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Professor Mestmäcker analyzes the competition provisions of the Free Trade Agreements that the Community has negotiated with many of its trading partners. The direct applicability of these provisions by reference to the standards of Community law is considered and rejected. Professor Mestmäcker then develops the relevant standards for applying these provisions to commerce between the Community and its trading partners.

INTRODUCTION

The European Economic Community has concluded numerous treaties and conventions with other countries and international organizations.[1] These treaties and conventions, although important to attain the Community's economic, political, and social goals, constitute a continuing source of problems. Problems arise because implementing such treaties and conventions involves more than simply integrating international law into a well-settled national system. Instead, to effect implementation, the Community must harmonize and coordinate the law and policy of the Member States, in order to conform it with a strong

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[1] *See generally* ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, VOL. B: EUROPEAN COMMUNITY TREATIES (K.R. Simmonds gen. ed. 1974).

but still evolving regional order.[2]

The treaties concluded by the Community include a series of bilateral Free Trade Agreements (FTAs) with the countries of the European Free Trade Association. These agreements raise serious and fundamental issues in connection with the FTAs' provisions on competition. A preliminary issue is whether these provisions are directly applicable to private persons and business undertakings in the Community. A second and related issue is whether direct applicability should be determined by the criteria developed for other international Community treaties, or by the criteria used for internal Community law.

Community rules on competition, contained in Articles 85 and 86 of the EEC Treaty, have been rendered directly applicable through Regulation 17, and are the subject of an extensive administrative practice by Community institutions. The FTAs' rules on competition closely track the language of Articles 85 and 86, but also reflect significant and deliberate differences. Those differences suggest that the FTAs' rules should not be made directly applicable by analogy to the EEC rules on competition.

The Community has taken the view that its powers and functions under Articles 85 and 86 suffice to discharge its obligations under the FTAs' rules on competition. Accordingly, the Commission has enforced the latter through the application of antitrust principles developed as a part of Community law. It is questionable, however, whether those principles—and the powers granted to the Community under Articles 85 and 86—will be ultimately adequate to cover anti-competitive conduct that violates the FTAs. This raises the larger issue of whether the Community's executive and decision-making powers are generally sufficient to discharge its treaty obligations.

This article attempts to develop several approaches to the above-mentioned problems. Part I offers a summary of the FTAs and the historical context in which they were created. Part II first sets forth the general criteria developed by the European Court of Justice for determining the direct applicability of the Community's international treaties. Second, the possibility of deciding the direct applicability of the FTAs by reference to the standards of Community law is considered and rejected. Finally, Part III applies previously developed principles to the FTAs' rules on competition.

Part IV considers the Community's fulfillment of its treaty obliga-

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[2] *See generally* F. ALTING VON GEUSAU, EUROPEAN ORGANIZATIONS AND THE FOREIGN RELATIONS OF STATES: A COMPARATIVE ANALYSIS OF DECISION-MAKING (1964); J. RAUX, LES RELATIONS EXTERIEURES DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE (1966).

tions under the FTA rules on competition. Section 1 examines the Community's view that the EEC rules on competition suffice to discharge the analogous FTA requirements. Section 2 is concerned with the Commission's practice regarding implementation of the FTA rules on competition. Finally, Section 3 examines the thesis of one commentator who seeks to render the FTA rules on competition coextensive with EEC law by making the FTA rules directly applicable in a limited core area and conforming other areas to existing antitrust law. Although that thesis ultimately is not persuasive, its examination serves to highlight some of the practical and policy problems that accompany implementation of the FTA rules on competition within the Community.

I. LEGAL BASES

1. Overview

On July 22, 1972, the European Economic Community concluded Free Trade Agreements with Austria, Iceland, Portugal, Sweden and Switzerland.[3] These agreements regulate the trade relations between the remaining European Free Trade Association (EFTA) states and the recently expanded Community that now includes Denmark, Great Britain and Ireland. The Community concluded a corresponding agreement with Norway after its accession failed to materialize.[4] Similar treaties exist with Finland[5] and Israel,[6] suggesting that the Free Trade Agreements have become a model for the Community's trade policy. The Council of the EEC "concluded, adopted and confirmed" each of these agreements by issuing a regulation to that effect.[7] Addi-

[3] Austria: Reg. No. 2836/72 (Council), Dec. 19, 1972, ABl. EG Dec. 31, 1972, No. L 300/1; Sweden: Reg. No. 2838/72 (Council), Dec. 19, 1972, ABl. EG Dec. 31, 1972, No. L 300/96; Switzerland (and Liechtenstein): Reg. No. 2840/72 (Council), Dec. 19, 1972, ABl. EG Dec. 31, 1972, No. L 300/188; Iceland: Reg. No. 2842/72 (Council), Dec. 19, 1972, ABl. EG Dec. 31, 1972, No. L 301/1; Portugal: Reg. No. 2944/72 (Council), Dec. 19, 1972, ABl. EG Dec. 31, 1972, No. L 301/164. On the history and origin of the FTAs, see 5 Bull. EG 9/11 (1972).

The English edition of the Official Journal of the European Communities did not commence publication until January 1, 1973. Therefore, the above references are to the German edition, the *Amtsblatt der Europäischen Gemeinschaften*. Likewise, publication in English of the Bulletin of the European Communities only began in 1973. Therefore, the above reference is to the German edition. For the English text of the FTA with Austria, for example, see ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, Vol. BIII: EUROPEAN COMMUNITY TREATIES B12-197 (1980). *See also* notes 2-4 *infra*, for the official English text of FTAs concluded after January 1, 1973.

[4] 16 O.J. EUR. COMM. (No. L 171) 2 (1973).

[5] 16 O.J. EUR. COMM. (No. L 328) 2 (1973).

[6] 18 O.J. EUR. COMM. (No. L 136) 3 (1975).

[7] On the significance of these Regulations under Community law, *see* Öhlinger, *Rechtsfragen des Freihandelsabkommens zwischen Österreich und der EWG*, 34 ZEITSCHRIFT FÜR AUS-

tionally, for each treaty, the Community issues an appropriate regulation governing jurisdiction and procedure, needed to implement the precautionary measures and safeguard clauses included in the Free Trade Agreements.[8]

The purposes of the Free Trade Agreements, according to the Preamble and Article 1, are to expand trade between the contracting parties, to provide fair conditions of competition for such trade, and thus to contribute, through the removal of barriers to trade, to the harmonious development and expansion of world trade. Towards the realization of those purposes, Article 13 prohibits the issuance of new quantitative import restrictions or measures having equivalent effect, and abolishes existing measures falling into those categories. In order to provide fair conditions of competition, each of the agreements contains in Article 23 identical rules on competition:

> 1. The following are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and [partner state]:
> (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;
> (ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in substantial part thereof. . . .

