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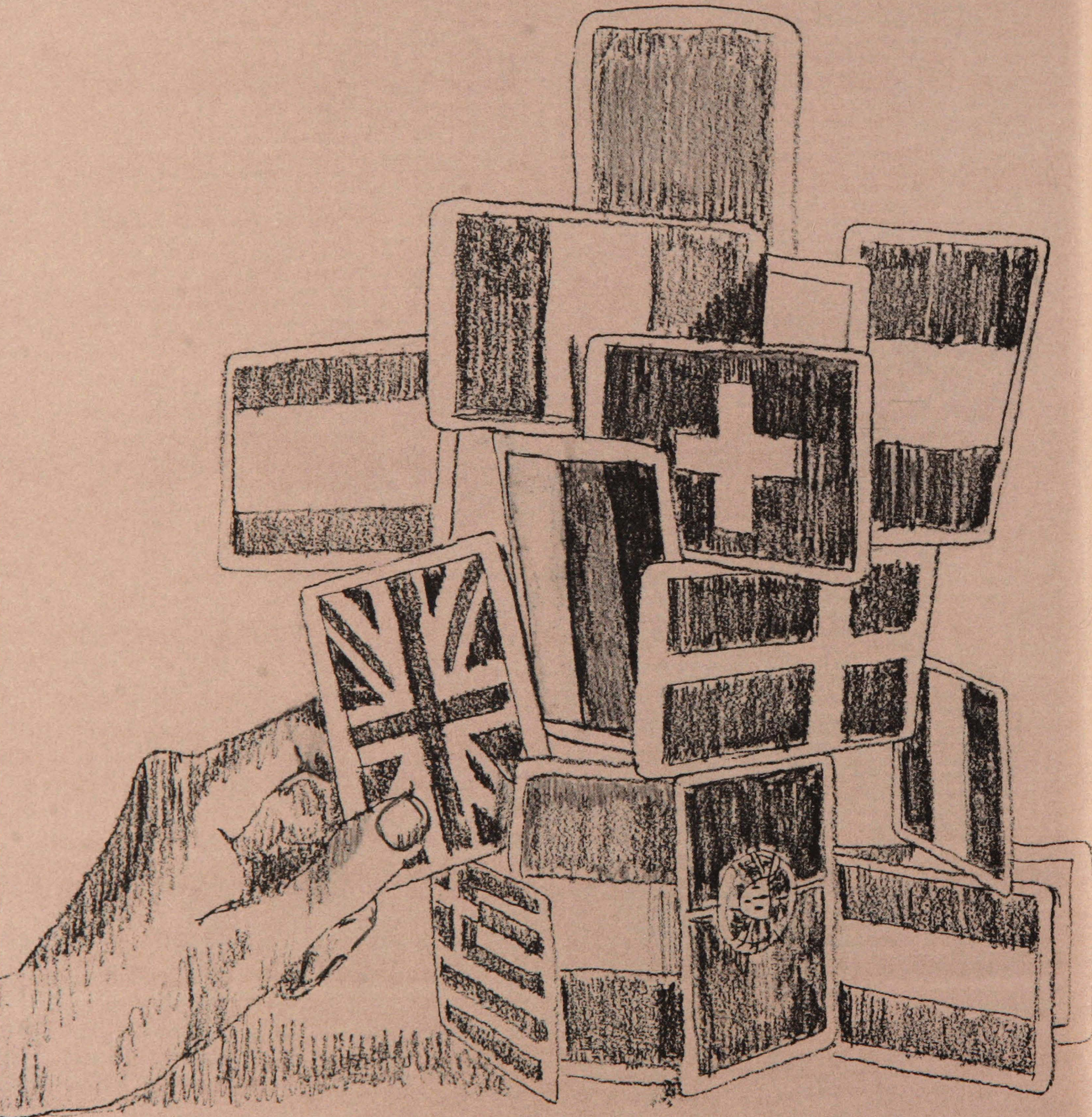

Joseph H.H. Weiler

Alternatives to Withdrawal from an International Organization: THE CASE OF THE EEC

Abbreviated adaptation of a study prepared for the Nathan Feinberg Festschrift (20 Israel Law Review *282 (1986))*

International lawyers are accustomed to a measure of skepticism regarding their discipline. The absence in the international legal order of a centralized legislator, compulsory adjudicator and, in particular, a law enforcement agency all lead to a measure of disbelief in the reality of international law.

