Correspondence

Dear Editor:

El Salvador, if one may judge by press reports in this country in the past year, is now characterized by a disregard for the rule of law and human rights, to which no one can be indifferent. Particularly disturbing is the death of four American religious women in El Salvador on December 2, 1980. It has been widely reported that these women were raped and killed at the hands of the Salvadoran military. There are claims that 10,000 persons this calendar year alone have been arrested without formal charges being placed against them, tortured, abused and executed without trial or any other legal process; that these are not random, lawless acts of individual officials, but part of a systematic program of intimidation carried on with official approval and supported by American foreign aid. Archbishop Oscar Romero, for example, who spoke out in defense of human rights and on behalf of social demands, was murdered while celebrating mass on March 23, 1980, only about one month after he wrote to President Carter to halt military aid which he claimed was being used to repress the populace.

Press accounts do not always agree. For example, a front-page article in today's *Wall Street Journal* [Dec. 23, 1980] quotes unnamed advisors of the president-elect as saying "There isn't any proof of government complicity in the killings" of the American women, and the mother of one of the victims, Mrs. Donovan, is quoted by the Associated Press as saying there is no doubt in her mind that the military killed her daughter, that "anyone who goes to help the people of El Salvador is political, even though they are just giving them the bare necessities of life. She was very political. She fed the hungry, clothed the naked, housed people that didn't have homes."

As lawyers, we are trained to recognize when a dispute is essentially factual and how to assess evidence. On December 21, 1980, at Holy Name Cathedral in Chicago, I heard two young men speak about conditions in El Salvador. One described his brother's arrest and the subsequent discovery of his mutilated body. Another described the arrest of his father, a minor union leader, who was taken to jail, tortured and killed. Although this "testimony" was moving, a lawyer could not help notice it was not under oath or subject to cross-examination.

We lawyers immediately recognize that compared to testimony under oath, subject to cross-examination, which bears strong indicia of reliability,

press reports are not very satisfactory as evidence. But lawyers easily forget that what is obvious to us is not obvious to lay persons, many of whom "believe" what they read in the newspaper. My son, Steven, who has been helping me research the situation in El Salvador by reading news accounts, came across the following *New York Times'* article, dated October 11, 1980, which is illustrative of the factual problems:

> Official of a Governing Party Is
> Slain in El Salvador
>
> Leftist guerillas assassinated the chief spokesman for the Christian Democratic Party in an ambush today near his home in the capitol, a witness said.
>
> A leftist guerilla group, Popular Liberation Forces, was responsible for the slaying, the witness said. The claim was not immediately verified. Members of the group announced that they killed the South African ambassador to El Salvador, Archibald Dunn, yesterday.
>
> Melvin Rigoberto Orellana, the Christian Democratic spokesman, was the national information secretary for his party, which has two members on the governing military-civilian junta.

The main source of the story is not identified and the story is not confirmed. This newspaper article has considerable value, for it is the only evidence available. As a political matter, it is critically important whether it was "leftists," "rightists," or some other political group who carried out the "assassination." But given the serious nature of the alleged human rights violations in El Salvador, particularly with regard to American citizens, we must have better evidence if, as the Rule of Law requires, criminals are to be brought to justice regardless of "politics."

For this reason, on December 15, 1980, I wrote to the Honorable Niall Macdermot, Secretary-General of the International Commission of Jurists, and encouraged the International Commission of Jurists to undertake a study of the present situation regarding the Rule of Law in El Salvador. I told Secretary-General Macdermot I was sure many other American lawyers shared my view that a study of present conditions in El Salvador should be encouraged and supported. I also sent a copy of this letter to you, as an *ex officio* member of the Section on International Law of the American Bar Association, with the request that you bring this matter to the attention of the American Bar Association.

The International Commission of Jurists is a nongovernmental organization devoted to promoting understanding and observance of the Rule of Law throughout the world. It has consultative status with the United Nations Economic and Social Council and the Council of Europe and conducts studies and inquiries into particular situations or subjects concerning the Rule of Law and publishes reports about them to obtain legal protection of human rights throughout the world. Of particular significance is a study of the Rule of Law in Cuba published by the Commission in 1962. This study, based on the reports of many eyewitnesses, documented the legal system of Cuba in practice during and shortly after the rise to power of Fidel Castro.

