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# THE COMMON COMMERCIAL POLICY OF THE EEC: DEVELOPMENTS IN THE FINAL STAGE

*Joseph Jude Norton\**

## I. INTRODUCTION

The free movement of goods, persons and capital and the freedom of establishment and services<sup>1</sup> throughout the EEC were the four fundamental objectives the Treaty of Rome<sup>2</sup> sought to accomplish in establishing the Community. In addition, the Treaty provided for the implementation of common Community policies toward agriculture, as well as transport and commercial relations with third countries. It also outlined specific rules for competition. Through the attainment of these freedoms and the implementations of these sectoral policies during a twelve year transitional period, the full measure of integration<sup>3</sup> envisioned by the Treaty of Rome was to be achieved.

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1. In the context of EEC law, freedom of establishment provides generally the right of Community nationals and companies to enjoy national treatment within each member state of the Community concerning all matters of economic self-employment, except nonprofit-making activity. Freedom to supply services creates a residual category of economic activity embracing those services not governed by the Treaty of Rome's provisions relating to free movement of goods, persons and capital. *See generally* U. EVERLING, *THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET* (1964).

2. Treaty Establishing the European Economic Community, *signed* March 25, 1957, 298 U.N.T.S. 3 (effective Jan. 1, 1958) [hereinafter cited as Treaty of Rome]. The official text currently exists only in the French, German, Italian and Dutch languages; with the accession of the United Kingdom an official English text will be prepared. The text referred to in this study is the revised English translation prepared by the British Foreign Office in 1967 and available from Her Majesty's Stationery Office.

3. For a discussion of the transitional period see COMMISSION OF THE EUROPEAN COMMUNITIES, *FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES 1970* (1971). For an interesting and critical account of the concept of sectoral integration in Western Europe see L. LINDBERG & S. SCHIENGOLD, *EUROPE'S WOULD-BE POLITY* (1970).

The concern of this article is the development of a common commercial policy by the EEC. This aspect of Community integration is particularly important today for two reasons. First, the common commercial policy (CCP) is one of the areas in which integration has been most difficult to achieve. To know the present state of the CCP is to understand the present state of Community integration.<sup>4</sup> Secondly, the development of the CCP has important ramifications for the commercial dealings between the United States and the EEC member states. In the post-transitional period, all matters within the scope of the CCP will be within the exclusive jurisdiction of the EEC and not the member states.<sup>5</sup> Therefore, an analysis of the content and scope of the CCP will also determine the precise nature of the commercial relationships between these parties after the total integration of the Common Market is achieved. Prior to beginning such an analysis, however, an explanation of the legal origins and the economic and political bases of the concept is necessary to place it in a proper perspective.

## II. BACKGROUND—THE COMMUNITY AND THE CCP

### A. *Community Commitment*

Article 110 of the Treaty of Rome outlines the broad aims of the Community concerning external trade with third countries:

By establishing a customs union between themselves, the Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

The article emphasizes the special responsibility of the Community in the area of commercial policy.<sup>6</sup> In principle, therefore, the institu-

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4. See generally C. KIM, *LA COMMUNAUTE ECONOMIQUE DANS LES RELATIONS COMMERCIALES INTERNATIONALES* (1971).

5. See Treaty of Rome, *supra* note 2, art. 113. For an example of the complications that may arise for the United States see Decision 69/494 du 16 decembre 1969, 1969 E.E.C. J.O. L326/39. In brief, this Council Decision calls for the substitution of EEC agreements for existing bilateral agreements between EEC member states and third countries that fall under the CCP. This means that all present U.S. commercial agreements with EEC member states will be transformed into agreements to be negotiated directly with the EEC in the future.

6. Rapport fait au nom de la commission des relations économiques extérieures sur les problèmes de la politique commerciale commune à l'issue de la période de transition prévue par le traité CEE, [1970-1971] EUR. PARL. DOCS., No. 32, at 6 [hereinafter cited as Kriedemann Report].

tions and member states of the EEC have undertaken a firm commitment to pursue liberal foreign trade policies. Although article 110 is couched in general terms, it is binding on member states as contracting parties. Consequently, it is not simply a vague policy statement, but is obligatory in nature.<sup>7</sup> Difficulties arise, however, because the Treaty of Rome gives neither a precise definition of the concept of commercial policy nor an exhaustive treatment of the extent of application of such a policy.

### B. *Economic and Political Bases*

Article 3(b) of the Treaty of Rome states that one of the dual purposes of the Community is to establish "a common customs tariff and a common commercial policy towards third countries." This mention of the institution of a common customs tariff with a concomitant reference to the CCP is not a coincidence, but is derived from sound economic principles.<sup>8</sup> Unlike a "free trade area," which calls only for removal of trade barriers between member states, the Common Market acts as a customs union to require the imposition of a common external tariff toward nonmember states.<sup>9</sup> In terms of international economics, the theory underpinning a customs union acknowledges that the union will produce both trade creation and trade diversion effects, but also maintains that its net contribution to the international economy as a whole will be positive to the extent that the former effect predominates.<sup>10</sup>

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7. "This clause must properly be regarded as being obligatory, at least in its second part, rather than a mere declaration of intent. Despite its wording, it is binding not only on member States, but also on the institutions of the Community, since the member States made that declaration in their capacity as contracting parties, thus committing also the bodies instituted by the Treaty. It is, however, questionable how far any specific conclusions can be drawn from this general wording in a concrete case. The margin for the judgment of the institutions and the limits to their discretion are so wide that it is probably only in exceptional cases that non-compliance could be challenged in court with any chance of success." Everling, *Legal Problems of the Common Commercial Policy in the European Economic Community*, 4 COMM. MKT. L. REV. 141, 148 (1966).

8. See Comité intergouvernemental créé par la Conférence de Messine, RAPPORT DES CHEFS DE DELEGATION AUX MINISTRES DES AFFAIRES ETRANGERES 75 (1956). For a further consideration of the relation of the CCP and the common customs tariff see I. FRANK, *THE EUROPEAN COMMON MARKET: AN ANALYSIS OF COMMERCIAL POLICY* (1961).

9. Treaty of Rome, *supra* note 2, art. 9.

10. For a consideration of theory behind a customs union see J. MEADE, *THE THEORY OF CUSTOMS UNIONS* (1955); J. VINER, *THE CUSTOMS UNION ISSUE* (1950).

Even in the early stages of its development, the Common Market has led to a shift in the flow of world trade. With the removal of internal trade barriers within the Community, there has been a displacement effect stemming from a diversion of imports from third countries to other member states. Countering this to a certain extent has been the dynamic effect such a large market has produced in terms of growth, increasing economies of scale, higher productivity and in subsequent stimulation of trade with third countries.<sup>11</sup> In this latter sense, the economic basis of the Common Market is "conducive to the expansion of trade on a basis of multilateralism and nondiscrimination . . . ."<sup>12</sup>

Although the establishment of the common external tariff will encounter serious obstacles, its development is indispensable not only to the initial implementation of the economic theory of the customs union but also to the realization of a viable CCP. Within the customs union, competition will be dislocated and distorted if member states are permitted to continue to formulate independently their policies toward third countries in other areas of common commercial concern. Referring to the relationship between a common tariff and other trade policies, M. Deniau of the European Commission has stated:

[R]elations with non-member countries do not depend solely on tariffs, and it seemed to us necessary to provide also for the co-ordination of trade policies in the broadest sense, with a view to the gradual establishment of a common trade policy . . . . [I]t is essential to agree on action *vis-a-vis* the outside world, and in particular *vis-a-vis* countries whose competitive conditions are very different from ours . . . . [I]f the external policies of the Community countries are widely different in this respect, quite severe dislocation can take place within the Community itself. If unity is not attained in this respect, the implementation of the internal provisions of the Treaty will be fraught with difficulty.<sup>13</sup>

Accordingly, in the formation of the Common Market, the common external tariff "must at the same time be combined with a common commercial policy vis-a-vis non-member countries."<sup>14</sup> The inescapable imperative is that member states of the Common Market must be

11. See N. KALDER, *DESTINY OR DELUSION* 59 (1971).

12. C. WILCOX, *A CHARTER FOR WORLD TRADE* 71 (1949).

13. Deniau, *The Objectives and Constitutional Structure of the European Economic Community*, in *LEGAL PROBLEMS OF THE EUROPEAN ECONOMIC COMMUNITY AND THE EUROPEAN FREE TRADE ASSOCIATION* (1960).

14. Quin, *The Establishment of the Customs Union*, in 1 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE* 101 (E. Stein & T. Nicholson eds. 1960).

prepared to transfer to the Community the power to regulate the external tariff as well as other commercial matters that affect trade between the Community and third countries.<sup>15</sup>

Like the development of a common external tariff, the implementation of a nation's foreign policy is inextricably related to the growth of a common commercial policy.<sup>16</sup> The necessity of these parallel developments is perhaps best illustrated by an examination of the economic consequences of a totally integrated Common Market. From six nation-state economies the Common Market has created an internal market of 190 million people, producing a gross national product of 485 billion dollars. At present, this customs union represents the world's foremost trading power, accounting for roughly twenty per cent of world trade. With the accession of Denmark, Ireland, Norway, and the United Kingdom, the Common Market will account for nearly 27 per cent of world trade and will represent an internal market of over 255 million people.<sup>17</sup>

The economic impact of the Common Market, even in its initial stages of development, has led to an increase in tensions in the international political sphere. A prime example is the increasingly protective relationship between the United States and the Common Market since the early 1960's. On a political level the United States remains committed to supporting European integration.<sup>18</sup> The economic relations between the two trading blocs, however, have shown signs of deterioration over the past decade because of the United States view of the Community as a protectionist organization whose enlargement damages American commercial interests.<sup>19</sup> The general

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15. "[I]t is impossible to set up a customs union and to transfer authority over tariffs to the Community, without at the same time giving the Community authority to decide as to quantitative restrictions. . . . However, when the main instruments of commercial policy, in the shape of tariffs and quotas, have been handed over to the Community, there appears to be little point in leaving the competence to take other commercial measures in the hands of the member States." Wohlfarth, *The European Economic Community and World Trade*, in *THE EXPANSION OF WORLD TRADE* 1, 6-7 (British Inst. of Int'l & Comp. L., Spec. Pub. No. 7, 1965).

16. See N. PALMER & H. PERKINS, *INTERNATIONAL RELATIONS* ch. 6 (1957).

17. For statistics see European Community Information Service, *Press Release* No. 8 (Jan. 22, 1972).

18. See Rogers, *Our Permanent Interests in Europe*, 10 *ATL. COMMUNITY Q.* 21 (1972).

19. See, e.g., *THE UNITED STATES AND THE EUROPEAN COMMUNITY: THEIR COMMON INTEREST* 3 (European Community's Information Service,

impression of the United States view resulting from the conflict between its apparent political policy and its actual economic aims is that the United States is no longer willing to accept immediate economic losses for long-term political advantages.<sup>20</sup>

The removal of trade barriers between member states and the imposition of a common external tariff against third countries necessarily restricts the flexibility of commercial dealings with nonmember states. Not only would political conflict develop among the member states if they were permitted to carry on independent national commercial policies, but the Community could not function as a credible economic unit if the member states retained the power to deal with third countries in matters of commerce.<sup>21</sup> In view of the consequences of political autonomy in commercial dealings of the member states, it is evident that they must be willing to surrender the ultimate control over their commercial policies to the Community:

[c]ommercial policy is the central part of a political unit's activities in the field of foreign economic relations, and as such of the greatest importance for its existence and development in the modern world.<sup>22</sup>

### III. THE ESTABLISHMENT OF THE CCP

#### A. *Legal Foundations*

The legal framework for the CCP is found in the Treaty of Rome, articles 110-16. These articles form a separate chapter that deals specifically with the establishment of a common commercial policy

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1971): "[T]he talk today in Washington and in Brussels and other European capitals is not of grand design for Atlantic partnership. It is the ugly talk of trade war. Each side damns the other for firing the first shots and threatens reprisals."