Since the end of World War II, the development of international economic law among western industrialized nations has been characterized by the integration of measures of competition policy into trade and customs policy. That linkage already had appeared in the unsuccessful Havana Charter for an International Trade Organization, which included a chapter on restrictive business practices.[9] The Havana Charter required every Member State to take appropriate measures and cooperate with the organization:

> [T]o prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or

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LÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 655, 659 *et seq.* (1974). *See generally* IPSEN, EUROPÄISCHES GEMEINSCHAFTSRECHT 176-77 (1972), speaking of a "confirming regulation" (translation by this author). For an overview, see Schwarze, *Die EWG in ihren völkerrechtlichen Beziehungen*, 32 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 456, 461-62 (1979).

[8] *E.g.*, Reg. No. 2837/72 (Council), Dec. 19, 1972, AB1. EG Dec. 31, 1972, No. L 300/94, for Austria and, in English, Reg. No. 1692/73 (Council), 16 O.J. EUR. COMM. (No. L 171) 103 (1973).

[9] United Nations Conference on Trade and Development, held at Havana, Cuba, from Nov. 21, 1947, to Mar. 24, 1948, Final Act and Related Documents (1948).

trade and interfere with the achievement of any of the other objectives set forth in Article 1. (Article 46(1)).

The Havana Charter left intact the exclusive jurisdiction of the Member States to take measures designed to eliminate restrictive practices violating the convention. Each state, by legislation or other measures within its territory, was to discharge its duties under the Charter. The members were also obligated to cooperate with an international organization in the context of grievance proceedings instituted to investigate restrictive trade practices (Article 48). The Member States agreed to "take full account of" the requests, decisions and recommendations of the organization (Article 50).

Article 15 of the EFTA contains rules on competition that parallel those of Articles 85 and 86 of the EEC Treaty in the assessment of what constitutes conduct infringing upon fair competition.[10] The powers of the organization, conferred in Article 31, are modeled on those contained in the Havana Charter. On the basis of determinations made by an examining committee, the Council may make recommendations to the Member States. If the recommendations are not implemented, other member states can be authorized to take countermeasures. This solution in turn served as the model for the Free Trade Agreements of the Community.

The efforts to develop an international competition policy are based on the realization that the increase in commercial activity resulting from the opening of markets could be eliminated or impeded by privately imposed restrictions of competition. Nevertheless attempts to establish effective measures against restrictions of competition at the international level have not succeeded until now, except within the European Economic Community. For that reason, the FTAs are milestones in the development of international economic law. In concluding those agreements, the Community is following a path similar to that of the United States, which included guidelines for mutual action against harmful restrictions of competition in virtually every one of its bilateral Treaties of Friendship, Commerce and Navigation.[11] The Community, however, has integrated its internal competition policy into the FTAs to a greater extent than the United States has accounted for its domestic antitrust policy in its various trade agreements. Substantively, the FTA rules on competition are modeled on Articles

[10] European Free Trade Association, Text of Convention, *approved* Stockholm, Nov. 20, 1959. For a systematic comparison, see SZOKOLÓCZY-SYLLABA, EFTA: RESTRICTIVE BUSINESS PRACTICES 85 *et seq*. (1973).

[11] For a detailed treatment, see RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 448 *et seq*. (1970).

85 and 86 of the EEC convention, although they do not directly address "undertakings."[12] Rather, the FTA rules are directed only at the contracting states (Article 27(2)). The nullity sanction contained in Article 85(2) is also lacking in the FTA provisions. Moreover, Article 23 of the FTAs does not include any language corresponding to the exemption provisions of Article 85(3) of the EEC Treaty.

2. Procedures and Institutions

The agreements provide for a "Joint Committee" which "shall be responsible for the administration of the Agreement and shall ensure its proper implementation" (Article 29). The Committee is composed of representatives of the Community and of the other contracting party. It always proceeds by "mutual agreement" (Article 30). The Joint Committee, acting by mutual agreement, can make recommendations and take decisions. These decisions are to be put into effect by the contracting parties "in accordance with their own rules" (Article 29).

If one of the contracting parties believes that certain practices are incompatible with the provisions on competition, it can take "appropriate measures." The right to take such measures, however, must be exercised subject to the conditions and in accordance with the procedures laid down in Article 27 of the agreement. If a contracting party considers a given practice incompatible with the proper functioning of the agreement, it refers the matter to the Joint Committee. The latter then has the task of examining the allegedly objectionable practices. The contracting parties—but not undertakings—are obligated to provide the Joint Committee with all relevant information and to give the assistance required for such examination (Article 27).

If the Committee determines that a violation has occurred, it may require the responsible contracting party to terminate the practices objected to within a time period fixed by the Committee. If those practices are not terminated, the other contracting party may adopt safeguard measures "to deal with the serious difficulties resulting from the practices in question." A contracting party has the same right of taking safeguard measures if the Joint Committee has not reached agreement within three months of when the matter was referred to it. Safeguard measures may include "in particular" the withdrawal of tariff concessions (Article 27).

The regulatory scheme of the FTAs differs fundamentally from

[12] The German "*Unternehmen*" might be most accurately translated into American English as "business enterprise" or simply "enterprise." Nevertheless this paper for the most part uses "undertaking," since that term is used in the official English texts of the EEC Treaty and the FTAs.

proposals made by the Community in the negotiations for the association of neutral European states in the sixties. The differences evidence a change in the Community's foreign policy goals. Awareness of that change is essential to understanding the substantive content of the FTAs.[13] In negotiating about the association of neutral European states, the Community insisted that association should approach complete membership as nearly as compatible with the status of neutrality. That concept required the establishment of procedures and institutions that would allow the continuous adaptation of the law of the associated states to the evolving law of the Community. The associated states, of course, could not accept a continuing obligation to adjust their law in conformity to the development of Community law without having any voice in that development. The Community, however, was not willing to grant non-members any influence upon the formation of policy by its institutions. These difficulties could not be overcome. They explain why the FTAs do not provide for any common institutions other than the Joint Committee.[14]