I do not know what difficulties of time and money may stand in the way of an inquiry by the International Commission of Jurists into the present situation in El Salvador, but I hope that the Section on International Law will be able to consider the matter. While I believe the status of the International Commission of Jurists as an impartial international body devoted to the Rule of Law uniquely qualifies it for this role, there may be much that the Section on International Law itself could also do.

For example, what rights, if any, do the families of the murdered American women have if, as they apparently believe, Salvadoran officials have tortured and killed these American citizens? What rights do persons who were subjected to torture and other deprivations of human rights, who are resident aliens in this country, have to right the wrongs allegedly done to them, or to their relatives? In this regard, the Section may want to consider the significance of a recent decision of the United States Court of Appeals in which Judge Kaufman held that Paraguayans who had applied for permanent political asylum in the United States could bring an action in the federal courts of this country against another citizen of Paraguay who was served with summons while visiting the United States for wrongfully causing the death, by torture, of their son. Deliberate torture carried out under the color of official authority, the court held, violates universally accepted norms of the international law of human rights and is actionable.*

There was a time, and not so long ago, when this country would have considered going to war if an American businessman was murdered or American property expropriated. That we do not seriously consider military action in these times when innocent American women are tortured and murdered—albeit "allegedly"—is considered progress, and properly so, precisely because we depend, as a civilized country, for vindication of these wrongs on the principles of international law set forth in the law of nations, to which we, along with most other nations, subscribe. For the Rule of Law has replaced the rule of force. Happily, as lawyers, we see in these words not merely a meaningless phrase, but a significant body of law which our profession uniquely suits us to make effective in these difficult times.

Sincerely,

ARTHUR R. MATTHEWS, JR.
Chicago, IL

cc: Niall Macdermot, Secretary-General
International Commission of Jurists

*Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

Dear Editor:

The *International Lawyer* carried an article some time ago[1] which provided its readers with "An American View of the Common Market's Proposed Group Exemption for Patent Licenses." Unfortunately, this article, although written by two distinguished United States lawyers[2] respected in the domestic antitrust arena, has confused the issue of patent licensing agreements in the European Common Market (EEC) more than it has helped the reader understand what is currently under consideration in the EEC in this respect. Messrs. Handler and Blechman have, in effect, created the impression that the Commission of the European Communities in Brussels is out to drastically change the law of the Common Market as it applies to patent licensing agreements. The reader must have come to the conclusion, as the two authors of the article themselves most likely have, that European attorneys are about to eliminate common legal and economic sense from the area of patent licensing, and dismantle any future cooperation among United States and other foreign companies and EEC firms as regards technology transfers.

Nothing is further from the truth. This response was written with the specific intention to set the record straight in this respect, to show, in other words, that nothing will change, in substance, in the interpretation of EEC antitrust law as it relates to industrial property rights, in general, and patents, in particular. Apart from that, the following comments will hopefully help to correct the possible view among readers of the Handler-Blechman article that Common Market lawyers are a bunch of ax-swinging fools determined to discourage United States companies from licensing their patented inventions or secret know-how in Europe.[3] Therefore, the remarks below are confined to the analysis, and the conclusions, in the Handler-Blechman article that extend to EEC law, generally, and the proposed group exemption regulation, specifically.

In light of the continuous assertions throughout the article that the proposed EEC regulation "condemns" certain licensing agreements, "prohibits" certain restrictions and "proscribe[s]" others,[4] thereby departing "radically both from the law that has evolved in the United States and from worldwide commercial practice,"[5] the following clarification must be made at the outset. The Commission Proposal for a Regulation on the Application of Article 85(3) of the Treaty of Rome to Certain Categories of Patent Licensing Agreements[6] does not condemn, prohibit or proscribe anything. With just a glance over the language of the proposed regulation the reader can quickly convince himself, as the authors of the criticized article could

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[1] 14 INT'L LAW. 403 (1980).