20. See REPORT ON EUROPEAN ECONOMIC PROBLEMS: TRADE RELATIONS BETWEEN THE USA AND THE EUROPEAN COMMUNITIES, Eur. Consult. Ass., 23d Sess., Doc. No. 2937 (April 27, 1971) [hereinafter cited as Destremau Report].

21. "If the EEC wants to avoid the risk of becoming a shapeless mass and if it wishes to prove itself in the eyes of the outside world, it must show a minimum of unity and, in particular, introduce a common customs tariff. But a tariff of this kind cannot remain static. The Community must be able to change it, either by independent action or by agreements concluded with third countries. This is already one step towards a commercial policy. It also means that one assumes that the Community possesses legal personality." Le Tallec, *The Common Commercial Policy of the EEC*, 20 INT'L & COMP. L.Q. 733 (1971).

22. Everling, *supra* note 7, at 142.

within the Community.<sup>23</sup> A brief synopsis of these articles provides a useful preview of CCP implementation and a procedural framework for subsequent analysis.

Article 110 introduces the main theme and direction of the CCP. As previously discussed, this article commits the member states to contribute "to the harmonious development of world trade."<sup>24</sup> Article 111, which is concerned with the CCP during the transitional period, provides:

Member States shall coordinate their commercial relations with third countries so as to bring about, by the end of the transitional period, the conditions necessary for the implementation of a common policy in the field of external trade.

Article 112 deals with export aids to third countries. This article requires that aid granted by the various member states shall be gradually harmonized by the end of the transitional period "to the extent necessary to ensure that competition between enterprises within the Community shall not be distorted." In this matter the Community is empowered to issue directives to the member states to insure compliance.

Article 113 forms the legal heart of the CCP in the post-transitional period. This article treats both autonomous—internal Community measures—and contractual—commercial agreements with third countries—aspects of the Community's commercial policy. Article 114 supplements the previous provisions by presenting the procedure for concluding commercial agreements on behalf of the Community.<sup>25</sup>

Article 115 is essentially a safeguard clause to protect member states from economic difficulties that may result from disparities among the measures taken by the member states in implementing the CCP. During the transitional period, member states may take autonomous action, subject to subsequent approval by the Commission, in cases of "urgency"; in the post-transitional period, however, the Commission alone is authorized to take the steps necessary to

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23. Treaty of Rome, *supra* note 2, tit. II, ch. 3, arts. 110-16. Other direct and indirect references to commercial policy are found in the preamble and articles 3(b), 9, 10, 18, 25, 27, 28 and 29.

24. Everling, *supra* note 7.

25. "The agreements referred to in Article 111(2) and in Article 113 shall be concluded by the Council on behalf of the Community, during the first two stages unanimously and subsequently by qualified majority." Treaty of Rome, *supra* note 2, art. 114.

26. "In selecting such measure priority shall be given to those which cause the least disturbance to the operation of the Common Market and which take into



avoid diversion of trade or other economic difficulties arising from the CCP.<sup>26</sup>

Article 116 extends the principles of common action and uniform policy to the role of the member states "within the framework of international organizations of an economic character." In the post-transitional period, this common action shall be put into effect by decisions of the Council of Ministers.<sup>27</sup>

### B. Substantive Content

Article 113 provides an indication of the substantive content of commercial policy. The first paragraph of the article deals with both autonomous and contractual aspects of the Community's commercial policy:

After the expiry of the transitional period the common commercial policy shall be based on uniformly established principles, particularly in regard to tariff amendments, to the conclusion of tariff and trade agreements, to the establishing of uniform practice as regards measures of liberalization, to export policy and to commercial protective measures including measures to be taken in cases of dumping or subsidies.

According to article 113 the autonomous aspects can be divided roughly into those measures affecting import policy, those concerning the formation of an export policy, and certain defensive commercial measures "to be taken in cases of dumping or subsidies." As to the contractual relations of the Community under the CCP, article 113 contains specific reference only to the conclusions of "tariff and trade agreements."<sup>28</sup> The article provides neither any indication of the nature or content of these agreements nor a timetable for implementation.

A careful reading of article 113(1) indicates clearly, however, that the measures specified are only illustrative, and not exhaustive, indications of what the CCP is to embrace in the post-transitional period.<sup>29</sup> This conclusion is corroborated by the fact that the list of implementation measures under article 113(1) is prefaced by the word

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account the necessity for expediting, as far as possible, the introduction of the common customs tariff." Treaty of Rome, *supra* note 2, art. 115.

27. For a further consideration of the bases of the CCP see Pescatore, *La politique commerciale*, in LES NOUVELLES: DROIT DES COMMUNAUTES EUROPEENNES 917, 919-31 (1968).

28. For an analysis of this phrase "tariff and trade agreements" see Section V B *infra*.

29. "Since the enumeration of activities in article 113 is introduced by the word 'particularly,' it can be assumed that this enumeration is not exhaustive.

"particularly." Professor Waelbroeck provides perhaps the most accurate analysis when he refers to "commercial policy" under article 113 as an *unbestimmter Rechtsbegriff*—an undefined concept of law.<sup>30</sup>

The purview of this commercial policy has been the subject of considerable discussion. At one extreme, those holding views similar to Professor Brinkhorst suggest that in the post-transitional period the notion of commercial policy would embrace not only those matters relating to the movement of goods but also such matters as the flow of services, and the right of establishment and transport.<sup>31</sup> Countering this assertion is Everling's view, which appears to be the currently accepted position of the Council of Ministers. Everling argues that such matters as establishment, transport and capital movements do not fall under the CCP, because they are dealt with by the Treaty of Rome under sections separate and distinct from those concerning commercial policy.<sup>32</sup> Everling appears to accept without question, however, the proposition that the movement of services would fall under the CCP, even though this position seems to contradict his basic premise that those areas of the Treaty of Rome covered in sections distinct from those concerning commercial policy are not within the purview of the CCP. In addition, agricultural products, services and the establishment of the external tariff are matters also covered in separate sections of the Treaty, and yet are acceptable to Everling as matters covered by the CCP. These inconsistencies seem to indicate, therefore, that the crucial factor in distinguishing those matters covered by article 113 cannot be simply the order and place of treatment in the various sections of the Treaty of Rome. Subsequent sections of this article will discuss why the differentiating element should be the relationship of particular implementation measures to the flow of the Community's external trade.

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Consequently, measures such as the regulation of export and import prices, the establishment of quotas, the determination of conditions for export transactions, the issuance of currency regulations for commercial transactions with third states, matters concerned with tourist trade, and others also fall within the competence of the Community." Feld, *The Competences of the European Communities for the Conduct of External Relations*, 43 TEXAS L. REV. 891, 901 (1965).

30. See Lauwaars, *The External Relations of the Unified European Community*, 5 COMM. MKT. L. REV. 346, 347 (1968). The first topic of consideration at the Colloquium concerned the international personality of the Community; the second dealt with the common commercial policy of the Community. The Institute prepared and published a *Cahier de documentation* of some four volumes treating the topics discussed during the Colloquium.

31. *Id.* at 346-47.

32. See Everling, *supra* note 7, at 150.

Another textual problem posed by article 113 centers around the clause, "the common commercial policy shall be based on uniformly established principles." As Pescatore has pointed out, this language admits of an ambiguity because it does not make clear whether the commercial policy should be "unconditionally common or if it is to be reduced merely to the formulation of common principles, the working out of which is to be reserved to the member states."<sup>33</sup> In the context of implementing a "common policy" the use of the phrase "uniformly established principles" would appear to be redundant. An argument based on this language could lead to a conclusion that the development of the CCP is to be more a harmonization of national policies by the member states themselves than a genuine coordination on the Community level.<sup>34</sup>

When article 113 is read in conjunction with article 111 and the broad purposes of the Treaty of Rome, however, it becomes difficult to envisage the implementation of the common commercial policy simply on the level of cooperation among member states.<sup>35</sup> One of the earlier reports issued to carry out the Treaty's terms, the *Community's Action Program for the Common Commercial Policy* of 1962, continually emphasized the preeminence of Community institutions in achieving the CCP;<sup>36</sup> moreover, as stated previously, the Treaty itself stipulates a primary objective of the Community as the "establishment of a common customs union and of a common commercial policy toward third countries." Both of these goals must be regarded as measures that can be implemented only at the Community level.<sup>37</sup> This conclusion also is supported by the fact that article 111 discusses the coordination of commercial relations by the member states during the transitional period specifically in terms of the Community policy and procedure to be followed.<sup>38</sup> Finally,

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33. Pescatore, *supra* note 27, at 926.

34. As noted by Wolhfarth, however, "[t]he common commercial policy . . . is not simply a co-ordinated commercial policy of the member States, but a commercial policy which is decided upon and is put into effect by the Council of Ministers and the Commission." Wolhfarth, *supra* note 15, at 7.

35. For further discussion see Everling, *supra* note 7, at 150-52.

36. See Programme d'action en matiere politique commerciale, 1962 E.E.C. J.O. 2353 [hereinafter cited as CCP Action Program]. An English translation of the Program is available in 1 CCH COMM. MKT. REP. para. 3816 (1962).

37. Treaty of Rome, *supra* note 2, art. 3(b).

38. "The Commission shall submit proposals to the Council as regards the procedure to be followed during the transitional period in order to achieve common action and as regards the achievement of a uniform commercial policy." Treaty of Rome, *supra* note 2, art. 111(1).

article 113 stipulates expressly that the Community's institutions are solely responsible for putting the CCP into effect.<sup>39</sup> Therefore, the substance of both article 111 and article 113 appears to support the view that "an effective commercial policy cannot be pursued successfully in the present world situation, except by the Community as such."<sup>40</sup>

The most plausible explanation of the terminology of article 113(1) is offered by several writers who suggest that the phrase "uniformly established principles" was employed in order to leave the Council of Ministers a degree of discretion in dealing with the implementation of a common policy in the matter of external trade.<sup>41</sup> If integration is to be viewed as a "process,"<sup>42</sup> however, and if Community claims of moving toward a complete economic union are ever to be realized,<sup>43</sup> then this political option eventually must be foreclosed in favor of a genuine Community approach.

#### IV. THE SCOPE OF THE CCP

##### A. *Autonomous Community Acts—Import Policy*

In proposing certain procedures for attaining uniformity in the commercial policies of the member states toward third countries, the 1962 *CCP Action Program* deals with the CCP under two major headings—import policy and export policy. This same categorization will be used hereinafter in analyzing the various autonomous or unilateral acts taken by the Community in implementing the CCP.

39. No reference is made in the text of article 113 to the role to be played by the member states themselves in the post-transitional period.

40. See Proposition 23 de résolution sur l'instauration progressive de la politique commerciale commune, in Rapport fait au nom de la commission du commerce extérieur sur l'instauration progressive de la politique commerciale commune, [1965-1966] EUR. PARL. DOCS., No. 3, at 19 [hereinafter cited as Hahn Report].

41. "A partir de ce moment, les échanges économique extérieurs de la Communauté seront régis par une politique commune 'fondée sur des principes uniformes.' La formule choisie par les auteurs du traité, que nous venons de citer, semble indiquer que seuls les principes fondamentaux, les grandes lignes de cette politique, seront communs, ce qui laisserait aux Etats membres une certaine latitude pour la mise en oeuvre des directives arrêtées en commun." Pescatore, *Les relations extérieures des Communautés européennes*, in LES NOUVELLES: DROIT DES COMMUNAUTÉS EUROPEENNES 89-90 (1968).