Mutual harmonization in the development of Community law and partner state law remains an unresolved issue. That problem is evidenced by seemingly contradictory statements of the contracting parties. Upon approving each FTA, the Community published a statement in its Official Journal to the effect that it would assess practices contrary to Article 23 on the basis of criteria arising from the application of Articles 85, 86 and 90 of the EEC Treaty. The partner states did not accept that declaration, stating that their rights as established by the agreements would not be altered thereby.[15] That signifies clearly that Community law should not prejudice the interpretation of the FTAs, notwithstanding the largely identical language of certain provisions. The interpretation of the FTAs, however, is an issue altogether distinct from another question that preoccupies current scholarly discussion on the subject. That question is which (if any) provisions of the FTAs are directly applicable to undertakings, after the model of Community law. A resolution of the latter question in favor of direct applicability does not determine whether and to what extent the provisions of the FTAs should be interpreted in conformity to the decisions

13 On the negotiations for association agreements with neutral states, see Öhlinger, *supra* note 7, at 678 *et seq*. *See also* Rollenweger, *Institutionelle und völkerrechtliche Aspekte des Freihandelsabkommens Schweiz-EWG*, 1973 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT, ANNUAIRE SUISSE DE DROIT INTERNATIONAL 82.

14 *See* Wellenstein, *The Free Trade Agreements Between the Enlarged European Communities and the EFTA-Countries*, 10 COMM. MKT. L. REV. 137 (1973).

15 Regarding Austria, see Öhlinger, *supra* note 7, at 675.

of the European Court of Justice.[16] Since the FTAs do not establish any common organ with adjudicatory competence for applying their provisions, each contracting party can autonomously take the safeguard measures authorized by Article 23 in the cases in which the Joint Committee does not reach agreement.

Against this background, it bears examination whether Articles 13 and 23 of the FTAs are directly applicable (self-executing) within the Community. The subject of that inquiry is whether those provisions can effect legally binding rights and obligations not only between the contracting parties, but also among private persons or between private persons and states. In a procedural context, the issue is whether courts and administrative organs can issue legally binding decisions to private persons on the basis of the FTAs.[17] Once it is clear that an international treaty forms part of an internal legal order, the further question of its direct applicability to private persons must be decided by the courts of the particular subject of international law that is party to and bound by the treaty. International conventions concluded by the Community within the realm of its competence form, from their effective date, "an integral part of Community law." Within the framework of that system of law, the Court of Justice "has jurisdiction to give preliminary rulings concerning . . . the interpretation" of agreements, under Article 177 of the EEC Treaty.[18] The European Economic Community concluded the FTAs on the basis of Article 113 of the EEC Treaty. Therefore the Court of Justice has jurisdiction regarding the interpretation of those agreements.

Two recent decisions of the highest courts of Austria and Switzerland demonstrate the far-reaching practical significance of direct applicability of the FTA provisions. In both cases, the issue was whether the exercise of industrial property rights or copyrights could be deemed measures having equivalent effect as quantitative restrictions, in conformity with decisions of the Court of Justice on Article 30 of the EEC Treaty. The Austrian *Oberste Gerichtshof* denied the applicability of

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[16] The same approach is developed regarding Article 13 in Schluep, *Die markenrechtliche Rechtsprechung des EuGH aus schweizerischer Sicht*, in HEFERMEHL, IPSEN & SIEBEN, NATIONALER MARKENSCHUTZ UND FREIER WARENVERKEHR IN DER EUROPÄISCHEN GEMEINSCHAFT 232, 259 (1979).

[17] For a complete treatment of these issues in international law, see BLECKMANN, BEGRIFF UND KRITERIEN DER INNERSTAATLICHEN ANWENDUNG VÖLKERRECHTLICHER VERTRÄGE (1970).

[18] Haegeman v. Belgian State, [1974] E. Comm. Ct. J. Rep. 449, 459, [1975] 1 Comm. Mkt. L.R. 515, 530 (preliminary ruling) (regarding the so-called Treaty of Athens concerning the association of Greece).

Article 13 of the FTAs to the exercise of copyrights.[19] The Swiss *Bundesgericht* likewise denied such applicability to the exercise of trademark rights.[20] It is likely that those judgments will influence the development of Community law because of the doctrine of the reciprocity of treaty obligations.[21] Substantively, the application of the rule prohibiting measures of equivalent effect as quantitative restrictions to the exercise of industrial property rights and copyrights is closely related to the rules on competition.[22] Nevertheless the meanings of those respective provisions in the FTAs must always be considered independently of each other.

II. Criteria for the Direct Applicability of International Treaties in the Decisions of the European Court of Justice

The question whether the FTA rules on competition are directly applicable must be answered in light of previous decisions of the Court of Justice regarding the application of international treaties as part of Community law. The first relevant decision concerned the question whether Article XI of the GATT, prohibiting the use of quantitative restrictions among the contracting parties, is directly applicable within

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19 Decision of July 10, 1979, Austro Mechana Gesellschaft zur Verwaltung und Auswertung von mechanisch-musikalischen Urheberrechten v. Granola Winter & Co., *Schallplattenspezialhaus*, 1980 Gewerblicher Rechtsschutz und Urheberrecht/Int. [GRUR/Int.] 185, with a comment by Eugen Ulmer. *See also* Dittrich, *Die Verträge Österreichs mit den Europäischen Gemeinschaften und das Österreichische Urheberrecht*, 1977 Juristische Blätter [JBl.] 81 (1977). The court followed the view expressed by Dittrich.

20 105 BGE 49, 59 (1979); 1979 GRUR/Int. 569, "*Omo*." *See also* Kucsko, *Parallelimporte von Konzernmarkenwaren und die Freihandelsabkommen Österreichs und der Schweiz mit der EWG*, 1980 GRUR/Int. 138.

21 *See generally* Ullrich, EEC Commentary, Intellectual Property in the EEC annot. 18.