[2] Milton Handler and Michael D. Blechman.

[3] *Supra* note 1, at 408 and 428.

[4] *Id.* at 410, 416, 421, 423 and 425, respectively.

[5] *Id.* at 428.

[6] O.J. Eur. Comm., No. C58, March 3, 1979, at 12; C.M.R. (CCH) ¶ 10,118.

have done, that Article 3 of the proposed regulation merely excludes from the benefit of group exemption certain agreements which contain clauses listed there. This means nothing more, and nothing less, than the continued necessity for such agreements to be notified to the Commission in Brussels for individual exemption pursuant to Article 85(3), Treaty of Rome. In other words, for these agreements nothing will change from today's situation. Others, mentioned in Articles 1 and 2 of the proposed regulation, will automatically be exempted from the prohibition contained in Article 85(1).[7]

The proposed group exemption regulation would not, in any way, change the law as it exists today in the EEC with respect to patent licensing. To the contrary, it clarifies this law, as it has evolved in the decisions of the Commission and the judgments of the European Court of Justice over the past thirteen years, and it simplifies enormously the procedure in respect of exemptions for certain contract clauses which may be required.[8] And there is no indication that the Commission might change its approach, by now well established, and reject individual applications for exemption under Article 85(3) where in the past it has seen fit to approve them. In fact, many of the clauses which Messrs. Handler and Blechman assert would be "prohibited" in future EEC law, are prohibited today by Article 85(1), as interpreted by the Commission and the Court, but have been exempted on several occasions. This is particularly true of territorial restrictions, as will be shown. There is nothing that suggests that this will change once the proposed regulation has been adopted.

To corroborate the statements made so far and in order to illuminate to readers the application mechanism of EEC competition rules laid down in Article 85, Treaty of Rome, something which the Handler-Blechman article failed to do,[9] a short digression into early EEC antitrust law seems in place.

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[7]Article 85(1), Treaty of Rome, prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices (not "concentrated" practices as stated in footnote 2 of the Handler-Blechman article) which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market.

[8]Article 85(3), Treaty of Rome, which represents a kind of built-in rule of reason in EEC antitrust law, allows the individual exemption from Article 85(1) of agreements, decisions and concerted practices of the type mentioned in subparagraph (1) if they contribute to the improvement of the production or distribution of goods or promote technical or economic progress, while allowing consumers a fair share of the resulting benefits, and if they do not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[9]With the exception of one short half-sentence, interjected at the beginning of the article, the authors did not explain that the possibility for an individual exemption of a particular licensing agreement under Article 85(3) exists in almost all cases. Nowhere did the authors state that the proposed group exemption regulation has no bearing whatsoever on the question whether such exemption can be granted in a specific case, but simply addresses the problem whether or not such an exemption can be automatic. This has the result, in this author's opinion, that the readers of the Handler-Blechman article were misled as to the effects of the proposed regulation, because not everyone can be assumed to know about the interplay of Article 85(1) and Article 85(3) in EEC antitrust law.

During the first years of application of Articles 85 and 86, Treaty of Rome, and after the adoption of Regulation 17/62, the Commission was swamped with thousands of notifications from companies seeking exemption of their agreements from the prohibitions of EEC competition rules. In order to facilitate the administrative tasks of the Commission it appeared desirable to enable the Commission to declare by way of regulation that the provisions of Article 85(1) do not apply to certain categories of agreements; in other words, to allow the Commission to grant a group or block exemption, pursuant to Article 85(3). One such category of agreements which was felt to qualify were exclusive dealing arrangements, as they can contribute to improving the production and distribution of goods, in general. Therefore, the EEC Council, in 1965, adopted Regulation 19/65 which gave the Commission the desired power to apply Article 85(3) of the Treaty by regulation to certain categories of bilateral exclusive dealing agreements.[10] This resulted in Regulation 67/67, issued by the Commission on March 22, 1967.[11] This group exemption regulation did not change the law, as it stood then in the Common Market, and it has worked well for all parties involved. As a result of this regulation, all agreements of the type referred to in Article 1, Regulation 67/67, and concluded after May 1, 1967 (the effective date) were automatically exempt from Article 85, Treaty of Rome, without prior registration. Others referred to in Article 3, which is of similar composition as Article 3 of the proposed regulation in the patent licensing arena, continued to receive individual exemptions from the Commission.[12] As had been anticipated, the workload of the Commission in this field decreased dramatically.[13]

