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European and foreign policy of the Länder

Introduction

At first it would appear that this chapter is misnamed. Surely “European and Foreign Policy” are themes that belong to the federal government. They do, of course, but the Länder are not irrelevant in these areas. Indeed, European policy is now to a considerable extent domestic policy, and many responsibilities that have traditionally belonged to the Länder have been and are today the subjects of European Community – now EU – regulations and legislation. The efforts by the Länder to protect their sphere of responsibility from EU incursions or, at the very least, to participate in the decision making that affects them directly, have been of varying success over the years. However, it seems as if they are now in a stronger position than ever before to influence decisions in Brussels. They also continue to have a modest impact on foreign policy, particularly in the area of foreign aid, where they have been quite successful in very specific areas of activity.

The Länder and European integration

European integration as a challenge to the Länder

European integration, which dates back at least to the creation of the European Coal and Steel Community (ECSC) in 1951, has from the start been supported strongly not only by all federal governments, regardless of party or coalition, but also by the Länder. Nevertheless, the Länder have often been frustrated by the loss of powers and influence they have suffered in the process of European integration in addition to the continuing
erosion of legislative powers to the federation. Some transfer of sovereignty must take place by definition in forming a more integrated Europe. But whereas the federal government has been a participant in negotiating such transfers, and therefore has agreed voluntarily to them, the Länder have generally had little to say. Where federal powers have been transferred, legislation thereafter is drafted in the European Commission and, possibly after some input from the European Parliament, adopted by the European Council of Ministers. Of course the federal government is an important participant in the Council. But the effect for the Länder has been that they no longer have a voice in these matters in the domestic legislative process via the Bundesrat.

To add insult to injury, Article 24 of the Basic Law has been used as the authorization for the federal government to transfer not only federal but also Land powers to the EC/EU without Land participation. Indeed, after the transfer of a Land power, the federal government gains the right to participate in legislation in the Council of Ministers on the matter over which it had no voice before. One should also note that the EC/EU has preempted certain Land powers by invoking Article 235 (now Article 308) of the European Economic Union (EEC) Treaty which serves as a kind of enabling or implied powers clause or by referring to other articles, e.g., Article 100, which also provide the European Community (EC) with a basis for action. Thus, European integration has meant an erosion of Land powers from the beginning.

While the complaint is often made that Land powers have been transferred to or preempted by the EC over the years, it is useful to ask just which functions these were. First, we have already noted the indirect transfer of Land powers that occurs when the federal government transfers federal powers to the EC/EU over which the Länder then have no voice via the Bundesrat. But this also applies to the Bundestag. That is, both legislative chambers in Germany lose to the Council of Ministers when federal powers are transferred. Second, there is the direct loss of Land powers owing to EC/EU preemptions. Thus, in the area of education and training and more recently in research, technology and environment, it is often claimed that EC policies have preempted certain Land powers. The European Court of Justice (ECJ) has said the EC/EU has no powers in the field of education, but it has used its jurisdiction over economic policy to promote worker mobility. “Mobility” includes mutual recognition of standards and certification in vocational and professional training. Thus, the ERASMUS and LINGUA programs that provide scholarships for students in EC/EU member states to study in other member states require mutual
recognition of academic standards. In the area of TV and radio, there has been a dispute over whether the mass media fall under Article 92 (now Article 87) of the EEC Treaty that permits regulation of regional economic policy or under “culture,” which is a responsibility belonging to the Ländler. In 1989 the federal government approved EC guidelines to which the Ländler objected, and Bavaria took the issue to the Federal Constitutional Court. The Court sided with the federal government, but this incident made the Ländler all the more determined to gain access to EC decision making by the federal government regarding EC policy. Construction, water, and general environmental protection have come under EC law in varying degrees, as have subsidies involved in regional economic policies. Since the member states implement most EC/EU legislation, this means administration by the Ländler for Germany. Some laws allow more leeway than others, but the Ländler are restricted especially in regional economic policy, e.g., subsidies, and they must pay the costs of administration.

It is common and understandable for the Ländler to be critical of these developments, but it is doubtful that such problems can be avoided in a common market. In 1990 a commission established by the parliament of North-Rhine Westphalia looked at the question of task transfers and reported that it is not at all clear what exactly has been lost. This may be due in part to the fact that transfers have also been made to the federation via constitutional amendment, federal preemptions have occurred through concurrent legislation and provisions in the Basic Law regarding “uniform living conditions,” and Federal Constitutional Court decisions have generally favored broader powers for the federation. Self-coordination among the Ländler at the domestic “third level,” where Land officials meet in extra-legal forms to promote cooperation and coordination, has also been a factor in the decline of Land legislative powers. Thus, the intergovernmental relations or joint decision making (Politikverflechtung) between the federation and the Ländler and among the latter also make any assessment difficult, since powers and responsibilities are mixed. It might be more accurate to speak of a redistribution of powers among the three levels of EC/EU, federation and Ländler, and the difficulty of compensating the Ländler in this process.

In any case conventional wisdom states that there has been a steady erosion of Land powers, which could be seen as contradicting the “eternal federalism” clause of Article 79, para. 3, of the Basic Law. This real or perceived erosion became a major reason for the search by the Ländler for procedures by which the federal government could continue to participate constructively in the process of European integration and at the same time preserve the distinctive character of the Länder.
Early efforts to protect Länder rights in European integration

During the ratification process of the ECSC in 1951, concern was expressed that the process of European integration could eventually turn the Länder into mere administrative units. As a result, the Bundesrat insisted in its official reaction to the ratification law sent to it by the federal government that the participation of the Länder be secured in the German decision making process regarding the ECSC. This demand was not met, and in the end, the Bundesrat was assured only that a subcommittee of its foreign affairs committee would be kept informed by the federal government.

