

**EUROPA INSTITUTE**  
UNIVERSITY OF AMSTERDAM

# **Protectionism and the European Community**

J.H.J. Bourgeois  
M.C.E.J. Bronckers  
C.W.A. Timmermans  
E.L.M. Völker (ed.)  
R.J.P.M. van Dartel  
D.J. Gijlstra  
J. Steenbergen

# PROTECTIONISM AND THE EUROPEAN COMMUNITY

IMPORT RELIEF MEASURES TAKEN BY  
THE EUROPEAN ECONOMIC  
COMMUNITY AND THE MEMBER  
STATES, AND THE LEGAL REMEDIES  
AVAILABLE TO PRIVATE PARTIES

J.H.J. Bourgeois

*Legal Service  
Commission of the European Community,  
Brussels*

E.L.M. Völker

*Europa Instituut,  
University of Amsterdam*

M.C.E.J. Bronckers

*Member of the Bar of The Hague*

R.J.P.M. van Dartel

*Ministry of Economics,  
The Hague*

C.W.A. Timmermans

*Professor of Law,  
University of Groningen*

D.J. Gijlstra

*Europa Instituut,  
University of Amsterdam  
Member of the Amsterdam Bar*

J. Steenbergen

*School of Law,  
University of Leuven  
Court of Justice of the  
European Communities*

KLUPER LAW AND TAXATION PUBLISHERS  
DEVENTER – THE NETHERLANDS

ANTWERP · BOSTON · LONDON · FRANKFURT

ISBN 90 654 4127 1

D/1983/2264/28

© 1983. Kluwer Law and Taxation Publishers, Deventer, The Netherlands

All rights reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical, photocopying, recording or otherwise, without the written permission of the publisher.

# **PROTECTIONISM AND THE EUROPEAN COMMUNITY**

## PREFACE

At the beginning of 1981 the Europa Institute established a Working Group on the law of international economic relations. The Group has a twofold purpose. In the first place it analyses and discusses rules of national and international public law in the field of international economic relations. Secondly, the Group examines the process which leads to the formulation of these rules. The Group consists of fifteen members, occupied in the Dutch, Belgian, and Community administration, private practice, the judicature and universities respectively.

One very important problem, which figures on the agenda of almost every meeting of the Working Group, is that of increasing protectionism. As a consequence of the economic crisis, the European Communities and the Member-States have to deal with an ever increasing number of requests for protective measures. Although these measures are officially qualified as dangerous and inappropriate for solving the crisis, Member-States and Communities nevertheless cannot abstain from this kind of action completely. Both of them will, however, have to respect the relevant international rules and to care for the legality of the measures which ultimately might be adopted.

The Europa Institute highly appreciates that a number of members of the Working Group was prepared to elaborate parts of this problem in separate studies. The first two contributions deal with the common commercial policy of the EEC as such. The following four studies cover more specific topics, while the book ends with a view on future policy in respect of non-tariff barriers. Although the book could not cover the whole field – and in this respect, too, a certain *selectivity* had to be adopted – it is hoped that it will make a useful contribution to the debate on a problem which every day becomes more important and may have considerable consequences for the future.

The general set-up of the book has been cared for by Drs. E.L.M. Völker, senior lecturer at the Europa Institute and secretary of the Working Group. He was assisted in the final editing of the contributions by Miss Annelies Kramers, student assistant.

On behalf of the Europa Institute,

R.H. Lauwaars  
Director.

# SUMMARY OF CONTENTS

**PREFACE** by R.H. Lauwaars, Professor of Law, Director of the Europa Instituut, University of Amsterdam.

## **CHAPTER ONE**

**The Common Commercial Policy – Scope and Nature of the Powers**

by Jacques H.J. Bourgeois, Legal adviser of the Commission of the European Communities; Associate Professor of Law at the College of Europe (Bruges).