The situation in the area of patent licensing today is what it used to be in the area of exclusive dealing prior to the adoption of Regulation 67/67. At year-end 1979, approximately two-thirds of all notifications and applications pending before the Commission related to patent licenses; the Commission calls it a "problem of sheer bulk."[14] Not surprisingly, the Commission has therefore sought to equip itself with an equally effective instrument as in the area of exclusive distribution agreements to master the flood of applications for individual exemption of patent licensing agreements. Regulation 19/65 of the EEC Council, which provided the legal basis to enact Regulation 67/67, also contains sufficient authority for the Commission to adopt a similar regulation granting a block exemption to certain bilateral agreements "which include restrictions imposed in relation

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[10]O.J. EUR. COMM., No. 36, March 6, 1965, at 533; C.M.R. (CCH) ¶ 2717.

[11]O.J. EUR. COMM., No. 57, March 25, 1967, at 849; C.M.R. (CCH) ¶ 2727.

[12]To name just one of many: Commission Decision of December 23, 1977 in the case of *Campari*; O.J. EUR. COMM. No. L 70, March 13, 1978 at 69; C.M.R. (CCH) ¶ 10,035.

[13]Of the 29,500 exclusive dealing agreements notified to the Commission during the early years of application of EEC competition rules approximately 25,000 were settled on the basis of Regulation 67/67; *cf.* NINTH REPORT ON COMPETITION POLICY OF THE EUROPEAN COMMUNITIES (COMP. REP. EC 1979), point 2 (page 15/16).

[14]COMP. REP. EC 1979, point 7 (page 20).

to the acquisition or use of industrial property rights, in particular of patents, utility models, designs or trademarks" (Article 1(1)(b), Regulation 19/65). The Commission has worked on such a block exemption regulation for patent licensing agreements for many years. After several futile attempts a draft of such a regulation was finally published for discussion in 1979.[15]

This draft document indicates that the Commission intends to issue a regulation for the block exemption of patent licensing agreements, which, in its structure, will closely resemble Regulation 67/67. The practical effects of this regulation (without going into any procedural detail) will be twofold, once adopted. First, it will allow companies, in the majority of cases, the immediate knowledge of whether or not their licensing agreements will benefit from exemption; all bureaucratic delay will be excluded. Legal certainty is the result. Second, the Commission will discharge itself of one of its greatest administrative duties in the area of antitrust enforcement, thereby automatically solving its "problem of sheer bulk." This will result in increased efficiency and more productive allocation of resources on the part of the EEC Administration. It can hardly be questioned, therefore, that the purpose and the effect of the proposed regulation are positive, in principle.

In view of this situation, the comments by Messrs. Handler and Blechman, ascribing a negative function to the proposed regulation in that it refuses, in Article 3, to extend automatic exemption to those agreements that do not fall within its limits appear almost perverse. Their criticism, while perhaps justified with respect to one or the other detail of the proposed provisions in the regulation, is unfounded as far as the objective of the Commission's proposal is concerned. The reader is reminded that the exclusion of certain agreements from the block exemption, by virtue of Article 3 in the current draft proposal, does not prejudice them in any way as regards a single case, individual exemption.[16] They are eligible, or ineligible for such an exemption under Article 85(3) regardless whether the regulation will ever be adopted. The only thing different in respect of

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[15] *Supra*, note 6. It is this draft which Handler-Blechman have made the subject matter of their article mentioned *supra*, note 1.