In the ratification process regarding the Treaties of Rome in 1957, the Länder were a little more successful. The federal government agreed to keep both the Bundestag and the Bundesrat informed of developments in the EEC and European Atomic Energy Community (Euratom) and to make this information available before any decisions were reached in the Council of Ministers which would have a direct effect on Germany or would require implementing legislation. In fact, however, this did not go much beyond the requirements of Article 53, para. 3, of the Basic Law which states that the federal government is to keep the Bundesrat informed. Real participation by the Länder in Community matters did not occur.

It took another twenty years before the Länder tried again to improve their position in the European Community – or, technically, Communities (after 1967, ECSC, EEC and Euratom combined). This time the Länder as such, rather than the Bundesrat, started negotiations with the federal government over procedures to involve the Länder in cases in which their exclusive powers or essential interests would be affected. After more than two years of talks, an exchange of letters took place in 1979 between Chancellor Helmut Schmidt and the prime minister of North-Rhine Westphalia, Johannes Rau, who was then chair of the Conference of Prime Ministers. In the letter it was agreed that the federal government would inform the Länder in a complete and timely manner about EC proposals, and, insofar as these affected the exclusive powers of the Länder, would give them the opportunity to present their positions completely and in depth. Only for compelling reasons of foreign and integration policy could the federal government exclude the Länder.
The idea behind this letter was to involve the Länder directly rather than via the Bundesrat. This idea was not applied consistently, however, since it was soon agreed that overlap with the Bundesrat should be avoided when it became involved in the process.\(^{17}\) There were also structural problems, such as the lack of Land instruments to coordinate the flood of information and direct it to the appropriate subject ministries and the difficulty of coordinating Land responses and arriving at some consensus among the Länder. Thus, while it seemed as though the Länder had now been able to secure their position in matters involving European integration, practice proved otherwise.\(^{18}\)

**The Bundesrat and the ratification of the Single European Act**

Various proposals and efforts in the early 1980s to reform the EC became an increasing focus of attention, with the Single European Act (SEA) emerging in 1986 as the most important development since the Treaties of Rome in 1957 which the SEA amended. The Länder saw another opportunity to replace the old procedures and devise new ones to protect their interests, and when the federal government submitted the draft ratification law for the SEA in February 1986, the Bundesrat was determined to improve its position. It passed a resolution insisting that the position of the Bundesrat be strengthened and suggested that Article 24 of the Basic Law be amended to provide for the approval of the Länder in transferring any of their autonomous powers to the EC. This led to charges that the Länder were trying to interfere in the realm of foreign policy that belonged to the federal government; but for the Länder European policy had become domestic policy, and they were reacting accordingly.

In any case the resolution had the effect of persuading the federal government to make the ratification law a consent law, thus conceding to the Bundesrat the right of veto. But the ratification bill still did not grant the Bundesrat the right of participation in the federal government’s decision making process concerning EC legislation affecting the Länder. This led to the Bundesrat’s insistence that the ratification bill be changed to provide for its participation and that the Basic Law be amended so that the transfer of autonomous rights under Article 24 could be made subject to Bundesrat approval. The result was that the federal government was forced to accept a change in the ratification bill which provided that the federal government had to obtain the position of the Bundesrat before it could approve any decisions of the EC Council of Ministers that wholly or partially affected the exclusive legislative powers of the Länder or their
essential interests. Furthermore, the federal government could deviate from this position only for compelling reasons. In this case the federal government was to provide the reasons and, upon the demand of the Bundesrat, engage as far as possible representatives of the Länder in the negotiations with the consultative organs of the Commission and Council of Ministers.19

In the meantime the Länder continued to push for more rights regarding the EC, and at the Länder Prime Ministers’ Conference in Munich in October 1987 ten theses were presented which outlined the demands of the Länder concerning the nature of the EC and their rights. This was followed in December by the “Federation–Länder Agreement” which again outlined various information and participation rights of the Länder, including Bundesrat representatives in the German delegation in Brussels when negotiations were taking place on matters that affected the Länder directly. In such cases, however, the leadership of the delegation which still had only one vote in the Council of Ministers was to remain with the federal government.

The success of the Bundesrat in improving its ability to protect its interests in matters concerning the EC has, of course, been criticized as an example of cooperative federalism carried too far; indeed, the provisions described above have been characterized as interfering in the responsibilities of the federal government for foreign policy and even as unconstitutional to some extent. At the very least a confusing picture is presented: the Land representatives in the German delegation in Brussels receive a double status; to the outsider they are representatives of the federal government, but internally they are representatives of the Länder.20

The negotiation and ratification of the Maastricht Treaty (TEU)

The Maastricht Treaty on the EC and EU, which we will refer to as the Treaty on European Union (TEU), represents a new stage in the process of European integration.21 It was designed not only to adapt the EC to a new Europe following the events of 1989 but also to integrate further and bind the larger, united Germany to Europe (“a European Germany, not a German Europe”). Given the various rights of information and participation which the Länder had gained since the SEA, they were well prepared for the challenge of Maastricht.