## **CHAPTER TWO**

**The Major Instruments of the Common Commercial Policy of the EEC**

by E.L.M. Völker, Senior Lecturer, Europa Instituut, Department of Law, University of Amsterdam.

## **CHAPTER THREE**

**A Legal Analysis of Protectionist Measures affecting Japanese Imports into the European Community**

by Marco C.E.J. Bronckers, Member of the Hague Bar.

## **CHAPTER FOUR**

**The Conduct of the EEC's Textile Trade Policy and the Application of Article 115 EEC**

by R.J.P.M. van Dartel, Ministry of Economic Affairs, The Hague.

## **CHAPTER FIVE**

**Community Commercial Policy on Textiles: A Legal Imbroglia**

by C.W.A. Timmermans, Professor of Law, State University of Groningen, The Netherlands.

## **CHAPTER SIX**

**The Anti-Dumping Policy of the EEC in Practice**

by D.J. Gijlstra, Senior Lecturer in European Law, Europa Instituut, Department of Law, University of Amsterdam, Member of the Amsterdam Bar.

## **CHAPTER SEVEN**

**Trade Regulation after the Tokyo Round**

by J. Steenbergen, Associated Senior Lecturer at the Law School of the University of Leuven, Belgium.

# TABLE OF CONTENTS

## CHAPTER ONE

### THE COMMON COMMERCIAL POLICY SCOPE AND NATURE OF THE POWERS

BY JACQUES H.J. BOURGEOIS

|                                                                 |    |
|-----------------------------------------------------------------|----|
| Introduction .....                                              | 1  |
| I. Some background elements .....                               | 2  |
| II. Scope of the powers .....                                   | 3  |
| III. Nature of the powers .....                                 | 6  |
| IV. The powers applied .....                                    | 8  |
| V. The Common Commercial Policy as it stands; some comments ... | 10 |
| A. Coverage .....                                               | 10 |
| B. Instruments .....                                            | 12 |
| C. Procedures .....                                             | 12 |

## CHAPTER TWO

### THE MAJOR INSTRUMENTS OF THE CCP

BY E.L.M. VÖLKER

|                                                                                                                                      |    |
|--------------------------------------------------------------------------------------------------------------------------------------|----|
| Introduction .....                                                                                                                   | 17 |
| I. The GATT System .....                                                                                                             | 18 |
| A. Tariffs .....                                                                                                                     | 19 |
| B. The elimination of quantitative restrictions .....                                                                                | 19 |
| C. The elimination of other non-tariff barriers in the GATT Agreement .....                                                          | 20 |
| D. The most favoured nation treatment clause (MFN-clause) ....                                                                       | 21 |
| E. Amendments and supplements .....                                                                                                  | 22 |
| II. The major Community instruments in the field of tariffs and quantitative restrictions on imports .....                           | 23 |
| A. The Common Customs Tariff (CCT) .....                                                                                             | 23 |
| 1. Regulation No. 950/68 on the Common Customs Tariff ....                                                                           | 23 |
| 2. Preferential customs treatment accorded by the EEC under bilateral agreements .....                                               | 26 |
| 3. The valuation of goods for customs purposes .....                                                                                 | 28 |
| 4. Determination of the origin of goods for customs purposes                                                                         | 31 |
| B. Quantitative Restrictions .....                                                                                                   | 36 |
| III. Safeguard measures .....                                                                                                        | 39 |
| A. General .....                                                                                                                     | 39 |
| B. The imposition of quantitative restrictions or the establishment of surveillance in the trade with non-state trading countries .. | 40 |
| 1. Basic Provisions .....                                                                                                            | 40 |
| 2. Further provisions regarding surveillance and protective measures .....                                                           | 44 |

|                                                                                                                           |    |
|---------------------------------------------------------------------------------------------------------------------------|----|
| C. Comparison between Regulation 288/82 and Regulation 1765+1766/82 regarding the application of safeguard measures ..... | 46 |
| D. Regulation 1023/70 establishing a common procedure for administering quantitative quotas .....                         | 46 |
| Conclusion .....                                                                                                          | 49 |