42. See generally E. NAAS, *THE UNITING OF EUROPE* (1958).

43. See *Report to the Council and Commission on the Realization by Stages of Economic and Monetary Union in the Community* (Oct. 8, 1970) (supplement to 3 BULL. EUROPEAN COMMUNITIES, No. 11, 1970).

Three essential concerns of the Community in developing a uniform import policy are the customs tariff, quantitative restrictions and certain defensive measures.<sup>44</sup> As provided by the Treaty of Rome, a common customs tariff, the establishment of which is causally linked to the successful implementation of the Community's CCP, "shall be applied in its entirety at latest upon the expiry of the transitional period."<sup>45</sup> The Treaty stipulates that the common customs tariff is to be imposed gradually during the transitional period, and at the end of this period the tariff "shall be established at the arithmetical average of the duties applied in the four customs territories comprised in the Community [Benelux, France, Germany and Italy]."<sup>46</sup>

A full eighteen months ahead of schedule, the common customs tariff came into effect on July 1, 1968.<sup>47</sup> Concerning this event, Homan has noted:

In their judgment on the external tariffs of the EEC's customs union critics mostly take it for granted that this union now has lower tariffs than have the United Kingdom and the United States, as an average. They often forget that the customs union includes two countries, France and Italy, which before had been protectionist in their trade policy. They also forget that the gradual decrease of the EEC tariffs since they were set up in 1958, was not only due to the Dillon round and Kennedy round negotiations, but also to unilateral decisions.<sup>48</sup>

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44. "The diversity of national import systems resulting either from independent provisions concerning foreign trade or from bilateral trade agreements with certain non-member countries is incompatible with the proper operation of a genuine customs and economic union. For the difference in the level of liberalisation of imports causes certain products or products from certain countries to be excluded from the freedom of movement. Distortions and checks at internal frontiers in the Community resulting from the disparity of national systems must therefore be eliminated by introduction of Community systems." *The Communities Work Programme* 10 (March 20, 1969) (supplement to 2 BULL. EUROPEAN COMMUNITIES, No. 4, 1969).

45. Treaty of Rome, *supra* note 2, art. 23(3).

46. Treaty of Rome, *supra* note 2, art. 19(1). Note, however, that following the Dillon and Kennedy Rounds of worldwide tariff negotiations under the GATT, this tariff was substantially reduced from its original level (the arithmetical average of duties of the member states as of Jan. 1, 1957).

47. For a general discussion on the common customs tariff see Mennens, *The Common Customs Tariff of the European Economic Community*, 1 J. WORLD TRADE LAW 73 (1967).

48. Homan, *The EEC and the World Economy*, 5 J. WORLD TRADE LAW 509, 513 (1971).

Any amendments to this tariff shall be based upon "uniformly established principles" and are a direct concern of the CCP.<sup>49</sup>

Articles 30-37 of the Treaty of Rome concern the elimination of quantitative restrictions and "measures having equivalent effect" among the member states of the Community. The CCP is concerned with the "liberalization"—the suppression or reduction—of these quantitative restrictions on imports from third countries.<sup>50</sup> Article 111(5) calls for "uniformization" at the highest level possible in the liberalization process, and articles 111(1) and 113(1) provide for the "uniformization" of quota policies.

One of the first indications of a procedure for implementation is found in a 1961 Council decision that proposed a system of consultation to inform other member states and the EEC Commission of a member state's plan "to undertake a modification of its program of liberalization with regard to third countries."<sup>51</sup> The most extensive treatment, however, of the Community's procedural approach to a "liberalization" policy is outlined in the 1962 *CCP Action Program*.

The 1962 Program dealt with two different aspects of the import liberalization process: those situations in which imports originated in member countries of GATT or third countries that follow the principles of GATT, and those in which they originated from countries with foreign trade policies that are not based on GATT. The procedure followed during the transitional period in order to deal with the former situation was to be carried out on two levels. "Uniformization" of national liberalization lists was to be achieved on a geographic level and according to the type of product involved.<sup>52</sup> When the Council of Ministers had ascertained that "sufficient uniformity has been achieved, it [would], upon proposal of the Commission, and according to the procedure of Article 111, paragraphs 1 and 3, decide on the formulation of a common liberalization list."<sup>53</sup>

49. Treaty of Rome, *supra* note 2, art. 113(1).

50. Treaty of Rome, *supra* note 2, art. 113(1).

51. See *Décision du 9 octobre 1961, concernant une procédure de consultations sur les négociations des accords relatifs aux relations commerciales des Etats membres avec les pays tiers et sur les modifications du régime de libération à l'égard des pays tiers*, 1961 E.E.C. J.O. 1273.

52. On the geographical level, the aim was to ameliorate the discrimination between the terms applied to the countries of the earlier OEEC on the one hand and the countries of the Dollar Zone on the other. This liberalization would be extended to other GATT countries except for those with abnormally low production costs.

53. CCP Action Program, *supra* note 36, 1 CCH COMM. MKT. REP. para. 3816 (1) (1962).

Despite persistent encouragement from the European Assembly, however,<sup>54</sup> the Council of Ministers did not enact its first regulations on the "uniformization" of liberalization until the end of 1968. On December 10 of that year, the Council promulgated three regulations concerning the establishment of a common liberalization list,<sup>55</sup> the gradual institution of a common procedure on the management of quantitative restrictions,<sup>56</sup> and the establishment of a special procedure for the imports of specific products from certain third countries.<sup>57</sup>

Essentially, regulation 2041/68<sup>58</sup> consolidated the lists of products that had been liberalized previously in all the member states. This regulation requires member states to abstain from introducing quantitative restrictions on imported products covered by a common list consisting of approximately 800 customs headings. The coverage of the regulation is further restricted, however, to those products imported from the third countries designated on an annex.<sup>59</sup> In addition, quantitative restrictions on such products can be imposed by member states only in cases of "urgency." Even then, however, the Commission must be notified immediately and the Council of Ministers may subsequently decide to approve, modify or abrogate these restrictions.<sup>60</sup> These obligations under the regulation are not binding on member states in the following cases: (1) when the member state introduces the restriction on imports from other member states in conformity with the Treaty of Rome; (2) when the member state introduces the restriction in conformity with articles 108 and 109 of the Treaty of Rome in order to deal with balance of payments problems; and (3) when the member state applies such

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54. See generally Hahn Report, *supra* note 40.

55. Règlement No. 2041/68, du 10 décembre 1968, portant établissement d'une liste commune de libération des importations dans la Communauté à l'égard des pays tiers, 1968 E.E.C. J.O. L303/1 [hereinafter cited as Regulation 2041/68].

56. Règlement No. 2043/68, du 10 décembre 1968, portant établissement graduel d'une procédure commune de gestion des contingents quantitatifs à l'importation dans la Communauté, 1968 E.E.C. J.O. L303/39 [hereinafter cited as Regulation 2043/68].

57. Règlement No. 2045/68, du 10 décembre 1968, instaurant une procédure spéciale pour l'importation de certains produits de certains pays tiers, 1968 E.E.C. J.O. L303/43 [hereinafter cited as Regulation 2045/68].

58. This regulation is not applicable to the state-trading nations of Eastern Europe.

59. Regulation 2041/68, *supra* note 55, art. 2.

60. Regulation 2041/68, *supra* note 55, art. 6.

restrictions because of obligations arising from multilateral or bilateral agreements to which it is a signatory.<sup>61</sup>

Regulation 2041/68 also empowers the Council, acting by a qualified majority and upon a proposal by the Commission, to include additional products in the common list, provided that such an addition would not seriously prejudice the interests of the Community or the member states.<sup>62</sup> The Council may also withdraw products from the list when market disturbances take place or threaten to occur.<sup>63</sup> These actions must not, however, hinder the performance of Community agreements with third countries or the application of regulations concerning the common agricultural policy.<sup>64</sup>

Regulation 2043/68 of December 10, 1968, outlines a highly technical Community procedure for the administration of import quotas specified either unilaterally or by Community agreements. In essence, this regulation attempts to create a distribution of quotas by the Community among member states for imports not covered by the liberalization list. To deal effectively with products not on the common liberalization list, however, the Community must be substituted as a contracting party for the member states in the bilateral and multilateral agreements that create the import quota. It should also be granted the power to invoke quantitative restrictions either unilaterally or by convention.<sup>65</sup>

Article 2(1) of regulation 2043/68 provides further that the Council, acting on a proposal by the Commission, is to decide "in principle" what the Community quota should be and how it is to be imposed in the respective member states. This allocation may be changed to facilitate use of the quota and to create a common reserve of products to be distributed at a later date.<sup>66</sup>

Within the three months following the Council's decision the member states are required to make known by official publication the imports that are to be authorized by license and the conditions governing such authorization.<sup>67</sup> A Quota Management Committee, comprised of representatives from the member states and presided over by a Commission representative, is given an ostensive power to

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61. Regulation 2041/68, *supra* note 55, art. 7.

62. Regulation 2041/68, *supra* note 55, art. 3.

63. Regulation 2041/68, *supra* note 55, art. 4.

64. Regulation 2041/68, *supra* note 55, art. 8. This regulation took effect on January 1, 1969; it has since been replaced by a subsequent Council regulation.

65. See Kim, *The Common Commercial Policy of the EEC: Quantitative Restriction and Import Control*, 4 J. WORLD TRADE LAW 20, 30 (1970).

66. Regulation 2043/68, *supra* note 56, art. 2.

67. Regulation 2043/68, *supra* note 56, art. 5.



decide details of these license awards, such as the nature and amount of Community quota, adjustments of quotas or the use of any common quota reserve.<sup>68</sup> This Committee is required, however, to act in agreement with the Commission, and any disputed decisions are to be submitted to the Council for resolution.<sup>69</sup>

The third regulation, No. 2045/68, was also promulgated on December 10, 1968. It outlines a special supervisory procedure, for certain items already liberalized, that may precipitate a situation adverse to Community interests and present difficulties in assigning quotas. This procedure allows prompt Community intervention whenever it is necessitated by an undesirable situation.<sup>70</sup> Another purpose of this regulation is to establish a system of supervision for a de facto liberalization phase for "non-sensitive" items prior to their full liberalization.<sup>71</sup>

These three import regulations of December 10, 1968, were by their very nature interim steps toward a unified Community import policy. In 1970 they were replaced by three other import regulations: one establishing a common import system with third countries that are members of GATT or follow that agreement's principles,<sup>72</sup> another providing a common procedure for the administration of Community quotas,<sup>73</sup> and a third dealing with state-trading countries.<sup>74</sup> As pointed out by the Commission of the European Communities:

The new arrangements do not make any change in the basically liberal common commercial policy, but streamline old machinery which was rather cumbersome and replace it by a more flexible and, particularly, a more "Community" procedure, based on close cooperation between the Commis-

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68. Regulation 2043/68, *supra* note 56, art. 9.

69. Regulation 2043/68, *supra* note 56, art. 10.

70. Regulation 2045/68, *supra* note 57, art. 162.

71. Regulation 2045/68, *supra* note 57, arts. 9-13 (concerning the Community procedures under the regulation).

72. Règlement No. 1023/70, du 25 mai 1970, portant établissement d'une procédure commune de gestion des contingents quantitatifs, 1970 E.E.C. J.O. L124/1 [hereinafter cited as Regulation 1023/70].

73. Règlement No. 1025/70, du 25 mai 1970, portant établissement d'un régime commun applicable aux importations de pays tiers, 1970 E.E.C. J.O. L124/6 [hereinafter cited as Regulation 1025/70].