[16] Provided they require such an exemption in the first place, because they contain prohibited clauses which fall under Article 85(1). Nobody should make the mistake, however, to assume that clauses that are not exempted are automatically prohibited. The Court of Justice, in Case 32/65, Italy v. EEC Council and EEC Commission, judgment of July 13, 1966, 12 Rec. 563 (1966); C.M.R. (CCH) ¶ 8048 had this to say in connection with an identical situation involving the group exemption of exclusive dealing agreements:

> Under Article 87 of the Treaty, "the Council shall issue the necessary regulations or directives to put into effect the principles set forth in Articles 85 and 86." It is for the Council to decide whether the adoption of a regulation is "necessary." The Council can find that such is the case for a specific point and is not obligated to issue exhaustive rules encompassing the entire field of application of Articles 85 and 86. It can therefore, if it considers it necessary, declare an exemption pursuant to Article 85, paragraph 3, through a regulation. *This does not mean, however, that everything that is not exempt must be considered to be prohibited* (emphasis added).

Citation at 7717 in C.M.R. (CCH) ¶ 8048.

agreements containing clauses that do not qualify for block exemption is the requirement for the companies involved to notify the Commission separately, and wait for an approval from Brussels. Thus, as was stated before, nothing will change for this type of licensing agreement when and if the proposed regulation is finally signed into law in the EEC.

Returning to the incorrect impression which the criticized article must have created in the readers' minds as regards the change of law in the Common Market, purportedly resulting from an adoption of the proposed regulation, the following observations are offered. Choosing territorial restrictions, one of the seven topics of the Handler-Blechman article, as an example,[17] the reader will be interested to learn that the European Court of Justice ruled on four occasions on the subject of compatibility of industrial property rights, which afford territorial protection under national laws, and EEC competition rules before the Commission itself had to make a determination on a specific patent licensing agreement.[18] In other words, the Commission found a body of case law when it finally set out to make individual decisions regarding the applicability of Article 85 to patent licenses.[19]

Generally speaking, the Court of Justice developed an approach which was designed to reconcile the basic Community principle of free trade across all intra-EEC borders with the protection of industrial property rights granted by the laws of the Member States. This reconciliation was based on a distinction between the existence of a property right, such as a patent, and its exercise. The Court acknowledged the legal status granted by the various Member State systems to a patent holder, thereby adhering to the letter and spirit of Article 222, Treaty of Rome,[20] but at the same time subjected the utilization of any industrial property right by means other than the unilateral exercise of the right to the rules of competition, laid down in the Treaty. As early as 1966, the Court held that "Articles 36, 222, and 234 of the Treaty . . . do not prevent Community law from having

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[17]Here is not the time and place to go into any great detail as to the current status of EEC law pertaining to patent licenses; this task must be left for another occasion. As was stated at the outset, this article was written with the specific intention to correct the faulty impression which the previous article in this Journal on the same subject must have created.

[18]Grundig, Consten v. EEC Commission; Cases 56 and 58/64, judgment of July 13, 1966, 12 Rec. 429 (1966), C.M.R. (CCH) ¶ 8046; Parke, Davis & Co. v. Centrafarm; Case 24/67, judgment of February 29, 1968, 14 Rec. 81 (1968), C.M.R. (CCH) ¶ 8054; Sirena S.r.l. v. Eda GmbH; Case 40/70, judgment of February 18, 1971, 17 Rec. 69 (1971), C.M.R. (CCH) ¶ 8101; Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte; Case 78/70, judgment of June 8, 1971; 17 Rec. 487 (1971); C.M.R. (CCH) ¶ 8106. The Commission's first patent licensing decision came in the twin cases of *Burroughs-Delplanque* and *Burroughs/Geha-Werke*, decisions of December 22, 1971, O.J. COMM. No. L 13, January 17, 1972, at 50 and 53, respectively; C.M.R. (CCH) ¶ 9485 and ¶ 9486.

[19]The earlier attempt to define this problem in its famous "Christmas Message" of 1962 (Official Notice of the Commission of 24 December 1962, O.J. EUR. COMM., No. 139, at 2922) is deliberately excluded from discussion, as this Commission Notice must be regarded as overruled by later decisions; the text of that Notice is reproduced in C.M.R. (CCH) ¶ 2698.

