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Austrian Membership in the European Communities

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I. INTRODUCTION

It is ironic that the European Communities' 1992 program should coincide with demands for mass democracy in Eastern Europe. Precisely as some Eastern Europeans demand more democratic political forms, the Western Europe of Brussels has bid the cumbersome legislative, judicial, and administrative structures of national democratic government farewell for a more flexible and technically sophisticated approach to government. As a result, the Western European response to developments in the East is mixed. We find not simply a mixture of encouragement and anxiety, but an uncertain blend of historical honor and the sense that we've been there before and don't want to go back.

The democracy of mass parties—in both its Western and Eastern forms—seems strangely antiquated. Western Europe has, in different ways in different countries, replaced democratic legislation with the entertainment of elections, coalition negotiations, polls, and the rhetoric of public opinion. Administration is no longer an affair of bureaucratic action within formally delegated competences. It is a much more transient, flexible, and technocratic process. Even the judiciary seems to have transcended its privileged role as keeper of the dogmatics of constitutional limitation. And nowhere are these developments more apparent than in the European Community (EC).

From this perspective, the Eastern Europeans' demands for participation in putatively "western" institutions pose a problem. The problem is not simply geopolitical—that movement too far towards the West may destabilize a series of delicate national and ideological accommodations between Berlin and the Urals. It is not simply that West Germany may be distracted from the project of Europe-building or that deeper unification may once again be undone by the temptations of breadth. Nor is it entirely the anticipation that the political

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balance of right and left in Western Europe would be unsettled were membership expanded eastward. The chief problem is that Eastern reformers are demanding a form of democracy that is increasingly incompatible with the structure of the European Communities.

For all these reasons, Western Europeans are right to be wary about admitting new members from the East. At the same time, however, it has been difficult for those outside the Communities to imagine a form of association that would not be dominated by the image of national membership. Almost nowhere do we find sustained attention to the development of a central European entity that could absorb and stabilize the economic and political demands of Eastern Europeans. Discussions about a renewed European Free Trade Association (EFTA) stretching from Finland to Austria remain stalled by the inability of current EFTA members to develop a common platform for negotiations with the European Economic Community (EEC).

Nowhere is this impasse more evident than in Austria, where the debate about membership in the Communities has become an *idée fixe* for those who align themselves with a whole range of Western economic and political values. As often happens when political imagination gets stuck, the debate about Austrian membership has not been a particularly sophisticated one. The economic consequences of membership are debated with crude statistics about current trade with the Communities rather than with detailed assessments of potential alternatives. And political discussion has largely been cut off from any realistic assessment of alternative political relations with the East and West.

Instead, a great deal of energy has been devoted to the somewhat arcane legal question of the compatibility of membership in the European Communities with Austrian "neutrality." Yet the result has not been a careful consideration of the neutrality issue. Instead, "Austrian neutrality" has figured either as an article of faith, broadly condemning association with the West, or as a thinly disguised question of political possibility which might be translated "Will the Soviet Union permit it?"

As a result, listening to the discussion, one cannot help but be struck by two facts. First, the neutrality/membership format limits the discussion of alternative arrangements that might be less national in focus. Second, it is hard to believe that neutrality is not being invoked by both sides in a somewhat cynical fashion. Opponents of membership have invoked neutrality to avoid stating exactly what institutional form relations with the evolving East should take. Proponents of membership have cited neutrality as a way of strengthening their bargaining position with the Communities in the expectation

that once membership has been achieved, neutrality will wither happily away.

Despite the poverty of the current discussion, we think the relationship between neutrality and Austrian membership in the European Communities could provide a useful starting point for developing a more realistic assessment of both the current state of politics in the European Communities and the changes that membership would bring to nations from the East. It is clear that Austria, like Finland, would be key to any new international structure in Eastern Europe, bridging the gap between the European Communities and demands in the East for more democratic regimes. The aim of this Article is to infuse some realism into the debate over the compatibility of neutrality Austrian membership in the European Community as a way of starting a conversation about alternative forms of political and economic cooperation in Eastern Europe.

Joining the European Communities means a large-scale and largely irreversible transformation of a state's substantive law, governmental structure, and international status. The Community legal framework reaches deeply into the political and economic autonomy of the independent sovereign state. European Community membership would so dramatically transform both the constitutional structure of Austrian government and its legal capacity for an independent defense that Austria's international legal status as a "permanent neutral" would be jeopardized.

It should be clear, however, that were the Austrian people to view such transformations as desirable, international law would not stand in its way. Austria is under no international legal obligation to remain a "permanent neutral." Legally, Austria remains free, with appropriate notice, to reconfigure its constitution and to attempt to renegotiate its international status. Other states may or may not be willing to recognize a new legal status of neutrality consonant with EC membership. But membership would so rupture the continuity of settled reciprocal obligations entailed by the status Austria has maintained since 1955 that other states would be entitled to disregard any continuing Austrian claims to a special neutral status.

There is a large legal literature both on Austrian permanent neutrality and on the relationship between membership in the European Communities and the requirements of neutrality and independence.[1]

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1. *See, e.g.*, S. ALLARD, RUSSIA AND THE AUSTRIAN STATE TREATY (1970); F. ERMACORA, ÖSTERREICHS STAATSVERTRAG UND NEUTRALITÄT (1957); H. FIEDLER, DER SOWJETISCHE NEUTRALITÄTSBEGRIFF IN THEORIE UND PRAXIS 242–48 (1959); B. KLIMENKO, DEMILITARIZATSIYA NEITRALIZATSIYA V. MEZHDUNARODNOM PRAVE 213–15 (1963); M. ROTTER, DIE DAUERNDE NEUTRALITÄT (1981); A. VERDROSS, DIE IMMERWÄHRENDE NEUTRALITÄT ÖSTER-

In stressing membership's incompatibility with Austria's traditional independent and neutral status, the authors are substantially in agreement with most of this prior literature. Indeed, recent developments in the Community—most particularly the 1987 Single European Act—have reinforced the wisdom of this tradition.

II. AUSTRIAN PERMANENT NEUTRALITY

A. General Framework

To retain its status as a "permanent neutral," Austria is obliged, as a matter of international law, to retain and defend its sovereign independence, to maintain the capacity comprehensively to defend its neutrality and independence, and to refrain from any peacetime legal arrangement that would call into question its ability and intention to remain neutral in time of war. Each of these legal requirements—independence, capacity for a comprehensive defense, and preservation of wartime neutrality in peacetime—must be interpreted in light of the specific history of Austrian permanent neutrality.

The international legal institution of permanent neutrality is a customary one that has evolved through centuries of state practice.[2] It is developed in each case on the basis of a unilateral declaration by the state seeking the status of permanent neutrality that is respected, observed, and recognized through the express or implied practices and statements of other states.[3] Emphasizing either the customary or the contractual basis for permanent neutrality to the exclusion of the other misconstrues the issue.[4] Constructed on the basis of reciprocal com-

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REICHS (1978); S. VEROSTA, DIE DAUERNDE NEUTRALITÄT (1967); DIE NEUTRALEN IN DER EUROPÄISCHEN INTEGRATION (H. Mayrzedt & H. Binswanger eds. 1970). The majority of Austrian scholars of international law agree that membership in the European Communities is incompatible with retention of permanent neutrality status. *See* Hummer & Schweitzer, *Das Problem der Neutralität—Österreich und die EG—Beitrittsfrage*, 43 ZEITSCHRIFT FÜR INTERNATIONALE POLITIK 501 (1988).

2. *See generally* Lalive, *International Organizations and Neutrality*, 24 BRIT. Y.B. INT'L L. 72, 87–88 (1947). For a comprehensive survey of the history of neutrality principles see Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 85 RECEUIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL [RCADI] (No. 1) 394 (1952).

3. As more fully explained below, recognition of the declaration is essential, though, contrary to the assertions of some writers, it need not be expressed in the form of a multilateral treaty. *See, e.g.*, Kunz, *Austria's Permanent Neutrality*, 50 AM. J. INT'L. L. 418 (1956).

4. Treating Austrian neutrality as a purely "contractual relation under international law" oversimplifies both the public international law tradition of permanent neutrality within which Austria's status was formulated and the history of reciprocal recognitions and expectations that have shaped Austria's status. *See, e.g.*, NEUTRALITY AND NON-ALIGNMENT IN EUROPE 48 (H. Neuhold ed. 1982). On the other hand, treating permanent neutrality as a customary matter of general principles overlooks the specificity of the Austrian declaration and its acceptance. Permanent neutrality involves both a mutual undertaking established by a unilateral declaration and its acceptance, on the one hand, and the customary framework provided by the international

mitments and expectations, the status of a permanent neutral, although capable of relatively precise definition in any given case, is a fragile one. It can be abandoned by the state concerned. If abandoned or unilaterally altered in material respects, the status need no longer be respected by other states. For example, should other states in peacetime have reason no longer to expect that Austria could remain neutral in war, the status of permanent neutrality would lapse. In this sense, the permanent neutral is under constant pressure to live up to its past conduct and declarations. Consequently, the specific legal requirements of Austrian permanent neutrality can be specified only on the basis of the history of that neutrality.

B. The Historical Context of Austrian Permanent Neutrality

1. The Austrian Declarations of 1955

Austria unilaterally declared its intention to remain permanently neutral in a series of statements over the summer and fall of 1955. The clearest and most important text was the constitutional law

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law of neutrality on the other. *See* A. VERDROSS, *supra* note 1, at 33. Verosta reflects this approach: "Eine einseitige Deklaration der dauernden Neutralität durch einen bestimmten Staat ist völkerrechtlich unerheblich; erst die Annahme des Offertes eines Staates, dauerende Neutralität üben zu wollen, durch die anerkennenden Staaten begründet . . . den völkerrechtlichen Sonderstatus der dauerenden Neutralität . . . ." S. VEROSTA, *supra* note 1, at 5.

Indeed, this ambiguity characterized permanent neutrality from the very beginning. The expression "permanent neutrality" was first used by the committee reporting to the Congress of Vienna on the status of Switzerland. Although it is generally argued that the neutrality of Switzerland developed out of its neutralization during the Congress of Vienna (1815), the country had maintained a policy of neutrality since its establishment as an independent state under the peace treaty of Münster (1648). *See* A. VERDROSS, *supra* note 1, at 11. Indeed, the actual policy of the Swiss Confederation between 1648 and the Napoleonic wars inspired the Treaty of Vienna of 1815. The August 1914 Swiss Declaration asserted that the Swiss Federation had "voluntarily determined to depart in no respect from the principles of neutrality . . . which the powers signatory of the treaties of 1815 have formally recognized." F. DEAK & P. JESSUP, 2 NEUTRALITY LAWS, REGULATIONS AND TREATIES 996 (1939).

A similar complex relationship between treaty obligations and customary international law also emerges in the case of Austria's neutrality. It is usually said that Austria's permanent neutrality stems from international recognition of its declaration in the Neutralitätsgesetz of October 10, 1955, *infra* note 5. Yet this declaration gives no specific substantive description of this neutrality. This substance developed through the history of Austrian neutrality from 1955 on. Austria's foreign policy and other decisions, such as the amendment of its constitution to specify a national defense capability, shaped the substance of this neutrality. Such steps created expectations on the part of the international community that now constitute the legal content of Austrian neutrality. See the various debates of the Austrian parliament on European integration (*Integrationsdebatte*) that developed—step by step—the content of Austrian permanent neutrality. Most decisive in this context was the debate regarding the 1972 agreement between the EC and the Republic of Austria. *See* J. SPÄNI-SCHLEIDT, DIE INTERPRETATION DER DAUERNDEN NEUTRALITÄT DURCH DAS SCHWEIZERISCHE UND DAS ÖSTERREICHISCHE PARLAMENT 165–74 (1983); *see also* F. ERMACORA, 1 DAS ÖSTERREICHISCHE WEHRRECHT 2 (1980).

enacted on October 26, 1955, which came into force on November 5 of that year.[5] The law reads in relevant part:

> 1. With the object of the lasting and permanent maintenance of its independence from without and the inviolability of its territory, as well as in the interest of maintaining internal law and order, Austria declares of its own free will its perpetual neutrality, and is resolved to maintain and defend it with all means at its disposal.
>
> Austria, in order to secure these objectives, will join no military alliances and will not permit the establishment of military bases of foreign states on its territory.[6]

Like all international declarations and treaty provisions, these declarations must be interpreted in the light of their context and preparation—here, the context of wider international negotiations and undertakings with respect to Austria's independence and sovereignty.[7]

2. The International Community's Response

Other states promptly acknowledged Austria's declaration of permanent neutrality.[8] For the United States, France, the Soviet Union, and the United Kingdom, this recognition was a corollary to their signature of the Austrian State Treaty of the same year. Indeed, the international community's reaction and expectations with respect to the Austrian declarations can be understood only in the context of the negotiations leading up to the Austrian State Treaty.[9]

The restoration of Austrian sovereignty began—as the Preamble to the State Treaty indicates—as early as 1943. In November of that year, the four allied powers expressed their intention to restore Austrian independence after the war.[10] Although the four occupying pow-

5. Bundesverfassungsgesetz über die Neutralität österreichs, 1955 Bundesgesetzblatt für die Republik Österreich [ÖBGBl] 211 (Aus.) [hereinafter Neutralitätsgesetz].

6. English translation from H. DEGENHART, TREATIES AND ALLIANCES OF THE WORLD (A. Day 3d ed. 1981).

7. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340, at art. 31.

8. *See* 2 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 864–65 (1956) (recording recognition by Czechoslovakia on Dec. 1, 1955, and by France, the U.K., the U.S. and the Soviet Union as of Dec. 6, 1955); *see also, e.g.*, the 1955 Swedish-Austrian agreement recognizing the permanent neutrality of Austria, AKTSTYCKEN UTGIVNA AV UTRIKESDEPARTEMENTET, 1:E:7 REGISTER ÖVER SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER 57 (1985).

9. *See, e.g.*, Stourzh, *The Austrian State Treaty and the Origins of Austrian Neutrality*, in NONALIGNMENT AND NEUTRALITY 9 (K. Misra ed. 1982); Kunz, *Austria's Permanent Neutrality*, 50 AM. J. INT'L L. 418, 421 (1956).

10. *See* 30 DEP'T ST. BULL. 307 (Mar. 1, 1954).

ers agreed on a draft Austrian state treaty as early as 1949, final negotiations remained deadlocked until 1955. Initially, the sticking point was the Soviet demand that withdrawal of troops from Austria be linked to a German peace treaty. At the Berlin Conference of 1954—after the formation of NATO and steps toward the rearmament of West Germany—the Soviet Union proposed that an Austrian treaty be concluded that would neutralize Austria while allowing final withdrawal of Soviet troops to await a German peace treaty.[11]

The United States rejected this proposal. Secretary of State Dulles called instead for a withdrawal of military forces within a fixed period, stating:

> A neutral status is an honorable status if it is voluntarily chosen by a nation. Switzerland has chosen to be neutral. . . . Under the Austrian State Treaty as heretofore drafted, Austria would be free to choose for itself to be a neutral state like Switzerland. Certainly the United States would fully respect its choice in this respect. . . . However, it is one thing for a nation to choose to be neutral and another thing to have neutrality forcibly imposed upon it by other nations as a perpetual servitude.[12]

The stalemate was broken in February 1955 when Soviet Foreign Minister Molotov conceded the possibility of an early withdrawal of Soviet troops if Austria were to undertake to adopt a position of permanent neutrality and if the treaty provisions prohibiting *Anschluss*—political or economic union with Germany—were satisfactory.[13] Bilateral talks between the USSR and Austria led to the signing of the Moscow Memorandum on April 15, 1955.[14]

The Moscow Memorandum set forth mutual undertakings in contemplation of conclusion of a State Treaty. Austria undertook, *inter alia*, to "make a declaration in a form which will obligate Austria to practice in perpetuity a neutrality of the type maintained by Switzerland," to "take all suitable steps to obtain international recognition for the declaration" as confirmed by the Austrian Parliament, and to seek and accept a guarantee from the four powers of the inviolability

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11. *Id.* at 309; *see also* B. EWING, PEACE THROUGH NEGOTIATION: THE AUSTRIAN EXPERIENCE 56–65 (1966).

12. 30 DEP'T ST. BULL. 309 (Mar. 1, 1954).

13. *See* Larson, *Crisis Prevention and the Austrian State Treaty*, 41 INT'L ORG. 27, 44–49 (1987); *see also* P. LYON, NEUTRALISM 167–68 (1963). The U.S. interpreted the Soviet approach as an effort by the Soviet Union to hold out to Germany the possibility of reunification on condition of permanent neutrality as an alternative to membership in NATO and the then inchoate Warsaw Pact. *See, e.g.*, A. COTTERELL & J. DOUGHERTY, THE POLITICS OF THE ATLANTIC ALLIANCE 57–59 (1964).