Even before the first summit meeting in Dublin in June 1990 concerning the EC and EU, the prime ministers of the Länder had placed Europe on their permanent agenda, including the idea of a “Europe of the
Regions.”22 In the late summer of 1990, the federal government declared its willingness to let the Länder participate in the internal preparations as well as in intergovernmental conferences (IGCs) on the Maastricht treaties. Delegates from Baden-Württemberg and North-Rhine Westphalia represented the Länder in IGC meetings on the EU, and representatives from Bavaria and Hamburg participated in similar meetings on a European Economic and Currency Union. Next to Germany, only Belgium had subnational units involved in both intergovernmental conferences. Parallel to these conferences, the Bundesrat created a Europe-Commission in which all sixteen Länder and the federal government participated.23

In August 1990 the Bundesrat passed a resolution outlining its expectations for the Maastricht Treaty. These included anchoring the principle of subsidiarity in the treaties with a specific reference to a European “third level”24 of Länder and regions (if taken seriously, this would mean an expectation that all member states become federal systems); opening the meetings of the Council of Ministers to representatives of the Länder and the regions; creating a special council for the regions; and providing for the right of Länder and regions to bring cases before the ECJ to protect the right of subsidiarity. These expectations were then confirmed by the Länder Prime Ministers’ Conference in Munich in December 1990.25

In the negotiations on the treaties during 1991, the German delegation presented a position that was a compromise between the views of the federal government and the Länder. The delegation accepted the demand for a regional council, but only as a consultative body, and the Länder agreed to attach it to the Economic and Social Committee that advises the EU Commission and Council of Ministers. The demand for anchoring the principle of subsidiarity in the Treaty was accepted, but the demand for regional participation in the Council of Ministers was not. The demand to have the right to bring cases to the ECJ was revised.26

From the above one can already see the German influence on the final results of the IGC meetings. The principle of subsidiarity was included in the Treaty, which was seen as a significant accomplishment. However, in the Munich Declaration of the Land prime ministers in December 1990, the expectation was for three levels throughout the EU and a clear separation of tasks between each of these. This was designed to counter the “creeping accession of powers” by the EC and to oppose the provisions of Article 235 (now Article 308) of the EEC Treaty of Rome that serve as a kind of general or implied powers. Unfortunately, there are problems with the expectations associated with the principle of subsidiarity: first,
its meaning is not clear, especially to non-Germans; second, as written in
the TEU it applies to the member states, and subnational levels are not
mentioned; and, third, not even in German federalism is there a clear
division of tasks between the federal and Land levels. Rather, widespread
joint decision making and cooperation (Politischer Verflechtung) and a trend
toward a “unitary federal state” make it difficult to take seriously a
demand by the prime ministers of the Länder that there should be clear
divisions of powers in the EU.27

Another major achievement from the perspective of the Länder and
some other regions was the establishment of a Committee of the Regions
(CoR), even if it has only advisory functions vis-à-vis the Commission
and Council of Ministers. With the three new member states that joined
the EU in 1995, the CoR has 222 regional and local representatives; Ger-
many has twenty-four members. It is not nearly as important a body as
the prime ministers of the Länder hoped it would be. It is neither an inde-
pendent nor a homogeneous regional organ, and its influence seems
quite limited. Nevertheless, it appears to have more than a mere symbolic
purpose;28 though weak, analyses of its actions in the short time it has
existed suggest that it has had some impact on the Commission and
Council and in representing the regions before the “Reflection Group”
that reported to the IGC in 1996.29 On the other hand, the representation
in the CoR of mostly large cities, rather than regions in the German sense,
has altered considerably the original idea behind the concept of the CoR
and perhaps even weakened the status of the German, Belgian, and Aus-
trian regions while providing no incentive to nonfederal member states
to create regions.30

A third victory for the Länder and regions in Europe was the introduc-
tion of Article 146 in the EC Treaty that provides for subnational minis-
ters to represent member states in the Council of Ministers when their
autonomous rights are affected. The Länder had insisted on this right all
along, but they were forced to drop the issue in the IGC. It was then
revived by the Belgian regions and later accepted as part of the Treaty.31

It should be noted that the German local governments, which play a very
significant role in German politics and administration, were not absent
from the developments outlined above. The principle of “subsidiarity” that
was pushed so hard by the Länder received the “fervent” support of German
municipalities, which were also concerned about the transfer of their
powers to the EU.32 There was disagreement between them and the Länder
governments, however, over their respective representation in the new CoR.
A compromise was reached according to which three of the twenty-four
German seats would be municipal representatives, one each nominated by the three local government associations representing the larger German cities (Deutscher Städtetag), the smaller cities and towns (Deutscher Städte- und Gemeindetag), and the counties (Deutscher Kreistag). German municipalities are not represented as strongly as those of other EU states, of course, because the German Länder consider themselves to be the appropriate “regions.” Nevertheless, the three local government associations, like the Länder, have established a small combined office in Brussels which serves as an “antenna” for gathering relevant information.\(^{33}\)

EU policy making affects local governments in two general ways: through regulations on a variety of topics and through grants. Regulations affect the procurement of goods, services, and construction work by municipal and county governments which are responsible for two-thirds of all public spending on capital investments in Germany; second, as noted above in the example from Saxony, the EU controls public subsidies to the private sector; third, EU environmental regulations have become more intrusive over the years; fourth, personnel polices are regulated by the anti-discrimination provisions of the TEU; and lastly, drinking water and sewage treatment are covered by EU regulations.\(^{34}\)