[20]This Treaty provision leaves the systems of property ownership existing in the Member States untouched.

an influence on the exercise of industrial property rights under domestic law,"[21] and less than two years later the Court specified this position with respect to patent rights by holding that "the provisions of Article 85 could be applicable if the utilization of one or more patents by enterprises acting in concert were to result in creating a situation likely to fall within the concepts of agreements between enterprises . . . within the meaning of Article 85, paragraph 1."[22] Consequently, the Court required in another case, related to the contractual exercise of a trademark right in 1971, that "it must be determined in each case whether the exercise of such right leads to a situation that would come within the prohibition of Article 85."[23] And shortly thereafter, the Court concluded that the exercise of an industrial property right (this time, the right under consideration was a type of copyright existing under German law) could fall under Article 85 (1) "wherever it appears to be the object, the means, or the result of an agreement,"[24] adding the rationale for all its decisions by stating that any other determination would conflict "with the essential goal of the Treaty, which is to merge the national markets into a single market."[25]

The Commission is bound by the interpretation of EEC law which the Court of Justice provides. When it had to decide, in December 1971, its first case involving a patent licensing agreement which provided territorial protection for the licensees, it therefore faced a situation which may be paraphrased as follows: The existence of an industrial property right, untouched by EEC law, provides the right to its owner to restrict competition unilaterally, but where the exercise of the right involves a contractual arrangement with another person or company no such restriction of competition will be allowed.[26] Thus, it can have surprised nobody when the Commission stated in respect of an exclusive patent license with resulting territorial restrictions that such licenses may, in some cases, restrict competition and come within the prohibition of Article 85(1).[27] In the situation at hand, the licensees of the Burroughs Corp. in France and Germany occupied "only a small share" of their respective home markets for the products

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[21] *Grundig, Consten*, *supra* note 18, at 7654 in C.M.R. CCH ¶ 8046.

[22] *Parke, Davis*, *supra* note 18, at 7825 in C.M.R. CCH ¶ 8054.

[23] *Sirena*, *supra* note 18, at 7112 in C.M.R. CCH ¶ 8101.

[24] *Deutsche Grammophon*, *supra* note 18, at 7192 in C.M.R. CCH ¶ 8106.

[25] *Id.*

[26] *Cf.* the similar view expressed in SMIT & HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, A COMMENTARY ON THE EEC TREATY § 85.66 (Mathew Bender, New York 1976).

[27] Decision of December 22, 1971, O.J. EUR. COMM., No. L 13, at 50, Jan. 17, 1972 (Burroughs-Delplanque); C.M.R. CCH ¶ 9845, and decision of same date, O.J. EUR. COMM., No. L 13, at 53, Jan. 17, 1972 (*Burroughs/Geha-Werke*); C.M.R. CCH ¶ 9846.

The relevant portion of both decisions in this respect reads as follows:

> The holder of the patent may transfer the use of the rights flowing from his patent by granting licenses for a particular territory. Where he agrees, however, to limit the exploitation of his exclusive right to a single enterprise in a territory and thus confers on that one enterprise the right to exploit the invention and to prevent other enterprises from using it, the holder of the patent loses the opportunity to enter into agreements with other applicants for licenses.

in question. Therefore, the Commission did not find a restriction of competition in the territorial restrictions resulting from the exclusive licenses granted by Burroughs. A negative clearance was granted for both agreements, pursuant to Article 2, Regulation 17/62.[28]

In later cases, however, the Commission did find contractually created restrictions of competition where a patent holder granted its licensee an exclusive license to manufacture and sell, with inherent territorial restrictions. In these cases, the market shares held by the licensees were substantial. The Commission concluded that Article 85(1) was applicable and that the territorial restrictions in respect of the exclusive rights were prohibited by EEC law. Nevertheless, both in *Davidson Rubber* and in *Kabelmetal-Luchaire*, an exemption was granted to the licensing agreements under Article 85(3).[29] The Commission found all the prerequisites of that subsection existent in both cases. The common element was the fact that the licensees could not have been expected to make the required investments, necessary to penetrate new markets, without the protection of exclusivity. As the Commission itself stated in a later decision, Article 85(1) may be declared inapplicable in cases of patent licenses containing territorial restrictions, in particular "when the exclusivity provides a stimulus for the licensee to penetrate a territorial, or product, market which has not yet been exploited by the licensor."[30] In no case so far was the market share held by either the licensor or the licensee a stumbling block, preventing the exemption under Article 85(3). Luchaire S.A. had approximately 20 percent of the French market for which it received an exclusive license from Kabelmetal, a subsidiary of a multi-billion DM enterprise in Germany; the relevant market was that of mechanical-engineering parts for the automobile industry and electrical industry, in particular. And the European licensees of the United States firm Davidson Rubber had a combined share of one-third of the relevant EEC market for automobile armrests.