14. Moscow Memorandum (Apr. 15, 1955), English text at 32 DEP'T ST. BULL. 1011–13 (June 20, 1955).

and integrity of the Austrian state territory.[15] The Soviet Union undertook to sign the treaty without delay and to withdraw its troops no later than December 31, 1955.[16] It was also "prepared to recognize the declaration concerning the neutrality of Austria" and "to participate in a guarantee by the four powers of the inviolability and integrity of the Austrian State Territory—according to the model of Switzerland."[17]

The Moscow Memorandum was transmitted to the United States, France, and the United Kingdom, each of which welcomed the call to convene a conference to finalize the text of the treaty.[18] One month later, the Austrian State Treaty was signed. The Treaty reads in relevant part:

> Preamble
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> Whereas the Allied and Associated Powers and Austria are desirous . . . of concluding the present Treaty to serve as the basis of friendly relations between them, thereby enabling the Allied and Associated Powers to support Austria's application for admission to the United Nations Organization . . . .
>
> Article 1
> Re-Establishment of Austria as a Free and Independent State
>
> The Allied and Associated Powers recognize that Austria is re-established as a sovereign, independent and democratic state.
>
> Article 2
> Maintenance of Austria's Independence
> The Allied and Associated Powers declare that they will respect the independence and territorial integrity of Austria as established under the present Treaty.
>
> . . .
>
> Article 4
> Prohibitions of Anschluss
> 1. The Allied and Associated Powers declare that political or economic union between Austria and Germany is prohibited. Austria . . . shall not enter into political or economic union with Germany in any form whatsoever . . . .

15. *Id.* § 1, ¶¶ 1–5.
16. *Id.* § 2, ¶ 2.
17. *Id.* § 2, ¶¶ 4–5.
18. *U.S. Note to U.S.S.R.*, Apr. 22, 1955, *reprinted in* 32 DEP'T ST. BULL. 733 (May 2, 1955); 1955–56 ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SURVEY OF INTERNATIONAL AFFAIRS 125–26 (1956).

Article 13
Prohibition of Special Weapons
1. Austria shall not possess, construct or experiment with: (a) any atomic weapon, (b) any other major weapon adaptable now or in the future to mass destruction and defined as such by the appropriate organ of the United Nations [or other enumerated weapons systems] . . . .

C. *The International Legal Framework for Austrian Permanent Neutrality*

1. The Relevant Legal Instruments

Commentators have considered the relationships among the Austrian declaration, the Moscow Memorandum, and the State Treaty at length.[19] From the point of view of international law, however, the matter is quite straightforward. The basis for Austria's obligations remains its own unilateral declaration, in so far as it has been—and continues to be—accepted or recognized by the international community. Austria remains free to abandon its declaration—either explicitly or by conduct that leads other states to doubt its commitment or capacity to remain permanently neutral. The historical context of its obligations—including the Moscow Declaration and the State Treaty—is relevant only in so far as it shaped either its own intentions or the expectations of other states.

The Austrian State Treaty is often misunderstood to have "neutralized" Austria.[20] The traditional international "guarantee of neutrality," however, referred to the legal undertaking by one or more states—the "guaranteeing powers"—to intervene militarily to protect a "neutralized" state from military aggression.[21] Such arrangements were neither fully voluntary nor universal. Often they were directed against a particular threat. Moreover, a state neutralized in this sense was not necessarily expected to defend itself. Indeed, these arrangements were open to abuse by guaranteeing powers who might intervene on the pretext of enforcing neutrality.

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19. *See, e.g.*, A. VERDROSS, *supra* note 1, at 28–35; M. WHITEMAN, 1 DIG. INT'L L. 342–55 (1963); Galina, *Problema Neitraliteta v Sovremennom Mezhdunarodnom Prave*, SOVETSKII EZHEVODNIK MEZHDUNARODNOVO PRAVA 1958, at 192, 200 (1959); Stourzh, *supra* note 9, at 9.

20. Brierly, for example, maintains that Austria "was neutralized in 1955 by Agreement with the Great Powers." J. BRIERLY, THE LAW OF NATIONS 137 (6th ed. 1963). "Neutralization," he writes, "involves no impairment of independence. A neutralized state is merely one whose integrity has been permanently guaranteed by international treaty, conditionally on its maintaining a perpetual neutrality except in its own defence." *Id.* at 136; *see also* Q. NGUYEN, P. DAILLIER & A. PELLET, DROIT INTERNATIONAL PUBLIC 847 (3d ed. 1987) (interpreting the Austrian State Treaty as a guarantee of permanent neutrality).

21. *See, e.g.*, C. SANGER & H. NORTON, ENGLAND'S GUARANTEE TO BELGIUM AND LUXEMBOURG 26–27 (1915); C. WICKER, NEUTRALIZATION 7 (1911).

The Austrian State Treaty contains no reference to a "guaranteed" neutrality. Although the four powers had agreed to respect an Austrian declaration of permanent neutrality, they felt that an explicit guarantee would be consistent neither with full Austrian independence nor with the system of collective security established within the United Nations framework.[22] Any independent obligation to intervene would have been inconsistent with the signatories' obligations under the United Nations Charter to refrain from the threat or use of force against the territorial integrity or political independence of other states except in the context of either self-defense or United Nations-sponsored enforcement actions. Consequently, the State Treaty promised only the "maintenance of Austria's independence" through a commitment to "respect the independence and territorial integrity of Austria . . . ."[23]

This approach accords with contemporary international law, for the older "guarantee of neutrality" has been reinterpreted since the establishment of the United Nations collective security system. Individual or specific "guarantees" have been replaced by a general agreement to respect the territorial integrity and sovereign independence of all states. Imposed neutrality has been replaced by the legal institution of "permanent neutrality"—a legal status chosen by an independent state.[24] The Austrian State Treaty, then, cannot be seen to have had the legal effect of earlier international impositions of neutrality.[25]

The Moscow Memorandum has also been treated—particularly by Soviet authors—as the source of an Austrian obligation to remain

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22. U.S. Secretary of State Dulles' report to the U.S. Senate accompanying the transmission of the Treaty for ratification declared "[i]t should . . . be clearly understood that none of the signatory powers to the treaty conditioned the conclusion of the Austrian Treaty or the implementation thereof on a guaranty of Austria's territorial integrity." 32 DEP'T ST. BULL. 1011 (June 20, 1955).

23. Austrian State Treaty, 1955 ÖBGBl 152 (Aus.), art. 2.

24. *See* G. SCHWARZENBERGER & E. BROWN, MANUAL OF PUBLIC INTERNATIONAL LAW 47 (6th ed. 1976), who write:

> A sovereign state may commit itself in an internationally binding form to remain permanently neutral or not to alienate its independence. This undertaking can be strengthened by other subjects of international law agreeing among themselves, and with the state directly concerned, to respect or guarantee collectively (*joint* guarantee) or collectively and severally (*joint* and *several* guarantee) the neutrality or independence of such a state.

Notwithstanding the basic difference between multilaterally imposed neutralization and permanent neutrality, some recent developments display a tendency to confuse these concepts. For example, Costa Rica has proclaimed that it desires a multilateral guarantee of its unilaterally declared neutrality. *See* Espiell, *La Neutralidad Permanente de Costa Rica y el Sistema Interamericano*, 39 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 7, 9 (1987). This program of "self-neutralization" has evidently been improvised to deal with Costa Rica's present practical inability to satisfy the legal criterion that defines "permanent neutrality" as armed neutrality rather than as disarmed non-alignment.

25. *See, e.g.*, Zemanek, *"Zeitgemässe" Neutralität*, in DIE SCHWEIZ IN EINEN SICH WANDELNDEN WELT 9, 12–13 (1877).

neutral.[26] It appears, however, that all of the specific undertakings set forth in the Moscow Memorandum have been fully executed and merged into the State Treaty or into the international arrangements created by recognition of Austria's declaration of permanent neutrality. As a result, following the entry into force of the State Treaty and the enactment of the Austrian constitutional law declaring Austria's permanent neutrality, the Moscow Memorandum of itself does not entail any obligations at international law. This approach accords with the Soviet Union's express recognition of Austrian independence in the State Treaty. Moreover, Austria has consistently rejected Soviet attempts to claim a unilateral authority to interpret Austria's undertaking.[27]

Consequently, the Austrian State Treaty and the Moscow Memorandum must be read in conjunction with the unilateral and voluntary declaration of permanent neutrality made by Austria and recognized by the international community. At the same time, however, the Austrian unilateral declaration and the international recognitions and acceptances that followed must be interpreted in the light of the State Treaty and the Moscow Memorandum. An accurate formulation of the central legal issue must focus on this reciprocal structure of contingent obligations and expectations.

Although Austria's status as a permanent neutral entails certain precise legal obligations, it is not obliged to *remain* a permanent neutral. International law simply specifies the contents of the Austrian commitment so long as it wishes to remain entitled to claim the status of permanent neutral.[28] These obligations are to be determined by

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26. *See, e.g.*, Kunz, *supra* note 3, at 420; Mikheev, *Vopros o Sovmestimocti Statusa Postoyannovo Neitraliteta s Obyazannostyami Chlena OON*, SOVETSKII EZHEVODNIK MEZHDUNARODNOVO PRAVA 1960, at 167, 171 (1961). *But see* Borodulin, *K Voprosu o Statuse Postoyannovo Neitraliteta*, SOVETSKII EZHEVODNIK MEZHDUNARODNOE PRAVA 1966–67, at 195, 196 (1968) (not mentioning the Moscow Memorandum and grounding Austrian permanent neutrality in the State Treaty and recognition of Austria's constitutional enactment on neutrality).

27. For example, the Austrian government replied to a statement by Krushchev during a 1960 visit to Vienna that Austria's neutrality would be violated by entry into the Common Market or by passage of American rockets over its territory by emphasizing that Austria would decide what would constitute a violation and what countermeasures might be in order. *See* P. LYON, *supra* note 13, at 172. Recent Soviet statements suggest a continued effort to ground Austria's obligation in the State Treaty or the Moscow Memorandum. *See* 40 CURRENT DIG. SOVIET PRESS, 20, 35 (1988) (quoting a September 1988 Izvestia article declaring that "for Austria to 'flee' to the EEC would mean not only betrayal of its EFTA partners but also a violation of the State Treaty and a renunciation of its policy of permanent neutrality").

28. That international legal recognition of Austria's unilateral declaration was legally effective to establish contingent rights and duties under international law is supported by the weight of authority. The Soviet statement of the rule accords with the approach of the free market states:

> There are . . . unilateral declarations in which a state officially announces the legal norms of its conduct in order to have them recognized by other states. An example is provided

looking to the context of expectations and commitments undertaken by Austria and recognized by other states. The Moscow Memorandum and the State Treaty, along with their negotiating history, are relevant—indeed indispensable—in specifying the precise contours of Austria's obligations.

2. The Relevance of the Swiss Analogy

This approach to the relevant legal materials can be well illustrated by considering the relevance of Swiss neutrality to the Austrian case.[29] Neither the Austrian Declaration nor international responses to it explicitly refer to Swiss practice. The Austrian State Treaty is similarly silent with respect to the Swiss model. The Moscow Declaration, however, refers to "a neutrality of the type maintained by Switzerland."[30]

Although the Moscow Memorandum does not compel Austria to follow Swiss precedent in every respect, it remains relevant in interpreting Austria's obligations under its own declaration. The reference to Switzerland in the Moscow Memorandum evidences an understanding that Switzerland provided the only relatively clear example of the sort of duties the international community would expect Austria to observe if it sought to obtain and maintain recognition as a permanently neutral state. Moreover, it is clear that the Austrian declaration was understood and accepted against a background understanding in which the Moscow Memorandum and the Swiss experience played a prominent part.[31]

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by the Declaration of Permanent Neutrality of Switzerland. Once it is recognized by other states, such a declaration is legally binding on the state that makes it and on other states. G. TUNKIN, INTERNATIONAL LAW 162 (2d ed. 1986). Of course, to interpret the "legal norms" of permanent neutrality as involving an absolute and irrevocable impairment of sovereign independence, as some commentators do, rather than as a conditional structure of reciprocal rights and duties, would contravene the essential purpose of the legal institution—preservation of political self-determination.

29. The relevance of the Swiss experience has been variously characterized in the literature. *See, e.g.*, Neuhold, *The Permanent Neutrality of Austria*, in NEUTRALITY AND NON-ALIGNMENT IN EUROPE 44, 56 (K. Birnbaum & H. Neuhold eds. 1981) ("Switzerland and Austria are subject to the same obligations . . . [but] are free to part company in the shaping of neutrality policies"); *see also* S. VEROSTA, *supra* note 1, at 79–83 (Swiss precedents important).

30. Moscow Memorandum, *supra* note 14, § 1, ¶ 1.

31. Although not dispositive, it is significant that the Moscow Memorandum is referred to in the Annex to the State Treaty.

> Article 36
> Forces of Annexes
>
> The provisions of the Annexes shall have force and effect as integral parts of the treaty.
>
> Article II
> Having regard to the arrangements made between the Soviet Union and Austria and recorded in the Memorandum signed at Moscow on April 15, 1955, Article 22 of the present Treaty [on disposition of German Assets in Austria] shall have effect subject to the following

Had Austria intended to depart from the Swiss model, the obligations of the Moscow Memorandum would not have been discharged by the conclusion of the State Treaty nor merged into the institution of Austrian permanent neutrality brought into being by the Austrian declaration and subsequent state practice. Moreover, to have mentioned Switzerland in the Austrian constitutional law or the State Treaty would have impaired Austria's independence both to make the declaration and to determine its terms. The Western powers took the position that they would respect a neutrality declaration only if it reflected Austria's free choice.

Consequently, the general obligations and expectations surrounding a Swiss type of neutrality must be distinguished from the vagaries of Swiss political practice. Permanent neutrality of the Swiss type is an international legal status whose particular obligations are not unilaterally determined by Switzerland but have emerged by a gradual process of international consensus on the basis of the Swiss, and increasingly, the Austrian, experience.[32]

D. Austrian Duties

To retain its status as a permanent neutral, Austria must fulfill the legal obligations established on the basis of its unilateral declaration by the reciprocal expectations and recognitions of the international community. For Austria, this means three things. First, it must preserve—and be seen to preserve—its sovereign independence. Second, Austria must maintain—and be seen to maintain—the capacity and intention comprehensively to defend its independence and neutrality. Finally, it must refrain in peacetime from actions that would draw into question its capacity and commitment to remain neutral in time of war.

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provisions: [the Annex goes on to clarify the relation between Memorandum and Treaty provisions on the scope and timing of transfers of economic assets].

32. The distinction between the idiosyncratic Swiss practice and the general legal standard that has emerged through recognition of the claims of states such as Austria can be illustrated by the question of membership in international organizations. For many years the Swiss government took the position that participation in the United Nations might jeopardize its claim to permanent neutrality, both because membership might cause it to be called upon to join in collective security actions and because it might be compelled to express political positions apparently hostile to some states. The negotiating process culminating in the Austrian State Treaty, by contrast, made clear that none of the parties considered Austrian membership in the United Nations incompatible with permanent neutrality. The general recognition of Austria's claim to permanent neutrality firmly established that the Swiss practice with respect to U.N. membership is not dispositive at international law. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 171 & n.169 (2d ed. 1966); *see also* Robertson, *Switzerland Rejects the United Nations*, 12 FLETCHER F. 312, 315–20 (1988).

The key to each of these duties is its reciprocal nature. Because permanent neutrality is a status that is established and preserved through the interaction of declared intention and acceptance, Austria must live up to its declared intention to the extent necessary to maintain the acceptance of other states. New circumstances or activities will be compatible with Austrian permanent neutrality to the extent that they conform to the Austrian declaration as it has been understood and interpreted by Austria and to the reasonable expectations of other states that have recognized Austrian permanent neutrality.