## CHAPTER THREE

# A LEGAL ANALYSIS OF PROTECTIONIST MEASURES AFFECTING JAPANESE IMPORTS INTO THE EUROPEAN COMMUNITY

BY MARCO C.E.J. BRONCKERS

|                                                                                                                                                  |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Introduction .....                                                                                                                               | 53 |
| I. The development of trade relations between the European Community and Japan within GATT .....                                                 | 54 |
| A. Background .....                                                                                                                              | 54 |
| B. Reliance on and abandonment of GATT Article XXXV in trade relations between EEC Member States and Japan .....                                 | 56 |
| C. The replacement of the EEC Member States by the Community within GATT .....                                                                   | 58 |
| II. The paradox in trade relations with Japan: Community powers, national measures .....                                                         | 59 |
| A. Community powers but no policy on trade relations with Japan .....                                                                            | 59 |
| 1. The scope of Article 113 of the EEC Treaty .....                                                                                              | 60 |
| 2. The lack of an all-embracing Community trade agreement with Japan; bilateral agreements .....                                                 | 61 |
| B. National restrictions on Japanese imports .....                                                                                               | 63 |
| 1. National restrictions on <i>direct</i> imports of Japanese products: Regulation (EEC) No. 288/82 .....                                        | 63 |
| Illustration: national restrictions on imports of Japanese cars .....                                                                            | 65 |
| (a) Italy's quota .....                                                                                                                          | 66 |
| (b) Measures introduced by France having an effect equivalent to import restrictions .....                                                       | 66 |
| (c) Voluntary export restraints negotiated by the Benelux countries (in particular Belgium) and the Federal Republic of Germany with Japan ..... | 67 |
| (d) Export-restraint arrangements between British and Japanese car industries .....                                                              | 68 |
| Final remark .....                                                                                                                               | 71 |
| 2. Intra-Community restrictions on <i>indirect</i> imports of Japanese products: Article 115 of the EEC Treaty .....                             | 71 |



|                                                                                                                                                  |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----|
| C. Ways in which the Community can bring pressure to bear with a view to creating a Community commercial policy <i>vis-à-vis</i> Japan .....     | 74 |
| III. Compatibility with the GATT of discriminatory restrictions on imports from Japan .....                                                      | 75 |
| A. Prohibition of discriminatory measures in the GATT .....                                                                                      | 76 |
| B. The exception to GATT principles embodied in the Article XIX safeguard clause .....                                                           | 76 |
| IV. Proceedings against Community commercial policy measures taken in respect of Japan .....                                                     | 78 |
| A. Legal protection against a Community restriction on Japanese imports .....                                                                    | 79 |
| 1. Direct application to the European Court of Justice under Article 173 of the EEC Treaty for annulment of a Community import restriction ..... | 79 |
| 2. Examination of a Community import restriction by the European Court of Justice on the basis of Article 177 of the EEC Treaty .....            | 82 |
| 3. Testing a Community import restriction in the courts by invoking the GATT .....                                                               | 83 |
| B. Legal protection in the European Community against Japanese trade restrictions .....                                                          | 85 |
| 1. Complaint against the Community's failure to act (Article 175 of the EEC Treaty) .....                                                        | 86 |
| 2. The complaints procedure provided for in Section 301 of the 1974 US Trade Act (as amended in 1979) .....                                      | 87 |
| 3. The desirability of a Community complaints procedure ....                                                                                     | 89 |
| V. Epilogue: Community action against Japan in GATT .....                                                                                        | 90 |
| A. The procedure of Article XXIII GATT .....                                                                                                     | 91 |
| B. The concept of 'nullification or impairment' .....                                                                                            | 92 |
| 1. The panel reports regarding Uruguay's complaint under Article XXIII GATT .....                                                                | 94 |
| 2. Trade frictions or interface tensions? .....                                                                                                  | 96 |
| Closing remarks .....                                                                                                                            | 98 |