The EU presence in Germany was small before unification with regard to grants. But the Ruhr area has qualified for some aid owing to its troubled smokestack industries, and all of former East Germany now qualifies. As a result of EU funding and regulations, some municipalities have created an office that deals with EU matters; however, these require only part-time attention in most cases. EU activities still have a low profile in most local governments.\(^{35}\)

As noted above, the Länder had rather high expectations of the TEU concerning the European “third level” of regions below the national governments. In the meantime it has become clear that these expectations could not be realized. As Jeffery has noted, the Länder have “run up against the buffers not so much of the limitations of their achievements in the Maastricht Treaty, but rather a more insuperable problem: the sheer heterogeneity of forms of sub-national governmental organization in the EU.”\(^{36}\)

The appropriate regional level simply does not exist in most EU member states, as is reflected clearly in the CoR in which local governments, rather than regions, are strongly represented.\(^{37}\) One result of the region–local division in the EU is the encouragement this gives to different and even conflicting interpretations of the concept of subsidiarity, which is so important to the Germans.\(^{38}\)
The Länder, the EU, and constitutional changes

After the Maastricht Meeting of December 1991, a Joint Constitutional Commission consisting of members of the Bundestag and Bundesrat was formed in January 1992 to consider amendments to the Basic Law that were deemed necessary after unification and continuing developments in European integration. In June the Commission agreed to recommend a new “Europe” article and to change Article 24.59

Thus, the old Article 23, which had been used by the five new Länder in the former East Germany to accede to the Federal Republic and was now obsolete, was replaced by a new Article 23 focusing on Europe. Article 23 and some other changes concerning Europe, including a new paragraph for Article 24, were approved by the Bundestag and Bundesrat at the same time they ratified the TEU in December 1992 (however, owing to a challenge made before the Federal Constitutional Court, ratification did not go into effect until 1 November 1993, after the Court approved the German ratification of the TEU).

The new Article 23 and the laws that have been passed pursuant to it replace the various agreements that were made between the Länder and the federal government in the past concerning Länder rights in the integration process.40 Article 23, para. 1 suggests that the EU will preserve the principles of federalism and subsidiarity, and it binds future transfers of sovereignty to the consent of the Bundesrat. It provides for a comprehensive exchange of information concerning the EU between the federal government and the Bundestag and Bundesrat, and it gives the Bundesrat the opportunity to state its opinion before the federal government participates in the EU legislative process. The Bundesrat is to have the right to participate in the decision making process of the federal government. Where the federal government has exclusive power but the interests of the Länder are affected, the federal government is to take into account the opinion of the Bundesrat. Where the autonomous rights of the Länder are affected, the opinion of the Bundesrat shall prevail while keeping in mind the overall responsibility of the federal government. And where the exclusive legislative authority of the Länder is involved, the Federal Republic shall be represented in EU councils by a representative of the Länder sent by the Bundesrat. In this case the representation shall take place with the participation and agreement of the federal government in order to preserve the interests of the federation. This last provision can be seen as an exception to the rule that the federal government represents the country as a whole in foreign affairs; on the other hand, the Bundesrat representative must
cooperate with the federal government. By 1995 representatives of the Länder nominated by the Bundesrat were participating in about 400 EU committees and other bodies.\textsuperscript{41}

It is worth noting that the “Law Regarding the Cooperation of the Federation and Länder in Matters Concerning the EU of March 1993” provides that a two-thirds majority in the Bundesrat can force the federal government to accept its position in case of conflict on a matter covered by Article 23, para. 5, of the Basic Law. This, of course, underlines the view that European policy is no longer foreign policy but a form of domestic politics.\textsuperscript{42}

A serious problem for the Bundesrat and Länder in actually being able to take advantage of their new rights concerning the EU is the flood of information that comes from Brussels. The problem is not new, and the Bundesrat has had an “EC Committee” since the Treaties of Rome to consider proposals for regulations from the EC Commission and proposals to the Council of Ministers sent to the Bundesrat by the federal government. This EC Committee has been very busy, which can be seen by the fact that the Bundesrat considered 6,355 proposals from the EC between 1957 and 1994. The EC Committee has recommended a Bundesrat position for most of these proposals. The numbers exceed the number of domestic bills sent to the Bundesrat by the federal government over the same period of time. The “flood of paper” has increased since 1989, when it began to reach 70–80 documents each day. These are placed in a computer and sent to all or some of the Länder on demand. Relevant documents are also sent to Bundesrat committees. For proposals in the Council of Ministers that affect the autonomous powers of the Länder, the federal government informs the Länder of the time frame for decision making in the Council, and the Bundesrat secretariat ensures that the appropriate committees hold meetings on the proposals in time to meet the deadlines. All of this requires close cooperation between the federal government and the Bundesrat and the Länder and demonstrates the demands and complexity involved in Bundesrat participation in matters involving the EU.\textsuperscript{43} Having “chosen a consensual approach in dealings with the Federal Government” throughout the first half of the 1990s, “there have been no great trials of strength pitting Bundesrat against Federal Government in the exercise of Article 23 powers.”\textsuperscript{44}

A relatively new instrument in the Bundesrat is the EC Chamber, authorized in 1988, and called the “Europe Chamber” since 1992 with the amendment of Article 52, para. 3a, of the Basic Law. This Chamber is to decide for the Bundesrat when there are serious time pressures or when
confidential material is involved. Each Land has one member or a representative with the same voting rights as in the plenary sessions. So far, this chamber has met only three times. The last meeting was in December 1999, when the Chamber majority voted to ask the federal government to oppose an EU environmental proposal that was to be considered in a few days. The federal government voted for the measure anyway “for reasons of state.” If, however, the Länder had opposed the measure by a two-thirds majority, the federal government would probably have been bound to accept the Chamber’s decision.45

