreover, the purpose of modern nuclear co-operation agreements is to impose restrictions on the use or movement of nuclear materials. Yet it is just such restrictions which, within the Community, the EURATOM Treaty outlaws. So Member States, who are obliged by Article 103 of the Treaty, to submit draft agreements to the Commission so that the latter may examine their compatibility with the Treaty and refuse to allow their conclusion if they contain provisions

impeding the application of the Treaty, must in effect negotiate in each of these agreements an exemption from such restrictions for the other Member States of the Community. They must do so because they can neither accept restrictions on transfers to other Member States nor give any undertakings in the name of other Member States. It would not be surprising if third countries found this unsatisfactory, for it leaves them with agreements which cannot guarantee their ends. This surprise might well turn to criticism of the Community for adopting a negative course.

Yet the solution is contained in the Treaty: it is for the Community to conclude such agreements, and in them the Community, essentially by virtue of the mechanism of its supply monopoly, can undertake that, within the confines of the Community, the necessary restrictions are imposed and that the necessary conditions as to transfer outside the Community will be imposed.

So we arrive at the point at which we finished our discussion of the EEC Treaty: then the Treaty did not provide specifically for the conclusion of agreements relating to energy, but it provided a sufficient legal basis and mechanism for them, and that was not used. The EURATOM Treaty provides for an exclusive Community competence in this field but it is not exercised. In both spheres the absence of Community action creates problems which can only be solved, if at all, by a system of parallel procedures. I draw no conclusion from the practice: but I do conclude that the Treaties still provide the means for simple and effective action in these fields.