## CHAPTER FOUR

THE CONDUCT OF THE EEC'S TEXTILE TRADE POLICY  
AND THE APPLICATION OF ARTICLE 115 EEC

BY R.J.P.M. VAN DARTEL

|                                                                                  |     |
|----------------------------------------------------------------------------------|-----|
| Introduction .....                                                               | 99  |
| I. The policy regarding countries party to the MFA .....                         | 100 |
| A. The drafting of the Multifibre Arrangement within the framework of GATT ..... | 100 |
| 1. History .....                                                                 | 100 |

|                                                                    |     |
|--------------------------------------------------------------------|-----|
| 2. The Multifibre Arrangement and the first extension .....        | 101 |
| 3. The second extension of the MFA .....                           | 103 |
| B. The operation of the MFA by the EEC .....                       | 107 |
| 1. The objectives of the EEC in bilateral negotiations .....       | 107 |
| a. Quantitative objectives .....                                   | 107 |
| b. The text of the standard bilateral agreement .....              | 108 |
| 2. The progress of the bilateral negotiations .....                | 109 |
| 3. The operation within the EEC .....                              | 110 |
| a. The special position of China and Bulgaria .....                | 111 |
| II. The policy regarding a number of preferential countries .....  | 111 |
| A. The Mediterranean countries .....                               | 111 |
| 1. The legal form of these arrangements .....                      | 112 |
| 2. The state of play in the talks on new arrangements .....        | 112 |
| 3. Operation within the EEC .....                                  | 113 |
| B. The countries falling under the Lomé Convention .....           | 113 |
| III. The Autonomous Textile Policy .....                           | 114 |
| A. Relation with a number of State-trading countries .....         | 114 |
| B. Taiwan .....                                                    | 114 |
| IV. The policy regarding the industrialized countries .....        | 115 |
| V. The Policy for Outward Processing Traffic .....                 | 116 |
| A. The contents of the OPT Regulation .....                        | 117 |
| 1. Territorial scope .....                                         | 117 |
| 2. Recourse to the Regulation .....                                | 117 |
| 3. The Management System for Outward Processing Traffic .....      | 118 |
| VI. The application of the safeguard measure of Article 115 EEC .. | 118 |
| A. The contents of Article 115 EEC .....                           | 119 |
| B. The new Execution Decision .....                                | 119 |
| C. Intra-Community Surveillance .....                              | 120 |
| D. More far-reaching protective measures .....                     | 121 |
| VII. Conclusion .....                                              | 122 |
| VIII. Annexes .....                                                | 123 |

## CHAPTER FIVE

COMMUNITY COMMERCIAL POLICY ON TEXTILES:  
A LEGAL IMBROGLIO

BY C. W. A. TIMMERMANS

|                                                                                                            |     |
|------------------------------------------------------------------------------------------------------------|-----|
| Introduction .....                                                                                         | 125 |
| I. Legal questions relating to Article 113 EEC .....                                                       | 126 |
| A. Division of powers between EEC and Member States .....                                                  | 126 |
| B. National subquota or quota limited to one or more Member States: compatible with Article 113 EEC? ..... | 131 |
| II. The application of Article 115 EEC on Textiles .....                                                   | 134 |
| A. General .....                                                                                           | 134 |
| B. Application of Article 115 in practice .....                                                            | 135 |
| C. Scope of Article 115 .....                                                                              | 136 |
| D. The new procedure for applying Article 115 (Decision 80/47) .....                                       | 141 |
| III. Judicial Protection .....                                                                             | 144 |