22 In a landmark decision of February 9, 1982, the Court of Justice held that Articles 14 and 23 of the FTA with Portugal do not prevent the enforcement of a copyright in Great Britain against the importation and marketing of Grammophon Records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor. Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd., Case 270/80 (unreported). The Court distinguished the interpretation of Article 30 of the EEC Treaty as applied to industrial and commercial property rights from the parallel provisions in the FTA, because they do not have the same purpose as the EEC Treaty, which seeks to create a single market reproducing as closely as possible the conditions of a domestic market. The case supports the view taken in this article that there are material differences between Community law and international law in general. The Court puts particular emphasis on the unique instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the Common Market. This reasoning is applicable to the FTA rules of competition as well.

the Community.[23] The Court first stated that the Community was bound by GATT to the extent that under the EEC Treaty it had assumed the powers previously exercised by Member States in the area of tariff and trade policy. It went on to deny the direct applicability of the particular provisions at issue. The court reasoned that GATT is marked by the great flexibility of its provisions, particularly those concerning derogation, that is to say the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.[24]

In interpreting Article 2(1) of the Yaoundé Convention, the Court of Justice also reasoned that the determinative issue is whether "the spirit, the general scheme and the wording of the Convention" appear to establish an individual right of citizens of Community members to rely on the treaty provisions in court. The court affirmed that right with respect to the prohibition, in Article 2(1) of that treaty, of customs duties and charges having equivalent effect.[25] The treaties at issue were association agreements which the Community concluded on the basis of Article 131 of the EEC Treaty with certain African states and with Madagascar. Prior to the effective date of the treaties, those nations had special relations with members of the EEC. The treaties impose different obligations upon the African states than upon the Community. The Court of Justice inferred from that imbalance of obligations a purpose to promote the development of those states. Thus the imbalance between the obligations of the Community and those of the associated states is inherent in the special nature of the treaty and does not prevent the Community from recognizing the direct applicability of some of its provisions that are not directly applicable in the other contracting states. The court deduced therefrom:

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[23] International Fruit Co. v. Produktschap voor Groenten en Fruit, [1972] E. Comm. Ct. J. Rep. 1219, [1975] 2 Comm. Mkt. L.R. 1 (reference for a preliminary ruling).

[24] The Court of Justice reached the same result for Article II of the GATT, in a later decision concerning the incompatibility of a compensatory levy with the rules of the GATT. Schlüter v. Hauptzollamt Lörrach, [1973] E. Comm. Ct. J. Rep. 1135, 1157, [1973] Comm. Mkt. L.R. 113. Legal commentators have been critical of those decisions, but to date have not influenced the thinking of the court. *See* Waelbroeck, *The Effect of GATT within the Legal Order of the EEC*, 8 J. WORLD TRADE L. 614 (1974); Schermers, *Community Law and International Law*, 12 COMM. MKT. L. REV. 77 (1975). *Compare* Capelli, *Réglementation du Gatt*, 1977 REV. M.C. 27 (1977); Kapteyn, *The "Domestic" Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules*, 8 INT'L LAW. 74 (1974).

[25] Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze, [1976] E. Comm. Ct. J. Rep. 129, 141, [1976] 2 Comm. Mkt. L.R. 62, 78 (preliminary ruling). *See also* White, *Effects of International Treaties within the Community Order*, 10 INT'L LAW. 402, 405 (1976). *See generally* Ullrich, *Der Stand der Assoziierung afrikanischer Staaten mit der EWG*, 135 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 444 (1971).

> By expressly referring, in Article 2(1) of the Convention, to Article 13 of the [EEC] Treaty, the Community undertook precisely the same obligation towards the Associated States to abolish charges having equivalent effect as, in the [EEC] Treaty, the Member States assumed towards each other. Since this obligation is specific and not subject to any implied or express reservation on the part of the Community, it is capable of conferring on those subject to Community law the right to rely on it before the courts and to do so with effect from 1 January 1970.[26]

In this case, direct applicability followed not only from the language of the treaty provisions, but also from the express reference to a rule of Community law, which rule in turn is directly applicable. The court denied direct applicability, however, for Article 62 of the Lomé Convention, which obligated each of the contracting parties to treat nationals and firms or companies of the other contracting party on a non-discriminatory basis as regards matters of freedom of establishment and provision of services.[27] Under the agreement, this obligation is subject to the express reservation that a contracting party which is unable to provide such treatment for a particular activity will not be bound to do so. The Court of Justice inferred from the purpose of the treaty that Article 62 does not oblige either of the two contracting groups to give the nationals of the other contracting group treatment identical to that reserved to its own nationals. Article 62 requires only that nationals of any state belonging to the other group be treated on a non-discriminatory basis.

A recent decision of the European Court of Justice concerns the direct applicability of Article 13 of the FTA with Switzerland.[28] The question referred by the French court was whether the threat of penal sanctions in the French law of customs could be considered a "measure having equivalent effect" upon trade between Switzerland and the Community. The German and British governments and the Commission, appearing in the case, argued that Article 13 of the FTAs could not be interpreted like Article 30 of the EEC Treaty. The Court of Justice, however, decided that the question should be resolved in the same manner for both the EEC Treaty and the FTAs. It concluded that an importer who has met his obligations under applicable Community import regulations could invoke the provisions of the EEC

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26 Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze, [1976] E. Comm. Ct. J. Rep. 129, 141-42, [1976] 2 Comm. Mkt. L.R. 62, 78-79 (preliminary ruling).

27 Jean Razanatsimba, [1977] E. Comm. Ct. J. Rep. 2229, 2238-40, [1977] COMM. MKT. REP. (CCH) ¶ 8447.

28 Procureur de la République v. Chatain, [1980] E. Comm. Ct. J. Rep. 1345, [1981] 3 Comm. Mkt. L.R. 418 (preliminary ruling). *See* Neue Zürcher Zeitung, Apr. 29, 1980, at 7.

Treaty as well as the FTAs in defending himself against criminal charges based on a national customs law.

The case law to date of the Court of Justice—including the most recent case described above—leaves open a fundamental question that is the major source of current scholarly controversy about direct applicability of the FTAs; namely whether the international treaties entered into by the Community should be assessed by the same criteria that the Court has used for adjudicating the direct applicability of Community law and for determining the rank of Community law as compared to the national law of the Member States. In arguing for the direct applicability of the FTA rules on competition or of Article 13 (measures having equivalent effect), one can rely on the parallels of language in certain important respects between the FTAs and the Treaty of Rome, the equivalence of their bases in international law, and their common purpose. Some scholars have gone so far as to claim that the common history of the EEC members and the EFTA nations and their common ancient Christian tradition support the basic equivalence in legal status of the FTAs and the EEC treaty.[29] The thesis, however, that the FTAs and the Treaty of Rome conform to each other in spirit, structure and language cannot be derived solely from their common basis in international law. In the closing arguments to the *Bresciani* case,[30] Advocate General Trabucci pointed out their differences. The priority of rules of Community law over national law and the direct effect of the former are a function of the special features and practical requirements of the Community system. The legal order of the Community must be sharply distinguished from the general system of international law. Nevertheless some scholars adhere to the thesis that the FTAs, subject to consideration for their peculiarities, should be interpreted in the same fashion as Community law.[31]

In interpreting the FTAs, however, it must be recalled that they did not establish an autonomous legal order, the norms of which can be uniformly interpreted and applied. Moreover, the legal system of the Community is not adequately represented in a comparative analysis that draws only on the body of directly applicable Community law.