**Other reactions by the Länder to the EU**

*Observer of the Länder at the EU*

Since the establishment of the EEC in 1958, the Länder have had an official observer who keeps them informed directly or via the Bundesrat of events in Bonn and Brussels. The scope of his activity was expanded to include the ECSC and Euratom in 1965. He is appointed by the Conference of Land EU Ministers. He serves in the German delegation, if only as an observer; but he is also a direct contact person for European institutions. From his offices in Bonn and Brussels, he was originally expected to keep the Länder informed of activities that were to be dealt with by the Bundesrat and to provide them with information over developments in Brussels that affected Land responsibilities. This information was in addition to materials supplied by the federal government, which were not always timely or sufficiently complete. These and many other duties were focused on the Länder, but the difficulties they experienced in handling the information and in arriving at a timely consensus, along with other problems, encouraged more focus on the Bundesrat. This came especially with the rights of information and participation gained during the ratification process of the SEA in 1986. As a result the Länder Observer no longer transfers to the Länder routine drafts and documents from the Commission and the Council of Ministers, since the Bundesrat now receives these. The federal government also sends its materials directly to the Bundesrat which transfers them to the Land Missions that are now in Berlin. Where necessary or useful, the Observer now sends materials to the Bundesrat. Since the SEA, the Observer has focused more on Brussels, and his offices in Bonn were closed in 1999. He continues to gather relevant information, assist the Länder with the organization and explanation of materials sent to the Bundesrat, report on the activities of other EU organs, and attend Bundesrat EU Committee and Europe Chamber
meetings. New duties include above all assisting the Representatives of the Länder in Brussels.46

Land liaison offices in Brussels
The German Länder were the first “regions” in Europe to establish liaison offices in Brussels in 1985 – an office for a local government, Birmingham, was opened in 198447 – and today all of the Länder are represented. Each Land has its own office except for Schleswig-Holstein and Hamburg, which share a “Hanse” office. The purpose of these offices is to provide information and documents relevant to their respective Land through their contacts with EU organs, the German Permanent Representative’s Office, other member states, and various interest groups in Brussels; to explain their Land’s views on various issues; to help economic enterprises in their Land with matters involving the EU; to try to obtain grants from the EU structural funds for the weak Länder, especially in former East Germany; to organize visits by politicians and others from the Land; and to lobby in favor of their Land through exhibits and various personal contacts; to promote efforts to educate the public concerning the EU, etc.48

These offices have often been models for more than 140 offices established by the end of 1995 by other European regions and cities since 1984.49 German cities, towns, and counties are represented collectively by a European Office in Brussels. In addition, some individual Länder have established an office to represent their own local governments.50

Questions have been raised about the extent to which the Land liaison offices might interfere with the federal government’s responsibilities for foreign policy, but the conventional view seems to be that the Länder are not prohibited from trying to influence EU organs which pursue policies that affect the Länder. Of course the Länder may not try to transform their offices into diplomatic institutions.51

The main differences between the Länder Observer and the Land Representatives in the liaison offices is that the former is concerned with continuing, broad issues that affect various subject ministries but not particular Länder. He enjoys a privileged position in his information-gathering functions, and it is more efficient for him to send materials to the Bundesrat than for the individual representatives in the Land liaison offices to gather information on their own. The Land Representatives are more concerned with lobbying and public relations and look for contacts and influence for their Land. These activities can, of course, bring the Länder into competition for EU projects. While the functions of the Länder Observer and the Land Representatives of the Land liaison offices are
separate, they complement each other in the general effort to improve the “Europafähigkeit” of the Länder, i.e., the capacity of the Länder to handle their EU responsibilities.52

“Europe ministers” in the Länder
In recent years the Länder have appointed “Europe ministers” to take responsibility for the various relationships among the EU organs, federal government, Bundesrat and Länder. In most cases these are ministers who share this responsibility with other fields, e.g., justice or economics, or who are simultaneously the Land “ambassadors” in the Land missions in Berlin. In 1992 the Conference of “Europe Ministers” of the Länder (EMK) was formed to watch over the EU’s consideration of the principle of subsidiarity. The Conference replaced the “Europe Commission” of the Land Prime Ministers’ Conference. In their first meeting they agreed to coordinate the interests of the Länder in matters concerning Europe. This included their interests vis-à-vis the federal government and the organs of the EU as well as their own activities, such as the dissemination of information about Europe. The operating assumption of the new Europe Ministers’ Conference seems to be that European politics are now domestic politics, and the Länder must act accordingly.53

Länder involvement in other foreign relations

Cross-border regions
Since the establishment of the EEC in 1958, forty transnational or cross-border economic regions have been created in Europe. With nine states on neighboring borders, it is no surprise that Germany is a member of fifteen of these.54 Examples include the “Euregio Maas–Rhine” consisting of a Dutch province, two Belgian provinces and the Aachen (Aix-la-Chapelle) region of North-Rhine Westphalia; the “Saar–Lor–Lux” region comprising the Saarland, Lorraine, and Luxembourg; the “Arge Alp” consisting of German, Swiss, Austrian and Italian Alpine regions; the “Four Motors for Europe,” which includes Baden-Württemberg, Lombardy, Catalonia, and the Rhône-Alpes regions; the “Euroregion Neisse” which joins border areas of Germany, Poland and the Czech Republic; and the “Euroregion Elbe/Labe,” which joins German counties around Dresden with counties in Northern Bohemia in the Czech Republic.55 These regions have their own administrative structures that promote cooperation and coordination of
policies in areas such as regional economic development, traffic, environmental protection, health services, and culture, education and sport.\textsuperscript{56} The involvement of the \textit{Länder} in such cross-border arrangements, with agreement of the federal government, are now constitutionally authorized in the new para. 1a of Article 24. The view that the Europe of the future will be a “Europe of the Regions” that will eventually replace the current national states is based in large part on examples such as the above.\textsuperscript{57}

