The Joint Declaration by the EEC and the CMEA

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I. Introduction

Relations between the European Communities1 (EC) and the Eastern European countries have been frosty until quite recently because of the hostility Eastern Europe has shown towards the EC. Eastern European countries have explicitly refused to recognize the EC under public international law and have made it more difficult for the EC to participate in international conferences and to conclude international agreements. One of the Soviet Union’s major objectives has been to prevent or delay the formation of any politically or militarily united body in Western Europe. The economic integration within the EC was viewed primarily as an adjunct to NATO and as having its “imperialistic” edge directed against the socialist countries of Eastern Europe. Nevertheless, these circumstances did not prevent smaller Eastern European countries from concluding sectoral bilateral agreements with the EC when the economic needs of these countries called for such arrangements.

Discussions between representatives of the EC and of the Council for Mutual Economic Assistance2 (CMEA or COMECON) took place from 1974 to 1981 with a view to arriving at some kind of understanding between the two organizations, but no result was reached. Substantive changes in East-West relations began in 1986. In a letter conveyed in June 1985 to Mr. Jacques Delors, President of the EC Commission, from Mr. Vyacheslav Sychov, Secretary of the CMEA, the latter proposed a joint declaration establishing official relations between the two organizations.3 The EC Commission insisted that such relations were not to limit the development of bilateral relations between the EC and the individual countries of the

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1 There are three Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Community (Euratom).
2 The Member States of the CMEA are: the USSR, Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, and Romania (known as the Eastern European members); and Mongolia, Cuba, and Vietnam. Yugoslavia, because of its special position in East-West relations, has observer status with the CMEA. Albania ceased to participate in 1961.
3 18 BULL. EUR. COMM. (No. 6) paras. 1.2.9 & 2.3.37-.39 (1985).
CMEA, a view to which the CMEA did not object. This issue was paramount to the EC since there would be no point in having official relations with the CMEA unless the EC also was recognized by the European-CMEA countries. On invitation by the Commission, the governments of the European-CMEA countries expressed their views about normalized relations with the EC and, by the end of May 1986, all had declared themselves ready to establish diplomatic relations and, where appropriate, to conclude agreements. The EC Commission's strategy, called the parallel approach, which aimed to negotiate simultaneously with the CMEA and individual countries proved to be a success.

The discussions between delegations from the Commission and the CMEA Secretariat about a Joint Declaration started in the middle of 1986. Negotiations in Geneva and Brussels followed and successfully ended in the signing of such a declaration in Luxembourg on June 25, 1988. On this occasion the interested countries of the CMEA issued a unilateral statement noting that nothing in the Declaration "shall affect [and nothing can] affect the Quadripartite Agreement of 3 September 1971." In November 1986 the Commission was authorized by the EC Council to open negotiations with Czechoslovakia concerning an agreement on trade in industrial products. The agreement was signed on December 19, 1988. In April 1987 authorization was

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4 18 id. (No. 7/8) para. 2.3.38 (1985); 18 id. (No. 10) paras. 2.3.29-30 & 2.5.30 (1985); 19 id. (No. 2) para. 2.2.21 (1986).
5 19 id. (No. 2) para. 2.2.21 (1986).
6 Id.
7 19 BULL. EUR. COMM. (No. 5) para. 2.2.37 (1986).
8 The first meeting took place in Geneva, Switzerland, Sept. 22-24, 1986. 19 id. (No. 9) para. 2.2.27 (1986).
9 20 id. (No. 3) para. 2.2.23 (1987) (meeting of experts to continue examination of draft agreement in Geneva); 20 id. (No. 12) para. 2.2.36 (1988) (meeting between Mr. De Clercq and Mr. Sychov in Ghent, Dec. 16, 1987, to discuss draft agreement).
10 Joint Declaration on the establishment of official relations between the European Economic Community and the Council for Mutual Economic Assistance, June 25, 1988, 31 O.J. EUR. COMM. (N. L 157) 35 (1988); discussed in 21 BULL. EUR. COMM. (No. 6) para. 1.5.1 (1988); 27 I.L.M. 1418 (1988) [hereinafter Joint Declaration]; see infra Appendix for complete text of the Declaration. The Declaration was initialled by the negotiators in Moscow on Jan. 9, 1988. It was then signed in Luxembourg on behalf of the EEC by the President of the Council, Mr. Hans Dietrich Genscher, Foreign Minister of the Federal Republic of Germany (FRG) and by Mr. Willy De Clercq, Member of the Commission, and for the CMEA by the Chairman of the CMEA's Executive Committee, Mr. Rudolf Rohlické, Deputy Prime Minister of Czechoslovakia, and by Mr. Sychov. 21 BULL. EUR. COMM. (No. 6) para. 1.5.1 (1988).
11 This quote came from an anonymous CMEA source. [Eds. Note: Citing confidentiality concerns of CMEA spokespersons, the author did not attribute this quote to a named source.] See infra text accompanying notes 110-14.
12 19 BULL. EUR. COMM. (No. 6) para. 2.2.39 (1986).
13 21 id. (No. 12) para. 2.2.37 (1988). The European Parliament passed a resolution to begin negotiations at the June Part Session in Strasbourg, June 9-13, 1986. 19 id. (No. 6) paras. 2.2.42 & 2.4.9 (1986). The EC Council authorized negotiations on Nov. 24, 1986. 19 id. (No. 11) para. 2.2.24 (1987). Further Council directives were given for nego-
granted to the Commission to negotiate a trade and cooperation agreement with Hungary and on September 26, 1988, such an agreement was signed.\textsuperscript{14} Negotiations with Romania on a trade and economic cooperation agreement to replace the two existing agreements signed in 1980 have been blocked for the moment. This is because Romania has asked for concessions from the EC which presuppose amendments to the existing authorization—amendments which the Council is not prepared to issue in view of the present domestic situation in Romania.\textsuperscript{15} Following exploratory talks with Poland and Bulgaria the EC Council authorized the Commission to open formal negotiations with these two countries on trade and cooperation agreements.\textsuperscript{16} The negotiations with Poland were recently finalized and the agreement was expected to be initialed in August of 1989. The agreement with Bulgaria will still take some rounds of negotiation to complete. In addition, the EC Commission is in the process of preparing a proposal to the EC Council for opening formal negotiations on a pure trade agreement with the German Democratic Republic (GDR) and the Commission was recently au-