74. Règlement No. 109/70, du 19 décembre 1969, portant établissement d'un régime commun applicable aux importations de pays à commerce d'Etat, 1970 E.E.C. J.O. L19/1.

sion and the national authorities. They also provide for a considerable widening of the geographical scope of the system.<sup>75</sup>

Regulation 1023/70, which is applicable to both imports and exports, sets out the common procedure for administering quantitative quotas fixed unilaterally by the Community or by agreement with nonmember countries. The previous notion of a "Community reserve" has not been retained in the present regulation. Instead, a member state may request an enlargement of its national share, or an amendment of its allocation of the total quota; if the Commission does not reply to the request within three weeks, the state may itself authorize additional imports up to twenty per cent of their originally assessed quotas.<sup>76</sup>

The main emphasis of the regulation continues to be that the Community has the primary role in the management of quotas. Accordingly, the Council, acting on a Commission proposal and by a qualified majority, fixes the total quota for the entire Community and determines the criteria by which the quota will be distributed among the member states.<sup>77</sup> The Commission, in conjunction with the Quota Management Committee, is responsible for the actual allocation of the quota shares and for allowing any increase in the total quota.<sup>78</sup> As in the previous regulations, however, the issuance of import licenses and other formalities are still primarily the concern of the member states.<sup>79</sup>

Concerning the compatibility of such a system of national quota shares with the free exchange of goods within the Community, Kim has observed:

Such a form of distribution of quotas thus seems to present an obstacle to the freedom of economic exchange among the member States. An investigation at Community level into all the economic factors in the situation of the markets in the member States for the products in question, and the arrangement of the quota, when its establishment is decided, for the Community as a whole, would no doubt be the only effective and valid solution.<sup>80</sup>

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75. COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES 1970, AT 331 (1971).

76. Regulation 1023/70, *supra* note 72, art. 4.

77. Regulation 1023/70, *supra* note 72, art. 2.

78. Regulation 1023/70, *supra* note 72, art. 11.

79. Regulation 1023/70, *supra* note 72, arts. 4-6.

80. Kim, *Developments in the Commercial Policy of the European Community*, 8 COMM. MKT. L. REV. 152 (1971).

Regulation 1023/70 requires the Council of Ministers, acting on a Commission proposal, to decide by the end of 1972 what necessary adaptation should be made in order "fully to guarantee that, within the limits of the fixed quota, import or export transactions can be achieved at the same time throughout the Community."<sup>81</sup>

Regulation 1025/70, which concerns the establishment of a common import system with third countries that are members of GATT or follow GATT principles, has extended the previous liberalization list to more than 900 customs headings.<sup>82</sup> Additional headings may be added by a decision of the Council, acting upon a Commission proposal and by a qualified majority.<sup>83</sup>

The regulation also provides certain procedural safeguards against the importation of products that might be prejudicial to the interests of Community producers. Briefly, when a member state gives notice to the Commission that the importation of a certain product is creating serious danger to one of its producers, this information must be communicated immediately to the other member states.<sup>84</sup> Thereafter, upon the request of a member state or the Commission, a consultative procedure is initiated to provide an evidentiary basis for examining the "economic and commercial situation of the product in question."<sup>85</sup> When in fact such a product is found to prejudice the interests of the Community or its producers, the Commission is to set up a further system to supervise the circulation of this product among the member states.<sup>86</sup> Finally, if the importation of the product into the Community continues at a significantly increasing rate or seriously disrupts the marketing of similar products, safeguard measures may be taken by the Council, acting on a Commission proposal and by a qualified majority.<sup>87</sup> Certain provisions are also made concerning

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81. Regulation 1025/70, *supra* note 73, art. 14.

82. Regulation 1025/70, *supra* note 73, annex I.

83. Regulation 1025/70, *supra* note 73, art. 2.

84. Regulation 1025/70, *supra* note 73, art. 3.

85. Regulation 1025/70, *supra* note 73, arts. 4 & 5.

86. Regulation 1025/70, *supra* note 73, arts. 7-9. Note that the Commission decides whether this system should come into force against the given product. Any member state, however, may within ten days bring the case before the Council of Ministers, which has the power to abrogate the Commission decision. The system is entirely supervisory. Products under the system must have an import document issued by the member states, which shows the following information: name and address of importer, country of origin, c.i.f. price free at frontier, the quantity, and the anticipated dates for importation. Under article 8(2) the document can be used only for a maximum period determined at the same time and under the same procedures stipulated at the beginning of the supervision for the given product.

emergency measures that can be taken by the Commission and the member states.<sup>88</sup>

Regulation 109/70 provides for the first Community system regulating imports from certain state-trading countries by applying the same principles applied to imports from countries under the GATT.<sup>89</sup> Provision is made for the consolidation of customs headings presently liberalized through the Community, vis-à-vis the Eastern European countries of Bulgaria, Hungary, Poland, Rumania, Czechoslovakia and the U.S.S.R.; the list of headings concerning these state-trading countries contains far fewer items, however, than those under regulation 2041/68.<sup>90</sup> Headings may be added by decision of the Council of Ministers,<sup>91</sup> but a safeguard procedure paralleling that stipulated under regulation 1025/70 is also provided.<sup>92</sup> Although the bulk of trade is conducted under independent agreements, this regulation has at least coordinated the trade relations between member states and the Eastern European countries.

### B. Common Export Policy

Article 113(1) of the Treaty of Rome states that, at the end of the transitional period, "export policy" in the Community shall be based on uniform principles. No further explanation is offered concerning the meaning of "export policy." It has been noted, however, that "[t]he execution of a common policy for exports presents less difficulties than for imports since the number of products that are not liberated has become negligible."<sup>93</sup> For the EEC, a common export

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87. Regulation 1025/70, *supra* note 73, art 11. Under article 10 the Commission may take certain emergency measures if required.

88. Regulation 1025/70, *supra* note 73, art. 12.

89. Examples include "uniformization" through liberalization, consolidation of liberalization, shift of decision-making powers to the Community for liberated customs headings, and the establishment of uniform procedures for additional subsequent headings.

90. Regulation 109/70, annex. This annex contains fewer than 500 customs headings. The discrepancy that existed between those liberalized products vis-à-vis Russia and other state-trading countries (due to West Germany's relations with the U.S.S.R. at the time) was eliminated at the end of 1970. *See* Regulation 234/71, 1971 E.E.C. J.O. L281.

91. *See, e.g.,* Règlement No. 2172/70, due octobre 1970, étendant a d'autres importations l'annexe du Règlement No. 109/70 portant établissement d'un régime commun applicable aux importations de pays a commerce d'Etat, 1970 E.E.C. J.O. L239/1.

92. *See* Regulation 109/70, titles II-IV.

93. Kim, *The Developments in the Commercial Policy of the European Economic Community*, 8 COMM. MKT. L. REV. 158-59 (1971).

policy has evolved as a result of the enactment of regulation 2603/69 by the Council of Ministers on December 20, 1969. The regulation established a common system on exports<sup>94</sup> and endeavored to implement one of the prime objectives sought by the 1962 *CCP Action Program*: "extension of liberalization to all third countries, except for products for which genuine difficulties might arise within the Community."<sup>95</sup> This regulation also institutes a procedure for enacting Community safeguard measures when Community interests may be endangered; the procedure is analogous to that under regulation 1025/70 concerning the common system on imports.<sup>96</sup>

As stressed by the Commission of the European Communities:

The disparities which exist between the national export assistance systems are liable to distort competition among enterprises in the Community. It therefore appears necessary, in conjunction with the development of the common trade policy, to give coherence to the national export credit and export guarantee systems.<sup>97</sup>

The need for a harmonization of national aids granted on exports to third countries during the transitional period is recognized in article 112 of the Treaty of Rome. According to article 113, these aids are to be based in the post-transitional period on "uniformly established principles."<sup>98</sup>

Recognizing that export credits and guarantees can be used to create highly favorable conditions for various exports, the Council decided as early as 1960 to set up "a group for coordinating credit insurance policies, guarantees and financial credits." Essentially, the

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94. Règlement No. 2603/69, du 20 décembre 1969, portant établissement d'un régime commun applicable aux exportations, 1969 E.E.C. J.O. L324/25 [hereinafter cited as Regulation 2603/69]. This system was applicable to all but 60 of the 1097 customs headings. Council Regulation No. 234/71 of Feb. 1, 1971, however, deleted certain products from the liberalization list appended to Regulation 2603/69.

95. CCP Action Program, *supra* note 36, § B (2). The regulation applies to agricultural exports already subject to the Community's common agricultural policy in only a "complementary manner." Regulation 2603/69, *supra* note 94, art. 12 (1). On the nature and scope of the common agricultural policy see 2 J. MEGRET, *LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE*, (1970); Norton, *The Heart of the Matter: The Problem of Agriculture, the U.K. and the E.E.C.*, 6 TEXAS INT'L L.F. 221 (1971).

96. Regulation 2603/69, *supra* note 94, art. 6-9.

97. *The Communities' Work Programme; Programme for the Next Three Years; Essential Tasks for 1969* at 10 (supplement to 2 BULL. EUROPEAN COMMUNITIES, April, 1969).

98. Treaty of Rome, *supra* note 2, art. 113(1).

function of this group was one of research and advice to the Council.<sup>99</sup> In 1962 the Council enacted a decision to establish a consultation procedure for this "group,"<sup>100</sup> which was subsequently revised in 1965.<sup>101</sup>

It was not until 1970, however, that the Community gave evidence of a determined effort to harmonize export aid policy. On October 27, 1970, the Council of Ministers adopted two directives—No. 70/509 and No. 70/510—pursuant to article 113 of the Treaty of Rome. Both directives deal with common credit insurance policies for medium and long-term transactions by public and private purchasers.<sup>102</sup> On December 16, 1970, the Council passed a decision pertaining to export guarantees and financing for certain subcontracts;<sup>103</sup> and on February 1, 1971, it enacted a directive concerning the harmonization of essential matters regarding guarantees for short-term transactions involving public and private purchasers.<sup>104</sup>

Credit insurance is a significant factor in international competition because of the importance of export credits. Because the risks connected with certain selling operations are assumed by private firms only, credit firm guarantees, on the state's behalf or with its backing, are being used increasingly.<sup>105</sup> The two Council directives of October

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99. *Décision du Conseil, du 27 septembre 1960, portant institution d'un Groupe de coordination des politiques d'assurance-crédit, des garanties et des crédits financiers*, 1960 E.E.C. J.O. 1339.

100. *Décision du Conseil, du 15 mai 1962, portant établissement d'une procédure de consultations au sein du groupé de coordination des politiques d'assurance-crédit, des garanties et des crédits financiers*, 1962 E.E.C. J.O. 1561.

101. *Décision du Conseil, du 26 janvier 1965, relative à la procédure de consultations dans le domaines de l'assurance-crédit, des garanties et des crédits financiers*, 1965 E.E.C. J.O. 255.

102. *See Directive No. 70/509, du 27 octobre 1970, concernant l'adoption d'une police commun d'assurance-crédit pour les opérations à moyen et long terme sur acheteurs publics*, 1970 E.E.C. J.O. L254/1; and *Directive No. 70/510, du 27 octobre 1970, concernant l'adoption d'une police commune d'assurance-crédit pour les opérations à moyen et long terme sur acheteurs privés*, 1970 E.E.C. J.O. L254/26.

103. *Décision No. 70/552, du 16 décembre 1970, relative au régime applicable, dans les domaines des garanties et des financements à l'exportation, à certaines sous-traitances en provenance d'autres pays membres ou de pays non membres des Communauté européennes*, 1970 E.E.C. J.O. L284/59.

104. *Directive No. 71/86, du 1 février 1971, concernant l'harmonization des dispositions essentielles en matière de garantie des opérations à court terme (risque politique) sur acheteurs publics et sur acheteurs privés*, 1971 E.E.C. J.O. L36/14.

105. 3 BULL. EUROPEAN COMMUNITIES, Dec. 1970, at 71.

27, 1970, outline in general terms the steps to be taken by the member states toward harmonizing export insurance techniques and developing a Community policy toward export credits.