\textit{Other “foreign relations” of the Länder}

German states that comprised the Holy Roman Empire and the German Confederation – if they were large enough – had their own foreign offices and diplomatic relations. Even in the North German Federation and the Kaiserreich, the powers associated with foreign relations were shared to a limited extent by the central government and the states. Thus Bavaria, Württemberg, Baden and Saxony had some form of diplomatic relations to certain states until the early twentieth century. The \textit{Länder} in the Weimar Republic between 1919 and 1933 had some limited treaty power, but foreign affairs was now a matter for the central government.\textsuperscript{58}

Article 32, para. 1, of the Basic Law gives the federal government jurisdiction over the conduct of foreign affairs. However, para. 2 calls upon the federal government to “hear” a \textit{Land} before the conclusion of a treaty if special circumstances affect the \textit{Land}. Such “circumstances” might involve shipping in the Baltic or North Sea or Rhine River traffic. Being heard does not necessarily mean the \textit{Land} must approve; but it probably does.

Article 32, para. 3 gives the \textit{Länder} the right to make treaties with foreign countries with the federal government’s approval, if the contents of the treaty fall within the legislative competence of the \textit{Länder}. This paragraph has led to some controversy between the \textit{Länder} and the federal government, because two different interpretations are possible. The federal government has argued that it has a concurrent power which allows it to make treaties even when they affect the exclusive legislative powers of the \textit{Länder} (compare the American constitutional case of \textit{Missouri v. Holland}, which confirmed that treaties are the “supreme law of the land!”\textsuperscript{59}). The \textit{Länder} insist that they alone have the power to make treaties when these affect their autonomous authority.\textsuperscript{60} They also point out that only they are in a position to implement the treaty’s provisions, since they are responsible for administration; that is, there are no “transformation rights” that accrue to the federal government by treaty as occurred in the
United States after *Missouri v. Holland*. Federal comity makes it highly unlikely that the federal government would try to commit the Länder to administering a treaty they did not approve.61

The two sides have found a compromise in the “Lindau Agreement” of November 1957. This agreement stipulates that the two sides disagree on treaty powers, but that the federal government has the responsibility for consular treaties, commercial treaties, and treaties with international organizations. Where the Länder believe their exclusive rights of legislation are concerned, especially regarding culture, the Länder must consent to federal treaties and must be given time to react. Finally, it was agreed that in the case of treaties where the essential interests of the Länder are affected, whether exclusive powers of the Länder are involved or not, they are to be consulted in time.62

As a result of the Lindau Agreement, a Permanent Treaty Commission of the Länder was also formed. This Commission meets monthly and consists of civil servants from the Land missions in Berlin. They consider draft treaties sent to them by the Foreign Office or by another ministry interested in negotiating a treaty. The examination of the draft treaty begins with a focus on which part of the Lindau Agreement it falls under and normally ends with the consent of all of the Länder before the federal government submits the treaty to the Bundesrat for ratification.63

Beyond certain treaty rights, the Länder have no power to conduct foreign affairs, and it cannot be said they conduct foreign policy on the side (Nebenaussenpolitik).64 Visits abroad by Land ministers are for information purposes only, in agreement with the federal government. The Land offices in Brussels do not violate the foreign policy powers of the federal government so long as they confine themselves to information-gathering, forming contacts, and trying to exercise influence on EU organs. They are separate from the German Permanent Representative’s Office in Brussels, which does fall under federal foreign relations powers.65

*Foreign aid and the Länder*

As we have seen above, according to Article 32, para. 1, of the Basic Law, foreign relations are the concern of the federal government. On the other hand, the federal government must consult a Land before it concludes a treaty with another country if the Land is affected in some special way. And in those areas that fall under the legislative powers of the Länder, especially culture – which includes education – the Länder may conclude treaties with other countries.
The Länder have always considered themselves free to conclude agreements with subnational regions of other countries. Informal relations with foreign states are also maintained, and, as long as federal comity is not disregarded, this does not normally present the federal government with any difficulties.66

Examples of Länder activities abroad are public and private foreign aid projects, the latter of which is provided by nongovernmental organizations (NGOs) such as the Red Cross, church organizations, foundations, schools, etc. The Länder become involved in foreign aid activities in three ways: first, they sometimes participate in aid projects of the federal government in which, for example, they provide education, training or research facilities or make available experts employed by the Länder; second, they promote educational activities in their schools and elsewhere to increase awareness of the developing world; third, they finance their own development projects in Germany and abroad. In the domestic arena, for example, they finance university and specialist college students (Fachhochschüler) and certain foundations. In the target developing countries, they manage and finance their own projects or operate through an NGO. These are usually modest programs ranging from emergency humanitarian aid to the construction of village wells and rural hospitals to the training of midwives and classes to teach women how to use hand-operated sewing machines. They do not become involved in large and expensive projects. In 1993 they spent a total of DM 172 million (depending on the exchange rate, about $105–115 million) on foreign aid, not including student stipends in Germany; from 1962 to 1993 they provided almost DM 2.2 billion in aid.67