## CHAPTER SIX

## ANTI-DUMPING POLICY OF THE EEC IN PRACTICE

BY D.J. GIJLSTRA

|                                                                               |     |
|-------------------------------------------------------------------------------|-----|
| I. Historical Survey .....                                                    | 147 |
| II. Field of Application .....                                                | 150 |
| A. Material Application .....                                                 | 150 |
| B. Territorial Scope .....                                                    | 150 |
| C. Competition Law and Anti-Dumping Rules .....                               | 151 |
| III. Dumping .....                                                            | 151 |
| A. General .....                                                              | 151 |
| B. The Normal Value .....                                                     | 152 |
| 1. Comparison of Prices .....                                                 | 152 |
| 2. Domestic Market Value .....                                                | 152 |
| a. Comparable prices .....                                                    | 153 |
| b. Prices really paid .....                                                   | 153 |
| c. Ordinary course of trade .....                                             | 153 |
| d. Like product .....                                                         | 154 |
| e. No or minimal domestic sales .....                                         | 155 |
| 3. Export Prices to Third Countries .....                                     | 155 |
| 4. The Constructed Value .....                                                | 156 |
| 5. Sales below Cost .....                                                     | 157 |
| 6. Imports from non-market economy countries .....                            | 157 |
| C. The Export Price .....                                                     | 159 |
| D. Comparisons .....                                                          | 160 |
| 1. General .....                                                              | 160 |
| 2. Currency Problems .....                                                    | 160 |
| 3. Reference Period .....                                                     | 161 |
| E. Dumping Margin .....                                                       | 161 |
| IV. Subventions .....                                                         | 162 |
| V. Injury .....                                                               | 164 |
| A. General .....                                                              | 164 |
| B. Market Share .....                                                         | 165 |
| C. Prices .....                                                               | 166 |
| D. Profits .....                                                              | 167 |
| E. Utilisation of Capacity .....                                              | 168 |
| F. Causal Link .....                                                          | 168 |
| G. Threat of Injury .....                                                     | 169 |
| H. Community Industry .....                                                   | 169 |
| VI. Procedure .....                                                           | 169 |
| A. Institutional Structure .....                                              | 169 |
| B. Complaint .....                                                            | 170 |
| C. Consultations .....                                                        | 171 |
| D. Initiation and Subsequent Investigation .....                              | 172 |
| E. Termination of proceedings where protective measures are unnecessary ..... | 174 |

|                                        |     |
|----------------------------------------|-----|
| VII. Conclusion of the Procedure ..... | 174 |
| A. Undertakings .....                  | 174 |
| B. Provisional Duties .....            | 176 |
| C. Definitive Duties .....             | 176 |
| D. Review .....                        | 178 |
| E. Community Interest .....            | 178 |
| VIII. Judicial Protection .....        | 178 |

## CHAPTER SEVEN

## TRADE REGULATION AFTER THE TOKYO ROUND

BY J. STEENBERGEN

|                                                                                                     |     |
|-----------------------------------------------------------------------------------------------------|-----|
| I. Issues on which no agreement was reached in the Tokyo Round .                                    | 181 |
| II. The implementation in the EC and the application of the Aree-<br>ments of the Tokyo Round ..... | 182 |
| A. Agreement on technical barriers to trade .....                                                   | 183 |
| B. The Areement on government procurement .....                                                     | 187 |
| C. The Subsidies and countervailing duties Code .....                                               | 188 |
| D. The new Anti-dumping Code .....                                                                  | 190 |
| E. The Agreement on customs valuation .....                                                         | 192 |
| III. Community trade law beyond the scope of the Tokyo Round<br>Agreements .....                    | 192 |
| IV. Legal remedies and settlement of disputes .....                                                 | 193 |
| V. Conclusions on an agenda for further negotiations .....                                          | 196 |
| A. Subsidies .....                                                                                  | 196 |
| B. Technical standards .....                                                                        | 198 |
| C. North-South and East-West trade .....                                                            | 198 |
| D. Conclusions .....                                                                                | 199 |

## CHAPTER ONE

# THE COMMON COMMERCIAL POLICY – SCOPE AND NATURE OF THE POWERS

BY JACQUES H. J. BOURGEOIS\*

### INTRODUCTION

1. The present contribution is one piece of the puzzle which the Europa Instituut of the University of Amsterdam has put together.