\textsuperscript{14} 21 BULL. EUR. COMM. (No. 11) para. 2.2.29 (1988). On Feb. 11, 1987, the Hungarian Deputy Prime Minister visited the European Community to begin preliminary negotiations. 20 \textit{id.} (No. 2) para. 2.2.20 (1987). Formal negotiations opened in Brussels on June 4, 1987. 20 \textit{id.} (No. 6) para. 2.2.29 (1987). The Treaty was initialed on June 30, 1988, and signed in Brussels on Sept. 26, 1988. 21 \textit{id.} (No. 11) para. 2.2.29 (1988).

The agreement, based on Articles 113 and 235 of the EEC Treaty, may be characterized as follows: The agreement consists of two parts, one dealing with trade matters and the other with cooperation. It is of a nonpreferential nature and covers farm and industrial products except for steel and textiles, which are already regulated in bilateral agreements. The most-favored-nation clause applies to both sides. On the EEC side, quantitative restrictions will be abolished in three stages ending in 1995. Hungary will improve access to the Hungarian market, in particular by means of nondiscrimination (for example, improving its import license system, overall quotas for consumer goods, and treatment of Community companies). Legal protection of intellectual property will be afforded in accordance with international conventions. The possibility of reciprocal concessions on agricultural products is also envisaged. Barter trade will not be promoted. Finally, there is a safeguard clause should detrimental effects occur in the market of one party as a result of imports from the other. The cooperation provision of the agreement is intended to promote economic cooperation in different sectors such as agriculture, energy, transportation, scientific research, tourism, and the environment. The parties will exchange economic and trade information and improve the opportunities for investments. The agreement is thought to be the most ambitious of the agreements in the first round of discussions with the Eastern European countries. See 21 \textit{id.} (No. 6) para. 2.2.43 (1988).

The agreement will be administered by a Joint Committee which will meet once each year. The agreement is valid for ten years and will be extended if neither of the parties denounces the agreement before its expiration. \textit{id.}

It should be borne in mind that neither the agreements with Czechoslovakia and Hungary nor those under way with the other Eastern European countries will create any free trade areas between the EEC and those countries since such areas presuppose the same kind of economic systems, that is, market economies.

\textsuperscript{15} See 21 \textit{id.} (No. 11) para. 2.2.28 (1988).

\textsuperscript{16} The EC Council gave the Commission such authorization on Feb. 20, 1989.
authorized to begin formal negotiations with the Soviet Union on a trade and cooperation agreement.\(^\text{17}\) By September 1988 all CMEA countries except Romania and Mongolia had lodged applications for the establishment of diplomatic relations with the EC.\(^\text{18}\) Of these, the EC has, so far, approved those applications of the Eastern European countries and Cuba.\(^\text{19}\) The Soviet Union's change in attitude, including its willingness to establish diplomatic relations with the EC, is explained by the foreign policy that country has pursued since Mr. Mikhail Gorbachev came to power in 1985. As a means of restructuring the declining Soviet economy, the extension of trade and cooperation relations is vital. In this context, the increasing importance of Brussels, seat of the EEC, as a political power center cannot be ignored. From the Soviet point of view, the Declaration by the EEC and the CMEA will give the latter increased political importance and perhaps will also further cooperation within it.

These recent developments in East-West relations are all encompassed by the measures envisaged by the Second Basket of the Final Act of Helsinki 1975.\(^\text{20}\) This Article mainly concerns the legal nature of the Joint Declaration and the obligations arising from it.\(^\text{21}\) Political and economic aspects are not discussed in detail.\(^\text{22}\)

II. Legally Binding and Nonlegally Binding Agreements\(^\text{23}\)

The very use of the term "Declaration" to denominate the

\(^{17}\) The EC Council authorized the commencement of negotiations with the USSR on June 12, 1989.


\(^{19}\) This information came to the author through confidential diplomatic channels.


\(^{22}\) On those aspects see generally, Maslen I, supra note 21; Maslen II, supra note 21; Maslen III, supra note 21; Schneider, supra note 21.

agreement raises the question of whether the document is legally binding, since states often use names such as “Act,” “Declaration,” “Understanding,” or “Resolution” for documents in which they express their concerted political or moral views or intentions. The best known document of this type is the Final Act of Helsinki where the parties signing it evidently did not intend to create a treaty in the sense of the Vienna Convention on the Law of Treaties (Vienna Convention).

In other words, the Act does not create legal relations between the parties signing it in accordance with public international law. Another example is the Final Document of the Stockholm Conference 1986. Paragraph 101 explicitly states that “[t]he measures adopted in this document are politically binding and will come into force on 1 January 1987.” Accordingly, the legal status of the Declaration merits some discussion.

The distinction made by states between legally binding and nonlegally binding instruments can best be understood in the context of some general assumptions about international law. The system of international law is designed to define the legal relations between states which are the subjects and addressees of that law. In addition, other entities such as international organizations created by states may be subjects of international law. Although individual persons (legal and physical) in certain instances may derive and claim rights from international law, such persons are not subjects in international law but, rather, objects.

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25 Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 63 A.J.I.L. 875, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention]. The Vienna Convention entered into force on Jan. 2, 1980, see id., art. 84, and has no retroactive effects, meaning it only applies to treaties concluded by states subsequent to its entry into force. Id., art. 4. Thus, customary law on treaties is applicable to treaties concluded prior to that date.