According to directives 70/509 and 70/510, the member states are required to "take all legislative, regulative or administrative measures necessary for putting into effect by September 1, 1971, a medium and long-term common policy for public purchasers."<sup>106</sup> The common policies delineate the general terms under which the credit guarantee is to be issued. In addition, the two directives treat such matters as the nature and extent of the guarantee, the obligations of the insured party, compensation, and miscellaneous matters.<sup>107</sup> The two directives differ because of the amendment of four articles in the directive on private buyers, regarding the definition of hazard, cause of loss and terms of compensation.<sup>108</sup> Under both directives each credit insurer remains free to decide on special terms, in accordance with the contracts made. In addition, under each of the directives a consultative committee is to be established, composed of representatives from the member states and presided over by a Commission representative, to aid the Commission in solving the problems relating to the uniform application of the directives.<sup>109</sup>

Directive 71/86 was designed to complement the first two directives by attempting to harmonize short-term credit involving public and private purchasers. Unlike the previous Council directives, this directive merely sets forth certain basic principles to be adhered to by the states under the supervision of the Council with assistance from the Advisory Committee on Export Credit Insurance. The directive does not take effect until satisfactory solutions are found on exchange guarantees, financial credit and guarantees against rising costs.<sup>110</sup>

Decision 70/552, which concerns the system of export guarantees and financing for certain subcontracts from other member states and third countries, covers subcontracts involving export transactions concluded on the basis of private guaranteed credits.<sup>111</sup> The essential provisions of the decision are also "applicable by analogy . . . to sub-contracts relating to export transactions concluded on the basis of

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106. Directives 70/509 and 70/510, *supra* note 102, art. 1.

107. One of the questions dealt with is the exchange rates to be used when converting amounts of foreign currency for compensation, recoveries, premiums and expert's fees.

108. Directives 70/509 and 70/510, *supra* note 102, annex A.

109. Directive 70/509, *supra* note 102 arts. 4-6; Directive 70/510, *supra* note 102, art. 5.

110. 4 BULL. EUROPEAN COMMUNITIES, No. 4, at 112 (1970).

111. Decision 70/552, *supra* note 103, annex § I.

credits involving financial intervention of whatever kind by a Member State."<sup>112</sup>

### C. Antidumping Measures

Article 113(1) of the Treaty of Rome explicitly includes under the CCP "commercial protective measures" to be taken in cases of dumping or subsidies. Such measures are usually referred to as antidumping measures and countervailing duties.<sup>113</sup> Although article 91 of the Treaty is a "dumping" provision, it pertains to only intra-Community activity occurring during the transitional period. Article 113(1), on the other hand, applies to the area of external Community trade in the post-transitional period.

Although the 1962 *CCP Action Program* called for a "uniformization of actual trade protection measure[s]" and the Commission submitted a draft regulation to the Council on this matter in 1963,<sup>114</sup> the Council did not promulgate a Community antidumping regulation until April 5, 1968.<sup>115</sup> This regulation was influenced by the GATT Anti-Dumping Code, adopted in 1967 as a result of the Kennedy Round of worldwide tariff negotiation.<sup>116</sup>

As enacted, regulation 459/68 prohibits "dumping, premium, or subsidy practices on the part of countries that are not members of the Community" without prejudice to special rules contained in Community agreements with third countries and to obligations under GATT. The regulation covers the movement of all goods, including agricultural products.<sup>117</sup>

112. Decision 70/552 *supra* note 103, art. 2.

113. On the general rationale behind these measures see *Anti-dumping and Countervailing Duties* (GATT 1958), supplemented by GATT Document MGT(59) 122 (1959).

114. See Proposition d'un règlement du Conseil relatif à la défense contre les pratiques de dumping, primes ou subventions de la part de pays non membres de la Communauté économique européenne, 1966 E.E.C. J.O. 989.

115. Règlement No. 459/68, du 5 avril 1968, relatif à la défense contre les pratiques de dumping, primes ou subventions de la part de pays non membres de la Communauté économique européenne, 1968 E.E.C. J.O. L93/1 [hereinafter cited as Regulation 459/68].

116. See AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS, (15th Supp. 1967) [hereinafter cited as GATT ANTI-DUMPING CODE]. For a discussion of the GATT Anti-Dumping Code see Rehm, *The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 427-34 (1968).

117. Regulation 459/68, *supra* note 115, art. 1.



Before antidumping duties may be imposed, one of the following conditions must be present: (1) actual dumping as defined by the regulation;<sup>118</sup> (2) material injury or the threat of material injury to an established Community industry; or (3) substantial retardation of the establishment of an industry whose creation is contemplated in the Community.<sup>119</sup> Acting on behalf of a Community industry, any interested party who contends that the above conditions are present may file a written complaint with the member states where the injured or threatened industry is situated. A copy of the complaint is forwarded to the Commission. Alternatively, the complaint may be made directly to the Commission and a copy sent to the member states.<sup>120</sup>

Once a complaint is deemed proper, a Community investigation procedure is initiated by the Commission in order to determine the existence of dumping and the nature of the resulting injury. The Commission will hear the views of both the exporters and importers involved, and may seek reassurances from the importers and exporters concerning price revisions in order to avoid the imposition of Community defense measures. The findings of the preliminary hearing must be published in the *Official Journal*, and on the basis of these published results any interested party may request a hearing.<sup>121</sup> If the Commission decides to impose either temporary or final antidumping measures, it will enact appropriate regulations.<sup>122</sup> Regulation 459/69 also provides for the imposition of countervailing duties in order to offset a subsidy or premium granted to a third country exporter that results or is likely to result in material injury to an established Community industry. It also applies if the premium is likely to retard the creation of such a contemplated industry.<sup>123</sup>

#### D. *The Matter of Services*

Another problem, which has been glossed over in the literature on the CCP, is whether the movement of services to and from the

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118. Regulation 459/68, *supra* note 115, art. 3 (1)(a): "A product introduced on the Community market shall be considered as being dumped when the price of the product exported to the Community is less than the comparable price, in the ordinary course of trade, for a similar product, within the meaning of Article 5, when destined for consumption in the country of origin or the country of exportation."

119. Regulation 459/68, *supra* note 115, art. 2.

120. Regulation 459/68, *supra* note 115, art. 6.

121. See Regulation 459/68, *supra* note 115, arts. 8-14.

122. Regulation 459/68, *supra* note 115, art. 19.

123. See Regulation 459/68, *supra* note 115, arts. 22-25.

Community would fall under the concept of commercial policy as envisioned by the Treaty of Rome. An affirmative answer should not be assumed. For example, services are explicitly excluded from treatment under the GATT,<sup>124</sup> and the Community legislation and agreements concluded under the CCP and articles 111 and 113 of the Treaty of Rome do not mention the term "services."

In the opinion of this writer, however, "services" must necessarily be included within the notion of a common commercial policy for the Community for several reasons. First, subsequent to the creation of the GATT in 1948, "services" have become an increasingly important factor in the commercial life of the economically developed Western nations. In fact, in the United States "services" are gradually replacing "goods" in their importance to the growth of foreign trade. One writer has even defined the economy of the United States as a "service" economy.<sup>125</sup> With this increasing growth of the movement of services in both the internal commercial development of the Western countries and their international commercial contacts, "services" should form a proper and integral part of the CCP. Secondly, the movement of services is considered an essential item in computing the current accounts on the balance of trade and payments figures by the Western nations.<sup>126</sup> Thirdly, in creating the conditions necessary for the creation of the Common Market, the Treaty of Rome clearly treats the movement of services as a crucial factor in facilitating the free movement of goods between the member states. A concomitant argument would point out that "services" would be an equally important factor in coordinating the Community's external commercial relations.<sup>127</sup> Finally, it would appear from the Treaty of Rome that the term "trade" has been interpreted to cover the movement of services as well as goods. This is particularly true in the case of the antitrust provisions of the Treaty.<sup>128</sup>

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124. See, e.g., General Agreement on Tariffs and Trade, IV BIDS (March, 1969), Ad Article XVII(2).

125. See Krause, *Why Exports Are Becoming Irrelevant*, 8 THE BROOKINGS BULL. No. 2, at 7 (1971).

126. See generally J. VANEK, INTERNATIONAL TRADE: THEORY AND ECONOMIC POLICY ch. 2 (1962); P. SAMUELSON, ECONOMICS ch. 5 (8th ed. 1970). The current account for the compilation of the balance of trade figures would consist of the merchandise trade balance, as adjusted for "invisible" service items.

127. Cf. Code of Liberalization of the Organization for European Economic Cooperation Council, Part II (rev. ed. 1959) (concerning "invisible transactions" (services)).

128. See, e.g., *Practical Guide of the Commission: Articles 85 and 86 of the*

## V. APPLICATION OF CCP TO COMMUNITY AGREEMENTS

A. *The Contractual Aspects*

Article 113 of the Treaty of Rome provides clearly that in the post-transitional period the CCP will be based on uniform principles, especially in the conclusion of "tariff and trade agreements." Again what is unclear, however, is the precise meaning of the phrase "tariff and trade agreements."

The first logical question is whether "tariff" and "trade" are to be considered mutually exclusive terms or are to be treated as concentric concepts—"trade" being the broader of the two terms. As with "tariff and trade" in the titles of the "General Agreement on Tariffs and Trade," there appears to be no indication in the Treaty of Rome that the two words are to be dealt with as exclusive terms. Although the phrase "tariff and trade agreement" causes much ambiguity, this writer suggests that the phrase "tariff and trade" implies no inseparable division between the reference of the two terms. "Trade agreement" should embrace the concept of "tariff agreement," as it does in American practice, although the converse would not be true.<sup>129</sup>

The real dilemma presented by the phrase "tariff and trade agreements" concerns its substantive content. Perhaps the best approach to analyzing this problem is to examine the nature and the legal basis of those tariff and trade agreements the Community has concluded with third countries in the post-transitional period.

B. *Tariff and Trade Agreements*

In October of 1961 the Council of Ministers of the European Economic Community had established, pursuant to article 111 of the Treaty of Rome, a system of notification and consultation between the member states and the EEC Commission concerning the conclusion, extension or renewal of commercial agreements with third countries. To complement this system and to fulfill one of the basic objectives of article 113 of the Treaty of Rome, the Council enacted Decision 69/494, which was to be applicable from January 1, 1971.

The primary aim of this decision was to create a procedure that would allow the progressive substitution of community agreements for existing national accords that concern tariff and trade matters

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*EEC Treaty and the Relevant Regulations, A Manual for Firms*, Part I, § I(3) (Pub. Serv. of the Eur. Communities Doc. No. 8062/5/IX/1962/5).

129. For a discussion of the meaning of "trade agreements in American practice" see Jackson, *The General Agreement on Tariffs and Trade in U.S. Domestic Law*, 66 MICH. L. REV. 249 (1966).

embraced by article 113.<sup>130</sup> This decision places member states under the obligation to "inform the Commission of bilateral treaties, accords and arrangements concerning commercial relations with third countries in the sense of Article 113" and to state whether an extension or renewal will be required. This information will then be transmitted to the other member states by the Commission.<sup>131</sup>

After receipt of this information, a procedure for preliminary consultation is set up at the request of either a member state or the Commission. This consultation is designed essentially to determine if the bilateral agreement in question contains provisions that would come within the scope of article 113. If the agreement does contain such provisions, then the Council will ascertain whether they present an obstacle to the implementation of the CCP.<sup>132</sup> If the provisions are not an obstacle, then the Council, acting on a proposal by the Commission, may authorize the member state concerned to extend or renew the provisions for a period of not more than one year.<sup>133</sup> If the provisions coming within the jurisdiction of article 113 are deemed an obstruction to the implementation of the CCP, the Commission submits a detailed report to the Council, setting out recommendations for the Council to authorize the Commission to open Community negotiations with the third country concerned.<sup>134</sup> These negotiations are conducted according to article 113 by the Commission in consultation with the special article 113 Committee appointed by the Council.<sup>135</sup>

When the implementation of a Community negotiating procedure would be impossible in fact, as in cases when certain state-trading nations refuse to recognize the competence of the Community, the Council may authorize the particular member state to conduct bilateral negotiations.<sup>136</sup> At first glance this delegation may suggest that a certain degree of concurrent competence to negotiate and conclude commercial agreements exists between the Community and the member states in the post-transitional period.<sup>137</sup> This conclusion

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130. Decision 69/494, *supra* note 5, preamble.