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29 *See* Hunnings, *Enforceability of the EEC-EFTA Free Trade Agreements*, 2 EUR. L. REV. 163, 164 (1977).

30 Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze, [1976] E. Comm. Ct. J. Rep. 129, 148, [1976] 2 Comm. Mkt. L.R. 62, 70-71 (preliminary ruling).

31 *Compare* Hunnings, note 29 *supra*, *with* KÜCHLER, LIZENZVERTRÄGE IM EWG-RECHT EINSCHLIESSLICH DER FREIHANDELSABKOMMEN MIT DEN EFTA-STAATEN 191 (rules on competition), 206 (Article 13 of the FTAs) (1976); Küchler, *Gewerbliche Schutzrechte und Freihandelsverträge Schweiz-EWG*, 94/I ZSR 177, 190 (1975).

The analysis should also take into account complementary Community institutions in the areas of legislation and harmonization of laws. Those complementing functions form a basis for the systematic interpretation of Community law and the cooperation of Community organs and Member States in the development of Community law and in the adaptation of national law to the requirements of the Community. This becomes particularly apparent in considering the case law on Article 30 of the EEC Treaty. The Court of Justice has ruled national price or quality regulations to be "measures having equivalent effect," to the extent that they work to the disadvantage of imports from Member States.[32] The court does not concern itself with whether the national rules remain functional without the components deemed to violate Community law. Purely as a legal matter, it is left to the Member States to determine whether they want to conserve or alter such domestic rules; in terms of economic policy, however, the tailoring of national legal regulation to meet the norms of Community law leads to a permanent narrowing of the range of policy choices remaining available to Member States. Those consequences either must be accepted in view of the universal nature of the Common Market and the obligations of Member States to abstain from measures likely to jeopardize the Community (Article 5), or must be corrected by means of a coordination of policies within the Community.

The history and origin of the FTAs suggest that their failure to establish an institutional and a substantive legal framework for the development of uniform law or a common commercial policy was deliberate. In its *Omo* decision, the Swiss *Bundesgericht* thus properly emphasizes the lack of a common court and of an obligation of mutual harmonization of law.

The meaning and structure of the FTAs are thus so different from the legal order of the Community that they cannot be interpreted by the same standards as Community law.[33] Nevertheless, it cannot be ruled out that certain FTA provisions are directly applicable within the Community on the basis of the criteria developed by the Court of Justice in the general context of international treaties. The similar or identical language of particular provisions, however, is not sufficient reason for drawing that conclusion. Moreover, the provisions of the FTAs by their own terms may not be susceptible to direct application to the

32 For a more detailed treatment, see E.-J. MESTMÄCKER, VEREINBARKEIT VON PREISREGELUNGEN AUF DEM ARZNEIMITTELMARKT MIT DEM RECHT DER EURPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT 52 (1979).

33 In the *Polydor* case, the Court of Justice adopted this argument. *See* note 22 *supra*.

same extent as corresponding rules of Community law. That possibility should be taken into account in assessing the impact of the *Sandoz* decision of April 24, 1980, of the Court of Justice.[34] There the Court attributed to Article 13 of the FTAs the same meaning as previously given to Article 30 of the EEC Treaty in the core area of restrictions of trade, which the customs union and the FTAs seek to counteract in the same fashion. The case left undecided whether Article 13 of the FTAs also limits the exercise of industrial property rights and copyrights after the model of Article 30 of the EEC Treaty. Legal commentators have already proposed varying solutions to that issue.[35] The above-described decisions of the highest courts of Switzerland and Austria naturally cannot prejudice adjudication of that issue within the Community; but at a minimum those cases require consideration of the effects on economic relations between the Community and the EFTA states resulting from an opposite decision by the European Court of Justice. In effect, a contrary decision of the European court would mean that a product protected by an industrial property right or a copyright could, with the owner's consent, be brought onto the market in an FTA state and from there be imported into the Common Market. The same owner, however, could prevent export out of the Common Market into an FTA state by invoking the national law of the latter.

It cannot be determined as a general matter whether the direct applicability of particular FTA provisions will better serve the interests of the Community or of the partner states. In any event, it is hardly justifiable to accuse the Community organs of imperialism, as Hunnings does, solely because they differentiate between Community law and the FTAs.[36] On the contrary, it is the partner states which emphatically resist any suggestion of equivalence between the FTA provisions and Community law, since they cannot influence the development of the latter.

III. The Treatment of the FTA Rules on Competition in the Community under International Law

The Community has issued comments on the interpretation and application of the FTAs. Although not part of the treaty documents

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34 Procureur de la République v. Chatain, [1980] E. Comm. Ct. J. Rep. 1345, [1981] 3 Comm. Mkt. L.R. 418 (preliminary ruling). *See* text accompanying note 28 *supra*.

35 *See, e.g.*, Schluep, *supra* note 16, at 257- 262 (treatment of trademarks of common origin). For an earlier similar view, see Tilmann, *Das markenrechtliche Importverbot bei "ursprungsgleichen" Warenzeichen*, 1975 RIW/AWD 479, 484.