1. The Obligation to Preserve Austrian Independence

Austria's primary obligation as a permanent neutral is to maintain its independence. By definition, only an independent state can remain a permanent neutral. Were a state to alienate its independence, its ability to remain disengaged from conflict would disappear. As a matter of international law, the duty to remain independent is measured by a state's ability to determine its own position on all issues relevant to war and peace.[33]

Moreover, in the Austrian case, independence has been a central preoccupation behind both the Austrian declaration of permanent neutrality and the acceptance of that declaration by other powers.[34] Austria has placed even more emphasis on its sovereign independence than has Switzerland.[35] This is evidenced by the insistence that Austrian permanent neutrality be freely chosen; by the Moscow Memorandum's conditioning of Austria's neutrality declaration upon withdrawal of all foreign troops and recognition by other states of its independence; and, perhaps most importantly, by the State Treaty's *Anschluss* prohibition, which reiterated a longstanding insistence by the international community on Austria's "inalienable" independence.[36] This history indicates that the general obligation of a per-

33. S. VEROSTA, *supra* note 1, at 13.

34. This duty is recognized in article 1 of the Neutralitätsgesetz, *supra* note 5.

35. Historically, the German annexation of 1938 and the State Treaty's prohibition of Anschluss account for the emphasis on independence. *See* H. FIEDLER, *supra* note 1, at 243.

36. The *Anschluss* prohibition must be read against the background of the Advisory Opinion of the Permanent Court of International Justice in the Austro-German Customs Union Case, interpreting a more general provision in article 88 of the 1919 Treaty of St. Germain:

> the independence of Austria . . . must be understood to mean the continued existence of Austria within its present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other . . . . By "alienation" . . . must be understood any voluntary act by the Austrian State which would cause it to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even by replaced by such will.

Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41, at 45–46

manent neutral to retain its political, economic, and military independence has a particular significance in Austria's case.[37]

The particular contours of Austria's obligation to remain independent can be seen by considering its membership in international organizations. The Swiss have generally regarded membership in international organizations with trepidation. Yet, as we have seen, Austria is under no obligation to refrain from membership in the United Nations. Quite the contrary—support for its membership in the United Nations was part of the process by which its neutrality was recognized and its independence underscored. At the same time, however, Austria is under a more specific and express obligation to avoid supranational organizations that demand some renunciation of sovereign independence. Similarly, it must exercise much more care in assessing the precise demands that will be made upon it by international organizations that remain intergovernmental but are not universal.[38]

2. The Obligations to Maintain the Capacity and Intention for a Comprehensive Defense of Austrian Neutrality and Independence

Austria's second major obligation as a permanent neutral is to maintain the capacity and intention comprehensively to defend its neutrality and independence.[39] The international legal institution of "permanent neutrality" differs from "guaranteed neutrality" precisely in the location of the obligation to defend both the neutrality and the territorial independence of the neutral state. Just as a state whose

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(Sept. 5, 1931). Although this independence is compatible with such international legal obligations as Austria may from time to time undertake—such as the obligation occasioned by its claim of permanent neutrality—any alienation of military, political, or economic independence to Germany is prohibited. *See id.* at 57–59 (Separate Opinion of Judge Anzilotti).

37. B. BROMS, ITAEVALLAN PYSYVAEN PUOLUEETTOMUUDEN KEHITYS JA JAESNYYS YHDISTYNEISSAE KANSAKUNNISSA [The Development of Austria's Permanent Neutrality and Membership in the United Nations] (1968).

38. Thus Austria, like Switzerland and Sweden, has participated in EFTA, a regional international organization, because its purposes are strictly economic and it does not require that any sovereign authority be alienated to it. The European Communities, by contrast, are supranational; their authority extends beyond the substantive reach of EFTA. *See, e.g.*, G. PERRIN, LA NEUTRALITÉ PERMANENTE DE LA SUISSE ET LES ORGANISATIONS INTERNATIONALES 64–98 (1964); Neuhold, *Austrian Neutrality on the East-West Axis*, in NEUTRALITY AND NON-ALIGNMENT IN EUROPE, *supra* note 4, at 68–70. This distinction has not been disputed by the Soviets. *See, e.g.*, 3 MEZHDUNARODNIE OTNOSHENIYA POSLE VTOROI MIROVOI VOYNI 276–79 (D. Melnikov & D. Tomashevskii eds. 1965).

39. F. ERMACORA, 20 JAHRE ÖSTERREICHISCHE NEUTRALITÄT 79 (1975). It follows that the Austrian and Swiss permanent neutrality differ from those forms of neutrality not based on a system of armed defense. Costa Rica, which declared its permanent neutrality in 1983, is the most recent example of unarmed neutrality. Those authors who try to establish an analogy between Austrian and Costa Rican permanent neutrality have not limited this effort to the "permanence" of the status. *See* Espiell, *supra* note 24, at 10.

neutrality has been "guaranteed" need not remain independent nor freely have chosen its neutrality, so also it may rely upon the "guarantors" for defense and need not develop an autonomous—universal or neutral—defense of its own. The permanent neutral, in sharp contrast, is understood freely to have selected its neutral status and must retain and be prepared to defend its independence and neutrality without reliance upon guaranteeing powers.[40] Only by so doing can it make good or reiterate in practice its promise to stay aloof from war regardless of where the war commences.

Since 1955, there has been a general consensus as to Austria's duty to defend its independence and neutrality. The Austrian declaration was coupled with a commitment to an autonomous defense.[41] The Swiss understanding of neutrality obliges the neutral to maintain armed forces to ensure neutrality and independence.[42] From the beginning, debates on Austrian neutrality focused on this obligation precisely because the four powers had agreed only to respect Austrian neutrality. They had not "guaranteed" it.[43]

The particular shape of the Austrian defense obligation must be read in the relationship between Austrian practice since 1955 and the acceptance and expectations of the international community. Three components of Austria's defensive obligation are of particular significance.

First, the Austrian approach to defense and especially the defense doctrine of 1975 emphasizes "defense" duties in both war and peace. It has always been thought that the obligations of the permanent neutral in war would structure and condition the defense that would be maintained in times of peace.[44]

Second, it has always been clear that Austria would maintain a comprehensive defense of its independence and neutrality. By comprehensive defense is understood a defense of its governmental struc-

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40. *See* Erklärung des Schweizerischen Politischen Departments, Nov. 26, 1954, tit. 2(b), SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 195–96 [hereinafter Swiss Declaration] ("Verpflichtung, die Neutralität bzw. die Unabhängigkeit zu verteidigen."). This duty is generally recognized by Austrian commentators on permanent neutrality and was introduced into article 9a of the Austrian Constitution, Bundes-Verfassungsgesetz 1920 in der Fassung von 1929 [hereinafter B-VG], by article I(1) of the Bundesverfassungsgesetz of June 10, 1975, ÖBGBl 368 (Aus.).

41. In 1955, "[t]he two coalition Parties agreed on the need for an effective army, based on general conscription, to defend Austrian neutrality, although the Socialists had some difficulty in overcoming pacifist scruples . . . ." 36 REP. FOR. AFF. 143 (General Council of the Commonwealth Parliamentary Association 1955).

42. *See* Swiss Declaration, *supra* note 40, tit. 2(b).

43. *See* S. VEROSTA, *supra* note 1, at 106; *see also* J. SPÄNI-SCHLEIDT, *supra* note 4, at 175–79 (Dr. Rudolf Kirchschläger, later President of the Federal Republic, and Dr. Franz Karasek of the Österreichische Volkspartei in the course of debates over the 1970 budget).

44. F. ERMACORA, *supra* note 4, at 2.

ture and autonomy that mobilizes the political, economic, social, and spiritual resources of the country. Austria has never sought simply to maintain a *pro forma* military defense posture, but to demonstrate its determination to defend its choice of economic and political system from external pressure by all means at its disposal.[45] As a result, issues of economic and political independence have consistently been thought crucial to Austrian neutrality. Indeed, the history of negotiations between the European Communities and Austria, Switzerland, and Sweden concerning various schemes of cooperation provides good guidance to the historical meaning of the requirement that the permanent neutral manage its economic relations consistent with its independence.[46]

This broad defensive posture received its most dramatic expression in the constitutional codification of an "integrated defense" (*Umfassende Landesverteidigung*) in 1975.[47] The actual defense doctrine integrates efforts in four sectors—military, civil, economic, and spiritual—in order to maximize Austrian defense capacities. This codification culminated two decades of development and shapes the expectations of the international community with respect to Austria's claim to permanent neutrality. Although not of independent normative force at international law, these constitutional obligations should guide assessment of the meaning of the defensive duties Austria incurs as a permanent neutral in accordance with the State Treaty and its own unilateral declaration of neutrality.

Third, and finally, a complete defense of Austria's independence and neutrality has always meant a civil defense of its constitutional form of government. Partly as a consequence of its experience under the Hitler regime and partly as a statement that its neutrality would continue to be the free expression of sovereign will rather than an imposition of the occupying powers, the Austrian government and the international community have associated Austrian independence and neutrality with a constitutional, federal, and democratic form of government.[48] Indeed, in Austria's case, the "defense-constitution is identical with the institution of national defense."[49]

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45. Neutralitätsgesetz, *supra* note 5, at art. 1 ("Österreich wird diese mit allen ihm zu Gebote stehenden Mitteln aufrechterhalten und verteidigen.").

46. *See* Öhlinger, *Verfassungsrechtliche Probleme*, in EUROPAPOLITIK DER REST-EFTA-STAATEN ÖSTERREICH, SWEDEN, SCHWEIZ, FINLAND, ISLAND, PORTUGAL 243 (H. Mayrzedt & H. Binswanger eds. 1972).

47. B-VG, *supra* note 40, at art. 9a.

48. *See* Austrian State Treaty, *supra* note 23, at arts. 8, 9 & 10; *see also* Verfassungsgesetz vom 1 Mai 1945 über die Wiederherstellung des Rechtslebens in Österreich (Rechts-Überleitungs-Gesetz), art. 1, Statts-Gesetzblatt [ÖStGBL] 6 (Aus.).

49. F. ERMACORA, *supra* note 4, at 7.

3. The Obligation to Refrain in Peace from Calling into Question Its Commitment and Capacity to Remain Neutral in War

International law specifies the duties of a neutral state in times of war.[50] A state becomes a permanent neutral at international law when it promises to remain a neutral in any future conflict. This promise is effective to create the status of permanent neutrality only when and to the extent that it is accepted by the international community. So long as both the promise and the acceptance remain valid, a state remains a permanent neutral.

Consequently, should the permanently neutral state conduct itself in peace so as to draw into question its commitment and capacity to remain neutral in the event of war, the status of permanent neutrality would lapse. This is clear regardless of whether such a change is interpreted as an implicit renunciation of the original declaration or as a material change justifying changed expectations on the part of the international community.[51]

Unlike the international law of neutrality developed early in this century at the Hague, the general status of "permanent neutrality" is the product of customary international law.[52] On the basis of state practice, international law has come to specify the international legal requirements imposed on the permanent neutral in peacetime as a series of secondary duties.[53] Maintenance of the status of permanent neutral is conditional upon continued satisfaction of these minimal secondary duties.

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50. *See* Convention Concerning the Rights and Duties of Neutral Powers and Persons in War on Land, Oct. 18, 1907, U.S.T.S. 540, 36 Stat. 2310 [hereinafter Hague V]; Convention Respecting the Rights and Duties of Neutral Powers in Maritime War, Oct. 18, 1907, U.S.T.S. 545, 36 Stat. 2415 [hereinafter Hague XII]; *see also* A. VERDROSS, *supra* note 1, at 44–47. On the distinction between "simple" and "permanent" neutrality, see generally Chaumont, *Nations Unies et Neutralité*, 89 RCADI (No. 1) 23–29 (1956).

51. To characterize permanent neutrality as a purely contractual institution is to view material breaches of secondary duties by the ostensible neutral as violations of the principle of *pacta sunt servanda* (agreements and stipulations of the parties to a contract must be observed). BLACK'S LAW DICTIONARY 999 (5th ed. 1979). From this perspective, it is primarily Austria's own past practice, as witnessed and accepted by other states, which constrains its capacity unilaterally to reinterpret the content of its legal status. Because permanent neutrality is grounded in a mutual concern about predictability, the objective constraints upon subjective redefinition of Austria's duties relate to the fact that self-contradiction undermines trust. Ultimately, therefore, the same reliance interest that informs the general principle of *pacta sunt servanda* also informs permanent neutrality and supplies it with content.

52. This is best expressed by Verdross, who addresses the law of neutrality as the sum of rights and duties of public international law: "Neutralitätsrecht eines dauernd neutralen Staates den Inbegriff der völker-rechtlichen Rechte und Pflichten." And later: "zwar ist auch das Neutralitätsrecht veränderlich, seine änderung kann aber nur durch zwischenstaatlichen Konsens erfolgen." A. VERDROSS, *supra* note 1, at 16.

53. *See* Verdross, *Die dauernde Neutralität österreichs und die Organisation der Vereinten Nationen*, 1955 JURISTICHE BLÄTTERVEREINIGT MIT GERICHTS-ZEITUNG 346. *See generally* G. SCHWARZENBERGER & E. BROWN, *supra* note 24, at 47–48, 176–83.

Austria's secondary duties can be specified on the basis of the Constitutional Declaration of 1955, the State Treaty, and subsequent state practice.[54] The Swiss analogy is particularly helpful here, for the quite precise 1954 Swiss specification of the secondary duties of permanent neutrality was by far the best-known benchmark for the development of reciprocal expectations in the Austrian case.[55] The purpose of the secondary duties is to maintain the expectations of the international community that the state in question will remain neutral should war break out.

General public international law recognizes four secondary duties in the Austrian case.[56] First, Austria is obliged as a permanent neutral not to begin a war and not to participate in wars between third states.[57] This duty goes beyond the general public international law renunciation of aggression and of the threat and use of force.[58] As a permanent neutral, Austria has renounced any aggressive designs and must retain a purely defensive military posture to protect the credibility of that renunciation. To that end, purely offensive weapons—and in the Austrian case, nuclear weapons particularly—have been seen as impermissible.[59]

Second, Austria must refrain from any action that would undercut its intention and capacity to mount an independent defense.[60] In peace, it must retain exclusive domestic control over the entire range of capacities necessary to mount a credible defense in time of war.[61] Legal arrangements or institutional memberships that would undercut this ability would erode Austria's claim to permanent neutrality.

Third, Austria must do nothing in peacetime that could reasonably be expected to impair its ability to avoid belligerency in case of war.[62] More than mere political statements or transient policies must be shown.[63] It is clear, however, that legal undertakings, alliances, and other collective arrangements from which the Republic could not extricate itself in time of war must be scrutinized quite carefully to

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54. *See* F. ERMACORA, *supra* note 39, at 77. Ermacora rejects the proposition that Austria's 1955 declaration of neutrality was modelled after the Swiss example. He accepts, however, the secondary duties as essential to permanent neutrality.

55. *See id.* at 72–73; *see also* Verdross, *supra* note 53, at 346.

56. *See* A. VERDROSS, *supra* note 1, at 47–48.

57. *See, e.g., id.* at 47; G. SCHWARZENBERGER & E. BROWN, *supra* note 24, at 177–78; Borodulin, *supra* note 26, at 195–96.

58. *See, e.g.*, U.N. CHARTER art. 2, para. 4.

59. *See generally* Austrian State Treaty, *supra* note 23, pt. 2, especially art. 15.

60. *See* A. VERDROSS, *supra* note 1, at 48.

61. *See, e.g.*, S. VEROSTA, *supra* note 1, at 80–81. *See generally* Fischer, *Invulnerability Without Threat: The Swiss Concept of General Defense*, in TOWARD NUCLEAR DISARMAMENT AND GLOBAL SECURITY: A SEARCH FOR ALTERNATIVES 525–26 (1984).

62. *See* A. VERDROSS, *supra* note 1, at 48; *cf.* Swiss Declaration, *supra* note 40, tit. 2.

63. *See* A. VERDROSS, *supra* note 1, at 48; *see also* S. VEROSTA, *supra* note 1, at 91.

determine whether other states might reasonably come to expect that Austria would not be able to remain neutral in war.

The 1975 constitutional amendment introducing article 9a of the Bundes-Verfassungsgesetz extended Austria's secondary duties to include the obligation to maintain and defend a democratic constitution. In particular, the article ensures that control over issues of importance to the defense of Austria will not become concentrated in an executive not responsible to its people.[64]

Although these duties, like all restrictions on sovereignty, are to be interpreted strictly, this formulation is hardly helpful.[65] A more accurate and satisfying legal formulation would focus on the function served by these obligations in maintaining the reciprocal structure of permanent neutrality. The secondary duties must be strictly interpreted in accordance with the purpose of maintaining the reciprocal expectations necessary to sustain the status of permanent neutrality.[66]

III. EUROPEAN COMMUNITY MEMBERSHIP AND AUSTRIAN INDEPENDENCE: FOREIGN POLICY AND DEFENSE

Membership in the European Community entails a significant transfer to the Community of authority over foreign affairs and other matters inseparable from defense and security concerns. To a large extent, future developments in this area will be determined unilaterally by organs of the European Communities. At a minimum, when such decisions are taken by the Court of Justice, by the Commission within the sphere of its delegated powers, or by the Council acting by qualified majority, Community membership would impair Austrian independence. Taken together, these changes would violate Austria's

64. Articles 8, 9, and 10 of the Austrian State Treaty (on a democratic, republican form of government; prohibition of Nazi organizations; and legislative procedure) and the Rechtsüberleitungsgesetz of 1954 are sources for this duty.