It focuses on the scope and nature of the powers conferred on the European Economic Community. For brevity's sake the commercial policy in the European Coal and Steel Community had to be left out<sup>1</sup> as well as the specific provisions on external relations of the Treaty establishing the European Atomic Energy Community. The term 'Community' without any qualification refers in this paper to the European Economic Community.

Part I deals with some background elements that help to explain the content of the Community policy and the manner in which the Community exercises its powers. The legal framework in which the Community uses its commercial policy instruments, particularly the General Agreement on Tariffs and Trade, will be examined by Völker.

Part II examines the scope of the commercial policy powers *ratione materiae*.

Part III analyses the nature of these powers and more precisely how they relate to the Member States' powers.

Part IV explores how the exclusive nature of the Community powers and Community commercial policy can be reconciled with the day to day needs and the attitudes of some third countries.

\* Legal adviser of the Commission of the European Communities; associate professor of law at the College of Europe (Bruges). The views expressed are presented in a personal capacity.

1. This subject would require another paper. Suffice it to say that Article 71 ECSC stating that 'the powers of the Governments of Member States in matters of commercial policy shall not be affected by this Treaty, save as otherwise provided therein' has lost its *raison d'être* as a result of the establishment of the EEC. The practice followed by the Council and the Member States is rather untidy. See e.g. Steenbergen, 'De Tokyo Ronde', 12 SEW (1980) 752-773, 763-764; for a reply see Bourgeois, 'The Tokyo Round Agreements on Technical Barriers and on Government Procurement in international and EEC Perspective', 19 CML.Rev. (1982) 5-33 at 22-23.

In a final part (V) and by way of conclusion some outstanding issues and some suggestions as to the way they could be resolved are treated.

### I. SOME BACKGROUND ELEMENTS

2. By establishing a 'customs union', as distinct from a 'free trade area', the EEC Treaty had to provide for a common customs tariff. By taking the further step of establishing a 'common market', a concept used in a series of Treaty provisions without being defined, but clearly designed to cover the free movement of goods, persons, services and capital, it had to provide for a common commercial policy, at least for the exchange of goods, as part and parcel of the common market and without which such common market would not function properly, as according to Articles 9 and 10 a product originating in a third country which is in free circulation in Member States benefits from the rules on free circulation within the common market.

The implications are obvious. The further the common market develops towards a market operating under conditions of a national market for products originating in the Community, the greater is the required degree of uniformity of the rules applying to products originating in third countries imported into the common market. If *e.g.* technical standards are harmonised in the Community, their divergent application by Member States to products originating in third countries would partly defeat one of the purposes of such harmonisation: intra-community controls would still be necessary for third country products and even the entry of Community products into the territory of another Member State or their use or sale on that territory would still be subject to certain formalities, such as proof of origin.

3. A second important element is undoubtedly the considerable degree to which industrialised economies have become interdependent over the last two decades. The question of U.S. interest rates which was discussed at the June 1982 Versailles summit, is a well publicised illustration of a phenomenon with many aspects and wide implications which led an observer to note already in 1973 that virtually all sectors of virtually all economies now rely heavily on external transactions.<sup>2</sup>

4. A third element, which underlines the specific importance of the interdependency for the Community, is the relatively high degree, in global terms, to which the Community is dependent on the world economy. First, the Community relies mainly on third countries for its supply of a series of important raw materials (*e.g.* aluminium: 61%; nickel 100%; tin 87%; iron-ore 79%; manganese: 100%; antimony 95%; chromium, cobalt, titanium, asbestos 100%).<sup>3</sup>

Second, international trade is more important for the Community economy than for other countries. Excluding intra-Community trade, the Community

2. Bergsten in Bergsten (ed.), *The Future of the International Economic Order: an Agenda for Research* (Lexington, Mass., 1973), at 4.