One of the classical debates on this theme concerns the right of States, as members of an international organization, to withdraw unilaterally from the organization, thereby eschewing their obligations to their fellow members.

The problem arises because of a common practice of omitting withdrawal clauses from the constituent treaties of many international organizations—as if not wishing to mar the marriage with talk about divorce.

The prevailing view is that there exists no presumption in favor of the right of unilateral withdrawal, and that withdrawal is therefore permitted only if it is expressly provided for or can be inferred by implication from the constitutent document of the organization. For example, in several cases States which withdrew unilaterally were held liable for continued membership fees.

Despite the merits of this conclusion, it poses two extra-legal problems. In the first place, one may simply ask: "So what?" Will a State determined to withdraw from an international organization really be impressed by the feeble international legal prohibition? Second, and more important, the practice of withdrawal has diminished considerably. Much more common, and troubling, is the practice of States to remain members of the organization while evading their obligations in one way or another.

In dealing with this issue, instead of discussing international organizations in general, I shall concentrate exclusively on the European Economic Community (EEC). An entity defying a precise conceptual categorization, the EEC, in its internal structure and process, straddles the line between an international organization and a quasi-federation. Thus, the issues encapsuled in the problem of unilateral withdrawal offer different, more complex, and highly interesting perspectives of transnational practice and doctrine.

Withdrawal from an international organization, whether unilateral or negotiated, is a drastic step. It is not taken lightly, and it indicates that a State has been unable to express its voice adequately in the organization. In many cases, especially for smaller States, withdrawal carries many penalties. Generally, the withdrawing State will not only lose whatever direct benefits accrue from membership, but will also lose a forum from which to influence the behavior of others. It is not surprising therefore, that withdrawal, unilateral or negotiated, is relatively rare and adopted as a "last straw" measure.

The drastic nature of withdrawal, especially unilateral withdrawal, leads instead for a search by what we may now call "recalcitrant Member States" for other techniques to avoid unpalatable consequences of membership. Naturally, recalcitrance occurs once a Member State has failed to convince its partners by the normal decisional processes of the organization.

In the EEC it is possible to identify, in addition to the threat of withdrawal, three other such techniques:

—inactive membership, whereby a Member State retains formal membership but withdraws from any active participation in the life of the organization;

—overactive membership, whereby a Member State retains full membership but seeks to use this mem-

bership to obstruct (illicitly) the internal processes in such a way as to avoid the consequences of unpalatable policies;

—selective membership, whereby a Member State retains membership but seeks to avoid the fulfillment of the unpalatable obligations by simply disregarding them.

I shall analyze in turn each of the four techniques with particular regard to the legal constraints on such behavior.

1. Unilateral Withdrawal

Unlike the Treaty of Paris, which established the European Coal and Steel Community (ECSC) for a limited duration of 50 years, the Treaty of Rome, establishing the EEC, was in the language of Article 240 "concluded for an unlimited period."

Given the language of Article 240, must we deduce that, absent any contrary indication to be derived from the interpretation of the treaty, unilateral withdrawal would be prohibited? I shall first treat this formal legal question and then offer some political observations. In principle, the relevance of the formal legal analysis of the right to unilateral withdrawal from the EEC is very limited.

How then should one interpret the delphic Article 240? It should be remembered that the *travaux* of the Treaty of Rome have not been published and cannot therefore be used as an aid in interpretation. To be sure, the failed European Political Community, on the ashes of which the EEC Treaty was drafted, contained yet a stronger term: it was to be "indissoluble." Arguing *a-contrario*, it could be said that all that Article 240 EEC intended to convey was that the EEC was not to be limited in time (unlike the ECSC, for example, which is so limited); rather, the intention was that it be perpetual. However, it is doubtful how legitimate reliance on the European Political Community may be, and the absence of *travaux* indicate that in interpretation, more weight should be given to the text and the *economie* of the treaty rather than to an attempt to divine the intention of the original framers from extraneous sources.