65. Caratasch, *The Permanent Neutrality of Switzerland*, in NEUTRALITY AND NON-ALIGNMENT IN EUROPE, *supra* note 29, at 13, 16.

66. Some commentators, moreover, have sought to distinguish between the law of neutrality and the political concept of neutralism and nonalignment. This distinction has been used to separate Austria's political freedom of action with respect to pursuing a neutral foreign policy from its legal obligations as a permanent neutral. But this formulation generates more confusion than clarity. In fact, as a permanent neutral, Austria remains completely free to shape and revise all aspects of its foreign policy. It is completely free to abandon permanent neutrality—indeed permanent neutrality compels it to maintain and defend its absolute sovereign independence. Such limits as exist arise solely from the historically and practice-based expectations of other powers. Therefore, it is to these expectations that we should look to determine the legal duties incumbent upon the permanent neutral, rather than to a dubious conceptual distinction between law and politics. *See, e.g.*, F. ALTING VON GEUSAU, EUROPEAN PERSPECTIVE ON WORLD ORDER 140–41 (1975); A. VERDROSS, *supra* note 1, at 48; S. VEROSTA, *supra* note 1, at 91.

obligations as a permanent neutral—its primary obligations to retain its independence and its capacity for an independent and comprehensive defense as well as its secondary obligations to refrain in peacetime from calling into question its capacity or intention to remain neutral during war.

A. Foreign Relations and European Political Cooperation

The European Community has international competence with respect to any matters exclusively within the internal competence of the Communities.[67] The precise contours of this exclusive competence continue to evolve as the internal competences of the Community develop.[68] In any given case, therefore, Community competence is determined by Community law.[69]

Until the passage of the Single European Act (SEA) in 1986, the distinction between the foreign affairs competences of the Community as such and procedures for coordinating foreign policy initiatives among Member States was relatively clear. Since the passage of the SEA, however, the coordination of national foreign policy, too, has been institutionalized.[70] Although the institutional mechanism of Eu-

67. Donckerwolcke v. Procureur de la Republique (Free Circulation), Case 41/76, Preliminary Ruling of Dec. 15, 1976, 1976 Eur. Comm. Ct. J. Rep. 1921, 1937, ¶¶ 31–32; Opinion 1/75 of Nov. 11, 1975 (Understanding on Local Cost Standard) 1975 Eur. Comm. Ct. J. Rep. 1355, 1356. *See generally* Pescatore, *External Relations in the Case Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615 (1979).

68. A classic example is the Community's authority to develop and pursue a common commercial policy under article 113 of the Treaty of Rome. *See* Timmermans, *Division of External Powers between Community and Member States in the Field of Harmonization of National Law—A Case Study*, in DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS 15–28 (V. Timmermans & L. Volker eds. 1981) (discussing extension of implied powers). *See generally* D. Nagler, The European Community and its Treaty-Making Power in International and Community Law 226–341 (S.J.D. diss., Harvard Law School 1985).

69. Under article 164 of the Treaty of Rome, the European Court of Justice is responsible for the interpretation of community law. Treaty Establishing the European Economic Community, 298 U.N.T.S. 3, art. 164 (1957) [hereinafter Treaty of Rome]. The Court has adopted an expansive and progressive approach to the issue.

> To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of Community law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions by the Community institutions.

Officier van Justitie v. Kramer, Preliminary Ruling of July 14, 1976, 1976 Eur. Comm. Ct. J. Rep. 1279, 1308, ¶¶ 19–20.

70. European Political Cooperation grew from efforts since the 1970's to coordinate foreign policy within the Community. *See* Bruckner, *Foreign Affairs Power and Policy in the Draft Treaty Establishing the European Union*, in AN EVER CLOSER UNION 127, 130–31 (R. Bieber, J. Jacqui & J. Weiler eds. 1985); Freestone & Davidson, *Community Competence and Part III of the Single European Act*, 23 COMMON MKT. L. REV. 793 (1986).

ropean Political Cooperation (EPC) remains formally distinct from the European Communities in several respects, it obligates members to consult and inform each other about foreign policy matters and to "endeavor jointly to formulate and implement a European foreign policy" so as to "ensure that common principles and objectives are gradually developed and defined."[71] The Single Act declares that

> the High Contracting parties consider that closer cooperation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to coordinate their positions more closely on the political and economic aspects of security.[72]

The precise line between matters suitable for discussion in the context of European Political Cooperation and in the Council itself remains obscure. As a formal legal matter, EPC remains more consensual, consultative, and cooperative than the Community itself, despite the substantive obligation to "coordinate" policy.[73] Moreover, the foreign affairs competence of the Communities might be limited by the right of each Member State under article 223 to withhold information "which it considers contrary to the essential interests of its security" and to "take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material" or by article 224's recognition that a Member State might need to take "measures . . . in the event of serious internal disturbances affecting the maintenance of law and order in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."[74]

While undoubtedly significant, these formal legal questions are not central to the issue of Austria's permanent neutrality. These provisions are directed toward harmonization of national defense initiatives with

71. Single European Act, 30 O.J. EUR. COMM. (No. L 169) 1, at art. 30(1), 30(2)(c) (1987).

72. *Id.* art. 30(6)(a).

73. The public records of EPC decisions are primarily in the form of explanations of U.N. votes and statements of EC positions in international fora and responses to questions from parliament members. The subject matters range from disarmament, human rights problems, and terrorism to cultural and educational matters. *See, e.g.*, Doc. 86/222, Question No. 316/86 (Concerning the Importance of Community Support for the Firm American Line Towards the Soviet Union). The noncommittal response to the question illustrates the lack of transparency in EPC affairs. 2 EUR. POL. COOPERATION BULL. 53–54 (1986). Within the framework of EPC, it has already been acknowledged that the movement to 1992 will require increased integration of police, customs, and immigration enforcement and political asylum policies. 10 BULL. EUR. COMM. 75–77 (1986).

74. Treaty of Rome, *supra* note 69, at arts. 223(1)(a)–(b), 224.

and within the objectives and requirements of the European Communities. And like other safeguard clauses in European Community law, articles 223 and 224 are to be interpreted by the European Court, which has taken a teleological approach to interpretation directed at closer integration of the Member States.[75] Article 224 establishes the obligation to members to "consult one another for the purpose of enacting in common the necessary provisions" to prevent unilateral national security measures from disrupting the functioning of the Community.[76] Thus, the primary focus of article 224 is not to protect national jurisdiction but to protect Community interests.

It would be a serious misreading of the intentions and historical roots of the European Political Cooperation mechanism, moreover, not to see it as part of a long-term effort to increase the foreign affairs competence of the Community.[77] For the international community considering the compatibility of EPC with Austrian claims about its intention and capacity to remain permanently neutral, it would be only prudent to read these efforts by the European Community broadly and expansively.[78]

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75. This approach is required by article 225 of the Treaty of Rome, which enables Member States to submit complaints to the Court when it is believed that unilateral measures under articles 223 or 224 prejudice the common goals of the Community.

76. Treaty of Rome, *supra* note 69, at art. 224.

77. The progressive integration of EC foreign policy competence and EPC culminated in the Single European Act's declaration that "the external policies of the European Community and the policies agreed in European Political Cooperation must be consistent." Single European Act, *supra* note 71, at art. 30(5). This process of convergence is well illustrated by the Community's approach to economic sanctions. For example, at the time of the Falklands/Malvinas War, consultations in European Political Cooperation led to a Council decision suspending all imports of Argentine products into the EEC. *See Council Regulation (EEC) No. 877/82 of 16 April 1982 Suspending Imports of All Products Originating in Argentina*, 25 O.J. EUR. COMM. (No. L 102) 1 (1982). *See generally* Kuyper, *Community Sanctions Against Argentina: Lawfulness Under Community and International Law*, in ESSAYS IN EUROPEAN LAW AND INTEGRATION 141 (D. O'Keefe & H. Schermars eds. 1982). The Council also adopted sanctions against the Soviet Union following its intervention in Afghanistan, although there was disagreement within the Community on the extent to which sanctions should have been implemented at the Community as opposed to the national level. *See Council Regulation (EEC) No. 596/82 of 15 March 1982 Amending the Import Arrangements for Certain Products Originating in the USSR*, 25 O.J. EUR. COMM. (No. L 72) 15 (1982). *See generally* M. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE (1987).

78. The relevant texts from the Hague Communiqué of December 2, 1969, to the European Parliament Resolution of European Political Cooperation of July 9, 1981, along with commentary of important European leaders, are compiled in EUROPEAN POLITICAL CO-OPERATION (EPC) (4th ed. 1982). The direction of this development can be seen quite readily in the role to be played by the European Parliament in EPC under the Single Act:

> The High Contracting Parties shall ensure that the European Parliament is closely associated with European Political Cooperation. To that end the Presidency shall regularly inform the European Parliament of the foreign policy issues which are being examined within the framework of Political Cooperation and shall ensure that the views of the European Parliament are duly taken into consideration.

Single European Act, *supra* note 71, at art. 30(4). The Parliament's Committees on Political Affairs and on External Economic Relations have played an active and expanding role, including

B. Western European Union

The Western European Union (WEU), revived at the behest of France in 1984, is composed of seven of the most populous and powerful of the twelve EC members: Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom. The WEU Platform on European Security Interests, adopted at the Hague on October 27, 1987, provides a clear statement of the members' self-perception as a group mediating between NATO on the one hand and the EC of the Single European Act on the other.

> We recall our commitment to build a European Union in accordance with the Single European Act . . . . We are convinced that the construction of an integrated Europe will remain incomplete as long as it does not include security and defence.
>
> [T]he security of the Western European countries can only be insured in close association with our North American allies. The security of the alliance is indivisible.
>
> It is our conviction that a more united Europe will make a stronger contribution to the [NATO] Alliance, to the benefit of western security as a whole. We are resolved to strengthen the European pillar of the alliance.
>
> [We shall] concert our policies on crises outside Europe in so far as they may affect our security interests.[79]

Although the legal roles of the WEU members are formally distinct from the EPC and EC, their ambition to integrate both substantively and institutionally suggests an ever closer harmonization of economic, political, and military policies. As a practical matter, the same individuals set and implement foreign policy in the European Council, in the WEU framework, and in NATO.

The formal legal distinctions between the competences of the Economic Community, European Political Cooperation, and the Western European Union do not alter the fact that economic and political decisions on matters of security are inextricably bound up with military planning. For this reason, the twelve Member States of the European

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drawing up proposals for common action on disarmament and other security matters. *See* Progress Toward European Integration 25–33 (1987) WG(VS1)/4437E; *see also* J. WEILER, THE EUROPEAN PARLIAMENT AND ITS FOREIGN AFFAIRS COMMITTEES 60 (1982).

79. WEU Doc. 1122, 27 I.L.M. 269, 270–72 (1988).

Communities—including Ireland—find it impossible to maintain a credible stance of military nonalignment.

For a permanent neutral, the most serious difficulty would be association with the outcomes of the quasi-federal decision-making process which these institutional arrangements seem, in the light of their historical development, determined to pursue. It would be difficult, as a factual matter, for a single neutral member to defeat the intention of the de facto WEU caucus within the EC to achieve "swift adoption of common positions and the implementation of joint action."[80] Although President Jacques Delors has stated in an interview that the "time is not yet ripe" for the EC to deal with defense and that defense policy should be discussed in the WEU or bilaterally, the vagaries of political initiative are not as compelling for the permanent neutral contemplating membership as the long-term direction indicated by the increasingly integrated institutional arrangements for political and military cooperation.[81]

Ireland illustrates the impact of this effort on the neutrality of Member States that are not alone powerful enough to block action by the Community as a whole. Ireland's neutrality is far hazier in origin and legal obligation than Austrian permanent neutrality.[82] Indeed, Irish neutrality is understood less as a legal status than as a policy position manifested in nonparticipation in NATO and the WEU. As a result, the pre-Single Act processes of European Political Cooperation seemed far easier to square with Irish neutrality than with Austrian permanent neutrality, since, as a formal matter, in the words of the Irish foreign minister, "the scope of political cooperation . . . is confined to political aspects of security and [excludes] defence or military issues as such."[83]

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80. Single European Act, *supra* note 71, at art. 30(3)(c). Some possible practical implications of this movement toward a "common European view" have been projected to extend to Community-wide consultation on explicitly military matters, such as nuclear strategy, deployment, and targeting, and to joint manning of nuclear submarines, so that the British/French nuclear deterrent would be recast to "cause Europe to be seen as an integrated unit which, by virtue of its nuclear capability, must inevitably have a major part to play in the discussion of world affairs." Luard, *A European Foreign Policy?*, 62 INT'L AFF. 573, 581–82 (1986).

81. NEWSWEEK, Feb. 6, 1989, at 32. Edward Heath recently expressed the view that the Twelve should say "politely but very firmly to them [the neutrals—Switzerland, Austria, and Sweden] that we will have trading relations with them as we have already but will not allow them membership of the full Community because we stand for unity and for a foreign and military policy which they are not able, to our regret, to accept. We will carry on the development of the Community in this direction, which is the way it was always intended to go." Heath, *European Unity Over the Next Ten Years: From Community to Union*, 64 INT'L AFF. 199, 207 (1988).

82. *See* Temple-Lang, *The Draft Treaty Establishing the European Union and the Member States: Ireland*, in AN EVER CLOSER UNION, *supra* note 70, at 241, 253–54.

83. *Id.* at 252 (quoting address by Professor Dooge, Irish Foreign Minister, Oct. 22, 1981).

With the passage of the Single Act, an action was brought in the Irish Supreme Court alleging that the Single Act contravened the constitutional requirement that Ireland remain a "sovereign, independent, democratic state." Members of the three-judge majority of the Court ruled that ratification of the Single Act was indeed unlawful absent a constitutional amendment because the EPC provisions impinge on the freedom of action of the State and begin a fundamental transformation which sets the Member States on a course leading to an eventual European Union in the sphere of foreign policy.[84] Although Irish neutrality is not rooted in constitutional obligation, the credibility of Ireland's claim to neutrality has been further eroded in its own eyes. Since 1972, Irish leaders, acknowledging the consequences of full participation in the EC integration process, have admitted that Irish neutrality was not permanent in the same sense as the neutrality of Austria, Finland, Switzerland, and Sweden.[85]

C. Neutrality and Nuclear Security

Austria's permanent neutrality has been fashioned against the background of the country's post-1955 status as a nuclear-free zone. Any nuclear alliance or participation in the development and deployment of nuclear weapons would be inconsistent with Austria's status as a permanent neutral.[86] Article 13 of the State Treaty provides that the Austrian Republic "shall not possess, construct or experiment with . . . any atomic weapon . . . ."[87] By adhering to the Treaty on Non-Proliferation of Nuclear Weapons and by taking a leading role, along with other European neutral and nonaligned states, in disarmament initiatives, Austria has consistently refused to participate in the nuclear weapons race.[88] Austria's position is reinforced by the 1907 Hague Convention Respecting the Rights and Duties of Neutrals in Wars on Land, which provides that "the territory of neutrals is inviolable" and which prohibits use of weapons or tactics that would violate the neutral jurisdiction of nonbelligerent states.[89]

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84. Temple-Lang, *The Irish Court Case Which Delayed the Single European Act:* Crotty v. An Taoiseach and Others, 24 COMMON MKT. L. REV. 709, 713 (1987).

85. Temple-Lang, *supra* note 82, at 254.

86. *See* Borodulin, *supra* note 26, at 196–97. *See generally* Roling, *The Concept of Security and the Function of National Armed Power*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 283 (A. Cassesse ed. 1986) (vagaries of fixing an "offensive/defensive" distinction).

87. Austrian State Treaty, *supra* note 23, art. 13; *see also* I. POGANY, NUCLEAR WEAPONS AND INTERNATIONAL LAW 10 (1987). This clause could be modified by agreement between Austria and the U.N. Security Council.

88. *See generally* Neuhold, *The European Neutrals and Arms Control*, in ARMS CONTROL IN EUROPE: PROBLEMS AND PROSPECTS 95–122 (K. Birnbaum ed. 1980).

89. *See* sources cited *supra* note 50; *see also* Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, in NUCLEAR WEAPONS AND LAW 132, 149 (A. Miller & M. Feinrider eds. 1984).