Now that the Vienna Convention is in force, there are two overlapping regimes applicable to treaties that come within the ambit of the Convention. The Convention applies between parties having ratified or acceded to the Convention and customary law of treaties applies to all other contractual relations between states unless otherwise provided by the parties to a treaty. For more information on the Vienna Convention, see 7 Encyclopedia of Public International Law 459 (1984).


27 Id., para. 101 (emphasis added). A final example of such an instrument is the Solemn Declaration on European Union signed by the Heads of State or Governments of the EC Member States in Stuttgart on June 19, 1983. See 16 Bull. Eur. Comm. (No. 6) para. 1.6.1 (1983). It should be noted that a politically binding document may be drafted in such a way as to appear similar to a treaty, as for example the Final Document of the Stockholm Conference, supra note 26, and may also have the same effectiveness as a treaty. In theory one may construe an international instrument such that it is composed partly of legally binding clauses and partly of clauses not having that character.

States, considered to be equal and sovereign in their rights, are able to enter into oral and written agreements with each other. These agreements may be considered either legal instruments, making them the prime source of international law, or "merely" political, moral documents. A secondary source of international law is created by state practice (usage), accepted by states as expressing principles or rules of law according to opinio juris sive necessitatis, that is, customary law.

The creation of rules of international law depends on the express or tacit consent of states. It also follows that there is normally no legislator "above" states and a state is to a very great extent its own "legislator." Legally binding agreements between states are rather to be viewed as contracts regardless of whether agreements for other purposes may be characterized as "contracts" or "law-making treaties."

Consequently, states may choose to enter into agreements that are legal instruments or political documents. In the former case an instrument has legally binding force under international law while in the latter case it is devoid of such a force; it carries only moral weight. Nevertheless, through the consent of states, moral rules may become rules of international law whereby the rules acquire a vigor which they did not possess before. The difference between these two types of rules is not only one of hierarchy but also of quality and nature. Thus, international law sets the ultimate parameters of behavior between states.

For the purposes of the Vienna Convention, a "treaty" is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation." Thus, the Vienna Convention is only applicable to written international agreements provided that the signatory states intended to submit their agreement to international law (auctor regit actum).

The Convention is not applicable to oral agreements between

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30 Id., art. 38, para. 1(b).
32 The importance of legally binding decisions by international organizations on their member states is not considered in this Article, nor the impact of nonlegally binding decisions of such organizations upon the creation of rules of international law.
33 For a discussion of the classification of treaties, see I. BROWNLIE, supra note 28, at 630-31.
34 See id. at 14.
35 Vienna Convention, supra note 25, art. 2, para. 1(a).
states even if governed by international law\textsuperscript{36} nor to agreements between states governed by national law.\textsuperscript{37} In addition, the Convention does not apply to agreements between states and international organizations\textsuperscript{38} nor to agreements between such organizations themselves.\textsuperscript{39} Consequently, the Convention is not applicable to the Joint Declaration even if the parties intended for the Declaration to be governed by international law. Nevertheless, the Declaration itself does not specify any particular law that should apply to it.

Consequently, one may ask: what law, if any, is applicable to the Declaration? Interestingly, the Vienna Convention itself may play a role in this determination. The Convention's seeming inapplicability to the Joint Declaration should not alter either the legal effects of the Declaration or the application of some of the rules set forth in the Convention to which the Declaration "would be subject under international law independently of the Convention."\textsuperscript{40} This is so because the Declaration would be governed by the customary law on treaties with regard to international organizations as that law existed when the Vienna Convention entered into force, and by any further developments since that time which may have been caused, inter alia, by the very rules of the Convention.\textsuperscript{41}

Nevertheless, the question still remains whether the Declaration is legally binding. In assessing the nature of an international agreement (regardless of its designation), the crucial question is whether the Parties intended to create a legally binding document, provided they possessed treaty-making powers at all. Because there are no simple criteria by which to determine this, each document must be examined individually. In so doing, the following considerations, in-

\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id., art. 1.
\textsuperscript{39} Id.
\textsuperscript{40} Id., art. 3(b). The same applies to agreements between states and other subjects of international law or to oral agreements between states. Furthermore, though the Vienna Convention does not apply to nonsignatory subjects of international law, the Convention still applies in multilateral agreements among those states that have ratified or acceded to the Convention. Id., art. 3(c).
\textsuperscript{41} An example is the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, reprinted in 25 I.L.M. 543 (1986) [hereinafter 1986 Vienna Convention]. The 1986 Vienna Convention was adopted by 67 states, with 1 against (France) and 23 abstentions. Conference on the Law of Treaties Adopts New Vienna Convention, U.N. CHRONICLE, Apr. 1986, at 97. However, the treaty has not yet entered into force and, with this demonstrated lack of consensus, probably never will.

ter alia, must be taken into account: (1) Does the content of the agreement lend itself to legal regulation? (2) Does the language evoke any intent to let the instrument be governed by law? (3) Have the Parties acted (before and after concluding the agreement) in such a way as to indicate an intention to create a legally binding instrument?

It is important to understand why a distinction must be made between legally binding and nonlegally binding international agreements, that is, between moral norms of a legal character and other moral norms. There are different ways in which a party can be bound to an agreement, but legal agreements are the supreme form of binding because of the consequences of violation under international law. This is what distinguishes legal forms of agreement from other forms of restriction expressed in various declarations of intent. This is evidenced by states’ common desire in certain cases not to be legally bound but rather to use a form which is less exigent and allows more freedom or flexibility. In such cases, the instrument may be called an Act, Declaration, Resolution, or Understanding. The political obligations may entail legal effects, for example, the application of the principle of estoppel.

