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THE LEGAL PERSONALITY OF THE EU

There has been much debate on whether the European Union (EU) has the necessary international legal personality to conclude international agreements and consequently incur duties and liabilities. Unlike the Treaty of Rome, which established the European Community (EC), the Treaty of Maastricht (TEU), which established the EU, did not explicitly confer international legal personality, nor did the Member States take up the invitation to do so in the subsequent amending Treaties of Amsterdam and Nice. Those supporting the argument that the European Union has legal personality have advanced innovative theses to justify their position (e.g. by extension from the EC), whilst opponents have sought refuge in the classic theories on the establishment of legal personality ("will" and "objective") to oppose such developments.

The Member States' actions have not assisted the situation. Although not prepared to confer legal personality expressly on the EU, they have nevertheless amended the TEU (Article 24) so as to enable the EU Council to conclude treaties in matters concerning the Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCC), the 2 non-EC pillars. Article 24 agreements are concluded by the Council but it is not clear from its wording whether they are concluded on behalf of the EU or on behalf of the Member States.

Article 24 states:

'When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title [CFSP], the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. The Council acting unanimously on a recommendation from the Presidency shall conclude such agreements. No agreement shall be binding on a member state whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them. The provisions of this Article shall also apply to matters falling under Title VI [PJCC].'

Indeed, until recently, CFSP agreements have neatly side-stepped the issue and avoided a head-on collision. However, in April 2001 the EU Council adopted Decision 2001/352/CESP [2001] OJ L125/1, approving an Agreement concluded between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY. This is the first time that an international agreement has clearly and explicitly been concluded between the EU and a third party. On earlier occasions there has always been an element of doubt as to the precise identity of the parties bearing rights and duties under such agreements. For example, in the 1994 Memorandum of Understanding establishing the EU's administration of Mostar, the EU was not formally a party to the agreement. The Memorandum was stated to be an agreement between the Member States of the EU "acting within the framework of the Union," the Member States of the Western European Union, etc, etc. Similarly in the Dayton Agreement, the General Framework Agreement for Peace in Bosnia and Herzegovina, the EU Presidency merely signed as one of the witnesses.

Several questions arise which need to be addressed. Apart from constitutional ones (such as which EC/EU institutions should negotiate EU agreements which contain foreign policy aspects? Who should issue the mandate? Who supervises the negotiations? Who resolves the clashes between the Presidency and the European Commission?), questions also arise as to the judicial control and legal responsibility for breach of these agreements. Is this an example of leaving to the courts what governments of EU Member States find expedient to leave unresolved?

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