Beyond this, Austria has avoided initiatives that might cast doubt on its renunciation of aggressive designs or its commitment to a nonnuclear defense. Austria's energy self-sufficiency has eased the burden of this commitment, since there has been no need to develop large-scale nuclear facilities with military applications. Austria has followed Switzerland in seeking to avoid any pretext for being targeted by consciously decentralizing its political, economic, and defense structure.[90] Under these circumstances, Austrians can with some confidence expect that their national territory is not currently targeted in the contingency plans of the nuclear powers, particularly as all concerned nuclear powers are parties to the Austrian State Treaty. More importantly, from the standpoint of permanent neutrality, other states in the international community can reasonably expect Austria to remain aloof from the instigation and pursuit of nuclear conflict.

Consequently, any international arrangements that undercut Austria's autonomy concerning nuclear issues or that make it less probable that Austria could remain free of the elaborate energy and transport net required for the positioning of nuclear weapons in Europe might reasonably call into question its commitment and capacity to remain permanently neutral.

Looking at membership in the European Communities from this perspective, we need simply ask whether Austria would find its commitment to an independent nonnuclear posture impaired. This is not a question of the relationship between legal and political authority any more than it is a question of restrictive versus broad interpretation of Austrian obligations. It is a factual question about Austria's capabilities and the reasonable expectations of other states in the international community.

A cursory examination of the facts suggests two related difficulties. First, regional integration of the economic infrastructure and cross-border linkage of basic industries contemplated under the unified internal market of the Single European Act would, as a matter of fact, imbed Austria in a political economy in which military and nonmilitary functions are inextricably bound. Second, to the extent that the supranational decision-making powers of the Communities touched on economic and political sectors of importance for sustaining an independent defense, Austria's claim to retain authority to discharge its duties as a permanent neutral would no longer be credible.

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90. *See* Fischer, *supra* note 61, at 525–26. *See generally* LEGAL ASPECTS OF A NORDIC NUCLEAR-WEAPON-FREE ZONE 45–46 (K. Lang & A. Rosas eds. 1987) (Swedish and Finnish arguments); Melkov, *Iuridicheskoe Soderzhanie Ponyatiya "Zona Mira"*, in SOVETSKII EZHEVODNIK MEZHDUNARODNOVO PRAVA 1979, at 96–107 (1980) (discussing "peace zone" concept generally).

Austrian membership in the EC would raise a series of questions about absorption into the European energy grid, joint research and development projects, transborder co-production networks, and other institutional arrangements immediately connected with the defense strategies and the strategic weapons development and production of the Western alliance states.[91] Moreover, the exclusivity of EC jurisdiction under the Euratom Treaty in external relations matters relating to nuclear materials has clearly been established.[92] Although the extent to which Austrian membership would entail integration into a unified energy structure is still unclear, the Community has endeavored to develop a joint energy strategy, an effort "bound up with the many other European policies in the fields of external relations, research, employment and industry."[93]

Were Austria a member of the EC, it would not be able to restrict its participation in such mixed policies based upon its own judgment of the requirements of permanent neutrality.[94] Austria would be legally bound to observe Community-level policy decisions and court judgments in these domains; assessment of the impact of such modes of association on the credibility of Austrian neutrality would no longer be under exclusive Austrian control. Indeed, so long as Austria was not a member of NATO, its lack of access to secret information might render it even more difficult to mark clear boundaries between economic and military cooperation. If Austria could no longer regulate or even reliably discriminate between military and nonmilitary applications of economic activity on its soil, the minimal preconditions for

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91. For example, under the recent European Council Directive on the Liberalization of Capital Markets, Member States are obliged to allow direct equity investment by persons and enterprises domiciled elsewhere in the Community. *Council Directive of 24 June 1988 for the Implementation of Article 67 of the EEC Treaty*, 31 O.J. EUR. COMM. (No. L 178) (1988); *reprinted in* 28 I.L.M. 1 (1989). As cross-border ownership increased, routine technical coordination and decentralization of production would make it virtually impossible to fix clear territorial boundaries for the production and maintenance of the defensive capability of the Western alliance. Thus, one might easily imagine a German multinational deciding to manufacture precision components in Austria for assembly in France into a nuclear-weapon-delivery system.

92. *See* Ruling 1/78 of Nov. 14, 1978 (Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports), 1978 Eur. Comm. Ct. J. Rep. 2151.

93. *See* A. DALTROP, POLITICAL REALITIES, POLITICS AND THE EUROPEAN COMMUNITY 161 (2d ed. 1986). The European Parliament has called for a Community-level siting policy. *See Resolution on the Conditions for a Community Policy on the Siting of Nuclear Power Stations Taking Account of their Acceptability for the Population*, 19 O.J. EUR. COMM. (No. C 28) 12 (1976). So far, no such policy has been adopted and Council directives have not gone beyond enjoining timely information exchanges and cooperation on siting in frontier regions. *See generally* Lenaerts, *Nuclear Border Installations: A Case Study*, 13 EUR. L. REV. 159, 174–75 (1988).

94. As Lord Cockfield, arguing against Prime Minister Margaret Thatcher's attempt to disaggregate Community policies, recently stated: "You cannot pick what you like and disregard what you do not like," *quoted in* Ferry, *1992 and All That*, PORTFOLIO MAG. 19, 63 (Dec. 1988).

a credible claim to be able to avoid participation in offensive preparations or, ultimately, in war, would lapse.

IV. EUROPEAN COMMUNITY MEMBERSHIP AND THE AUSTRIAN POLITICAL ECONOMY: MAINTAINING A CREDIBLE CAPACITY FOR A COMPREHENSIVE DEFENSE OF AUSTRIAN NEUTRALITY

Although the progressive integration of foreign policy in the European Communities alone would directly contravene Austria's obligations as a permanent neutral, the impact of the broader constellation of legal and constitutional changes entailed by membership on the neutrality and independence of the Austrian Republic will be even more critical. Despite the importance of particular obligations and procedural changes wrought by membership, focusing on membership in the Communities simply as a combination of particular obligations and specific regulatory duties risks creating a false impression that conflicts between Community membership and Austrian neutrality might be easily resolved during accession negotiations or avoided thereafter by Austrian vigilance in the application or interpretation of particular legal norms.

Far more important than particular obligations—some of which might well be subject to negotiation—is the supranational structure of law and government into which Austria would move upon becoming a member of the Community. It is this total constellation of changes that would compromise Austria's capacity for an independent and comprehensive defense. The Austrian constitutional system would be remade by the institutional arrangements and decision-making processes of the European Community system.

This more general vantage point is essential for an understanding of Community developments over the last twenty years that have deepened and widened the scope of integrated decision-making and legal regulation. Periodic enlargements have slowed this process to a certain extent but have not thwarted it. On the contrary, there is every expectation that integration among the members of the EC will expand and accelerate in the coming decades. This developmental horizon makes it all the more important to look at the general structure of the Community legal system rather than simply to particular obligations when assessing the impact of membership upon Austrian independence and neutrality. In particular, membership in the European Communities would transform the democratic and federal aspects of Austrian constitutional governance so materially as to render it incompatible with even the narrowest reading of Austrian permanent neutrality and independence.

A. The Structure and Status of European Community Law

New members, without exception, must accept the developed corpus of Community law as it exists at the time of their accession.[95] Although compliance with particular substantive obligations—abolition of particular state subsidies, reduction in particular tariffs, *etc.*—may be phased in over a "transitional" period, the legal and institutional structure must be accepted intact.[96] The legal and institutional structure into which a new member steps, moreover, is a universe unto itself. The European Community is not simply a set of collective public international law obligations or intergovernmental arrangements. The Community legal order is a supranational structure—an independent sovereign association with its own sovereign rights and a legal system independent of the Member States, to which both the Member States and their nationals are subject within the fields of the Communities' substantive competence.

The position of the European Court of Justice on this point has been accepted both at international law and by the municipal legal orders of all Member States.[97] Within the Community, norms of

95. *See* T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 215–17 (1988).

96. The transitional period for the original six members was completed in 1968. The newest members, Spain and Portugal, have until January 1, 1993, to implement their obligations under their 1985 Accession Agreement. D. VAUGHAN, 1 LAW OF THE EUROPEAN COMMUNITIES ¶ 1-12 (1986). The relevant transitional measures have concerned such crucial subject matters as trade liberalization, agricultural markets, capital movements, state aids to basic industries, and external relations adjustments. *See id.* ¶ 1-16 and Acts of Accession cited therein.

97. In *van Gend en Loos*, the Court held:

> The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not only Member States but also their nationals.

Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 Eur. Comm. Ct. J. Rep. 1, 2.

In Costa v. ENEL, the Court stated, without reference to international law:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity for representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from the States of the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Costa v. ENEL, 1964 Eur. Comm. Ct. J. Rep. 585; *see* literature cited in 5 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN COMMUNITY 587–601 (1988). At international law, the EEC participates in intergovernmental organizations and negotiations as a full partner within its sphere of competence. Under article 210 of the Treaty of Rome, *supra* note 69, the Community has a legal personality distinct from its Member States. It has also the power to conclude international agreements of an economic character. *Id.* arts. 113, 238. The Court has interpreted these provisions as delegating both express and implied treaty-making competence to the Community. In many cases this competence is exclusive; in others it is mixed or concurrent. *See generally* E. VOLKER & J. STEENBERGEN, LEADING CASES AND MATERIALS ON THE EXTERNAL RELATIONS LAW OF THE E.C. (1985).

Community law defeat contrary national laws.[98] This principle ensures the uniformity of Community law throughout the EC.[99] This superiority is ensured both doctrinally and institutionally. Doctrinally, Member States are obliged to implement authoritative legislation of the Communities, either directly or by secondary legislation.[100] In many cases, individuals may enforce their Community law rights directly in municipal courts.[101] In all cases, other Member States and the institutions of the Communities may legally compel Member States to fulfill their obligations.[102]

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98. *See* Wilhelm v. Bundeskartellamt, 1969 Eur. Comm. Ct. J. Rep. 1. The preeminence of the Community law superstructure, based on article 189 of the Treaty of Rome, *supra* note 69, has been consolidated and specified through the Court's construction of two fundamental principles: the direct applicability and effect of Community law and the primacy of community law over conflicting national legal provisions. Direct applicability and effect provide that Community law is part of the national legal order of Member States, conferring rights and obligations not only on the Community institutions and Member States but on Community citizens. Direct applicability means that no transforming legislation is required to bring the Community rule into the national legal order. Direct effect means that the individual can rely upon Community rules in national courts. The *van Gend en Loos* and *Costa* cases, *supra* note 97, established these principles. *See generally* Wyatt, *The Nature of Regulatives and Directives: Direct Applicability and Direct Effect*, 2 EUR. L. REV. 215 (1977); Timmermans, *Directives, Their Effect Within the National Legal Systems*, 16 COMMON MKT. L. REV. 533 (1979).

99. The problem of divergent administrative procedures in the various Member States has been addressed by the Court's requirements that national organs execute Community law on a nondiscriminatory basis and that national rules of equity or exceptional circumstances not be invoked to frustrate the uniform application of EC Law. *See, e.g.*, Lippische Hauptgenossenschaft v. BalM, 1980 Eur. Comm. Ct. J. Rep. 1863.

100. The Council is empowered by Treaty of Rome, *supra* note 69, to issue directives and regulations to unify and harmonize national laws. The incorporation of Community law into national legal systems has been accompanied by the establishment of the principle that where Community law and national law conflict, Community law will prevail. *See, e.g.* Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 Eur. Comm. Ct. J. Rep. 1125; *see also* Thys & Henry, *Government Procurement Regulations of the European Economic Community*, 20 GEO. WASH. J. INT'L L. & ECON. 445, 447–48 (1987).

101. The Court of Justice summed up its previous case law on direct applicability in Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 Eur. Comm. Ct. J. Rep. 629:

> Direct applicability . . . means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law. "This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law. It is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act on any national measures which might impede the direct and immediate application of Community rules.

102. *Id.* Community power under articles 174 and 176 of the Treaty of Rome is such that, upon pronouncement of invalidity by the European Court of Justice, national legal norms are void *erga omnes* and, except for certain regulations, with retroactive effect. *See* D. VAUGHAN, supra note 96, at 51–52. The ideal of uniform application is immediately tied to the ideal of integration, which is further specified in the Court's "teleological" interpretation of primary and secondary norms to maximize internal market "harmonization" and unity of action in external

To this end, the European Court of Justice in Luxembourg is given exclusive power to "ensure that in the interpretation and application of the law [the EC Treaties] is observed."[103] Following this mandate, the Court interprets and applies the entire corpus of Community law, from the basic treaties to the various implementing regulations, directives, and decisions issued by the Council and the Commission.[104] A decision of the European Court is not subject to appeal.

The Community thus retains control over its own legal order. It legislates, interprets, and applies its own legislation. The degree of flexibility present in Community law to accommodate particular national situations would thus, after accession, be determined by the Community in accordance with its legislative and adjudicative processes.[105] Legislative flexibility in this regard has been striking primarily for the extent to which it is oriented towards eventual uniformity.[106] The Court, which has worked for some fifteen years to a considerable degree as a substitute for the legislative process, has exercised its authority similarly. This is particularly striking in areas in which the Court has deployed its "teleological" approach to interpretation of Community norms.[107] By interpreting Community law so as to fulfill the goals and aspirations of a united Europe, the Court has extended and specified Community authority. The Community's considerable foreign affairs powers, for example, are the result of Court rulings that internal powers "imply" corollary external authority.[108]

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relations. *See, e.g.*, B. BEUTLER, DIE EUROPÄISCHEN GEMEINSCHAFT: RECHTSORDNUNG UND POLITIK 43 (1982).

103. Treaty of Rome, *supra* note 69, at art. 164.

104. *See generally* 3 M. CAPPALLETTI, M. SECCOMBE & J. WEILER, INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (1986). This is true even when issues of Community law are initially raised in domestic courts. Recourse to the Court is obtained through direct actions or requests for preliminary rulings. Direct actions are generally initiated by the Commission or by a Member State but can in some cases be brought by the Council, Parliament, or individuals. Direct actions include proceedings against Member States for failure to fulfill an obligation, proceedings for annulment of Community acts, or actions against Community institutions for failure to act or for noncontractual liability. Preliminary rulings are made in response to questions put to the Court by national judges. When a national court from which appeals are allowed is faced with an unsettled point of EC law, it may apply to the European Court for a preliminary ruling. When such a question arises in a case before a national court of last resort, that court is required to refer the matter to the European Court.

105. *See* Ehlermann, *How Flexible Is Community Law? An Unusual Approach to the Concept of "Two Speeds,"* 82 MICH. L. REV. 1274 (1984).

106. *Id.*

107. *See* Hilf, *The Relevance of Acts of International "Supra-National" Organizations to Municipal Law: The European Community*, in INTERNATIONAL LAW AND MUNICIPAL LAW 149, 152–53 (G. Tunkin & R. Wolfrum eds. 1988); Bleckmann, *Teleologie und Dynamische Auslegung des Europäischen Gemeinschaftsrechts*, 14 EUROPARECHT 239 (1979); *see also supra* notes 75–76 and accompanying text.

108. *See* Bourgeois, *Some Comments on the Practice*, in DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS 97–110 (C. Timmermans & E. Völker eds. 1981) (reviewing Comm'n v. Council, 1971 Eur.

This progressive and expansive approach to Community powers is reinforced by various obligations on the Member States to refrain from "measures prejudicial to the attainment of the objectives of Community law."[109]

The Single European Act consolidated these trends. The central provisions for development of a single European internal market extend the Community's legislative authority and limit the need for consensus.[110] Although other provisions allow Member States to derogate, these are either temporally or substantively constrained and are to be interpreted by the European Court in accord with the objective of integrating the internal market.[111]

B. The Substantive Reach of Community Law

European Community law reaches deep into the substantive structure of national economies in ways that would directly affect Austria's capacity to mount an integrated defense of its independence and neutrality. Unlike the narrowly circumscribed technical tasks assumed by many intergovernmental organizations and supranational institutions, Community authority encompasses a wide range of subject matters traditionally jealously guarded by national governments. In the crucial sectors of coal, steel, and atomic energy,[112] the European Coal and Steel Community (ECSC) and Euratom Treaties grant the Community broad legislative and administrative authority.[113]

More fundamental, however, are the provisions of the Treaty of Rome, which have enabled the Community to transform itself into a unified, centralized regulatory superstructure with authority over a

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Comm. Ct. J. Rep. 263; *Kramer*, 1976 Eur. Comm. Ct. J. Rep. 1279; Opinion Given Pursuant to art. 228(1) of the EEC Treaty, 1977 Eur. Comm. Ct. J. Rep. 741).