It is important, however, to make a clear demarcation between legal obligations embodied in agreements and those which flow from political commitments. Without this, uncertainty arises as to the law to be applied with the result that the force and efficiency of international law decreases. In any particular case it may be difficult to ascertain exactly what the legal obligations are under the agreement because of inexact formulation or discretionary reservations. In such cases the law must be recognized as acting with equal force on all the obligations to which the parties subscribed regardless of how precisely the agreement’s obligations are drafted. The notion of “soft law” must be rejected on the grounds that it is both detrimental to the system of international law and is theoretically inappropriate because, among other reasons, one legal rule cannot be more legal than another. For the purposes of developing orderly relations within the international community, it is important for states to be able to employ different instruments on different occasions as they see fit.

A good illustration is the Final Act of Helsinki. This agreement initiated the CSCE process and contributed to a significant relaxa-
tion of tensions in Europe.\textsuperscript{45} But the Act never could have become a treaty because of the political climate.\textsuperscript{46} Thus, there will always be situations in which it is "useful to formulate shared expectations, be they only of a lower degree of certainty."\textsuperscript{47}

III. Treaty-Making Powers of the EEC and the CMEA

Significant clues as to the legal character of the Declaration can be derived from the examination of the treaty-making powers of the EEC and the CMEA.\textsuperscript{48}

A. EEC Powers

Article 210 of the EEC Treaty provides that "[t]he Community shall have legal personality."\textsuperscript{49} In the \textit{ERTA} judgment\textsuperscript{50} the European Court referred to this Article, saying:

This provision, placed at the head of Part Six of the Treaty, devoted to "General and Final Provisions," means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements.

Such authority (i.e., to enter into international agreements) arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.\textsuperscript{51}

From the \textit{ERTA} case it follows that the implied external powers


\textsuperscript{46} See Bothe, \textit{supra} note 23, at 91.

\textsuperscript{47} Id.

\textsuperscript{48} Note that the matter of treaty-making powers of international organizations is treated by the 1986 Vienna Convention. "The capacity of an international organization to conclude treaties is governed by the rules of that organization." 1986 Vienna Convention, \textit{supra} note 41, art. 6. A treaty is defined as "an international agreement governed by international law and concluded in written form . . . whatever its particular designation." \textit{Id.}, art. 2, para. 1(a).


\textsuperscript{50} \textit{Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 210, 298 U.N.T.S. 11} [hereinafter EEC Treaty or Treaty of Rome].

of the EEC run parallel to its internal powers. The Community has exclusive power to govern in certain areas defined by EEC Treaty provisions, for example, commercial policy.\textsuperscript{52} The EEC also preempts national government where the Community has laid down binding common rules, regardless of the means—internal legislation or conclusion of agreements.\textsuperscript{53} The power of the Community may be extended via Article 235 under which such power may be used to issue internal acts or to conclude international agreements.\textsuperscript{54} Until the Community has exercised its powers under the Treaty, Member States have parallel power in such matters. It must be emphasized that the Member States have transferred, once and for all, national powers to the Community in accordance with the Treaty—powers which are to be exercised by the Community.\textsuperscript{55}

To the above-mentioned explicit powers should be added those mentioned in Articles 131 through 136 concerning the association of overseas countries and territories with the Community\textsuperscript{56} and those of the Commission in order to maintain contacts with international organizations.\textsuperscript{57}

\textbf{B. EEC Procedures}

Article 228(1) states in general terms that the Commission shall negotiate and the Council shall conclude agreements on behalf of the EEC with "one or more States or an international organisation,"\textsuperscript{58} save for the power vested in the Commission to conclude certain agreements such as those defined by Articles 229 through 231.\textsuperscript{59}

If an agreement is beyond the power of the Commission to conclude, Article 228 applies.\textsuperscript{60} From the \textit{ERTA} doctrine it follows that Article 228 applies not only to agreements based on explicit treaty-making powers but also to agreements based on powers derived

\textsuperscript{52} See, e.g., Bulk Oil v. Sun Int'l Ltd. and Sun Oil Trading Co., 1986 E. Comm. Ct. J. Rep. 559. "[S]ince full responsibility in the matter of commercial policy was transferred to the Community by Article 115(1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community." \textit{Id.} at 586.


\textsuperscript{54} See \textit{EEC Treaty}, supra note 49, art. 235.


\textsuperscript{56} \textit{EEC Treaty}, supra note 49, arts. 131-36 & 238.

\textsuperscript{57} \textit{Id.}, arts. 229-31.

\textsuperscript{58} \textit{Id.}, art. 228, para. 1.

\textsuperscript{59} This includes agreements with the organs of the United Nations, the UN's specialized agencies, the General Agreement on Tariffs and Trade, the Council of Europe, the Organisation for European Economic Co-operation, and all other international organizations. \textit{Id.}, arts. 229-31.

\textsuperscript{60} \textit{Id.}, art. 228, para. 1.
from other Articles of the Treaty whereby such Article(s) must be combined with Article 228.

Article 228 seems to say that it is applicable only to legally binding agreements entered into with other subjects of international law, regardless of the designation of the agreement. First, the Article refers to the treaty-making powers "[w]here this Treaty provides for the conclusion . . .". Second, the institutions and the Member States may obtain the European Court's opinion on the compatibility of a contemplated agreement with the EEC Treaty. Third, agreements so concluded are binding not only on the EEC but also on its Member States.

Article 228 only provides a general framework for negotiating and concluding agreements and it has been left to the institutions to fill in detailed rules in conformity with international law and the EEC Treaty. This has been done through the day-to-day work of the Commission and Council, and by the decisions of the European Court. Nevertheless, the scheme set out in Articles 111 through 114 furnishes a generally applicable model for negotiating and concluding agreements.