The Länder are in a particularly good position to offer aid in the form of training in crafts and trades, given their highly respected “dual system” of concurrent vocational education and practical apprenticeship training. They also take great pride in providing relatively inexpensive but effective practical aid that involves a good deal of personal contact with native populations.68 Of course the impact of such programs is generally limited, unless a multiplier effect can take place.69

Since the Länder do not provide enough aid to justify a Land ministry for such purposes, there can be problems of coordination among the various ministers and their modest programs. Coordination does exist, especially via the prime ministers’ staffs (Staatskanzleien), but problems do arise, given the German tradition of ministerial responsibility, especially in the case of coalition governments. Formal treaties or contracts are not the rule, so that a successor minister may not follow closely the
plans of his or her predecessor. Land budget planning helps with coordination, but it does not solve all potential problems by any means. Given the lack of public enthusiasm for foreign aid in Germany as in other donor countries, it is also tempting to cut back projects that may be in fact quite promising over time.

Problems between the Länder and the federal government can arise for a variety of reasons. The Länder may make promises, real or perceived, that they do not keep because of the nature of the agreement with the target country. Of course, if there is a legal commitment under international law, the federal government feels bound to abide by the agreement. This raises the question of the extent to which the federal government should coordinate Land aid projects. The Länder and the federal government do cooperate in many ways, and the Federal Ministry of Economic Cooperation and Development meets two or three times a year with a “Federal–Land Committee on Development Aid.” In addition there is some contact between the Federal Ministry and the Foreign Office with individual Länder. But the federal ministries have no authority to instruct or direct the Länder in this area of activity. Thus a Land or an NGO supported by a Land may build a hospital or school in Cuba or Nicaragua, which for foreign policy reasons the federal government could or would not do, whether it secretly approves or not.70

The responsibility of the federal government is limited by the fact that the agreements between the Länder and the target countries do not normally fall under international law and therefore do not involve the federal government. Otherwise, the Länder have to receive the consent of the federal government. But with few exceptions the federal government has come to accept a kind of customary legal basis for Land practices. In return, however, a strong sense of federal comity has prevented the Länder from abusing this customary right.71

Foreign trade policy and the Länder
In 1995 a major national newspaper in Germany reported that in April of that year the prime minister of Bavaria was leading a delegation of businessmen from his Land to Beijing, only to be met there by delegations from North-Rhine Westphalia, Baden-Württemberg, and Stuttgart, as well as executive board members from three large German enterprises. All were trying to arrange meetings with the same responsible Chinese economic policy makers. This coincidental meeting was not only an example of the lack of coordination among public officials but also generally symbolic of overlapping activities and competition in the efforts by Land and
even city officials to secure economic advantages for their constituents. The result is that “Germany” may not be represented by any one office with separate divisions but by multiple offices representing various Länder, cities, foundations, and agencies. It may be that other countries also face problems of coordination, but these are probably more severe in federal systems where the constituent units compete not only with other countries but also among themselves. In meeting the competition for export promotion, they have four instruments at their disposal: they provide grants for export consulting services, especially to their medium-sized enterprises; they provide businesses in their territories with subsidies to help them participate in foreign trade fairs or organize their own trade fairs, e.g., Hanover and Leipzig; they reduce the risks of exporting by giving certain guarantees against non-payment for goods and services received; and they establish a temporary or even permanent presence in selected foreign countries. In some cases, as the report above demonstrates, Land ministers and prime ministers, accompanied by business representatives, travel abroad on trade missions. In some cases, especially in China, trade partnerships are made with certain regions. Land activities in Western countries, such as the United States, are usually focused more on attracting investment in Germany. As already noted above, the Land offices in Brussels are more interested in lobbying for various EU funds for regional development plans.

Of course such activities can affect foreign policy and, under certain circumstances, involve the federal government. Thus if a prime minister or minister makes a controversial public political statement in the country he or she is visiting, e.g., concerning human rights, it makes a difference whether he or she is doing so as a party leader or as the representative of the Land government. In the first case he is not speaking for any government; in the latter case his statement might be seen as interference in the internal affairs of the country and cause an international incident directly affecting the federal government’s responsibility for foreign policy making. Needless to say, the fine line might not always be understood in all cases.

As we saw on p. 374, foreign policy is an activity that belongs to the federal government in principle; however, whether in the area of foreign aid or in foreign trade relationships, the Länder can act on their own within certain limitations. They can conclude treaties with foreign states only with the consent of the federal government; they may not interfere with federal government responsibilities; Land spokespersons must abide by standards of international behavior, e.g., regarding interference in the
internal affairs of other states; and they must act in concert with the German conventions of federal comity. On the other hand Land government officials are generally free to comment in debates on foreign affairs in Germany and to react critically to federal government policies.76

Conclusion

The Länder have not only experienced an erosion of their powers owing to federal government actions and constitutional amendments, they have also seen the EC (now EU) Commission and other EU organs make policy decisions that affect their powers. In some cases the federal government, which has no authority in areas of exclusive Land powers, has agreed in the Council of Ministers to legislation affecting the Länder, thus undermining the constitutional protection the Länder thought they enjoyed. As a result of these developments, the Länder have tried since the beginning of European integration in the 1950s to gain meaningful rights of participation in federal government decision making in Brussels. While they had some limited success in the 1970s and early 1980s, they were basically unable to gain the kind of influence that would provide them with real protection against further incursions on their powers.