109. *E.g.*, Treaty of Rome, *supra* note 69, at arts. 37(2), 53, 115. In practice, conflicts in policies translate into friction between the roles of national and supranational judges. *See generally* M. VOLCANSEK, JUDICIAL POLITICS IN EUROPE 4–46, 88–130 (1986).

110. Treaty of Rome, *supra* note 69, at arts. 8C, 100A(4).

111. *See id.* arts. 8C, 100B. *See generally* Weiler, *Eurocracy and Distrust*, 55 WASH. L. REV. 1103 (1987).

112. The Community exercises exclusive jurisdiction over transactions in fissile materials:

> The judgment of the European Court in the "supply agency" case . . . held that once a special system had been set up at the Community level for the supply of fissile materials, even the end of its normal period of validity did not lead, despite the absence of any decision that it should continue to apply, to the creation of national powers. On the contrary, the Community powers continued to exist and those powers had to be exercised by means of temporary measures adopted by the Community itself.

Bieber, *On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders*, 13 EUR. L. REV. 147, 148–50 (1988) (discussing Comm'n v. France, 1971 Eur. Comm. Ct. J. Rep. 1003).

113. Treaty Establishing the European Atomic Energy Community, 298 U.N.T.S. 167 (1958) [hereinafter Euratom]; Treaty Establishing the European Community of Steel and Coal, 261 U.N.T.S. 140 (1952) [hereinafter ECSC].

wide range of socioeconomic and political fields. Over the last thirty years, the Community has developed uniform and comprehensive provisions in fields such as the movement of goods and labor, agriculture, and competition policy. In the push toward establishment of an internal market by 1992, further integration can be expected in laws regarding rights to establishment, movement of capital, monetary policy, taxation, financial institutions, environmental and consumer protection, and other areas. European Community integration and the compulsory harmonization of national laws accompanying it impose fundamental restrictions on the ability of Member States to set their own agendas for economic development or redistribution or to marshal national resources in times of crisis.

At its substantive core, the Community's regulatory authority is founded upon four quasi-constitutional principles, often referred to as the "fundamental freedoms" or "pillars" of the Community: the freedom of movement of goods, the freedom of movement of persons, the freedom to establish a business or service, and the freedom of movement of capital.[114] Unlike norms commonly articulated in national constitutions, these principles emphasize economic rather than political liberties and are designed to foreclose certain kinds of legal regulation of economic activity by Member States. Based on this idealized framework of "free exchange," the Community has intervened in a wide variety of substantive fields to preclude impairment of the interests served by the four freedoms.[115]

Until now, the Community has been most successful in its promotion of the first two freedoms. Free movement of goods has been achieved through the elimination of all tariff and nontariff barriers to intra-Community trade, which also required establishment of a customs union, that is, a common external tariff. Free movement of workers is protected through an array of detailed measures obliging Member States to grant national treatment to the citizens of other Community states with respect to employment rights and privileges. As a result, Member States are required to accord Member State nationals equal treatment not only in matters of employment, wages, and working conditions, but also with respect to health, education, and other social welfare entitlements.

With regard to the last two freedoms, integration has progressed more gradually. Community legislative measures have long required equal treatment in the right of establishment of businesses and ser-

114. It is widely acknowledged that the increasing pace of integration is blurring the line between the economic and political aspects of these freedoms. *See, e.g.*, D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 13 (2d ed. 1987).

115. *See generally* Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987).

vices, but this formal requirement has been undermined by discriminatory licensing requirements imposed by Member States. Attempts to liberalize capital flows have also met with national resistance in the past. Nonetheless, under the new provisions of the Single European Act and with the push toward 1992, the Community will move further toward the standards set in these last two freedoms.

In conjunction with its substantive intervention in Member State activities to pursue these goals of economic integration, the Community has established new Community-level regulatory regimes, known as "common policies," which have dramatically centralized decision-making in at least two areas. In the field of agriculture, the Community operates a complex and expensive common policy, which sets prices, regulates supply and demand, and controls extra-Community trade in agricultural products.[116] In the area of competition law, the Community exercises exclusive legislative and enforcement jurisdiction, setting strict constraints on the abilities of corporations and even Member State national and subnational governmental units to conduct market interventions regarded as trade-distorting.[117] The Community has also attempted to establish a common transport policy, although this effort has so far met with limited success.[118]

Finally, there are a number of substantive areas where the Community has not yet achieved integration but where it has taken regulatory initiatives that further constrain Member State autonomy. In areas such as monetary policy, taxation, regulation of financial institutions, patents and trademarks, and environment and consumer protection, the Community has taken steps toward integration or harmonization of Member State legislation. In addition, the Community has utilized its powers to raise and spend revenues to intervene in areas such as regional development, social policy, research, education, and culture.

C. Decision Making in the Communities

The process of Community decision-making varies with the substantive area of regulation. In all cases it involves a number of Community institutions. Legislative and executive functions are horizontally divided between the Council and the Commission; the Parliament fulfills some co-decision and control functions; judicial control is exercised by the Court. Despite the formally democratic roots of these

116. *See generally* J. USHER, LEGAL ASPECTS OF AGRICULTURE IN EUROPEAN COMMUNITY LAW (1988).

117. *See generally* VAN BAEL & BELLIS, COMPETITION LAW AT THE EEC (1987).

118. *See generally* 3 THE EUROPEAN UNIFICATION, EUROPEAN DOCUMENTATION 1986, at 29–60.

institutions in national parliaments and the presence of a European Parliament, Community decision-making is an autonomous and technocratic process in which legislative competence is increasingly being shifted from parliaments to the executive[119] and in which the Court, rather than the elected Parliament, serves as the only institution empowered to control the executive organs.

The most important Community decision-making body is the Council, which has primary legislative responsibility among the Community institutions. Consisting of ministers sent from national governments according to the subject on the agenda, the Council is intended to ensure that national interests are given primary input into the Community legislative process.

But the input of national interests into Community lawmaking is limited in several ways. First, although the Treaty of Rome grants primary legislative authority to the Council, it leaves certain important legislative powers with the Commission.[120] Second, Council decisions are often taken *in camera*, granting broad discretion to participating ministers and limiting the extent to which national executives acting collectively can be held accountable to national parliaments or other interest groups. Third, since the promulgation of the Single European Act, the unanimity requirement established by the Luxembourg Compromise[121] has been replaced by a codified requirement for qualified majority voting in a number of important areas.[122] Weighted voting under the qualified majority method allows certain Council dispositions to be carried out by several of the larger states acting together.

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119. *See, e.g.*, Tumlir, *GATT Rules and Community Law—A Comparison of Economic and Legal Functions*, in THE EUROPEAN COMMUNITY AND GATT 1, 16 (M. Hilf, F. Jacobs & E. Petersmann eds. 1986). Roland Bieber has argued that the Community processes have been unrepresentative because "political options underlying decisions are hardly ever made public and are only indirectly subject to influence and control" of Community citizens. Bieber, *The Institutions and Decision-Making Procedure Under the Draft Treaty Establishing the European Union*, in AN EVER CLOSER UNION, *supra* note 70, at 31, 34–35.

120. In addition to these powers, article 155 of the Treaty of Rome, *supra* note 69, grants the Commission broad jurisdiction to enact implementing regulations and directives.

121. Luxembourg Accords, Jan. 28–29, 1966, 1966 BULL. EUR. COMMUNITIES 8.

122. The following articles of the Treaty of Rome are among those modified by the Single European Act to provide for Council decisions by a qualified majority in cooperation with decisions of the Parliament: art. 7 (intra-Community nondiscrimination on nationality grounds); art. 49 (free movement of laborers); art. 54(2) (harmonization of national legislation affecting foreign nationals, *e.g.*, immigration standards); art. 57(1) (mutual recognition of diplomas and credentials, excluding qualifications covered by professional regulation). The Single European Act also added important new provisions conferring power on the Council to regulate other subjects by qualified majority decision: art. 100A (approximation of laws affecting the internal market); art. 100B (verification of 1992 "equivalences"); art. 118A (Council directives concerning worker health and safety); and art. 130Q (organization of joint research and dissemination of information gathered from such research).

The Commission is responsible for initiating Community policy, formulating proposals for decision by the Council, and enforcing Community law. Although formally appointed by Member States, Commissioners act collegially as custodians of the "European interest." Commission policy initiation involves an elaborate process of consultation with national governments, advisory bodies, and interest groups at national and European levels. Despite this consultation, however, the Commission decision-making process remains technocratic and unrepresentative. The administrative competence of the Commission has expanded by delegation from the Council, which often seeks to depoliticize matters by deferring to the technocratic expertise of the Commission and conferring authority upon it.[123]

The European Parliament, directly elected since 1979, is the most representative of the Community institutions. But unlike most national parliamentary bodies, the Parliament lacks any significant legislative authority. The Parliament's greatest powers concern the Community budget, which it draws up in conjunction with the Council. The Parliament also has supervisory powers over the Commission, which must report annually to the Parliament and can be compelled to resign following a vote of no confidence. Finally, the Parliament must be consulted by the Council during the legislative process and in certain circumstances can reject or amend Council decisions, which may then be enacted in their original version only by a unanimous Council.[124] Despite its representative nature, Parliament's role in the Community decision-making process remains marginal.

The European Court of Justice is the final authority on questions of European law. It consists of thirteen judges, appointed by common accord of the governments of the Member States for a term of six years. Over time, the Court has come to exercise some of the control functions usually performed by national legislatures as well as some of the legislative authority originally vested in the Council. In undertaking these responsibilities, the Court has become an important force for Europeanization, consolidating the Community's normative hierarchy, supporting the substantive extension of Community law, and aggressively enforcing Community laws and treaty obligations.

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123. Ernst-Ulrich Petersmann, among others, has critized the "secrecy surrounding many of the bilateral 'Voluntary Export Restraints' (VERs), concluded, induced or tolerated by the EC Commission," arguing that the Commission's opaque, legally ill-defined, and overly discretionary powers are open to abuse. Petersmann, *The EEC as a GATT Member*, in THE EUROPEAN COMMUNITY AND GATT, *supra* note 119, at 23, 30.

124. Treaty of Rome, *supra* note 69, at art. 149. Under article 149 as modified by the Single European Act, Parliament has no effective power of legislative veto, since the Commission and a qualified majority of the Council may take a decision despite parliamentary objections, provided that the cooperation procedure is formally satisfied.

One example of court-driven integration is the extension of the direct applicability of Community legislation, displacing the competences of Member States. Initially, a clear distinction was maintained between regulations and directives—only the former were binding in their entirety and directly applicable.[125] Directives were viewed as similar to public international law obligations, unsuitable for immediate transformation into the national legal order.[126] Article 189(3) of the Treaty of Rome provides that directives shall be binding "as to the result to be achieved . . . but shall leave to the national authorities the choice of forms and methods" for achieving the result. Eventually, however, the Court of Justice interpreted article 189 as allowing certain directives to displace national law:

> Wherever the provisions of a directive appear . . . to be unconditional and sufficiently precise, those provisions may [if not adequately implemented by national authorities in due time] be relied upon as against a national provision which is incompatible with the directive . . . .[127]

This expansive reading of the force of directives exhibits the inherent power of the Court to engage in teleological interpretations grounded in "necessities" dictated by the Community's political program of integration. If Austria were a member, this power would sharply reduce both its independence in framing policies sensitive to neutrality and its constitutional freedom of maneuver on defense questions.

D. The Political Structure of the European Community After 1992

The 1992 program, and indeed much of what has transpired in Brussels since the Single European Act, has inaugurated a new politics as much as new policy. In many ways this new European politics is an attractive one—it brings flexibility, technocratic sophistication, and some universality to government regulation. But the limited nature of the governmental apparatus available for developing the 1992 program creates a political style at once opaque and narrow.

A complicated legislative agenda shifting new substantive areas to the Community has placed Brussels at the center of a broader range of issues than ever before. Regulation encompasses a widening range

125. *See* H. OLDENHOUNG, DIE UNMITTELBARE WIRKUNG VON EG- RICHTLINIEN IM INNERSTAATLICHEN BEREICH 10–13 (1984).

126. *Id.* at 34–35.

127. Becker v. Finanzamt Münster-Innenstadt, 1982 Eur. Comm. Ct. J. Rep. 53.

of economic issues—product liability, banking, and so forth. We find legislative disputes about products standards and concern about the administration of a European industrial policy as often as we find more straightforward issues of trade and commercial policy. In most national governments, such issues are the stuff of more multidimensional politicking and lobbying. In the European Community, however, the limited number of governmental instruments available in Brussels has sharpened the autonomous and technocratic aspects of Community decision-making.

The limits on Brussels' authority should give little comfort to states contemplating membership. Tryng to do a great deal with very little has produced a governmental structure more opaque and less politically responsible than we might otherwise have expected, precisely because Brussels continues to operate as if it were an administration of delegated powers even while pursuing an extensive legislative agenda.

Politically, this means that the legislative process responds most readily to the politics of unification. Legally, Brussels has been unable to develop limits on its authority—legal doctrines and juridical procedures as much as political checks—commensurate with its more general legislative powers. The 1992 program has expanded the legislative program without developing compensatory institutional, political, or legal limitations. Instead, the Communities continue to work with the legal and political framework intended to limit a much more modest animal: a simple administration of delegated powers.

Both legally and politically, the European Community continues to adhere to the sectoral approach to integration—integration driven by progress in particular, politically feasible, substantive sectors—that has dominated discussion about the legal and political limitations on Community legislative authority since the 1950's. Partly as a consequence of this functional or sectoral strategy, the European Communities, from the era of Coal and Steel through the Single Act, have defined their mandate, competence, and legislative process to a far greater extent than have other federal systems in substantive legal terms. Theirs is more than a system of enumerated powers. In the Community, the legal definition of substantive competences is the starting point for determining even the legislative process that will apply to a given measure.

This approach reached its height in the Single European Act, upon which the 1992 program is built. A more flexible—"integrated" if you will—legislative process was linked to specific substantive areas in which Community action was thought politically desirable: the internal market, research and technology, the environment, and so forth. Largely left behind, or unintegrated, were areas of political

disagreement such as monetary affairs, taxation, and social and cultural policy.

This approach made sense in the early years when Member States had legitimate democratic legislatures of general competence and were seen to delegate authority to Community institutions within precise legal channels. The so-called "legal competences" could then act as limits on the authority of a supranational institution that lacked democratic roots of its own. As the Community has come to pursue a general legislative program, however, this approach has found itself on shakier ground.

The result has been an awkward inability on the part of the Community to admit or develop general governmental responsibility commensurate with the scope of its legislative program. The European Communities continue to act as if they were only elaborating their limited competences. This approach also makes it more difficult to manage the variable geometry that seems necessary to a truly general legislative program and that would be necessary were Austria to retain any separate relationship to new Community legislation. The success of the 1992 internal market agenda has been due in no small part to radically diminished expectations for complete unification or harmonization. The move to "home country" regulation, "mutual respect," "minimum standards," or variable regimes at the option of each Member State has significantly diversified the fabric of Community law. This sort of flexibility will become increasingly important as the Community works to accommodate EFTA and other non-Member States seeking participation in the Community's internal market. Yet this sort of diversity is harder to manage when measures are proposed and adopted in sectoral terms—when, for example, the legislative process for adopting an energy or a health measure differs dramatically from that for adoption of a measure for the establishment of an internal market in energy products or health care.

Most importantly, perhaps, the sectoral competences approach makes it necessary to build administrative or technical substitutes for political and constitutional limits on Community authority. The strain of pursuing a general legislative program on the basis of limited substantive competences can be seen in the makeshift mechanisms that have been developed to limit Community authority now that specific substantive competences no longer do the trick and political avenues are not yet reliably available.

In pursuing the 1992 program, the Community has repeatedly needed to define the limits of its authority vis-à-vis both Member States and the private sector. The result has been a variety of innovative efforts at self-restraint—thresholds for intervention, block exemptions, commitments to intervene only when it seems "efficient" to do so,

and so forth. But these are largely administrative rather than legal limits. This problem of limits has been no less difficult when it concerns the relationship between Member State and Community jurisdiction.