There is nothing that suggests that these cases would have been decided differently had the current draft proposal for a group exemption regulation already been adopted in the Common Market when the Commission granted the exemptions to *Davidson Rubber* and later to *Kabelmetal-*

In some cases an exclusive manufacturing license may therefore restrict competition and come within the prohibition of Article 85, paragraph 1.

Supra, at 9041 (C.M.R., CCH ¶ 9485), *Delplanque*; and at 9044 (C.M.R., CCH ¶ 9486), *Geha-Werke*.

[28]This provision in the Council's EEC antitrust enforcement regulation reads as follows: "Upon application by undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision, or practice."

[29]*Cf. Davidson Rubber Co.*, Commission Decision of June 9, 1972, O.J. EUR. COMM., No. L 143, at 31, June 23, 1972; C.M.R. (CCH) ¶ 9512; and *Kabelmetal-Kuchaire*, Commission Decision of July 18, 1975, O.J. EUR. COMM., No. L 222, at 34, August 22, 1975, C.M.R. (CCH) ¶ 9761.

[30]*AOIP/Beyrard*, Commission Decision of December 2, 1975, O.J. EUR. COMM., No. L 6, at 8, Jan. 13, 1976, C.M.R. (CCH) ¶ 9801, at 9793-9.

Luchaire. The territorial restrictions in the agreements might have prevented the automatic exemption under the regulation, but Article 85(3) would have provided a basis for an individual exemption as it has in many other cases where the turnover limits currently envisaged by Article 1 of the draft proposal were exceeded.[31] Messrs. Handler and Blechman have overlooked the fact that EEC law, as regards contractually created territorial restrictions in patent licensing agreements within the Common Market, has been settled for many years; nothing will change in this respect when the proposed group exemption regulation is finally adopted. Following the guidance provided by earlier Court judgments, the Commission has held these territorial restrictions consistently to violate Article 85(1), save for exceptional circumstances. However, at the same time it has been able, given the appropriate situation, to grant individual exemptions from the prohibition of Article 85(1) to many companies, including large-size US multinationals. The American legal profession should rest assured that this situation will continue after the group exemption regulation has become law in the EEC. And for many companies, including United States firms, life in this respect will become a lot easier, as was explained before.

U. P. TOEPKE
New Rochelle, NY

Dear Editor,

I was delighted to receive the Summer 1980 issue of *The International Lawyer* with my article on the Moon Treaty. Through my own error I find that one statement contained in footnote 198 at p. 483 is not factual, namely the entry into force of the Agreement. I would like to suggest that the next issue of The *International Lawyer* note that the second sentence of the footnote should read: "By January 1, 1981 the treaty had been signed by Chile, France, Romania, The Philippines, Austria, Morroco, and Guatemala."

Sincerely yours,

CARL Q. CHRISTOL
Professor of International Law
and Political Science
UNIVERSITY OF SOUTHERN CALIFORNIA

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[31] *Cf., for example*, in the related area of joint ventures the exemptions granted to Bayer A.G. of Germany and Gist-Brocades of Holland, Commission Decision of December 15, 1975, O.J. EUR. COMM., No. L 30, at 13, February 5, 1976, C.M.R. (CCH) ¶ 9814; or to Beecham Group Ltd. of England and Parke, Davis and Co. of USA, Commission Decision of January 17, 1979, O.J. EUR. COMM., No. L 70, at 11, March 21, 1979, C.M.R. (CCH) ¶ 10,121. The turnover limits set by Article 1, Draft Proposal, are exceeded by far by all these companies.