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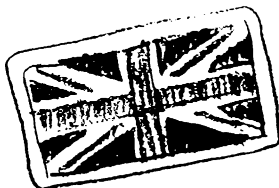


Regarding textual and contextual argument, the objective of indicating that the treaty was concluded for an unlimited period would have been achieved by silence. Normally, a treaty does not automatically expire unless a duration is explicitly or implicitly provided. If then Article 240 EEC is to receive a non-superfluous meaning, it must be that it is a non-withdrawal clause.

The Court of Justice of the European Community, which is the supreme judicial body charged with interpreting the Treaty of Rome, has not had occasion to give a direct response to this question. Its *dicta* in *Commission v. France* are, however, highly suggestive:

> The Member States agreed to establish a Community of unlimited duration, having permanent institutions vested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community.
>
> ...
>
> Power thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the member States alone, except by virtue of an express provision of the Treaty.
>
> ...
>
> To admit that the whole of Chapter VI [of the Euratom Treaty which for our purposes might be equated with the EEC] lapsed without any new provisions simultaneously coming into force would amount to accepting a break in continuity in a sphere where the Treaty, particularly by Article 2, has prescribed the pursuit of a common policy.

The judgment is not conclusive, but it indicates the preference of the Court for the interpretation restricting rather than enlarging the options for unilateral Member State action.

As mentioned above, the legal argument, fascinating or otherwise, is of little political relevance. In the first place, even though at least one Member State, the United Kingdom, seriously entertained withdrawal plans, and even conducted in 1975 an internal referendum one choice of which was exit, the passing years and the ever increasing economic and political enmeshment of the Member States reduce the feasibility of such an option.

Secondly, for that very same factor of high enmeshment, it would from a practical point of view be highly unlikely that a Member State could withdraw by a simple deposit of an instrument of withdrawal. The legal regime of the EEC extends deep into the commercial and other activities of individuals and undertakings within the Member States. A non-negotiated withdrawal could create such a level of legal and economic uncertainty as to be damaging to the withdrawing State's own interests.

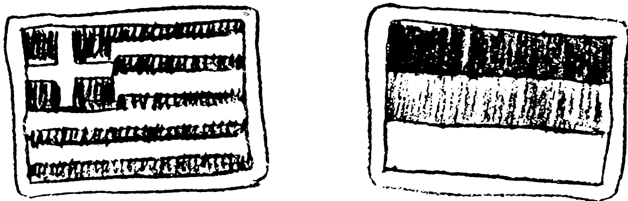
It would be safe, therefore, to make two politico-legal predictions. First, if a Member State were to decide that withdrawal would be in its best interests, it is unlikely that other Member States would use legal means to try to prevent such withdrawal. Such a decision would be greeted with regret or relief, but it

would be accepted. Second, it is unlikely that the withdrawing Member State would attempt to use such political license to withdraw abruptly. As the case of Greenland's withdrawal illustrates, there would probably be protracted negotiations with a view to a mutually satisfactory exit regime.

In conclusion, then, from both the legal and political points of view in the EEC, the issue of unilateral withdrawal is not critical.

2. Inactive Membership

Let us assume that a Member State of the EEC is faced with an intra-organizational problem which it is unable to resolve through the normal decision making mechanisms. If indeed the political reality of the EEC is such that unilateral withdrawal is an unlikely option for solving membership problems, Member States may resort to other "techniques."



A Member State unhappy with the prospective direction of a Community policy will use its membership rights to block an unfavorable outcome and will then rely on the failure of the Community to adopt a policy in order to take unilateral action.