Although these difficulties, like other growing pains of federalism, might be ironed out within the Community through a combination of political compromise and judicial innovation, the possibilities for judicial review of the 1992 program are quite constrained. The rules on standing and jurisdiction significantly limit the opportunities for judicial management of the limits on Brussels' authority. It is notoriously difficult in any system to mount a challenge to governmental inaction. In the United States, for example, the "state action" doctrine undergirds much of the constitutional structure. Such challenges are even more difficult in a government by administration, especially a flexible, discretionary administration such as that of the Community, which is more likely to conduct policy without the traces a legislature more routinely leaves behind.[128]

From a doctrinal point of view, we can already see the difficulty of developing legal limits on the new European government in the jurisprudence regarding what is known in Community argot as the "legal basis" for Community acts. Community acts may be challenged if their adoption is not motivated by the appropriate article of the Treaty—if, for example, they cite an article about the internal market in their preamble when they really concern free movement of workers, and so forth. Since different articles come with different legislative procedures, choosing the correct one is an important issue of inter-institutional power.

In principle, in a legal-competence-driven system, challenges on legal basis grounds should provide a useful opportunity for general consideration of the political legitimacy of a Community action. Indeed, we can see the beginnings of a judicial correction to the legalism of the general legislative program in the Court's judgments on "legal basis."

But the Court of Justice has so far taken a rather formal approach to the issue, proving itself reluctant to explore what we think of as legislative history or to delve into the substantive relationship between declared legislative ends and chosen means. The Court has been unable or unwilling to scrutinize the legislative program in a way that could take up the slack left by underdeveloped political and administrative

128. This is most evident in the competition area, where the Commission has responded to the potential for a radical expansion in its workload by a combination of general decisions not to act and informal procedures leading to assurances, comfort letters, and indications that no action can be expected. The communications are difficult for concerned parties either to challenge or to rely upon as precedent.

checks on the governmental process. The underdeveloped judicial apparatus for developing Community law on the basis of private initiative makes it even more difficult to test the proportionality of the means chosen or the substantive legal basis in what we would think of as constitutional terms.

The political consequences of this approach to the growth of a general European legislative program are more significant for Austrian membership. In general, however, the European institutions present themselves as simply fulfilling, implementing, or administering their legal competences. Politics has somehow already happened elsewhere—in the Treaty, or the European Summit, or in the Member States, or in the Council, and so forth. The European institutions are, in this vision, legal rather than political—responsive to the politics of Member States. So long as the legislative system acts as if its concerns were substantively limited by enumerated competences, public input is more likely to take a technical than a political form. This inhibits the range of direct political involvement—by industry as much as citizenry—more characteristic of developed national legislative systems.

The new European politics of the 1992 program also presents itself as apolitical, or even antipolitical and antigovernmental, in an important substantive sense. And committed Europeanists often think of the Community institutions in nongovernmental terms. "Government" means the Member States. The European "Communities" transcend mere government. The 1992 program gets a great deal of mileage out of this sentiment. But given the variable geometry of legislation and application that characterizes the 1992 program and the unwillingness of the legislative authority to forsake its traditional legal identity for a more open politics, the institutional result of the 1992 program is not likely to be either simpler or more politically transparent regardless of the content of particular initiatives.

Of course, European institutions also acknowledge that their work is political. But they have a particular image of the political in mind when they do so. Theirs is a politics of unification—of government-building, not of government. From the point of view of the Community, the "right" solution, when it is not determined by the technical approach of an administration, is likely to be seen through the limited political optic of Community-building or establishing the internal market. To equate this with the politics of nation-building, which characterized the development of a mass politics in the late nineteenth century and has characterized a number of societies in the Third World since independence, would be a mistake. For this is precisely not nation-building—it is the development of a political instance freed from, outside of, the institutions and pressure points of national mass politics.

This is a technical politics that responds to two forces: the bureaucratic imperatives of managing an industrial policy and the political wishes of Member State governments. And a technical politics is convenient, not only for the Commission, but also for Member States, who often find technical agreement possible or convenient—recasting difficult political choices as the functional imperatives for an "internal market." Moreover, whether looked at from the viewpoint of the Member States, or from Brussels, the 1992 program is an executive-driven package. In every Member State, 1992 has meant a shift in power from the legislature to the executive and often, as a result, from the regions to the center.

The narrow range of governmental authority at the Community level reinforces this narrow approach to politics itself. One result is that political compromises can be harder to strike—or must be struck exclusively in legislative terms—because packages must be developed from a narrow range of political options and must be developed across legislative procedures that artificially divide initiatives by competence. The result is often vague language enabling a variety of implementing approaches.

Taken together, the compromises that have been necessary to permit increased Community competence in a state-focused legislative apparatus mean a complex legal fabric increasingly isolated from direct political input at either the Member State or the community level. The combination of variable geometry, flexibility, home country regulation, and so forth, means in practice two political regimes, each able to pose as the mere legal implementation of the other.

So far as 1992, a moment of massive political rearrangement and institutional change, is concerned, the Community is either technical, legal, and administrative—responsive to a politics created elsewhere—or political only in the limited sense that it establishes itself as a legislative program and opposes the politics of government. The Member States, by contrast are either implementing Community legislation or adjusting the imperatives of an internal market to their own, largely executive, sovereignty. If we take these trends together, it seems that the 1992 program, looked at as a legislative initiative, has, to a frustrating extent, developed a politics which, at least as of yet, dares not speak its name.

E. "Integrated Defense": Austrian Democracy and the European Community

The democratic and constitutional character of the Austrian Constitution is linked to its civil defense capabilities. Membership in the European Communities would fundamentally alter the constitutional structure of political and legal decision-making in the Republic. Indeed, the changes would be so radical as to raise doubts about Austria's

intention and capacity to continue to defend the independence and neutrality of its constitutional system. This section, after explaining the constitutional principle of "integrated defense," considers changes in the allocation of authority among the branches of government that would result from membership.

The concept of an "integrated defense," embodied in article 9a of the Bundes-Verfassungsgesezt of Austria's Constitution, expands Austria's definition of its secondary duties as a permanent neutral. This constitutional enactment codifies the consensual understanding within Austria that emerged after twenty years of debate over the political, economic, and military aspects of the secondary duty of national self-defense.[129] Although domestic consensus has no normative force on the international level, article 9a responds to and confirms international expectations about Austria's popular commitment to permanent neutrality.[130] The doctrine of integrated defense was further spelled out in a 1975 resolution of the Parliament.[131] This doctrine emphasizes popular contributions to the prevention of an outbreak of total war on Austrian territory. It defines a broad range of requirements specifying the government's constitutional commitment to use force when and as necessary to vindicate the state's declared intention to remain neutral.[132]

This commitment involves both hierarchical and territorial divisions of power. The "defense constitution" consciously strives to coordinate the efficacy of federal and local levels of government and of all regional administrations. The independence of the political system is influenced by defense concerns, just as the independence of the defense system depends on political considerations of organizational efficiency and popular consent. The economic basis of defense is unified with other spheres of public administration so that impairments of political independence in a period of potential crisis would immediately affect defense preparedness.

Membership in the Communities would transfer political and legal authority from Austria to the institutions of the Community itself. These institutions would be able to take political and legal decisions that would bind Austria without Austrian consent and, in some cases,

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129. B-VG, *supra* note 40, at art. 9a, reads in pertinent part:
Österreich bekennt sich zur umfassenden Landesverteidigung. Ihre Aufgabe ist es, die Unabhängigkeit nach aussen sowie die Unverletzlichkeit und Einheit des Bundesgebietes zu bewahren, insbesondere zur Aufrechterhaltung und Verteidigung der immerwährenden Neutralität.

130. *See* F. ERMACORA, *supra* note 4, at 3.

131. *Id.* at 7–10.

132. B-VG, *supra* note 40, at art. 9a(2), expressly recognizes the interdependence of political, economic, military, and morale factors.

without its direct participation.[133] This transfer of sovereignty would alter not only the constitutional allocation of authority between parliament and executive and the scope of judicial review, but also the degree of centralization of planning authority. These changes would be sufficient to call into question the constitutional principles of legality, separation of powers, and participatory democracy.[134]

Most importantly, EC membership means a substantial transfer of power from the parliament to the executive at all levels of government. To the extent the EC legislates through interaction of governments in the Council, the legislation is a collaboration among executives whose decisions are not subject to ratification by home parliaments.[135] Within the EC system, the Council's decision-making authority is substantially constrained as a matter of both law and practice by the Commission's exclusive right of initiative. The European Parliament, moreover, lacks the scope of initiative of a domestic parliament. Its authority is confined to some budgetary matters. On other issues, it is merely consulted and encouraged to offer its opinion.[136]

To the extent these mechanisms have not produced suitable community legislation, the Court has with some frequency interpreted the primary legal instruments to increase the delegated powers of the Commission acting alone and the binding force of legislation rooted in judicial interpretations of the primary treaty itself.[137] As a result, as sovereignty over particular subject-matter areas is transferred from Member States to the Communities, legislative initiative and authority passes from parliaments to executives.

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133. The powers of the EEC Council, the Commission, and the Court of Justice are autonomous and may override the interests pressed by Austrian representatives. *See supra* notes 119–127 and accompanying text.

134. The Austrian Constitution is fundamentally committed to the separation of powers in B-VG, *supra* note 40, at arts. 94, 115–120, and to a democratic order, *id.* arts. 1, 41, 43. The principle of "Rechtstaatlichkeit" is expressed in the constitutional structure as a whole and in *id.* arts. 92, 103(4), 130, 139, 140, 140A.

135. *See* Bleckmann, *supra* note 107, at 244 (examining inapplicability of German transformation doctrine to Community legislation).

136. The "cooperation" procedure is set forth in the Single European Act, *supra* note 71, at art. 7. Although this picture improved somewhat with the Single European Act, the main thrust of the treaty amendments was precisely to break the legislative deadlock in the Council without increasing the Parliament's role. Most every other proposal advanced at the time would have strengthened the Parliament more than the text finally adopted. *See, e.g.*, Bieber, *supra* note 119, at 31–37.

137. Even fields which . . . seemed to be within the exclusive powers of the Member States are now affected by Community law: Examples are the field of education, culture, national administration or even political relations, as in the case of economic sanctions against third states. The Council, in agreement with the ECJ, interprets, in rather broad terms, the given powers of the EEC in the light of the general aims of the Community as formulated in Art. 2 of the EEC Treaty.

Hilf, *supra* note 107, at 152.

Membership in the EC would thus have a substantial effect on the democratic form of the Austrian Republic. Some legislative powers of the Parliament would be transferred to the Community, with the consequence that matters now regulated by the legislative body would fall within the competence of organs whose participants are delegates of the executive branch.[138] This is most apparent in the realm of foreign relations. Although the Austrian legislative body exercises power in external affairs, the Community has full power to negotiate with non-Member States in matters of its internal competence, including the power to legislate or allocate funds.[139] The Austrian legislature would be deprived of many of its constitutionally guaranteed powers with respect to customs and tariffs, trade and industry, patents and the protection of design, forestry, transport, and labor legislation.[140] In these matters, the Austrian legislature would also be tightly constrained within the domestic sphere remaining within its competence.[141] Once enacted as a part of European Community law, a legal provision is not subject to revision or modification in the domestic parliament. Finally, the Austrian legislative body would lose power to the executive to the extent Community legislation that is not self-executing is clarified and implemented by administrative act.[142] Taken together, these shifts in authority from a democratic parliament to a technocratic executive would seriously alter the democratic form of the Republic.

Membership in the European Communities also means a substantial contraction of the autonomous power of Austrian courts to review acts of both the executive and the legislature. Most dramatically, to the extent Community legislation displaces national legislation, the last instance of judicial review passes from domestic courts to the European Court of Justice.[143] This shift is accompanied by a shift in the nor-

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138. *See, e.g.*, B-VG, *supra* note 40, at arts. 10, 11, 12, 14, 15 for the constitutional delimitation of legislative competences.

139. *Compare* Treaty of Rome, *supra* note 69, at arts. 113, 238 *with* B-VG, *supra* note 40, at art. 10(1)(2).

140. It is difficult to overstate the detail with which the EC legislates with respect to these matters. *See, e.g.*, Commission Regulation (EEC) No. 3498/86, 29 O.J. EUR. COMM. (No. L 323) 8 (1986) (customs duties for new cars); Commission Regulation (EEC) No. 3575/86, 29 O.J. EUR. COMM. (No. L 331) 10 (1986) (*amending* Commission Regulation (EEC) No. 1152/86, 29 O.J. EUR. COMM. (No. L 105) 15 (1986)) (promotional activity and publicity measures); Commission Regulation (EEC) No. 3529/86, 29 O.J. EUR. COMM. (No. L 326) 5 (1986) (protection of forests from fire); Commission Regulation (EEC) 3528/86, 29 O.J. EUR. COMM. (No. L 326) 2 (1986) (protection of forests from pollution).

141. This is most evident in the area of state aids and subsidies, which must be notified to the Commission and approved. Treaty of Rome, *supra* note 69, at art. 93.

142. *See, e.g.*, Council Regulation (EEC) No. 17/63, 6 J.O. COMM. EUR. 528, at art. 3 (1963). Article 3 fixes criminal punishments; it was adopted in many Member States by administrative act.

143. *See* T. HARTLEY, *supra* note 95, at 56–59; Bleckmann, *supra* note 107, at 195–99.

mative basis for review. In general, the European Court reviews European legislation for its fit with the primary norms of the Community, not for its fit with domestic constitutional provisions. Just as the domestic parliament may not modify Community legislation applicable to the Member States, so too the domestic constitutional court may not find it unconstitutional.[144] This transfer would be less troubling were the Court of Justice bound to interpret some category of human rights norms. But Community law contains no catalog of human rights.[145] Rather, the Court of Justice has undertaken to apply general principles common to all Member State legal systems to test the validity of Community legislation.[146]

Judicial control of the executive would also diminish with membership in the Communities. To the extent legislative and executive functions were transferred to the European executive, the Austrian courts would lose the ability to control their exercise. Administrative acts of the Community may be challenged in the Court of Justice, but only in accordance with the procedures and standards of European law. The Austrian parliament and judiciary would thus surrender control over the executive precisely as they transferred powers to it.

F. The Structure of Government: Austrian Federalism and the European Community

Membership in the Community would substantially unsettle the federal balance of powers in Austria. The Austrian *Länder*, generally viewed as the bearers of cultural and political continuity throughout Austrian history, would undergo a drastic and irreversible reduction of power. The directly binding provisions of the Community treaties and laws and the rights and obligations that flow from them apply to subnational units as well as to national Member States. Community institutions would gain authority over a variety of areas now governed by national, regional, or local Austrian governments. But only the national government, through its vote in the Council, would have any effective input into the EC decision-making process.

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144. Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorrasstelle für Getreide und Futtermittel, 1970 Eur. Comm. Ct. J. Rep. 1125, [1971–73 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8126 (1970); Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Fa Köster Berodt & Co., 1970 Eur. Comm. Ct. J. Rep. 1161, [1971–73 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8127 (1970).

145. T. HARTLEY, *supra* note 95, at 133–39.

146. The European Court, in Hauer v. Land Rheinland-Pfalz, 1979 Eur. Comm. Ct. J. Rep. 3727, [1979–81 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8629 (1979), referred to "fundamental human rights enshrined in the general principles of Community law" and looked to the national constitutions of Italy, Germany, and Ireland, but without being bound by national judicial decisions.

This fundamental shift in powers would effect the *Länder* in two ways: first, by curbing Länder influence in federal affairs through the marginalization of the Bundesrat with regard to Community decisions; and second, by usurping their constitutionally guaranteed legislative and executive competences in a number of specific fields. The Bundesrat's loss of influence would stem from the transfer of powers from national to supranational institutions. The shift in decision-making from national democratic institutions to essentially undemocratic institutions would reduce the sphere of parliamentary influence and expand the relative power of the executive. In order to clarify further the radical constitutional transformation that would follow upon EC membership, this section considers some of the particular implications for the federal system of Austrian government.

It is impossible to catalog the areas in which Community authority would enroach on *Länder* competence with precision, because the substantive powers of the Community are continually evolving and expanding in the wake of Treaty amendments or decisions by the Commission, Council, or Court. Nevertheless, Community law is liable to affect most of the legislative, executive, and administrative activities carried out by the Länder to some degree. A few examples will illustrate the substantive and procedural effects of Community law on the *Länder*'s constitutionally allocated responsibilities. A major concern is those subject matters that fall—according to the Austrian system of separation of power (checks and balances)—under the legislative and executive power of the *Länder*.[147]

The Community's complex agricultural support program centralizes legislative, policy-making, and administrative authority over this field within the Community bureaucracy. It would significantly reduce the autonomous powers that the *Länder* have traditionally enjoyed over matters of agricultural land use. For example, *Länder* competence over the planting of vines in Austrian wine-growing regions would be replaced by Council regulations, which have banned the planting of new vines since 1976.[148] In addition, *Länder* technical standards would

147. Article 15 of the BV-G, *supra* note 40, reserves all subject matters not expressly within the power of the *Bund* to the legislative and executive competence of the *Länder*. This provision underlines the importance of the *Länder* as carriers of political power in the Austrian system. The respective powers of the *Länder* have been shaped through decisions of the constitutional court. *See* R. WALTER, ÖSTERREICHISCHES BUNDESVERFASSUNGSRECHT, SYSTEM 206–09 (1972).