36 For a criticism of this thesis, see Hunnings, note 30 *supra*, and accompanying text. *See also* Waelbroeck, *Enforceability of the EEC-EFTA Agreements: A Reply*, 3 Eur. L. Rev. 27 (1978).

proper, these comments were issued on the occasion of the agreements' signing and the respective partner states took cognizance of them. The comment on Article 23 reads:

> Since the FTAs fail to establish a single organ with jurisdiction to apply their provisions, the contracting parties must effect compliance autonomously. A violation of these rules—which by contrast to the provisions of the EEC treaty are not directly applicable to undertakings and do not entail the nullity of an objectionable measure—leads in appropriate cases to the application of safeguard measures by the contracting party that feels injured by such violation.[37]

The Commission adds that the FTAs were not intended to depart significantly from rules of law operative at the national level or within the framework of other agreements concluded by any of the parties (agreements with the Mediterranean states in the case of the Community, the Treaty of Stockholm in the case of the EFTA members). The Swiss *Bundesrat* issued a declaration with substantially similar comments on the occasion of ratifying the Swiss FTA.[38] Legal commentators for the most part also support that view, irrespective of whether the question of direct applicability is examined in terms of general international law, in terms of the criteria established by the European Court of Justice for the direct applicability of international treaties in the context of Community law, or in terms of the standards applied to that question in the law of the partner states.[39]

The opposing view, to the effect that the FTA rules on competition are directly applicable, is based on a direct analogy to Community law:

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37 5 Bull. EG 9/11, 19 (1972). The translation is by the author, since the Bulletin was not published in English prior to January 1, 1973.

38 [1972] II Schweizerisches Bundesblatt 703. *See also* the *Bundesrat*'s reply of Feb. 18, 1976, to the question posed by representative Jauslin, Stenografisches Bulletin, 1976 STR 177-78.

39 Arioli, *Das zwischenstaatliche Kartell - und Wettbewerbsrecht gemäß Art. 23 ff. des Freihandelsabkommens*, in WETTBEWERB UND KARTELLRECHT IM FREIHANDELSABKOMMEN SCHWEIZ-EWG 35, 40 (Meyer-Masilius ed. 1974); Koppensteiner, *Österreichisches und europäisches Kartellrecht*, 1973 JUR. BL. 82, 104; Homburger, *Zur international-kartellrechtlichen Situation der Schweiz: Unter besonderer Berücksichtigung des Freihandelsvertrages mit der EWG*, 1972 SCHWEIZERISCHE JURISTEN-ZEITUNG [SJZ] 337, 342; Koller, *Zur Frage der unmittelbaren Anwendbarkeit von Art. 23 des Freihandelsabkommens Schweiz-EWG*, in FESTGABE FÜR HENRI DESCHENAUX 593, 605 (1977); Waelbroeck, note 36 *supra*; Waelbroeck, *L'effet direct de l'accord relatif aux échanges commerciaux du 22 juillet 1972 entre la Communauté Economique Européenne et la Confédération Suisse*, 29 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT, ANNUAIRE SUISSE DE DROIT INTERNATIONAL 113 (1973); Hirsch, *L'accord entre la Suisse et la CEE confère-t-il des droits aux particuliers*, 1974 CAHIERS DE DROIT EUROPEEN 194; Öhlinger, *supra* note 7, at 672 *et seq.*; Schluep, *supra* note 16, at 254 n.1. For a complete treatment, see Roth, *Die Wettbewerbsregeln in den Freihandelsabkommen der EWG*, 1978 WETTBEWERB IN RECHT UND PRAXIS 409, 413 *et seq.* Roth, however, wants to distinguish application of the rules on competition as a matter of Community law from application of those rules as a matter of international law. *See* notes 56-57 and accompanying text *infra*.

since Articles 85 and 86 of the EEC Treaty are directly applicable, the same must be true of the FTA rules on competition, notwithstanding certain differences in language.[40] The rules on competition contained in Article 15 of the Treaty of Stockholm, by comparison, indisputably obligate only states.[41] In comparing Article 85 of the EEC Treaty and Article 23 of the FTAs, the following differences become apparent:

—the FTAs lack a nullity sanction or any other sanction that would be mutually effective as between the contracting parties;
—the FTAs lack an exemptive provision corresponding to Article 85(3) of the EEC treaty;
—the FTAs fail to impose any direct substantive or procedural obligation upon the undertakings whose conduct is the object of regulation;
—when a violation of the agreement has been determined, the FTAs obligate only the contracting parties, rather than the offending undertaking, to effect a termination of the objectionable practices;
—if a violation is not terminated or if the Joint Committee does not reach agreement, the sanction provided in Article 27 of the FTAs is safeguard measures, including particularly the withdrawal of tariff concessions.

These differences concern legal issues that are at the core of any antitrust legislation and that, indeed, had to be addressed in the development of competition policy within the Community.

The described differences are not merely semantic, instead the FTAs left deliberate gaps in the regulation of competition. Neither Community law nor the domestic law of the FTA states leave such issues to resolution by the judiciary. In the Community, for example, the circumstances in which restrictive agreements will be void was an intensely debated issue when Regulation 17 was being drafted, notwithstanding the clear language of Article 85(2). Thus Regulation 17 represents a compromise that modulated the nullity sanction in a variety of forms with the aid of the notification system. In the *Bosch* case, the Court of Justice decided that Article 85 was not directly applicable so long as the legislative organs of the Community had not provided the means for applying Article 85(1) and (3).[42] Even if one assumes the existence of an unwritten exemption provision corresponding to Article 85(3), the problem is not solved. That assumption would charge the courts with resolving an issue which the Community, through Article 9(3) of Regulation 17, placed within the exclusive jurisdiction of the Commission in its capacity as an administrative organ. The issuance of block exemptions, on the other hand, falls within the

40 *See* Hunnings, note 29 *supra*; Küchler, note 31 *supra*. *But see* Arioli, note 39 *supra*.

41 SZOKOLÓCZY-SYLLABA, *supra* note 10, at 199-200.

42 De Geus v. Bosch, [1962] E. Comm. Ct. J. Rep. 45, [1962] Comm. Mkt. L.R. 1 (reference for a preliminary ruling).

competence of the Council as legislator of the Community. Of course, the procedure provided in Article 27 of the FTAs for ascertaining violations at a political level does not in itself preclude direct applicability. The sanctions provided there, however, are incompatible with the direct applicability of the rules on competition.[43] Moreover, in comparing the authorization to take safeguard measures under Article 27 of the FTAs with the EEC Treaty, one finds that as a general rule the latter authorizes Member States to take protective measures only during the time that its provisions are not fully applicable (compare, for example, Article 37(3) of the EEC Treaty). In other areas, protective measures are also typically structured so that within their operative scope they may include derogation of the treaty provisions (compare, for example, Article 226(3) of the EEC Treaty).

The history and origin of the FTAs, their relation to the EEC Treaty and the Treaty of Stockholm, and their above-noted gaps in antitrust regulation lead to the conclusion that the FTA rules on competition should be enforced at the level of public international law through sanctions against the contracting parties only. Article 23 of the FTAs, for the reasons given above, is not justiciable. That conclusion, however, leaves unanswered the question of how the contracting parties can autonomously fulfill their treaty obligations as a matter of international law. That question is examined below as regards the Community.