The first would be the classical "inactive membership." This has happened once in the life of the Community in the famous, (or, as some would put it, infamous) crisis of the mid-1960s. In that instance, France withdrew from active participation in the European institutions, practicing the so-called "empty chair" policy.

France consciously used inactive membership as a means of applying pressure on her partners. There was no question of withdrawal. The technique eventually succeeded when a solution was found in the legally dubious Luxembourg Accord of 1966. Under this treaty, the six partners formally "agreed to disagree," but de-facto introduced the right of each Member State to assert a veto on Community decisions which contradicted a self-defined vital national interest.

From the legal point of view we may confine ourselves to two brief observations. First, during the period of inactive membership there was no question that France remained bound by all her treaty obligations in matters concerning the operation of the Common Market. There could be no question of trying to disengage from the standstill on the introduction of new customs or quantitative restrictions on imported goods and the like. Inactive membership simply meant that France would not participate in the on-going decision-making activity. Also, strictly speaking, if Community bodies in the absence of a French representative were to adopt binding measures, these measures *would be binding* on France. (In principle, this is no different from other international organizations. As mentioned above, the membership fees of inactive members continue to accrue.) Politically this would be unwise and indeed the other Member States sought a political resolution to the crisis.

Second, doubts may be expressed about the legality *within the Community context* of the very practice of inactive membership.

Article 5 of the Treaty of Rome provides:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

The provision is reminiscent of the duty of "federal loyalty" developed in the Federal Republic of Germany. There can be little question that the French action was a step which could jeopardize the attainment of the objectives of the treaty. In principle, France could have been "sued" by the Commission of the European Community under Article 169 of the treaty or by one or more other Member States under Article 171 EEC. Once again, politics and good sense prevailed. Such a legal action would only have exacerbated the situation and plunged the Community into an even deeper political crisis.

3. **Overactive Membership**

In order to introduce the rather inelegant term "overactive membership," recourse might be had to the famous definition of *Chutzpah.* The epitome of *Chutzpah* is illustrated by the case of the child who kills both his or her parents. When brought to justice, the youngster throws himself/herself before the Bench and pleads, "Mercy, I am an orphan."

This "technique" is much closer than the previous ones to the day-to-day political reality of the Community. By this technique, a Member State unhappy with the prospective direction of a Community policy will use its membership rights to block an unfavorable outcome and will then rely on the failure of the Community to adopt a policy in order to take unilateral action.

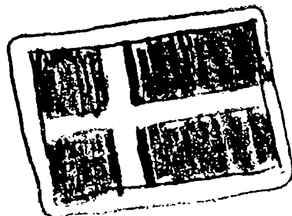
I shall illustrate this technique and the legal and political issues involved therein by reference to one paradigmatic case study, the case of *Commission v. United Kingdom.*

Article 102 of the Act of Accession (regulating all matters concerning the accession in 1973 to the EEC of Britain, Ireland, and Denmark) provides that

> [f]rom the sixth year after Accession at the latest, the Council [of Ministers of the EEC], acting on a proposal from the Commission [of the EEC], shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

This apparently dry and technical provision was of great political and economic moment. In principle, for the purposes of fishing, both national fishing grounds, including the 200-mile Exclusive Economic Zone, were

The avenues of inactive membership and overactive membership may yield very poor results to the recalcitrant partner.



to be considered Community fishing grounds with no discrimination among fishermen of the various Member States. The introduction of a common conservation policy was a crucial step towards the eventual elaboration of a more general common fisheries policy to be achieved by the end of 1982.

Until the deadline specified in Article 102 AA, Member States could impose their own conservation measures restricting fishing, subject only to some international obligations and a provisional Community regime. The Community fear was that Member States could use this license to impose restrictions which would indirectly, at least, favor their own fishermen.

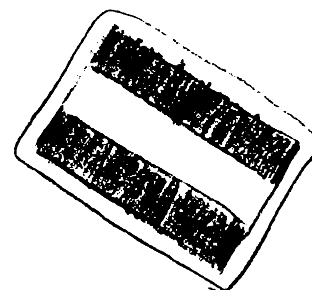
The Commission of the European Community duly made its proposals for common conservation measures at the beginning of 1979. Council, which is composed of the governmental representatives of the Member States, was unable to reach a common accord and adopted a further series of interim measures.