With the negotiations between the federal government and the Bundesrat over ratification of the 1986 SEA, however, the Länder were successful in forcing the federal government to take the position of the Bundesrat into account when voting on issues in EC councils that affected Land interests and even to allow the Länder to participate in negotiations in Brussels when exclusive Land interests were involved. These rights were then confirmed after German unification by the addition of the new Article 23 to the Basic Law. The result is that today the Bundesrat has constitutional rights of participation that place the Länder in a stronger position than ever before in the area of European integration.

The Länder have had liaison offices in Brussels for several decades, but these have been strengthened over the years to provide them with a variety of services and contacts. More recently, the Länder have been appointing “Europe ministers” to help meet the many demands made upon them by the increasing number of EU regulations and actions.

The Länder like to argue – and for good reasons – that European policy is now domestic policy. That may be overstated in some areas, just as it would not be correct to suggest – as some have – that the Länder have their own foreign policies in general. On the other hand, they do participate in
limited foreign aid projects, especially with subnational regions in third world countries, and they appear to have had considerable success with the education and training they have provided and the relatively small amounts of money they have spent on their activities. Like American states, they engage also in trade policies designed to increase exports of home industries throughout the world. The Länder are, then, active if limited participants in the general arena of foreign affairs.

Notes

4 Thoma Remmers, Europäische Gemeinschaften und Kompetenzverluste der deutschen Länder (Frankfurt/M.: Peter Lang, 1992), pp. 84–86.
7 In the summer of 1996, Kurt Biedenkopf, the prime minister of Saxony in eastern Germany, defied the European Commission by granting VW a higher subsidy for investing in his Land than the Commission had authorized. After a year of serious conflict between Saxony and the Commission, with the German federal government caught more or less in the middle, a compromise was reached according to which VW had to repay most of the subsidy. See Frankfurter Allgemeine Zeitung, 7 August 1997.
8 Remmers, Europäische Gemeinschaften, pp. 88–91.
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10 See also Jeffery, “Farewell to the Third Level?, ” p. 58.
13 Remmers, Europäische Gemeinschaften, pp. 159–176.
14 Ibid., pp. 211–212.
16 Ibid., pp. 10–11; Kilper and Lhotta, Föderalismus, p. 216.
17 Ibid., p. 11.
18 Ibid., pp. 11–12.
20 Kilper and Lhotta, Föderalismus, p. 219.
22 See also Jeffery, “Farewell to the Third Level?, ” p. 64.
26 Ibid., p. 225.
27 Ibid., pp. 226–228.
28 Ibid., p. 229.
33 Ibid., pp. 62–63.
34 Ibid., p. 64.
36 Jeffery, “Farewell to the Third Level?,” p. 69.
39 For a general discussion in English, see Leonardy, “Regionalism within Federalism,” pp. 303–308.
40 Jeffery, “Farewell to the Third Level?,” pp. 61–62.
44 Jeffery, “Farewell to the Third Level?,” p. 72.
49 Jeffery, “Regional Information Offices in Brussels,” p. 183; Fountain, “German Cooperative Federalism,” p. 9, speaks of over ninety regional offices.
51 Jeffery, “Regional Information Offices in Brussels,” p. 199, notes, however, that the German Permanent Representative in Brussels has been perturbed by some of the larger Länder calling their offices “missions.” See also Ulrich Fastenrath, “Länderbüros in Brüssel: Zur Kompetenzverteilung für informales Handeln im auswärtigen Bereich,” Die öffentliche Verwaltung 43, no. 4 (February 1990), pp. 125–136.
53 Hartmut Klatt, “Die Identität der Regionen soll gesichert werden,” Das
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55 Kilper and Lhotta, Föderalismus, p. 237; Fountain, “German Cooperative Federalism,” p. 15.

56 See, for example, the information handout for “Euroregion Elbe/Labe,” issued by the Kommunalgemeinschaft Euroregion EEL, Pirna, Germany.


58 Uwe Leonardy, “Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs,” German Politics 1, no. 3 (December 1992), p. 120.

59 252 U.S. 416 (1920).


61 Bruno Schmidt-Bleibtreu and Franz Klein, Kommentar zum Grundgesetz (8th edn; Neuwied: Luchterhand Verlag, 1995), Article 32, p. 646.

62 The Lindau Agreement is reprinted in most constitutional commentaries on Article 32. See, for example, ibid., pp. 644–645.


65 Schmidt-Bleibtreu and Klein, Kommentar, p. 642.


67 Klaus Otto Naß, “Recht und Praxis der Entwicklungspolitik der deutschen Länder,” Die öffentliche Verwaltung, no. 7 (April 1996), pp. 274–275. For a breakdown of aid by Land, see n. 8, p. 275. Total federal foreign aid in 1994 was almost DM 8.3 billion, almost 6 billion of which was for bilateral aid and 2 billion for multilateral aid (n. 10, p. 276).

68 Interview with a former Land prime minister, September 1996.


71 Ibid., pp. 279–281.

72 Frankfurter Allgemeine Zeitung, 13 July 1995, p. 11.

And apparently in some other areas as well, as indicated by the prime minister of an East German Land who suggested in a meeting with visiting American scholars that he maintains official contacts with bordering Central European states without seeking approval of the Federal Ministry for Foreign Affairs. Wayne Thompson, “Germany and Central Europe: A Fulbright Journey,” unpublished manuscript, 1998.