131. Decision 69/494, *supra* note 5, art. 1.

132. Decision 69/494, *supra* note 5, art. 2.

133. If the act in question contains an annual denunciation clause or an "EEC clause," that extension or renewal can be granted for a period longer than one year. Decision 69/494, *supra* note 5, art. 3.

134. Decision 69/494, *supra* note 5, art. 4.

135. Decision 69/494, *supra* note 5, art. 5.

136. Decision 69/494, *supra* note 5, art. 9.

137. Schneider, *La mise en oeuvre de la politique commerciale commune de la C.E.E.: Bilan et perspectives*, 129 REV. MARCHÉ COMMUN 11, 20 (1970).

is not well-founded, however, because the text of Decision 69/494 makes clear that the Community alone has the ultimate competence in matters pertaining to article 113. Moreover, this type of delegation is available only until the end of December, 1972, and even in those situations in which such bilateral negotiations are permitted, they can begin only after specific Council authorization setting certain guidelines to be followed.<sup>138</sup> Furthermore, the results of such negotiation must be transmitted by the member state to the Commission, which in turn informs the other member states. If after five days no objections are raised by the member states, the bilateral agreement in question may be concluded; but, if objection is raised, then the agreement can be concluded only on Council authorization.<sup>139</sup> Therefore, the provisions of Decision 69/494 make clear the exclusive competence of the Community concerning contractual agreements with third countries. Any deviation from this principle is only by virtue of specific Community legislation enacted at its discretion.<sup>140</sup>

*Tariff Agreements.*—Article 111 of the Treaty of Rome has granted the Community a degree of competence in negotiating tariff agree-

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138. Decision 69/494, *supra* note 5, arts. 9 & 120.

139. Decision 69/494, *supra* note 5, art. 13.

140. A series of derogations from the Council decision of October, 1961, were authorized by the Council in 1969. For a list of these derogations see Leonard & Simon, *La mise en oeuvre de la politique commerciale: passage de la période de transition à la période définitive*, 107 REV. TRIM. DR. EUR. 157 (1971). The Council has subsequently continued to permit derogations pursuant to Decision 69/494, both on renewals or extensions of existing bilateral commercial agreements and on the conclusion of new bilateral agreements. *See Id.* at 189; 1970 E.E.C. J.O. L262/18 (renewal of 18 commercial agreements with third countries); 1971 E.E.C. J.O. L26/10 (renewal of cotton textile accords with Japan); 1971 E.E.C. J.O. L56/8 (renewal of 17 commercial agreements with third countries); 1971 E.E.C. J.O. L31/18 (renewal or extension of FCN-type agreements with 36 countries); 1971 E.E.C. J.O. L122/24 (renewal of 20 commercial agreements with third countries); 1971 E.E.C. J.O. L122/26 (renewal of cotton textile agreements with Japan); 1971 E.E.C. J.O. L248/71 (renewal of over 80 commercial agreements with third countries). The authorization of new bilateral accords has occurred primarily in relations with state-trading countries because of their politically sensitive nature and the Community's desire to move with caution in implementing the CCP. For a discussion of the Community's approach toward state-trading nations see *Rapport fait au nom de la commission des relations économiques extérieures sur les problèmes des relations commerciales entre la Communauté et les pays à Commerce d'Etat d'Europe orientale*, [1967-1968] EUR. PARL. DOCS., No. 205. Unless a new Council decision rules otherwise, however, at the end of 1972 even these state-trading countries will have to deal with the Community directly in negotiating any new commercial agreements within the scope of article 113.

ments necessary to insure the implementation of the common customs tariff by the end of the transitional period. In the post-transitional period, these tariff agreements are to be based on "uniform principles" throughout the Community. As previously discussed, the term "uniform principles" under article 113 implies exclusive Community control; consequently, the Community was substituted for the member states during the transitional period in all existing bilateral tariff agreements.<sup>141</sup>

Under the mandate of articles 111 and 113, therefore, the Community has assumed the obligations of the member states arising under the GATT. As demonstrated by the highly publicized marathon sessions of the Kennedy Round of tariff negotiations and the earlier Dillon Round, the power of the Community to deal with the question of tariff negotiations has been fully established.<sup>142</sup> For example, in the Kennedy Round, the Council of Ministers issued a negotiating mandate to the Commission under article 111.<sup>143</sup> Pursuant to this mandate the Commission negotiated for the member states such matters as the fixing of tariff schedules and bindings, the abrogation of the American Selling Price,<sup>144</sup> the fixing of minimum and maximum prices on wheat,<sup>145</sup> food aid to developing countries,<sup>146</sup> and the drafting of an antidumping code.<sup>147</sup>

141. Since the wording of article 111 implies that tariff negotiations during the transitional period are to become the exclusive competence of the Community, it would seem logical that the changed wording in article 113 cannot be construed in such a way as to imply that the Community would have a lesser competence (*e.g.*, concurrent powers) in the post-transitional period than it possessed in the transitional period.

142. *See generally* Rapport fait au nom de la commission des relations économiques extérieures sur les résultats des négociations Kennedy et les conclusions à en tirer, [1967-1968] EUR. PARL. DOCS., No. 176.

143. Decision du Conseil No. 68/411, du 27 novembre 1967, portant conclusion d'accords multilatéraux signés à l'issue de la Conférence de négociations commerciales de 1964-1967, 1968 E.E.C. J.O. L305/1. For a consideration of the Kennedy Round see Rehm, *The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 403 (1968).

144. *See* Accord concernant principalement les produits chimiques, additionnel au Protocole de Genève (1967) annexé à l'accord général sur les tarifs douaniers et le commerce, 1968 E.E.C. J.O. L305/3, art. 2.

145. *See* Mémoire d'accord sur les éléments de base pour la négociation d'un arrangements mondial sur les céréales, 1968 E.E.C. J.O. L305/9, art. 2.

146. 1968 E.E.C. J.O. L305/9, § 5.

147. *See* Accord relatif à la mise en oeuvre de l'article VI de l'accord général sur les tarifs douaniers et le commerce, 1968 E.E.C. J.O. 305/12.

The agreements reached after the Kennedy Round, however, were signed not only by the Community but also by the EEC member states individually. Again, the use of the "mixed procedure" militates against a conclusion that the Community possesses exclusive treaty-making powers. In the case of pure tariff agreements, however, this power appears clearly to be within the competence of the Community in the post-transitional period.<sup>148</sup>

The conclusion of the Kennedy Round represented a high point in Community development. Apart from achieving substantial tariff reductions on 70 per cent of those imports on which the industrialized countries had imposed tariff protection, the Kennedy Round demonstrated that the Community could function effectively as a unified economic entity in confronting an economic "superpower" such as the United States. As J. Rey summarized:

Politically the Kennedy Round was an exceptionally important factor in the cohesion of the Community: for the first time the EEC appeared as a single unit vis-a-vis non-member countries and was represented by a single negotiator, defending a jointly agreed position . . . . For the first time too, the Community negotiated on an equal footing with the greatest economic power in the world . . . . The success of the Kennedy Round represents a considerable strengthening of the Community, both internally and in the eyes of the world.<sup>149</sup>

*Trade Agreements.*—In the post-transitional period the Community has concluded trade agreements with Spain, Israel and Yugoslavia, and has renewed existing agreements with Iran and Lebanon.<sup>150</sup> These

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148. This is evidenced by a series of tariff agreements that recently have been concluded solely between the Community and various third countries. *See, e.g.*, 1968 E.E.C. J.O. L311/24 (agreement with United Kingdom); 1969 E.E.C. J.O. L257/1 (agreement with Austria); 1970 E.E.C. J.O. L54/4.

149. Rey, *Successful Conclusion of the Kennedy Round*, 6 BULL. EUROPEAN COMMUNITIES 1, 5-7 (1967).

150. *See* Accord entre la Communauté économique européenne et l'Espagne, 1970 E.E.C. J.O. L182/2 [hereinafter cited as Spanish Agreement]; Accord entre la Communauté économique européenne et l'Etat d'Israel, 1970 E.E.C. J.O. L183/2 [hereinafter cited as Israeli Agreement]; Accord commercial entre la Communauté économique européenne et la république socialiste fédérative de Yougoslavie, 1970 E.E.C. J.O. L58/2 [hereinafter cited as Yugoslavian Agreement]; Accord sur les échanges commerciaux et la coopération technique entre la Communauté économique européenne et les Etats membres, d'une part, et la République libanaise, d'autre part, 1968 E.E.C. J.O. L146/2 [hereinafter cited as Lebanese Agreement], renewed 1971 E.E.C. J.O. L181/11; Accord commerciale entre la Communauté économique européenne et le gouvernement imperial de l'Iran, 1963 E.E.C. J.O. 2555 [hereinafter cited as Iranian Agreement], renewed 1971 E.E.C. J.O. L262/54.

agreements, in conjunction with the association accords with Greece, Turkey, Morocco, Tunisia and Malta, form part of a piecemeal Community policy for the "Mediterraneanization" of the EEC. The reason the Community has embarked on such a policy can be attributed both to the growing commercial links between the Community and the various nonmember Mediterranean countries and to a desire to help advance the cause of peace and economic stability in the entire Mediterranean area.<sup>151</sup>

As discussed previously, the Greek and Turkish association agreements were signed under the "mixed procedure" system, while those with Morocco, Tunisia and Malta were not. The latter three agreements, however, resembled a straightforward trade agreement rather than the association agreement concluded with Greece and Turkey. To add to the confusion, the Lebanese agreement contained provisions for technical assistance similar to those found in an association agreement, and was originally based upon article 111 but signed under the "mixed procedure" system. No logical rationale seems to have prevailed. Perhaps the best explanation for the diversity in the legal nature of these various agreements has been offered by the Political Affairs Committee of the European Assembly:

[T]he legal differences between the agreements concluded by the Community are mainly political in origin. In other words the legal character of the agreements was in each case determined by the political affinities that the Community thought it discerned and in light of the political and economic interests of the Community or of some of its influential Member States.<sup>152</sup>

*The Israeli Agreement.*—On June 29, 1970, a trade agreement concluded under article 113 between the EEC and Israel was signed by the President-in-Office of the Council of Ministers and the President of the European Commission for the EEC, and the Minister of Foreign Affairs for Israel. This five year preferential accord was the product of extended negotiations that began in 1961, and it replaced an earlier nonpreferential trade accord between the two parties which had expired in 1967.<sup>153</sup> The aim of the present agreement was to foster trade between the two parties and to lay the groundwork for

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151. See generally Rapport fait au nom de la commission du commerce extérieur sur la politique commerciale de la Communauté dans la Méditerranée, [1970-1971] EUR. PARL. DOCS., No. 246.

152. *Id.* at 19.