The United Kingdom informed the Commission that, in the light of this failure, and in order to protect its fishing grounds, it intended to introduce a series of unilateral conservation measures. These measures were in most respects very similar to those proposed by the Commission. The Commission indicated that it would need time to study these measures. The U.K. nonetheless brought the measures into force as of July 1, 1979.

In the language of the judgment:

> [t]he criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the Community, that the Council would have been in a position to adopt them in the form intended by the Treaty *if the United Kingdom had not itself blocked the decision-making process* in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the Community [emphasis added].

The recalcitrant Member State might be tempted by one further option: simply disregard those provisions of Community law which are not to its liking while continuing its membership.



This, then, was the situation upon which the Court was called to adjudicate. The British "orphan," in the face of a policy which was not to its liking, had not attempted to withdraw from the Community, nor even to "sulk" with an empty chair and "inactive membership." Instead, it *actively* sought to *inactivate* the Community process and thus pave the way for continued unilateral action.

The European Court of Justice was on the horns of a real dilemma. Let us review the options:

Option 1: In the face of the imperative language of Article 102 of the Treaty of Accession, it could simply hold that until such time as the Council could reach agreement on a regime of common conservation measures, no Member State could introduce unilateral measures. The advantage of such a ruling would be to provide the Member States in the Council with an incentive to "hurry up" and reach a common accord.

This, however, would be a dangerous path to take. The notoriously tortuous Community decision-making process could mean further lengthy delays. If it were not Britain, it could well be some other Member State which would, at the last minute, introduce objections. In the meantime, one of two things would take place: either, in the absence of adequate conservation measures, the fishing grounds would become depleted to the detriment of all concerned; or, one or more of the Member States would simply rebel at this last prospect and be pushed towards an open defiance of Community law. The latter possibility is an extremely rare occurrence which, indeed, at that time had never happened.

Option 2: The Court of Justice could rule that, given the failure of the Council to reach agreement and given

further the objective need of introducing conservation measures, Member States would be allowed to adopt unilateral provisions.

This would be an equally dangerous path to tread. Such a ruling would remove any incentive from the Member States to achieve agreement on common policies since in every field there will always be at least one partner which would prefer the unilateral way. *"Chutzpah"* would be judicially sanctioned.

The Court's eventual judgment was truly Solomonic.

In the first place it confirmed that

> since the expiration ... of the transitional period laid down by Article 102 [AA], power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.

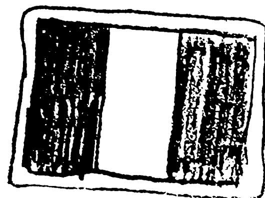
Then, while taking notice of the failure of the Council of Ministers to act on the proposal of the Commission, the Court further stressed that

> the transfer to the Community of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.

However, the Court recognized that it would not be acceptable to make it

> entirely impossible for the Member States to amend existing [national, or interim Community] conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere.

Generally, in public international law, the most effective sanction is the fear of reciprocal reprisals.



How then to square the circle? The Court proceeded to hold that

> [b]efore adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure.

This decision achieves the best of all worlds. It gives a way to ensure that fishing grounds should not become depleted; it preserves the Community interest represented by the Commission; and it provides an incentive for the Member States in the Council to adopt a definitive policy. Under the ruling of the Court, absent such a Council policy, each Member State would have to abide by the rulings of the Commission. By contrast, the Council itself may introduce amendments to the proposals of the Commission.

This is not the place to analyze expansively and critically the reasoning which allowed the Court to arrive at this decision. It is sufficient for present purposes to cite again from the judgment one cornerstone of the Court's rationale:

> According to Article 5 of the Treaty, Member States are required to take all appropriate measures to facilitate the achievement of the Community's task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. This provision imposes on the Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.
>
> ...
>
> As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required...except as part of a process of collaboration with the Commission....