148. The *Länder* Burgenland, Niederösterreich, and Steiermark provide for specific legislation. Burgenland and Niederösterreich entered into an administrative agreement (B-VG, *supra* note 40, at art. 15a) to limit the acreage of wine in their respective jurisdictions. A ban on planting was first provided for a two-year period in Commission Regulation (EEC) No. 1162/76, 19 O.J. EUR. COMM. (No. L 135) 32 (1976) to adjust wine-growing potential to market requirements. The ban has been extended several times, most recently to August 31, 1990, by Council Regulation No. 882/87.

have to be harmonized with Community-determined standards. For example, standards regarding the seeds that can be used for agricultural production are currently established by each *Land*.[149] Under EC membership, seed standards would be determined in accordance with a 1966 directive on seed marketing, supervised by a Council-established Standing Committee on Seeds and Propagating Material for Agriculture, Horticulture, and Forestry.[150]

The *Länder*'s comprehensive competence over environmental matters would be substantially affected by EC membership.[151] The EC has increasingly sought to take environmental policy initiatives, ranging from the prevention of the pollution of waterways to the protection of migrant songbirds. Until recently, the EC has had only tenuous authority to legislate over these matters. The Single European Act, however, has given the Community broad competence over environmental matters.

Though the *Länder* should have little difficulty meeting EC standards, given the generally high Austrian environmental standards, further standard-setting would be carried out in an international setting that might not favor such strong protective measures. Moreover, Community requirements for regular reports on a plethora of environmental matters may impose an administrative burden on *Länder* governments.

Länder power as to construction regulation also covers environmental planning.[152] Each *Land* has established comprehensive and detailed regulations prescribing allowable materials for residential and commercial construction. These technical standards, which have been justified on health, safety, and/or environmental grounds, could be regarded under EC law as measures equivalent to quantitative restrictions.

The Community's competition policy with regard to state aid will have drastic effects on the *Länder*'s ability to provide subsidies, low-

149. Based upon the general power in agricultural matters created under B-VG, *supra* note 40, at art. 15(1), all *Länder* except Vienna have enacted legislation regulating the kinds of seeds to be used for agricultural purposes within their respective jurisdictions.

150. The standing committee was established by Council Decision (EEC) No. 66/399, 9 J.O. COMM. EUR. 2289 (1966). On the same date, the Council issued directives on the marketing of beet seed, fodder plant, cereal seed, seed potatoes, and forestry reproductive products. The purpose of the directives is to harmonize Member State provisions and to reduce restrictions on inter-Community seed trade.

151. The *Länder* have power as to the following subject matters: air pollution, B-VG, *supra* note 40, at art. 10(1) (in conjunction with 1938 ÖBGBl 175, at art. 2 (Aus.)); B-VG, *supra*, at art. 15(1); *id.* art. 118(2)); refuse disposal, *id.* art. 15(1) (*see* 41 Sammlungen der Entscheidungen des Verfassungsgerichtshofs [VfSlg] 215 (Aus.)); sewage sanitation, *supra*, at art. 15(1); 41 VfSlg 215 (1976), 31 VfSlg 94 (1966), 28 VfSlg 139 (1963).

152. As to the planning power, see B-VG, *supra* note 40, at art. 15(1), 47 VfSlg 258 (1982); B-VG, *supra*, at art. 118(3), *StGG* art. 5. As to construction regulation, see B-VG, *supra*, at art. 15(1), 35 VfSlg 565 (1970); B-VG, *supra*, at arts. 15(9), 15(5), 118(3).

interest loans, tax exemptions, deferments of social security payments, and other aids to local undertakings. Article 92(1) of the Treaty of Rome declares state aid to be incompatible with the Treaty insofar as it affects trade between Member States. "Aid" has been interpreted more widely than "subsidy" and includes any measures that relieve an undertaking of a burden it would otherwise have to bear.[153] Although the Treaty contains a number of exceptions to this general prohibition, they can be applied only with authorization from the Commission or Council, which can invoke the jurisdiction of the European Court of Justice to enforce their decisions against a recalcitrant Member State. Community membership would affect not only the substantive law that the *Länder* must apply, but the procedures with which they must comply in making administrative decisions. As noted above, for example, EC environmental regulations would require *Länder* officials to report not only to their Austrian constituents and governmental bodies, but to officials within the EC institutions.

Community regulations regarding public supply contracts provide a good example of the potential for changes in administrative process. Council Directive 77/62[154] coordinates procedures for the award of public supply contracts to ensure that they are adequately publicized within the Community and awarded on nondiscriminatory, objective criteria. This directive applies to national, regional, and local authorities when they make expenditures of more than 200,000 ECU. In these cases, the authorities must publish a notice in the Official Journal of the European Communities setting out all criteria necessary to allow interested parties to make a bid and must provide equal treatment to each bidder. Directive 71/306[155] establishes an Advisory Committee for Public Contracts, which supervises the application of Directive 77/62 and investigates complaints by firms that allege unfair government treatment.

The shift in decision-making authority from the *Länder* to the EC would have no prejudicial impact on the Austrian federal balance of power if the *Länder* could participate in EC decisions affecting them. Unfortunately, the peculiar institutional structure of the Community is most responsive to national, rather than local or regional, inputs into the EC law- and policy-making process. Although regional governments can express concerns to be articulated in the Council by

153. D. VAUGHAN, *supra* note 96, ¶ 7-03. Among the relations characterized by the Commission as "aids" are tax exemptions, preferential interest rates, loan guarantees on discriminatory terms, land or building acquisitions on better-than-market terms, subsidized loans from state institutions, deferred collection of social contributions, and state subscription of capital on noncommercial terms. *Id.* ¶¶ 7-03, 7-04.

154. 20 O.J. EUR. COMM. (No. L 13) 1 (1977).

155. 14 J.O. COMM. EUR. (No. L 185) 15 (1971).

national executives, the confidential and consensus-oriented nature of Council decision-making precludes any subnational supervision of final decisions.

At the level of Commission decision-making, the consultative process that precedes policy initiation grants certain limited opportunities for regional government participation.[156] But pressures from a single subnational government or interest group are unlikely to be very influential. Indeed, the Commission encourages approaches through national and, in particular, European-wide groupings. Although subnational administrations, such as those of Scotland and the German *Länder*, have from time to time made approaches to the Commission directly, these efforts require the strong and persistent support of the national government.[157]

The European Parliament, directly elected since 1979, is a natural focus for subnational pressures because of its independence from Member State governments. Opportunities for the articulation of regional pressures vary according to the system of election chosen by each Member State. Although many states elect MEPs on the basis of a national list, others, such as Germany, Italy, and the United Kingdom provide a territorial basis for election, enhancing opportunities for regional administrative influence. Nonetheless, the Parliament's utility as a vehicle for articulating subnational interests is drastically limited by its lack of powers. Notwithstanding the reforms of the Single European Act, the Parliament remains at the periphery of Community decision-making.

Regional interest groups may be able to achieve some influence through their representation on the Economic and Social Committee[158] and other consultative committees and European federations that have direct consultative status with the Commission. Despite the fact that the Commission encourages the formation of European-wide interest groups to promote a Community perspective on policy issues, national groups have predominated in consultative discussions.[159] This weakening of the European, as against the national, dimension of policy-making has reduced the scope for participation by distinct subnational interests where their views differ from those of national governments and national groups.

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156. Keating, *Introduction*, REGIONS IN THE EUROPEAN COMMUNITY 8 (M. Keating & B. Jones eds. 1988).

157. Keating & Water, *Scotland in the European Community*, in REGIONS IN THE EUROPEAN COMMUNITY, *supra* note 156, at 60–88.

158. The establishment of the Economic and Social Committee was authorized by the Treaty of Rome, *supra* note 69, at art. 4(2). Its power stems from *id.* art. 193. For a discussion of the Committee, see T. HARTLEY, *supra* note 95, at 36–37.

159. *See* Keating, *supra* note 156, at 9–10.

Current EC Member States represent a wide variety of governmental systems. But EC membership has centralized decision-making in each of them. In the Federal Republic of Germany, the *Bund* and *Länder* have devised a number of mechanisms to maintain some *Länder* influence in Community decision-making. Since 1980, the *Bund* and *Länder* have operated under an agreement known as *Länderbeteiligungsverfahren*,[160] which provides for some measure of *Bund-Länder* cooperation in Community regulation of areas within the exclusive powers and essential interests of the *Länder*. In such cases, the *Bund* must inform the *Länder* of the EC proposals, allow the *Länder* to form a unanimous common position on the matter, and represent the *Länder* position, as far as possible, in meetings of the European Council. Germany has also established the position of *Länder* Observer, a public official nominated by the *Länder* who sits as an observer at Council meetings, distributes EC documents to the *Länder*, and reports on upcoming legislative initiatives and other Community developments. *Länder* officials have also sometimes been included in German delegations to EC committees, particularly in fields where important *Länder* interests are at stake or *Länder* officials possess special technical expertise.

The *Länder* and *Bund* have been unable to resolve the issue of whether the *Bund* has the constitutional right to transfer not only its own powers, but those of the *Länder*, to EC competence. But because the *Länder* have always supported the process of European integration, they have been willing to sacrifice their autonomy over fields encroached upon by Community law in exchange for the institution of the cooperative measures described above. The result has been a dramatic centralization in terms of constitutional principles, but only a minor movement in that direction in political terms.

Membership has helped to maintain or encourage centralization in a number of other Member States. In Italy, where regional governments have been established but are not influential, membership in the Community has reinforced centralizing trends by requiring issues with regard to fields such as agriculture, formerly largely a regional responsibility, to be handled at the national level.[161] In France, indirectly elected regional councils with planning and economic responsibilities have existed since 1972, but until recently the French na-

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160. Gerstenlaver, *German Länder in the European Community*, in REGIONS IN THE EUROPEAN COMMUNITY, *supra* note 156, at 181. *See generally* S. BULMER, THE DOMESTIC STRUCTURE OF EUROPEAN COMMUNITY POLICY MAKING IN GERMANY (1986); S. BULMER & W. PATERSON, THE FEDERAL REPUBLIC OF GERMANY AND THE EUROPEAN COMMUNITY (1987); Malanczuk, *European Affairs and the "Länder" (States) of the Federal Republic of Germany*, 22 COMMON MKT. L. REV. 237 (1985).

161. Merloni, *Italian Regions in the European Community*, in REGIONS IN THE EUROPEAN COMMUNITY, *supra* note 156, at 160–72.

tional government has rigorously excluded them from involvement in Community policy-making.[162] In the United Kingdom, regional governments have had some success in influencing Community policy through their representation within the Scottish, Welsh, and Northern Ireland offices, which are a formal part of the British government and are represented in Cabinet and committee meetings. But because these offices are merely departments within an essentially centralized system of government, their influence is constrained by powerful policy interests from other departments and by the policy line of the governing party.

V. CONCLUSION

Membership in the European Communities would transform Austria's governmental structure, substantive law, and international status so substantially that its independence, its capacity to mount a comprehensive defense, and its credibility as a permanent neutral would be impaired. These changes are compatible with neither its international status as a permanent neutral nor its constitutional and international law obligations to retain an independent, federal, and democratic state structure.

The European Communities are an autonomous legal and political order, distinct from both international law and the law of the Member States. In joining the Communities, states merge their identity into a larger legal whole. Their law must give way to the law of the Communities. Their parliament must yield to the legislative machinery of the Communities. Their courts must respect and apply the rulings of the European Court of Justice. The Community legal order has broad substantive competence in areas central to the political and economic life of its members. This competence extends to the conduct of foreign affairs.

Decisions are taken and policies are set in the European Communities in a complex array of institutions which balance and merge the interests of the various states. Many decisions that are presently taken legislatively at home would be taken administratively or judicially in the European Communities. Even those decisions made in the "legislative" branch of the Community machinery would be made by representatives of the national executives. In all these institutions, many decisions are taken by majority or qualified majority vote.

These transformations in the structure of government would implicate Austria's national constitutional system of judicial review and

162. Meny, *French Regions in the European Community*, in REGIONS IN THE EUROPEAN COMMUNITY, *supra* note 156.

alter the balance of authorities characteristic of its federal system. Membership in the Communities is more than a set of discrete legal transactions. Belonging to the EC means irreversible participation in an altered form of state government. The full scope of these changes can only be comprehended against the ongoing historical movement of the Communities.

Taken together, these changes would overwhelm the specific duties of a permanent neutral. The permanent neutral must refrain in peace from undertaking any obligations that might draw into doubt its capacity or intention to remain neutral in time of war. It must remain governmentally independent and preserve its ability to mount a comprehensive defense of its neutrality and political integrity. No state so thoroughly integrated, as a matter of both government and political economy, could meet these obligations.

But permanent neutrality is more than a set of discrete obligations. Set in motion by Austria's own declaration, permanent neutrality has ripened into an international status through the recognition of other states. It is grounded in the continuity of reciprocal expectations created in the mid-1950's and conditioned by Austrian constitutional law and practice since that time. Although Austria may revoke its declaration and remains free to pursue its neutrality as it sees fit—indeed, any attempt to impose conditions on its autonomy would violate the very terms of its neutral status—it does so always at the risk of damaging the international expectations upon which it relies for continued recognition of its declaration.

Permanent neutrality at international law is built on this customary and contractual basis, that is, on the mutual expectations of antagonistic and potentially belligerent states. To be respected, neutrality must be seriously intended and credibly defended. Membership in the European Communities is simply not compatible with Austria's historical practices and commitments.

This is not to say, however, that Austria must forswear closer cooperation with the Communities. In the conduct of its foreign policy as a permanent neutral it remains free to enter into public international law obligations of various sorts. To retain its neutrality and independence, it must simply ensure that the agreements it makes are governed by international law, that it can terminate them, and that it retains control over their interpretation. Membership in the Communities would meet none of these conditions. But the Treaty of Rome itself provides for alternative forms of cooperation with non-Member States.[163]

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163. Treaty of Rome, *supra* note 69, at arts. 113, 238.

Purely commercial agreements under article 113 of the Treaty of Rome should pose no problem for Austrian independence and neutrality. Indeed, Austria's current relations with the European Communities are regulated by "commercial agreements" within the framework of article 113. These arrangements might well be expanded. They are terminable by the unilateral declaration of either party and provide procedures and an institutional framework for dispute resolution that are wholly compatible with Austrian neutrality. Such a relationship is governed by international law, not the law of the European Community, and thus does not compel submission to the authoritative jurisdiction of the European Court of Justice.

A more comprehensive "association agreement" might also be negotiated, as long as Austria remained outside the compulsory decisional and interpretive structures of the EEC itself. So long as these arrangements preserved a strict bilateralism between Austria and the Communities, Austria's intention and capacity to defend its permanent neutrality in a comprehensive way would not be drawn into question. If an article 238 arrangement specified interpretation either by Community institutions, or, like the Treaty of Rome itself, so as to "facilitate the achievement of the Community's aims," Austrian neutrality and independence would be impaired.[164] As Austria seeks closer cooperation with the European Communities, it must pursue a path that keeps it free of the compulsory structure of Community law and governance if it seeks to maintain the international legal status of permanent neutrality.

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164. *Id.* art. 5. The same article further provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." Such formulations transform the issue of Austrian neutrality from a factual question subject to Austrian control into a legal question, decidable by Community organs and effectively removed from case-by-case Austrian evaluation. *See* Hummer, *Neutralitätsrechtliche Erwägungen im Hinblick auf eine Mitwirkung an de EWG*, in DIE NEUTRALEN IN DER EUROPÄISCHEN INTEGRATION 165 (H. Mayrzedt ed. 1970). The existing relationship between Austria and the Community is governed by the 1972 Austria-EEC Convention, which provides: "no provision of this Agreement may be interpreted as exempting the Contracting Parties from the obligations which are incumbent upon them under other international agreements . . . ." Agreement of July 22, 1972, between the European Economic Community and the Republic of Austria, 21 J.O. COMM. EUR. (No. L 300) 2, at preamble (1972). Thus, this 1972 agreement, identical in this regard to Switzerland's EEC treaty, clearly remains on the plane of public international law and subordinates Austria's undertakings to the EEC to retention of permanent neutrality. The essential difference between this legal relation and membership cannot be dissolved by appeals to expediency.