3. Hager and Noelke, *Community - Third World: the challenge of interdependence*, 2nd ed. at 56; Commission of the European Communities, Documentation Bulletin, Series A, Brussels 1980.

now represents in world trade approximately one-fifth on the export side and almost one quarter on the import side. It has a weight in world trade approximately equal to that of Japan and the USA together.<sup>4</sup>

Exports of goods and services accounted in 1980 for roughly 14.5% of the GDP in the Community, imports for roughly 15% (for the USA these figures were for 1979 8.7%, and 9.7% respectively).

5. A fourth element, linked to the third element, relates to the interests of industry and labour in the Community with respect to external trade. These interests vary of course considerably from industry to industry, and it is one of the Government's tasks to promote equitable trade-offs between the conflicting interests of the various sectors of the economy with respect to external trade. In the Community this task is all the more complex and difficult. Not only are there conflicts of interests between the various sectors of the economy, but the weight of external trade in the economy varies considerably from Member State to Member State, *e.g.* for exports from 81.1% of the GDP in Luxembourg to 14.8% in Greece. In addition, in the absence of a common general economic policy and of a common industrial policy, the Community does not have the usual instruments on which governments rely to make the necessary trade-offs socially and politically acceptable.

## II. SCOPE OF THE POWERS

6. The EEC Treaty is rather poorly drafted with respect to commercial policy.

To the extent that the Treaty itself qualifies the common commercial policy as an integral part of the 'common market' (Article 3 b), logically it ought to have organised the section on the common commercial policy accordingly; it should have defined the common commercial policy as the external face of the 'common market' encompassing exchange of goods and services, movement of workers and of capital and establishment of non-EEC individuals and companies. Article 113, which is the basic Treaty provision conferring powers to the Community with respect to commercial policy, does not define what is meant by commercial policy. It only gives examples: tariff amendments, measures of liberalisation, export policy, protective measures including measures to be taken in case of dumping or subsidies.

The Commission has always taken the view that Article 113 is not limited to the exchange of goods (and connected payments) but that it covers also the exchange of services (and connected payments). There are a certain

4. Commission of the E.C., *European Economy*, No. 9, July 1981, p. 103. More detailed figures and comments appear in Steenbergen, De Clercq and Foqué, *Change and adjustment: external relations and industrial policy of the E.C.*, Kluwer Law and Taxation, Deventer, 1983.

number of provisions in bilateral agreements concluded on the basis of Article 113 which deal with services.<sup>5</sup>

The Commission has however never taken the position that Article 113 extends to free circulation of persons, freedom of establishment and free circulation of capital arguing that these transactions are not the object of 'trade'.<sup>6</sup>

There are some inconsistencies in the international trade aspects of areas which are covered by common sectoral policies (agriculture and transport). Agreements on agricultural products are concluded on the basis of Article 113, while agreements on transport are concluded on the basis of Article 75, although transport is a type of service.

7. It is not surprising that differing views developed not only on the proper relationship between Article 113 on the common commercial policy and the other Treaty provisions which confer external powers on the Community, but also and more importantly on the scope of the commercial policy powers of the Community under Article 113. (The ensuing brief analysis examines the issue of the scope of these powers irrespective of the way in which they are exercised, *i.e.*, by entering into internal agreements or by autonomous measures.)

8. On this last point the differing views held by the Council and the Commission have been clearly set out in the *International Rubber Agreement* opinion which the Court of Justice rendered pursuant to Article 228 EEC.<sup>7</sup>

The reasons behind this difference of views are twofold. First, as will be explained (*infra* III), the Community's powers under Article 113 are exclusive: Member States are no longer entitled to take on their own any measure in the field covered by Article 113. Second, Member States, and particularly the 'larger' ones, are anxious to keep their own powers as much as possible and are reluctant to relinquish them to the Community because they fear that the Community would be unable to act or that the Community policy would be wrong, and because they want to preserve their external identity.