IV. The Autonomous Application of the FTA Rules on Competition in the Community

1. Questions of Authority

In connection with entering into the FTAs, the Community issued a unilateral declaration published in its Official Journal. In view of the contracting parties' autonomous obligation to implement Article 23(1), the Community declared, it would assess practices contrary to that provision on the basis of criteria arising from the application of Articles 85, 86, 90 and 92 of the treaty establishing the EEC. Although that unilateral declaration cannot prejudice the interpretation of the FTAs in the Joint Committee, it is instructive as regards the problem of implementation in the Community. The declaration assumes that the authorized powers of the Community's organs under Articles 85 *et seq.* basically suffice to meet its treaty obligations under Article 23. To the extent that view is correct, the issue of direct applicability of the FTA

[43] *See* Waelbroeck, *supra* note 24, at 634.

rules on competition within the Community has no practical significance because the EEC rules on competition are in any event directly applicable under Regulation 17. The conception of the Council of the Community—which must also be taken as the conception of its Member States—that the FTAs are not to enlarge the powers of the Commission granted under Articles 85 and 86 of the EEC Treaty, is tenable only on the above-described premise that those powers suffice to fulfill the FTA obligations. That thesis, however, leaves unresolved those cases in which the FTA rules on competition, but not the corresponding rules of the EEC Treaty, were violated. This situation might arise, for instance, if the conduct at issue does not affect trade between Member States.

The legal power which the Community claims as authorizing it to conclude the FTAs is not a sufficient basis for determining whether the possibility of applying the FTA rules on competition without simultaneous applicability of the EEC competition rules was taken into account. The Community invoked "in particular" its foreign commerce powers under Article 113 of the EEC Treaty as authority for entering into the FTAs. It is disputed, however, how far those powers extend in practice and whether they cover the conclusion of agreements with independent rules on competition.[44] On the assumption that Article 113 authorizes adoption of the FTA rules on competition, a discrepancy between the latter and the EEC rules on competition must be considered possible. The contrary assumption is that in agreeing to the FTA rules on competition the Community relied on an external competence derived from the internal powers of Articles 85 and 86 of the EEC Treaty. Under the latter assumption, the Community could recognize a violation of the FTA rules on competition only if the conduct at issue also affected trade between Member States. In the *AETR* case, the Court of Justice decided that authority for entering into an international agreement could derive not only from an express grant of power by the EEC Treaty, but may also flow from other provisions of that treaty together with measures adopted by the Community institutions within the framework of such provisions:

> In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.
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> As and when such common rules come into being, the Community

[44] For a detailed treatment, see Roth, *supra* note 39, at 417 *et seq*.

> alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[45]

These conditions are met in the context of the common competition policy. If the FTAs, insofar as they concern antitrust law, were concluded pursuant to internal powers, the requirement of an effect on trade between Member States must be read into the FTAs as a matter of Community law.[46] That raises the issue whether the Community's decision-making powers flowing from the legal sources described are sufficiently extensive to enable it to discharge its obligations under treaties with third states. That question, like the practical significance of direct applicability of the FTA rules on competition within the Community, depends upon whether Articles 85 *et seq.* of the EEC Treaty apply to all restrictions of competition that are incompatible with the proper functioning of the FTAs.

2. The Practice of the Commission

The decisions of the Commission already afford insights about the manner in which the EEC rules on competition can be applied to enforce the FTA rules on competition. In economic terms, the conduct usually at issue is either import restrictions agreed upon in the partner states as regards the Common Market or export restrictions established in the Common Market as regards the partner states.

a) Import Restrictions

In the case of import restrictions, it must be noted that the EEC rules on competition may be applicable with respect to non-members independently of the FTAs. Those rules apply to all restrictions of competition that originate outside of the Common Market but have effects therein. The extra-territorial applicability of Community law on the basis of the effects doctrine (*Auswirkungsprinzip* or *objektives Territorialitätsprinzip*) can be considered firmly established under the case law of the Court of Justice.[47] Moreover, the Commission has proceeded repeatedly against so-called self-limitation agreements that re-

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[45] Commission v. Council, [1971] E. Comm. Ct. J. Rep. 263, 274, [1971] Comm. Mkt. L.R. 335, 355.

[46] *See* Roth, *supra* note 39, at 417 *et seq.*

[47] Beguelin v. S.A.G.L. Import-Export, [1971] E. Comm. Ct. J. Rep. 949, 959-60, [1972] Comm. Mkt. L.R. 81, 95-96 (reference for a preliminary ruling); ICI v. Commission, [1972] 2 E. Comm. Ct. J. Rep. 619, 661-62, [1972] Comm. Mkt. L.R. 557. In the *ICI* case, the Court of Justice expressed no opinion on the limits of the effects doctrine because it attributed the conduct of the foreign enterprises to their subsidiaries located within the Common Market. The Advocate General discussed those limits, *see id.* at 694-97.

strict imports into the Common Market.[48] Community law is applicable if import restrictions agreed upon abroad have a noticeable effect within the Common Market.

b) Export Restrictions

Community law also applies to restrictions of competition agreed upon by undertakings in the Common Market to govern their conduct outside of the Common Market, if they noticeably restrict competition within the EEC and affect trade between Member States. The type of conduct most prevalent in this context is restrictions on exports from the Community to other countries. In these cases, however, the Commission has generally not found an appreciable restriction of competition nor an effect on trade between Member States, accordingly issuing negative clearances.[49] Decisions of the Court of Justice have held that Article 85 of the EEC Treaty applies if repercussions of export restrictions can be ascertained within the Common Market.[50] In the *Commercial Solvents* case, the Court of Justice made the following statement regarding the effect on intra-Community trade resulting from the abuse of a dominant position within the Common Market:

> The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the Common Market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position within the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.[51]

More recent decisions of the Commission evidence its view that, after the elimination of tariffs, restrictions on exports into FTA states may constitute appreciable restrictions of competition within the Common Market. In granting exemptions or negative clearances for sole distributorship systems, the Commission has not objected to prohibitions of exports into third countries, but has demanded that enterprises

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48 Commission Decision of Nov. 29, 1974, 17 O.J. EUR. COMM. (No. L 343) 19 (1974) (Franco-Japanese ballbearings agreement); Commission Decision of Jan. 8, 1975, 18 O.J. EUR. COMM. (No. L 29) 26 (1975) (preserved mushrooms).