After appropriate contacts have been made, this procedure provides that the Commission pursue informal exploratory discussions to determine the demands of the opposing country or organization and recommend to the Council whether formal negotiations should be opened. The opening of negotiations follows upon the grant of authorization by the Council. The authorization is generally accompanied by directives for the negotiations and very often requires the Commission to consult a special committee composed of representatives from the Member States. The Commission then informs the Council on developments in the negotiations. Note that the Council may refuse to accept the result of the Commission's negotia-

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61 According to the court any legally binding agreement is envisaged by Article 228(1)-(2): The formal designation of the agreement envisaged under international law is not of decisive importance in connexion with the admissibility of the request. In its reference to an "agreement," the second subparagraph of Article 228(1) of the Treaty uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.

Opinion 1/75, supra note 53, at 1361. It is difficult to conceive that the first section would comprise something that the second would not, that is, nonlegally binding agreements.

62 EEC Treaty, supra note 49, art. 228, para. 1.

63 Id.

64 Id., art. 228, para. 2.

65 The specific problems and procedures connected with "mixed agreements" are not considered in this Piece. See generally D. O'Keefe & H. Schermers, Mixed Agreements (1983).

66 EEC Treaty, supra note 49, art. 113, paras. 2 & 3.

67 Id., art. 113, para. 3.

68 See id.
Negotiations are often closed by the initialling of a written Agreement by the Parties.

The agreement may be concluded using one of two methods: the simple procedure or the solemn procedure. For the simple procedure there first must be consultation of the Parliament when required by the Treaty. Whether the Parliament or other community organs must be consulted depends on which article(s) of the EEC Treaty the agreement is based. Second, the Council approves the agreement in a sui generis decision and authorizes its President to designate a person to sign the agreement on behalf of the EEC, that is, to express consent to be bound as a matter of law. The signing of the agreement is often done by both the Council and the Commission. The agreement will come into force immediately or as otherwise provided.

For the solemn procedure, the Council decides, sui generis, to sign the agreement. The Council then authorizes its President or a designate to sign on condition of the Council's later approval to be bound. The Parliament must then be consulted if required by the Treaty. Finally, the Council approves the agreement and authorizes its President to ratify the agreement. Upon approval, there may be deposition of instruments of ratification and the agreement comes into force as provided in the agreement or otherwise.

For the Joint Declaration, the EEC institutions have followed the simple procedure and the conclusion of the Declaration has been based on Articles 228 and 235.

Once the procedures in the EEC Treaty for entering into a legally binding agreement have been satisfied, the Community's intent is evident. The fact that Article 228 envisages only legally binding instruments does not exclude the EEC from entering into nonlegally binding agreements within its competency, and in such cases Article 228 does not apply.

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69 See id., art. 113, para. 4.
71 See 3 id. at 695-97 (1988).
73 In support of this view, see Opinion 1/75, supra note 53.

In [Opinion 1/75] the Court stressed that what counts with regard to the application of the Treaty is the question whether negotiations undertaken within the framework of an international organization are intended to lead to an "undertaking entered into by entities subject to international law which has binding force." In such a case it is the provisions of the Treaty relating to the negotiation and conclusion of agreements, in other words Articles 113, 114 and 228, which apply and not Article 116. Opinion 1/78, 1979 E. Comm. Ct. J. Rep. 2915, 2916. Note, for example, that the Final
C. CMEA Powers

The legal capacity of the CMEA is defined by Article XIII(1) and (3) of the Charter of the CMEA\textsuperscript{74} and in the Convention on the Legal Capacity, Privileges, and Immunities of the CMEA.\textsuperscript{75} Although doubts about the existence of the legal personality of the CMEA may have existed at one time, these doubts have been removed.\textsuperscript{76}

Article III(1) of the CMEA Charter states that the CMEA may "assist the member countries of the Council in the preparation and execution of joint measures."\textsuperscript{77} Article X, entitled "Participation of Other Countries in the Work of the Council," envisages cooperation with third countries, permitting participation in the work of the organs of the Council or otherwise.\textsuperscript{78} In either case, the conditions shall be set forth "by the Council in agreement with the countries concerned."\textsuperscript{79} Article XI specifically provides that the Council may establish relations with international organizations where "[t]he nature and form of such relations shall be determined by the Council in agreement with the international organizations concerned."\textsuperscript{80} It should be noted that the Russian word for "agreement" used by the Charter implies an agreement governed by international law.\textsuperscript{81}

The CMEA is a classical international organization in that no real powers have been transferred to the CMEA from the Member States. Article III, entitled "Functions and Powers," enumerates activities which the Member States (all or some of them according to

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\textsuperscript{75} Convention Concerning the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance, Dec. 14, 1959, 368 U.N.T.S. 237. See also Convention on the Juridical Personality, Privileges and Immunities of the CMEA, June 27, 1986, — U.N.T.S. —.

\textsuperscript{76} Schweisfurth II, \textit{supra} note 48, at 617-19.

\textsuperscript{77} \textit{CMEA Charter, supra} note 74, art. III, para. 1.


\textsuperscript{79} \textit{CMEA Charter, supra} note 74, art. X.

\textsuperscript{80} \textit{Id.}, art. XI. The CMEA maintains relations, \textit{inter alia}, with various agencies of the United Nations and also concluded an agreement with the International Atomic Energy Agency in 1975. Agreement with International Atomic Energy Agency, Sept. 26, 1975, CMEA-IAEA, 1022 U.N.T.S. —.

\textsuperscript{81} Schweisfurth II, \textit{supra} note 48, at 627.
the principle of interest)\(^8\) may agree to carry out within the framework of the organization.\(^8\) Nevertheless, the external powers of the CMEA are determined, within the broad parameters set by the Charter, on a case-by-case basis and only extend as far as all members agree. Note that the CMEA does not pursue a foreign commercial policy of its own.

D. CMEA Procedures

Each step in the CMEA’s negotiation of international agreements must be unanimously approved by the Member States.\(^8\) This, of course, can be quite an obstacle. Two procedures are used to negotiate agreements.

Under the first method, only the approval by the Session\(^8\) or the Executive Committee\(^8\) is needed, whereupon the consent to be bound as a matter of law is expressed by signature, exchange of letters, or by documents of approval.