It would seem therefore not only that the EEC Member States are precluded from unilateral withdrawal, but also that the avenues of inactive membership and overactive membership may yield very poor results to the recalcitrant partner. There can be little question that membership in the EEC is very onerous indeed.

4. Selective Membership

The recalcitrant Member State might be tempted by one further option: simply disregard those provisions of Community law which are not to its liking while continuing its membership. Indeed, this is an option which is fairly common in current international life; the notorious weaknesses of international enforcement mechanisms render this option particularly attractive. Generally, in public international law, the most effective sanction is the fear of reciprocal reprisals. For example, a State not according another State the benefits of certain rules of the law of the sea might find itself denied the same benefits. This type of sanction is unavailable within the Common Market. A differentiated regime of countervailing measures among the Member States in the face of alleged or real violations would have two serious consequences. It would

destroy the basic idea of creating a common market place of production factors, and it would also penalize innocent individuals who are among the main beneficiaries of the Common Market. In this respect, a system of reprisals by one or more Member States faced with another partner's failure to fulfill obligations would be as unthinkable as it would be for states in the U.S. to introduce countervailing measures against each other.

What responses then has the EEC developed to deal with the recalcitrant Member State practicing "selective membership"? The EEC has charted a course which goes well beyond any similar experience in other international organizations and which makes it extremely difficult for the Member State to adopt the technique of selective membership. For this the Community relies on its system of judicial review.

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The hierarchy of norms within the EEC is typical of a non-unitary system. The higher law of the Community is of course the treaty itself. Neither Community organs nor Member States may violate the treaty in their legislative and administrative actions. The Community, however, also has extensive legislative capacity whereby the Council of Ministers, on a proposal by the commission, may promulgate regulations, directives, and decisions. These measures, thousands of which have been promulgated over the last three decades, are binding in law and are *supreme* over conflicting Member States' law.

Not surprisingly then, the Community features a double-limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: 1.) the measures of the Community itself (acts of the Council and Commission) which are reviewable for conformity with the treaties; and, 2.) acts of the Member States which are reviewed for their conformity with Community law and policy, including the above-mentioned secondary legislation.

In the context of our discussion of attempts by Member States to practice selective membership by disregarding those obligations which are not to their liking, the effectiveness of the second set of measures assumes critical importance. I shall focus here, then, only on that aspect of judicial review.

Both the Commission of the EEC and individual Member States may, in accordance with Articles 169-172 EEC, bring an action against a Member State for failure to fulfill its obligations under the treaty. In general, failure to fulfill an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. The very existence of a non-optional and *exclusive* judicial forum for adjudicating these types of disputes places the Community above many international organizations. The role of the Commission is even more special. As noted by one commentator:

> [u]nder traditional international law, the enforcement of treaty obligations is a matter settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent community body, the Commission, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State.

At the same time, the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring.

i.) The political nature of the procedure. In the first place, the decision of the Commission and/or a Member State to bring an action against an alleged violation by another Member State will often be influenced by other (extraneous) political considerations. The Commission might decide that it does not wish to threaten delicate on-going negotiations and Member States might not wish to precipitate an international crisis. Moreover, the Commission, as required by the infringement procedure, will strive to reach a friendly settlement with the infringing Member State. This settlement might not fully remedy the infringement legally. Finally, the Commission might be particularly reluctant to bring an action against a violation committed by a national judicial decision.