153. See Accord commercial entre la Communauté économique européenne et l'Etat d'Israel (first accord), 1964 E.E.C. J.O. 1518.



negotiating a new accord in the future based on more liberal trade principles.<sup>154</sup>

Essentially, the Israeli agreement provided a system of preferential trade treatment between the parties. The EEC offered tariff concessions on more than 85 per cent of all industrial products, and approximately 80 per cent of all Israeli agricultural products imported into the Community.<sup>155</sup> Accordingly, Israel agreed to tariff concessions on more than 50 per cent of the industrial and agricultural products imported from the Community to Israel.<sup>156</sup>

In addition to tariff concessions, the agreement also covers the procedure to be followed before a contracting party can take protective measures to offset any dumping or subsidization on the part of the other party.<sup>157</sup> Provision is also made for safeguard measures that may be taken by either party in the event of balance of payment or other economic difficulties.<sup>158</sup> The agreement further provides that the transfer of payments from the trade of goods covered by the agreement is subject to restrictions by either party.<sup>159</sup>

*The Spanish Agreement.*—Like the agreement with Israel, the trade agreement with Spain is based on preferential trade treatment between the parties and does not require any long-term commitments from either party. The Spanish accord is the product of extensive negotiations that began in 1967; it was signed on June 29, 1970, by the President-in-Office of the Council and the President of the Commission on behalf of the Community, and by the Spanish Minister of Foreign Affairs. The initial agreement is for a period of six years and expires in October of 1976.<sup>160</sup>

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154. Eighteen months before the actual expiration date of the agreements, negotiations may be initiated for the purpose of concluding a new and more comprehensive agreement. Israeli Agreement, *supra* note 150, art. 17.

155. Israeli Agreement, *supra* note 150, annex 1, art. 12. For a commentary on the Israeli Agreement see Rapport fait au nom de la commission des relations économiques extérieures sur l'accord commercial entre la Communauté économique européenne et l'Etat d'Israel, [1970-1971] EUR. PARL. DOCS., No. 167.

156. For the exact formula to be followed in the reduction in the rates of Israeli tariff duties see Israeli Agreement, *supra* note 150, annex III, art. 1.

157. Israeli Agreement, *supra* note 150, annex III, art. 1.

158. Israeli Agreement, *supra* note 150, annex III, art. 11.

159. Israeli Agreement, *supra* note 150, annex III, art. 10.

160. For an analysis of the Spanish Agreement see Rapport fait au nom de la commission des relations économiques extérieures sur l'accord commercial entre la Communauté économique européenne et l'Espagne, [1970-1971] EUR. PARL. DOCS., No. 164.

The agreement anticipates a two-stage process for the liberalization of trade between the two parties, although it dictates provisions covering only the first stage. During this period lasting at least six years, the terms of the agreement are to be purely commercial in nature.<sup>161</sup> The transition from the first to the second stage is to be effectuated by another common agreement between the parties.

On Spanish industrial products, the Community has offered a 60 per cent tariff reduction and removal of quantitative restrictions on substantially all such imports into the Community. Further, the agreement anticipates the possibility of increasing the general tariff preference to 70 per cent. Except for important concessions on such items as citrus fruits and nonrefined olive oil, the Community intends to deal with agricultural products on an ad hoc basis.<sup>162</sup>

Spain had already extended significant tariff concessions to the Community on industrial products, but agreed further to reduce quantitative restrictions on at least 95 per cent of Community industrial imports by the sixth year of the agreement. Liberalization of quantity restrictions on agricultural products is continued at a pace paralleling the reduction of tariffs for industrial products.<sup>163</sup> As in the Israeli agreement, the Spanish agreement includes provisions for antidumping and safeguard measures, for the treatment of transfer of payments concerning goods covered by the agreement, and for the management of the agreement by a joint committee.<sup>164</sup>

*The Yugoslavian Agreement.*—On March 17, 1970, a nonpreferential trade agreement was signed between the Community and Yugoslavia. This agreement was signed for the Community by the President-in-Office of the Council and the President of the Commission, and for Yugoslavia by a member of the Federal Executive Council. The accord came into force for a three year period beginning May 1, 1970.<sup>165</sup>

The agreement provides that tariff rates agreed on in the Kennedy Round would be applied immediately to certain industrial and agricultural products. The central concession, however, is that the Community agreed to adjust its agricultural levy on "baby veal"—a product representing 40 per cent of Yugoslavia's agricultural exports

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161. Spanish Agreement, *supra* note 150, art. 1.

162. Spanish Agreement, *supra* note 150, annex I.

163. Spanish Agreement, *supra* note 150, annex II.

164. Spanish Agreement, *supra* note 150, arts. 9-11.

165. See generally Rapport fait au nom de la commission des relations économiques extérieures sur l'accord commercial entre la Communauté économique européenne et la république socialiste fédérative de Yougoslavie, [1970-1971] EUR. PARL. DOCS., No. 64.

to the EEC—and other categories of high quality beef, according to a prescribed timetable.<sup>166</sup>

The real significance of the agreement goes far beyond any trade concessions. For the first time, the Community has formally consolidated commercial relations with an Eastern European state-trading nation. The heart of the agreement states that “the Contracting Parties shall endeavor to promote and intensify their commercial relations on the basis of equality and mutual advantages.”<sup>167</sup> Supervision over the terms of the agreement will be in the hands of a joint committee.<sup>168</sup> In addition, the Community has specified, for the first time, in a commercial agreement the extent to which liberalization will be extended to a nonmember country with the following language: “the highest degree of liberalization of imports and exports [are] applicable in a general manner with regard to third countries.”<sup>169</sup> Nonetheless, the agreement also makes clear that certain advantages accorded to member states shall not be applicable to Yugoslavia,<sup>170</sup> and that in addition “both the general and the specific provisions of the agreement referring to particular products replace the provisions of the agreements concluded between Yugoslavia and the Member States of the Community which are incompatible with those of the said agreement or identical to them.”<sup>171</sup> Again, therefore, the primary significance of the agreement is that it creates a legal basis for the development of future commercial and economic relations between the Community and the Federal Socialist Republic of Yugoslavia.

*The Lebanese Agreement.*—An agreement on trade and technical cooperation came into effect between the Community and the

166. Yugoslavian Agreement, *supra* note 150, annex 1. As noted by one source: “The adjustment of the levy is mainly designed to give Yugoslavia a financial, but not a commercial advantage. Thus, it was agreed that Yugoslavia would take all necessary steps to ensure that the free-at-frontier offer price plus the customs duty and the reduced levy would not remain at the same level as in the case where the standard levy is applied.” 3 BULL. EUROPEAN COMMUNITIES, No. 8, at 16-18 (1970).

167. Yugoslavian Agreement, *supra* note 150, art. IV.

168. Yugoslavian Agreement, *supra* note 150, art. VII. The joint committee is to consist of representatives of both the EEC and Yugoslavia, and is to meet at least once a year (although more frequent meetings are anticipated). The task of the committee is not only to supervise the operation of the present agreement but also to make suggestions for a further development of trade based on mutual advantages between the two contracting parties.

169. Yugoslavian Agreement, *supra* note 150, art. III(1).

170. Yugoslavian Agreement, *supra* note 150, art. II(a).

171. Yugoslavian Agreement, *supra* note 150, Echange de lettres No. 1.

Republic of Lebanon on July 1, 1968. It was concluded on the basis of article 111 but was signed under the "mixed procedure" system. The only conceivable rationale for the use of this procedure is the insistence of the Council of Ministers on limiting Community agreements to matters of a traditional trade content. Apparently, the agreement's provisions for minimal technical assistance extended by the Community to Lebanon are considered outside the exclusive treaty-making competence of the Community.<sup>172</sup>

This agreement stipulates that trade relations are to be conducted on a nonpreferential basis. The contracting parties agreed to grant each other most-favored-nation treatment under certain circumstances in matters such as the levying of duties on exports and imports.<sup>173</sup> Technical aid to Lebanon is also to be coordinated by the parties<sup>174</sup> and can consist of the following: (a) sending experts, specialists or teachers to public bodies for research or teaching institutions in Lebanon; (b) the technical training of Lebanese subjects at public bodies, educational institutions, industrial, agricultural, commercial or banking concerns in the member states of the Community; (c) the preparation of studies and inquiries into the full development of the resources of Lebanon; and (d) if necessary, supplying technical equipment to research or teaching institutions in Lebanon.<sup>175</sup> Technical cooperation is subject to "joint agreements, reached through a bilateral procedure, between each of the Member States concerned and Lebanon, bearing in mind the conclusions arrived at by the joint committee," set up by the agreement.<sup>176</sup>

Originally the agreement was to expire on June 30, 1971. Although negotiations were then under way for the conclusion of a new preferential type of trade agreement, the original agreement was temporarily extended for a one year period, in accordance with the

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172. The "mixed procedure system" is a procedure for concluding international agreements between the EEC and third countries by which both the EEC (as an international legal entity) and the member states individually conclude the agreement. This has been particularly used in the conclusion of EEC "association agreements." Such a procedure has been subject to considerable criticism as its legal basis is in doubt, and as it obscures exactly what is the competence of the EEC under the particular agreements. For further discussion see INSTITUT D'ETUDES EUROPEENNES UNIVERSITE LIBRE DE BRUXELLES, *L'ASSOCIATION A LA COMMUNAUTE ECONOMIQUE EUROPEENNE* (1970).

173. Lebanese Agreement, *supra* note 150, arts. I & II.

174. Lebanese Agreement, *supra* note 150, art. V.

175. Lebanese Agreement, *supra* note 150, art. VI.

176. Lebanese Agreement, *supra* note 150, art. VII. Article IV discusses the creation of the joint committee.

provision permitting annual renewal and under article 113 of the Treaty of Rome.<sup>177</sup>

*The Iranian Agreement.*—The Iranian agreement, signed in Brussels on October 14, 1963, marked the first purely commercial agreement negotiated by the Community pursuant to articles 111 and 114 of the Rome Treaty. The original term of the agreement was for three years, with provision for an annual renewal thereafter by agreement of the parties.<sup>178</sup> The latest renewal of the agreement was concluded in November of 1971.<sup>179</sup>

The Iranian agreement was limited to temporary reductions by the Community of the common external tariff and a nondiscriminatory tariff quota on Iranian carpets, certain dried fruits and caviar.<sup>180</sup> These products accounted for about fifteen per cent of Iran's trade with the Community at the time; petroleum oil comprised 75 per cent of Iran's exports to the Community and, therefore, was not subject to a Community tariff.<sup>181</sup> No specific concessions were made by the Government of Iran, although a joint committee set up by the agreement was to study ways to further extend trade harmoniously between the two parties.<sup>182</sup>

*Other Bilateral and Multilateral Trade Agreements.*—The Community has concluded various other bilateral commercial agreements with third countries pursuant to article 113 of the Treaty of Rome. The Community also has entered into a series of agreements pursuant to the Food Aid Convention and the Long-term International Cotton Textile Agreement. Under the Food Aid Convention of the International Wheat Agreement of 1967, which expired on June 30, 1971, the Community has concluded over 30 bilateral agreements with developing countries concerning the type, amount and conditions of

177. Décision du Conseil No. 71/207, du 12 juillet 1971, portant conclusion de l'accord reconduisant l'accord sur les échanges commerciaux et la coopération technique entre la Communauté économique européenne et les Etats membres, d'une part, et la République libanaise, d'autre part, 1971 E.E.C. J.O. L181/11.

178. Iranian Agreement, *supra* note 150, art. V.

179. Décision du Conseil No. 71/385, du 16 novembre 1971, portant conclusion de l'accord reconduisant l'accord commercial entre la Communauté économique européenne et l'Iran, 1971 E.E.C. J.O. L262/54.

180. Iranian Agreement, *supra* note 150, arts. I & II.

181. For a consideration of the various policy factors surrounding the negotiation of the Iranian Agreement (along with the one with Israel and the Association Agreements with Turkey and Greece) see S. HENIG, *EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITY ASSOCIATION AND TRADE AGREEMENTS*, 25-38 (1971).