Under the second method, the agreement is first approved by all the Member States and, following internal approval of the CMEA, it is ratified by the signing parties.\(^8\)

For the Joint Declaration, the negotiations with the EEC were pursued by representatives of the CMEA’s Secretariat in consultation with Member States. The Declaration was approved by all the Member States, unanimously adopted by the Executive Committee of the CMEA, and subsequently signed in Luxembourg.\(^8\)

It appears that the CMEA normally regulates its relations with third countries and international organizations through legally binding international agreements although it may also employ nonlegally binding instruments. Mr. Sychov, Secretary of the CMEA, suggested in his letter of June 1985 to Mr. Delors, President of the EC Commission, that official relations should be established by adopting a presumably nonlegally binding agreement, a proposal that would have pleased the EC Commission.\(^8\) However, on the suggestion of the

\(^8\) CMEA Charter, supra note 74, art. IV, para. 3.
\(^8\) See id., art. I, para. 2 & art. III.
\(^8\) Schweifurth II, supra note 48, at 635. “All decisions integral to the treaty-making process, i.e., the initial decision to establish treaty relations, instructions to the negotiators, the presentation of a draft agreement and inter-organizational consent to an agreement negotiated must be taken unanimously. Lack of unanimity is an obstacle to each step in the treaty-making process.” Id.
\(^8\) The Assembly is the supreme organ of the CMEA. CMEA Charter, supra note 74, art. VI, para. 1.
\(^8\) The Executive Committee is composed of one representative from each of the Member States “at the level of deputy heads of government.” Id., art. VII (as translated in W.E. Butler, supra note 74, at 270).
\(^8\) This method was used for the cooperation agreement between the CMEA and Finland. Cooperation Agreement with Finland, supra note 74, art. 8.
\(^8\) See supra text accompanying note 10.
EC-CMEA RELATIONS

CMEA, the document was “upgraded” to come within the application of Article 228 of the EEC Treaty, although the original designation of the instrument remained unchanged. Thus, the intention of the CMEA to conclude a legally binding agreement is evident.

IV. Material Content of the Declaration

A. Establishment of Official Relations

Clause 1 of the Joint Declaration states that the EEC and the CMEA are establishing official relations through this document. The specific meaning of “official relations” is not clear, but the expression implies that the prevailing state of relations is “unofficial,” that is informal. This is further borne out by the various informal contacts between the two organizations since 1974. Therefore, one may conclude that official relations include, in part, the de jure recognition of the EEC as a subject of international law, and the acceptance of the EEC’s independence and its own powers as transferred to it by its Member States. The wording of the Preamble of the Declaration supports the last contention by stating: “HAVING REGARD to the acts establishing the EEC and the CMEA, and in particular the Treaty of Rome [the EEC Treaty],” in conjunction with the expression “by the activities they pursue within their fields of competence . . . .” All these implications following from the establishment of official relations apply mutatis mutandis to the CMEA.

B. Cooperation

In Clause 2 the development of cooperation is envisaged in areas where both Parties are competent and there is a common interest to do so. This does not include foreign commercial policy measures because they are outside the competence of the CMEA and rest with its Member States.

According to Clause 3, the area, forms, and methods of coopera-

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90 See 21 id. (No. 6) para. 1.5.2 (1988).
91 Joint Declaration, supra note 10, clause 1.
92 E.g., supra notes 8-9.
93 Recognition in international law of “States or governments or other designators of recognition” may be done to “establish official or non-official, full or partial, permanent or temporary relations with them.” A DICTIONARY OF INTERNATIONAL LAW 208 (M. Saifulin ed. 1986). De jure recognition customarily takes place when the recognising State has no doubt as to the legality of the newly emerged State or government to be recognised, or, compelled by circumstances, has to accept it as an irreversible fait accompli and deems it necessary to establish normal diplomatic relations and cooperation with the recognised State. [De jure recognition] is usually considered full and final. Id. A unilateral declaration is normally used to recognize a State or government, but an agreement with the new State or government may also be used.
94 Joint Declaration, supra note 10, preamble.
95 Id., cl. 2.
tion are to be determined by the parties as agreed upon by their representatives designated for these purposes.\textsuperscript{96} The wording of this Clause, in conjunction with Clause 4's view toward future cooperation, seems to imply a step-by-step procedure for developing cooperation in certain areas. An earlier version of Clause 3 included some defined fields of cooperation, explaining Clause 4's wording to a certain extent. The cooperation may entail identification of problems of a general nature within the relations between the EEC and Eastern Europe which could be solved either on a bilateral basis, or multilaterally such as within the U.N. Economic Commission for Europe (ECE). Such a development presupposes that the Parties are able to create an efficient system for exchanging information and channels for consultations.

One possible forum for the representatives mentioned in Clause 3 is an ad hoc working group that might become permanent or the creation of a mixed committee.

\textbf{C. Territorial Application of the Declaration}

The Vienna Convention only states that an agreement applies to the entire territory of the states concerned unless otherwise provided.\textsuperscript{97} Since the Convention only applies to treaties between states,\textsuperscript{98} there are no rules concerning the territorial application of treaties concluded between states and international organizations.\textsuperscript{99} Such rules may be found in the provisions of the founding treaty of an organization or by provisions in other agreements concluded by an organization.

In Article 227 of the EEC Treaty, provisions were laid down about the territorial application of the Treaty.\textsuperscript{100} The Treaty applies to the European territories of the Member States with certain exceptions\textsuperscript{101} and in some cases on certain conditions.\textsuperscript{102} Application of

\textsuperscript{96}Id., cl. 3. A first meeting between the parties was held in November 1988 where the delegations mainly discussed forms and methods of cooperation and the respective activities and powers of the EC and the CMEA.

\textsuperscript{97}Vienna Convention, supra note 25, art. 29.