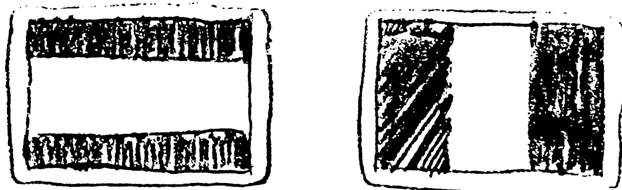
ii.) The problem of monitoring Member State infringements. Given the vast number of Community measures, it is simply impossible for the Commission to keep tabs on all practices of the Member States with a view to scrutiny and possible judicial action.

iii.) The appropriateness of Article 169 for small violations. It is unrealistic to expect the Commission to put the entire legal machinery into full swing in the face of minor violations. Article 169 would seem more appropriate for dealing with flagrant violations of some political consequence.

iv.) The lack of real enforcement. In most cases, either the prospect or actual commencement of infringement proceedings is sufficient to terminate a violation, and even more so, an actual judgment by the Court condemning the violation. These judgments, however, are merely declaratory. There is no army to enforce them nor any real sanction in the event that a judgment is disregarded. The record of compliance with decisions of the Court by Member States is remarkable. But there are several instances when judgments were disregarded which highlight this weakness.

These weaknesses are, to an extent, remedied by judicial review which takes place *within the judicial system of the Member States in collaboration with the European Court of Justice.* Article 177 EEC provides *inter alia* that when a question concerning the interpretation of the treaty is raised before a national court, the latter may—and if it is a court against whose decision there is no further judicial remedy then it must—suspend the national proceedings. It may then make a request for a preliminary ruling on the correct interpretation of the treaty to the European Court of Justice in Luxembourg. Once this ruling is made, it is remitted back to the national court which will give, on the basis of the ruling, the decision in the case before it. The national courts and the European Court are integrated thus into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face, the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. However, very often the factual situation in which Article 177 comes into play is when an individual litigant pleads in the national court that a rule or measure or national practice should not be applied because it violates the Community obligations of the Member State. The attempts of Member States to practice selective membership by disregarding their obligations thus come regularly to be adjudicated before their own national courts. On remission to the European Court, the latter renders its interpretation of Community law



A Member State should not be allowed to practice the *alternative techniques* for avoiding obligations. If a Member State cannot accept these obligations, it is better that it be allowed to withdraw, even unilaterally.

within the factual context of the case before it. Theoretically a division exists whereby the European Court may not itself rule on the *application* of Community law. But as one scholar (Rasmussen) notes:

> It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline...it provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.

What is important, indeed crucial, in the procedure, is the fact that *it is the national court which renders the final judgment.* The main result of this procedure is the binding effect and enforcement value which such a decision has on a Member State—coming from its own courts—as opposed to a similar decision handed down in declaratory fashion by the European Court under the previously discussed 169 procedure.

This takes care of the most dramatic weakness of that procedure, the ability of a Member State, *in extremis*, to disregard the strictures of the European Court. Under the 177 procedure this is not possible. A Member State—in our Western democracies—cannot disobey *its own courts.*

The other weaknesses of the 169 procedure are also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions; small as well as big violations come to be adjudicated; and in terms of monitoring, the Community citizen becomes merely a decentralized agent for monitoring compliance by Member States with their treaty obligations.

Conclusions

This analysis of the European Community system has shown that the reluctant Member State wishing to practice any of the three avoidance techniques—inactive membership, overactive membership and selective membership, as an alternative to withdrawal, faces in the Community serious legal and political constraints for such behavior.

We may now return to our point of departure—the legality of unilateral withdrawal—and re-examine it as a matter of policy rather than in strict legal terms. Underlying the classical analysis was the notion of the universal international organization. In such organizations the very fact of large and pluralistic membership has a high value in itself. The truncated and diminishing membership of the League of Nations remains a valid experience till this day. Even if States disregard some of their membership obligations, it is probably still worthwhile for the international community as a whole to retain as wide a membership as possible in the universal organization.

This is not the case in an organization such as the EEC. The EEC could not function, and its very basic objectives would be irreparably compromised, if Member States could retain their membership and yet systematically avoid their many and day-to-day obligations. In these circumstances, we come to a conclusion which overturns accepted wisdom of international law. The conclusion must be that a Member State should not be allowed to practice the *alternative techniques* for avoiding obligations. If a Member State cannot accept these obligations, it is better that it be allowed to withdraw, even unilaterally.

A profile of Professor Weiler appears on pages 7-8.