182. Iranian Agreement, *supra* note 150, art. III.

food aid to be granted to third countries.<sup>183</sup> Similarly, pursuant to its accession to the Long-term Arrangement on Cotton Textiles, the Community has entered bilateral agreements with such countries as South Korea, India, the Republic of China and Pakistan on the basis of article 113.<sup>184</sup> In addition, accords have been concluded with Pakistan on imports of jute, with India and Pakistan on imports of handicrafts, and with Austria and Denmark on imports of livestock for processing purposes.<sup>185</sup>

Of special importance is the commercial agreement made in November of 1971 between the Community and Argentina.<sup>186</sup> This is the first accord to be concluded by the Community with a Latin American country; it is to last for an initial three year term, and contains an annual renewal clause for the period thereafter. The

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183. The Community has furnished food aid by bilateral agreement with the following countries: Algeria, Cameroon, Ceylon, India, Indonesia, Jordan, Lebanon, Morocco, Mali, Niger, Pakistan, Peru, Somalie, Sudan, Tunisia, Turkey, Upper Volta and Yemen. In addition, the Community has concluded bilateral agreements on food aid with the World Food Program and the International Committee of the Red Cross.

184. *See, e.g.*, Décision du Conseil No. 71/89, du 1 février 1971, portant conclusion d'accords entre la Communauté économique européenne, d'une part, et respectivement, la république de l'Inde, la République arabe unie, la république de Chine et la république islamique du Pakistan, d'autre part, sur le commerce des textiles de coton, 1971 E.E.C. J.O. L431/1; Décision du Conseil No. 71/117, du 15 février 1971, portant conclusion d'un accord entre la Communauté économique européenne et la république de Corée sur le commerce des textiles de coton, 1971 E.E.C. J.O. L55/12.

185. *See* Décision 70/374, du 20 juillet 1970, portant conclusion d'un accord entre la Communauté économique européenne et la Pakistan sur le commerce des produits de jute, 1970 E.E.C. J.O. L170/4; Décision No. 70/386, du 27 juillet 1970, portant conclusion d'un accord entre la Communauté économique européenne et l'Inde et d'un accord entre la Communauté économique européenne et le Pakistan sur le commerce des produits faits a la main, 1970 E.E.C. J.O. L176/1; Décision No. 71/181, du 30 mars 1971, portant conclusion de l'accord sous forme d'échange des lettres reconduisant l'accord entre la Communauté économique européenne et l'Autriche sur le bétail de fabrication, 1971 E.E.C. J.O. L99/1 (the original agreement can be found at 1970 E.E.C. J.O. L140/1); Décision No. 71/182, du 30 mars 1971, portant conclusion de l'accord sous forme d'échange des lettres reconduisant l'accord bilatéral pour le bétail de fabrication entre la Communauté économique européenne et le Denmark, 1971 E.E.C. J.O. L99/4 (the original agreement was signed at Geneva on June 30, 1967, for a period of three years).

186. Accord commercial entre la Communauté économique européenne et la République argentine, 1971 E.E.C. J.O. L249/19 [hereinafter cited as *Argentinian Agreement*].

objective of the agreement is "to consolidate and extend traditional commercial and economic relations between the European Economic Community and the Republic of Argentina."<sup>187</sup> The Argentine agreement is based on the principle of nondiscrimination,<sup>188</sup> and each party extends to each other the highest degree of liberalization for imports and exports that is applicable to a third country.<sup>189</sup> The core of this nonpreferential agreement concerns tariff and nontariff trade concessions on beef and veal.<sup>190</sup> The present accord replaces any bilateral agreements between member states of the Community and Argentina that may be in conflict with it.<sup>191</sup> Here again the Community stressed its exclusive powers derived from article 113 of the Treaty of Rome.

Finally, the Community has concluded several multilateral agreements pursuant to article 113 of the Treaty of Rome in the post-transitional period: the International Wheat Agreement of 1971, incorporating the Wheat Trade Convention and Food Aid Convention of 1971,<sup>192</sup> and the Fourth International Tin Agreement of 1971.<sup>193</sup> In addition, the Community has participated in renewal of the Long-term Arrangement for Cotton Textiles.<sup>194</sup>

These multilateral agreements have posed a series of problems for the Community.<sup>195</sup> First, some countries, mostly those in Eastern Europe, have hesitated to recognize the Community as an international legal entity. This became evident during the negotiation of the International Sugar Agreement in 1968,<sup>196</sup> conducted under the auspices of the United Nations Conference on Trade and Development (UNCTAD). During the course of the negotiations, the U.S.S.R. challenged the right of the Community to participate in the

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187. Argentinian Agreement, *supra* note 186, preamble. For an analysis of the agreement see Rapport fait au nom de la commission des relations économiques extérieures sur l'accord commercial entre la Communauté économique européenne et la République d'Argentine, [1971-1972] EUR. PARL. DOCS., No. 251.

188. Argentinian Agreement, *supra* note 186, art. 1.

189. Argentinian Agreement, *supra* note 186, art. 2.

190. Argentinian Agreement, *supra* note 186, art. 4(1) & annex I.

191. Argentinian Agreement, *supra* note 186, art. 6.

192. For the English text of the International Wheat Agreement of 1971, which replaced an earlier 1967 version, see T.I.A.S. No. 7144 (1971).

193. For a discussion of the renewal of the International Tin Agreement see 1972 E.E.C. J.O. L90/2. The agreement is discussed in 4 BULL. EUROPEAN COMMUNITIES, No. 2, at 76 (1971).

194. For a discussion of the renewal of the Long-Term Agreement on Cotton Textiles see 1970 E.E.C. J.O. L225/29.

195. See Leonard & Simon, *supra* note 140, at 154-56.

196. See, e.g., U.N. Doc. TD/sugar.7/2/rev/17 (1968).

Conference. As a result of this challenge, neither the Community nor its member states have signed the Sugar Agreement.

It should also be noted that the multilateral agreements concluded in the post-transitional period have been concluded under the "mixed procedure" system. As to the various association agreements concluded in this manner, a controversy arises concerning which provisions in the agreements are considered by the Council of Ministers to fall exclusively within the Community's competence. An illustration of the problems surrounding these multilateral agreements occurred in the negotiation of the Tin Agreement. Before the Community could participate in the negotiation it first had to receive a mandate from the Council. In granting this mandate, the Council noted:

[I]n view of the type of agreement envisaged, some of the provisions at present being negotiated come within the scope of commercial policy, while others relate more broadly to economic and financial policy. For this reason, the Commission has been authorized, in accordance with Article 113 of the Treaty, to negotiate the commercial aspect of the proposed Agreement, whereas the Member States will, naturally, step in as regards the other aspects of the negotiations.<sup>197</sup>

Again the Council failed to specify precisely which provisions should be considered as within article 113. Consequently, the following provision was inserted into the Tin Agreement in order to satisfy the objections of the Eastern bloc concerning EEC participation:

An intergovernmental organization having responsibilities with respect to the negotiation of international agreements may participate in the International Tin Agreement. Such organization shall not itself vote. In matters within its jurisdiction, its Member States may vote collectively.<sup>198</sup>

## VI. CONCLUSIONS

Any assessment of the common commercial policy proceeds from two contending assumptions of substantial import. The first is supported by the text of article 113 and contends that the CCP is an "undefined concept of Community law." Accepting this premise, a logical argument is that "commercial policy [embraces] all the measures intended to regulate economic relations with the outside world."<sup>199</sup> Proceeding from this assumption the CCP could cover

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197. 3 BULL. EUROPEAN COMMUNITIES, No. 6, at 84 (1970).

198. COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMISSION 1970 at 320 (1971).

199. Pescatore, *supra* note 27, at 917, 921.



matters of establishment, capital movements and transportation when they have a direct or indirect effect on the movement of goods and services between the Community and third countries.<sup>200</sup>

The second assumption is that the CCP is a limited concept dependent on the will of the member states and the Council of Ministers for its implementation. An analysis based on this assumption would emphasize the practical difficulties with the implementation of the CCP, and proceed very much like Professor Everling's observations:

It should have become clear how much tension and overlapping is arising from the fact that functions and powers previously vested in the States are now assigned to the Community on the one hand and the member States on the other. In exercising its powers, the Community affects the powers reserved by member States in many ways, in some instances even in their central parts. As member States remain in the present stage of integration responsible for the fate of their people—in contradistinction to what their status in a federation would be—the Community is confined within natural limits which it would find hard to overstep even if this were legitimate.<sup>201</sup>

Between the limits of an overly ambitious interpretation of the content of the CCP and the inescapable realms of *realpolitik*, however, several conclusions may reasonably be drawn. First, the Community possesses exclusive power under the CCP in the following matters, which are enumerated specifically by article 113 of the Treaty of Rome:

- (1) Tariff agreements.
- (2) Trade agreements. This term is coextensive with the entire content of the CCP, because it is related to the Community's contractual relations with the outside world.
- (3) Export policy. Although this term is rather imprecise, it clearly embraces matters concerning export subsidies, export credit and export insurance. In the opinion of Le Tallec, "export policy . . . covers all measures taken by the authorities which exercise a *special* influence on exports."<sup>202</sup> The measure, therefore, must be intended primarily to have a significant impact on the export of goods or services. Under this interpretation, such measures as production subsidies would not come under "export policy," because their

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200. For a further discussion of the broad interpretation of article 113 see C. KIM, *LA COMMUNAUTE ECONOMIQUE EUROPEENNE DANS LES RELATIONS COMMERCIALES INTERNATIONALES* 43-46 (1971).

201. Everling, *supra* note 7, at 164.

202. Le Tallec, *supra* note 21, at 735-36.

primary purpose is not to have a special or primary influence on exports.<sup>203</sup>

- (4) Commercial protective measures. These would consist primarily of antidumping measures and the imposition of countervailing duties, although these two types of measures are not exhaustive of the general category.
- (5) The fixing and liberalization of quotas.
- (6) Regulations pertaining to payments connected with the movement of goods and the transfer of these payments. Examples of the scope of these matters under the CCP can be found in the Israeli and Spanish trade agreements.<sup>204</sup>
- (7) Regulations concerning tax discrimination against goods from third countries. Again examples can be found in the Israeli and Spanish trade agreements.<sup>205</sup>

Secondly, although not deducible from the present state of EEC law, the following matters also are reasonably within the scope of the CCP:

- (1) The supply of services.
- (2) Transportation measures that have a direct influence on the flow of goods and services to and from the Community. The act of transportation itself would constitute a service.<sup>206</sup>
- (3) The regulation of prices, to give the Community a direct influence on exports and imports. The Community appears to have this power in view of its signing of the Wheat Trade Convention at the end of the Kennedy Round. Because this Convention was signed under the "mixed procedure" system, however, it is not clear whether this power is the Community's exclusively.

Finally, the following matters appear to be not within the scope of the CCP:

- (1) Matters concerning technical assistance, as demonstrated by the Lebanese trade agreement.

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203. The primary purpose of production subsidies is to influence the general production or consumption of a certain product irrespective of exports or imports. For a consideration of the difficulties in distinguishing between subsidies affecting domestic markets and those affecting imports and exports see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, ch. 15 (1970).

204. See article 10 of these agreements.

205. See article 3 of these agreements.

206. Cf. Stabenow, *Opportunities for an External Policy of the EEC in the Field of Transport*, 4 COMM. MKT. L. REV. 32 (suggests that the CCP should apply to the external aspects of the transport sector of the Community).

- (2) Matters generally relating to establishment and to foreign exchange of payments, unless they directly affect the movement of imports and exports.<sup>207</sup>

In summary, the best standard to follow in determining whether a matter is within the scope of the CCP is to conclude that the CCP empowers the proper authorities to take all measures that have a direct influence on the international movement of goods and services.

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207. The French Treaty, as noted *supra*, contains provisions on the "employment of specialists" and "capital movements." By its exclusion of the French Treaty from the list of FCN's containing provisions falling under the CCP, it is clear that the Council does not take a broad approach to the content of the CCP.