\textsuperscript{98}Id., art. 1.

\textsuperscript{99}The 1986 Vienna Convention did not improve matters. "Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States or one or more international organizations is binding upon each State party in respect of its entire territory." 1986 Vienna Convention, supra note 41, art. 29.

\textsuperscript{100}EEC Treaty, supra note 49, art. 227.


\textsuperscript{102}Examples include the Channel Islands and the Isle of Man. EEC Treaty, supra note 49, art. 227, para. 5(c), as amended by Act of Accession, Mar. 27, 1972, 15 J.O. COMM. EUR.
the Treaty to territories outside Europe and in West Berlin is very complicated.\textsuperscript{103}

When an agreement is concluded by the EEC, the Community normally includes a clause about the agreement's application to various territories. An example is a clause used in the first Lomé Convention:\textsuperscript{104} "This Convention shall apply to the European territories to which the [EEC Treaty] applies, in accordance with the conditions set out in that Treaty, on the one hand, and to the territories of the [African, Caribbean, and Pacific] States on the other."\textsuperscript{105}

A special problem is the Treaty's application to the Western Sectors of Berlin.\textsuperscript{106} The legal status of Berlin is a complex and delicate matter. The Western Sectors do not form part of the Federal Republic of Germany (FRG) and are not governed by that State, a position which was not changed by the Quadripartite Agreement.\textsuperscript{107}

Following the signature of the Agreement, the Soviet Union ceased to oppose the extension of laws, regulations, and international agreements of the FRG to West Berlin. With regard to international agreements concluded by the FRG, Annex IV(B) of the Quadripartite Agreement permits the extension of such an agreement to West Berlin provided that the intention is stipulated in the agreement or is so declared by the FRG and that the agreement does not affect the status and security of West Berlin.\textsuperscript{108} Accordingly, the Soviet Union need not accept every treaty concluded by the FRG which the latter wants to extend to West Berlin, and, in fact, the Soviet Union still opposes the application of the EEC Treaty, derived Community law, and Community international agreements to West Berlin. The Soviet Union, supported by its Eastern European allies, has always considered the integration of West Berlin with the EC to be incompatible with the international legal status of Berlin because of

\textsuperscript{103} See id., art. 227, para. 13 & arts. 131-36.


\textsuperscript{105} Id., art. 85, para. 1.


\textsuperscript{107} Quadripartite Agreement on Berlin, Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551 [hereinafter Quadripartite Agreement]. It is unclear if the German Democratic Republic has acquired sovereignty over East Berlin rather than simple de facto control.

\textsuperscript{108} Id., Annex IV(B). Note for example the International Cocoa Agreement of 1972 (mixed agreement), in which the Soviet Union made the following declaration: "The Soviet Union can take note of the declaration of the Federal Republic of Germany concerning the extension of the application of the Agreement in question to [West] Berlin only on the understanding that such extension is effected in accordance with the Quadripartite Agreement of 3 September 1971 and provided that the established procedures are followed." International Cocoa Agreement, 1972, Oct. 21, 1972, 882 U.N.T.S. 67.
the final objective of the Community—the formation of a political unit among its Member States.

Federal legislation and international agreements of the FRG do not automatically become applicable to West Berlin but remain conditioned upon adoption by the Senate of West Berlin and the censorship which may be exercised by the Allied Kommendatura of Berlin by virtue of the droit de l'occupation. Despite the Soviet Union's opposition, the EEC Treaty, derived Community law, and international agreements concluded by the EEC do apply to West Berlin, since the three Western Allied Powers have agreed to this, on conditions similar to those applicable to the federal laws and agreements of the FRG.109

When the EEC has concluded a bilateral agreement with an Eastern European country the insertion of a territorial clause has been difficult because the wording of the clause normally employed by the Community also includes the application of the agreement to West Berlin.110 Nevertheless, such clauses have been included in a number of agreements111 and at signature the Eastern European

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109 For a discussion of the legal basis for this, see Wengler, supra note 106, at 229.

110 See 21 BULL. EUR. COMM. (No. 6) para. 1.5.3 (1988).

111 Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, and Romania have all entered into arrangements with the EEC covering trade in textiles and sheep or goat meat or both. Romania has also entered into an agreement on trade in industrial products. See Maslen I, supra note 21, at 350–32. In the Polish agreement on trade in textile products, the clause reads as follows: "This Agreement shall apply, on the one hand, to the territories in which the [EEC Treaty] is applied and under the conditions laid down in that Treaty and, on the other hand, to the territory of Poland." Council Regulation (EEC) No. 885/82, of Mar. 31, 1982, art. 18, 25 O.J. EUR. COMM. (No. L 107) 1, 7 (1982). The Soviet Union has not yet concluded any bilateral agreement with the EEC. Note that East Ger-
country concerned unilaterally declares that the agreement in no way affects the status of Berlin as determined in the Quadripartite Agreement. The territorial clause is not only of political significance in relation to the Eastern European countries but also has legal consequences because it allows physical and legal persons resident in West Berlin to benefit from the international agreements entered into by the EEC.

Clause 5 of the Joint Declaration simply states that by using the normal wording of the EEC territorial clause, the Declaration applies everywhere that the EEC Treaty applies, including West Berlin. As mentioned above, a unilateral statement was made at the time of signature by the interested countries of the CMEA.

The unilateral statement does not constitute a reservation since, if it did, it would purport to exclude or modify some of the provisions of the Joint Declaration and hence there would be no consensus ad idem and no treaty. It may be viewed as an interpretive declaration, however.

Although territorial clauses have been inserted into agreements with Eastern European countries prior to the conclusion of the Joint Declaration, it was important to the EEC that the Declaration with the CMEA establish that it applies to West Berlin. This was a sticking point for the CMEA and resulted in prolonged negotiations and, ultimately, in the unilateral statement.