According to the Council – the Council's view is not necessarily shared by all Member States – a commercial policy measure is any measure that aims at influencing the volume or flow (pattern) of trade. At first glance this interpretation appears convincing: other Treaty provisions on common

5. In the agreements with Mexico (of 15 July 1975, O.J. L247 of 23 Sept. 1975); Brazil (of 19 Dec. 1973, O.J. L102 of 11 April 1974); Argentina (of 8 Dec. 1971, J.O. L249 of 10 Nov. 1971) and Uruguay (of 2 April 1973, O.J. L333 of 4 Dec. 1973), the Parties grant each other m.f.n. treatment on taxes on regulations concerning payment in respect of, and regulations affecting the use of services; the agreement with China (of 3 April 1978, O.J. L123 of 11 May 1978) provides that '... the provision of services between the two contracting parties shall be exported at market-related prices and rates'.

6. To a certain extent the gap between Art. 113 thus interpreted and the need to manage the external face of the 'common market' has been filled by the Court of Justice. In its Opinion 1/76 it affirmed that 'the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is (...) necessary for the attainment of one of the objectives of the Community' (Opinion 1/76 of 26 April 1977, (1977) ECR 741, para. 4).

7. Opinion 1/78 of 4 October 1979, (1979) ECR 2871.



policies (Articles 43 and 75) are generally interpreted in this way and the interpretation is teleological, a method which the Court has used time and again persuasively.

This interpretation has, however, two main drawbacks. First, for the purposes of autonomous Community commercial policy measures it has results that are hardly satisfying where applied to measures that are inherent in the conduct of any commercial policy; e.g., customs formalities and rules of origin would under the Council's interpretation probably not be covered by Article 113, since it would more than often be difficult to affirm that they aim at influencing the volume or pattern of trade. Second, it contains a subjective element that carries with it the risk of abuse, allowing reluctant Member States to claim that, in their view, because of its purpose, a measure either is beyond the EEC Treaty or could only be taken under another EEC Treaty provision requiring unanimity.

In the Commission's interpretation a measure of commercial policy must be assessed primarily by reference to its specific character as an instrument regulating international trade. When it put forward this interpretation the Commission was mainly concerned by the necessity to avert the dangers lurking in the Council's views on the scope of Article 113. The Commission's interpretation is not entirely satisfying either, in that the 'instrument' continues to be too broad.

9. In its opinion on the *International Rubber Agreement* the Court clarified important points: the Community may develop a commercial policy aimed at regulation of the world market; 'repercussions on certain sectors of economic policy such as the supply of raw materials to the Community or price policy' do not constitute a reason for excluding such objectives from the common commercial policy; in order to determine whether a subject matter falls under Article 113 regard should be had to the 'essential objective'.

However, the Commission's attempt to settle its dispute with the Council failed. Both Council and Commission are relying on the Court's opinion to defend their unchanged views.

10. The better interpretation of Article 113 lies probably in a combination of both views.<sup>8</sup>

*All measures which regulate openly and specifically trade with third countries* should always be considered as part of the common commercial policy; they are *per se* measures of commercial policy unless the Treaty provides for an exception. Other measures should be considered as part of such policy by a sort of 'rule of reason' viz. when their *dominant purpose* is to influence the volume or flow of trade.

11. In this construction the following measures would be *per se* commercial policy measures:

8. Cf. C.D. Ehlermann, Director General of the Commission Legal Service, in his exposé at the 10th Congress of the International Federation for European Law held in Dublin, 24-26 June 1982. The subsequent developments of this interpretation are based on the text of this exposé which will be published shortly in Vol. 3 of the papers of this conference.