The Joint Declaration is silent on its territorial application to the CMEA countries as is the CMEA Charter, save for references to “member countries” and “in member countries,” whatever the precise extent of the territories of these countries may be.

D. Authentic Languages of the Declaration

Clause 6 defines the authentic languages of the Declaration. The French and Russian language versions of the Declaration have been the basic texts for elaboration. The original texts of the Joint Declaration were proposed and conveyed by the CMEA to the EC Commission. The Declaration has been drawn up in all official languages of the EC as well as in all the languages of the member coun-

many benefits from the Protocol on German Internal Trade in that, inter alia, goods from East Germany may freely enter the market of West Germany.

112 This is customarily known as the “Hungarian Formula.”
113 Joint Declaration, supra note 10, cl. 5.
114 See supra text accompanying note 11.
115 The Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention, supra note 25, art. 2, para. 1(d).
116 21 BULL. EUR. COMP. (No. 6) para. 1.5.3 (1988).
117 Joint Declaration, supra note 10, cl. 6.
tries of the CMEA, all those texts being equally authentic. Article 33 of the Vienna Convention provides rules for the interpretation of plurilingual treaties. Difficulties between the Parties because of the language differences seem to a great extent to have been removed because the French, English, and Russian versions of the Joint Declaration are quite uniform in their translations.

V. Concluding Remarks

The EEC and the CMEA have followed the procedures and used the powers entrusted to them to conclude a legally binding instrument between themselves in the form of the Joint Declaration. In so doing, their intention is beyond doubt. The CMEA’s unilateral statement appears superfluous from a legal point of view if the Parties “only” had the intention to conclude a nonlegally binding document. In addition, a legally binding instrument between the two organizations fits the EEC’s parallel approach.

The question still remains whether the content of the Joint Declaration lends itself to legal regulation. The answer appears to be that it does. Although the objective could have been attained by less exigent means, the Declaration, a legally binding instrument, is a proper form to use for the establishment of “official relations.” With respect to future cooperation between the parties, clauses 2, 3, and 4, express a legal commitment to designate representatives for this purpose. In addition, clause 5, the territorial clause, is well-suited to binding legal force.

The Declaration is binding upon the Member States of the EEC according to Article 228(2), but it does not bind the individual Member States of the CMEA. The obvious implication is de jure recognition by EEC Member States of the CMEA as a legal entity subject to public international law. This is not reciprocated by the CMEA Member States to the EEC. The recognition of the EEC is established through diplomatic relations between the EEC and those countries. Of course, there was a great deal of coordination between the signing of the Declaration and the applications by the CMEA Member States for establishing diplomatic relations with the EEC.

The inclusion of the territorial clause in the Declaration implies recognition by the CMEA of the application of the EEC Treaty to West Berlin since the EEC Treaty extends itself to West Berlin and is

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118 See id. The CMEA Charter has been concluded in the Russian language only. CMEA Charter, supra note 74, art. XVII.
119 Vienna Convention, supra note 25, art. 33.
120 The cohesion among the other languages of the Declaration has not been examined.
121 Joint Declaration, supra note 10, cl. 1.
122 Id., cls. 2-4.
123 Id., cl. 5.
actually applied there. Thus, the Declaration must apply to West Berlin also. The Declaration is a bilateral agreement but is multilateral in the sense that CMEA procedures for the approval of international agreements implies that each individual CMEA country has separately agreed to the territorial clause. This means that the Soviet Union, in particular, no longer views the EEC Treaty as per se incompatible with the status and security of West Berlin. The Soviet Union has impliedly agreed to the extension of the EEC Treaty to West Berlin just as with any treaty compatible with the Quadripartite Agreement. The CMEA’s unilateral statement then has the character of a superfluous reminder that EEC law only applies to the extent it is in conformity with the Quadripartite Agreement since the EEC and the CMEA (and their Member States) have no power to change that agreement in any respect.

The Joint Declaration is of little importance to the EEC with regard to substantive matters, but it is an essential element of the parallel approach to establishment of normal relations with Eastern Europe. The primary interest of the EEC is recognition by Eastern European countries and the conclusion of trade agreements.\(^{124}\) For the Soviets, the Joint Declaration will serve to strengthen the CMEA from which internal political and economic advantages can be drawn. The Joint Declaration will lead to economic gains for Eastern European countries by means of trade and cooperation agreements between the EEC and those countries, and bring (at least the smaller countries) politically closer to Western Europe.

JOINT DECLARATION

on the establishment of official relations between the European Economic Community and the Council for Mutual Economic Assistance

THE EUROPEAN ECONOMIC COMMUNITY,

of the one part, and

THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE,

of the other part,

HAVING REGARD to the acts establishing the European Economic Community and the Council for Mutual Economic Assistance, and in particular the Treaty of Rome,

ON THE BASIS OF the Final Act of the Conference on Security and Cooperation in Europe, and taking account of the results of the subsequent stages of the CSCE process,

DESIROUS of contributing, by the activities they pursue within their fields of competence, to the further development of international economic cooperation, an important factor in economic growth and social progress, DECLARE as follows:

1. The European Economic Community and the Council for Mutual Economic Assistance establish official relations with each other by adopting this Declaration.

2. The Parties will develop cooperation in areas which fall within their respective spheres of competence and where there is a common interest.

3. The areas, forms and methods of cooperation will be determined by the Parties by means of contacts and discussions between their representatives designated for this purpose.

4. On the basis of the experience gained in developing cooperation between them, the parties will, if necessary, examine the possibility of determining new areas, forms and methods of cooperation.

5. As regards the application of this Declaration to the Community, it shall apply to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty.

6. This Declaration is drawn up in duplicate in the Bulgarian, Czech, Danish, Dutch, English, French, German, Greek, Hungarian, Italian, Mongolian, Polish, Portuguese, Romanian, Russian, Spanish and Vietnamese languages, each text being equally authentic.