49 E.-J. MESTMÄCKER, EUROPÄISCHES WETTBEWERBSRECHT 159 *et seq.* (1974).

50 Suiker Unie v. Commission, [1975] E. Comm. Ct. J. Rep. 1663, 2011-2020, [1976] 1 Comm. Mkt. L.R. 295, 416-29.

51 Commercial Solvents Corp. v. Commission, [1974] E. Comm. Ct. J. Rep. 223, 252-53, [1974] 1 Comm. Mkt. L.R. 309, 342.

forego such prohibitions, as regards FTA states, as soon as the contract goods are no longer subject to customs duties in trade between the Community and an EFTA country. That has been the case since July 1, 1972.[52] These decisions correspond to an administrative practice that generally requires enterprises to terminate prohibitions on exports into EFTA countries as soon as the contract goods are no longer subject to customs duties. The *Campari* decision summarizes the criteria which the Commission uses to assess the effects of export prohibitions in the Common Market:

> [I]t is true that this obligation not only eliminates the freedom of the licensees and their trade customers to do business in the relevant product outside the EEC, but also prevents any distributor in a non-member country from buying the product from the licensees or from a previous purchaser for resale in the Common Market.[53]

In the case of an export prohibition operative within the Community, the Commission, with acquiescence of the Court of Justice, assumes that "by its very nature" it constitutes a restriction of competition and affects intra-Community trade.[54] By contrast, export prohibitions regarding third countries, including the EFTA states, must be examined as to their actual effects in light of other trade barriers.[55] A critical evaluation of the above-described case practice leads to serious misgivings about the facile formulae used by the Commission to deny any effect within the Community resulting from restrictions of exports into third countries. Therefore the administrative and adjudicatory practice regarding prohibitions of exports into EFTA states could lead to a desirable improvement of the problem's treatment as regards third countries in general.

The above-sketched application of Community law to international restrictions of competition does not suffice to capture restrictions originating abroad against which the Commission has no practical means of enforcement, notwithstanding the theoretical applicability of Community law. Likewise, Community law may not reach cases in

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52 Commission Decision of Dec. 15, 1975, 19 O.J. EUR. COMM. (No. L 28) 19, 22 (1976) (SABA); Commission Decision of Dec. 21, 1976, 20 O.J. EUR. COMM. (No. L 30) 10, 14, para. 24 (1977) (Junghans); Commission Decision of Dec. 23, 1977, 21 O.J. EUR. COMM. (No. L 70) 69 (1978) (Campari). In the *Campari* decision, the Commission reasoned that there was no appreciable restriction of competition resulting from the prohibition to export, in view of the still existing customs barriers for alcoholic beverages. *Id.* at 74.

53 *Id.*

54 Miller Int'l Schallplatten GmbH v. Commission, [1978] E. Comm. Ct. J. Rep. 131, [1978] 2 Comm. Mkt. L.R. 334.

55 For a criticism of the adjudicatory practice of the Commission, see Bellis, *International Trade and the Competition Law of the European Economic Community*, 16 COMM. MKT. L. REV. 647, 665 (1979).

which the Community permits exports to EFTA countries, but the latter prevent those exports on the basis of internal national law. The cited decisions of the highest courts of Austria and Switzerland bear out that conflict in connection with industrial property rights.

3. Direct Applicability of the FTA Rules on Competition by Virtue of Council Regulation

In his thorough treatment of the FTA rules on competition, Roth recommended their direct applicability in a core area.[56] He describes that core area as consisting of those restrictions of competition that impede the opening of markets sought by the FTAs. Those restrictions of competition are to be prohibited directly and without any possibility of exemption. Outside of that core area, the FTA rules on competition are to be applied by way of narrow interpretation and only in conformity to the antitrust law of the country affected by the restrictions at issue. Thus Roth would meet the objection that the FTA rules on competition may not be more exacting than Community law. Roth argues that his concept of limiting the direct applicability of Article 23 of the FTAs in terms of the purpose underlying the FTAs follows within the Common Market from the self-executing nature and direct applicability of the Council regulation putting into force the FTAs. Of course, Roth admits, the implementing regulation of the Community gives the Commission jurisdiction to apply the FTAs. He further reasons, however, that the Commission has no adjudicatory authority over conduct affecting third countries unless such conduct simultaneously constitutes a violation of Articles 85 or 86 of the EEC Treaty. When conduct affecting third countries does not violate Articles 85 or 86, jurisdiction lies with national courts and antitrust authorities.

The critical issue is whether one can effectively identify restrictions of competition that impede the opening of markets and therefore are to be prohibited without exception.[57] Resolution of that issue will determine whether it is possible to reach the goal of interpreting Article 23 of the FTAs such that the antitrust law it embodies is no more stringent than Article 85 of the EEC Treaty. If past experience in the Community is any guide, that goal is unattainable. In the past, the grant of

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[56] *See* Roth, *supra* note 39, at 420 *et seq.*

[57] Similar proposals were made regarding the interpretation of the EEC rules on competition prior to the effective date of Regulation 17 and regarding the interpretation of the intra-Community trade clause. *Compare, e.g.*, COING, KRONSTEIN & SCHLOCHAUER, FRANKFURTER GUTACHTEN (1958); Steindorff, *Das Verbot von Wettbewerbsbeschränkungen in der Anfangszeit der EWG*, 1958 DER BETRIEBSBERATER 89. *See also* Teichmann, *Die Zwischenstaatlichkeitsklausel in Art. 85 Abs. 1 EWHGV*, 1969 WIRTSCHAFT UND WETTBEWERB 675.

block exemptions and the administrative practice concerning Article 85 have gone so far as to admit exceptions to the principles of free access to markets, if they were justified as facilitating the entry of certain enterprises into a new market. One encounters further difficulties, also familiar from the development of Community law, in separating those parts of restrictive agreements that impede the opening of markets from those parts with purely domestic effects. In addition, restrictions of competition are not easily recognized as also intending or effecting a restriction of access to markets. Express prohibitions of buying or supplying goods are the exception rather than the rule and in any event could be readily cast in the form of indirect restrictions of access, again rendering recognition difficult. The resulting problems of interpretation would not only diminish the desired heightened effectiveness of the rules on competition, but would also hinder the process of adapting national antitrust law to the requirements of the FTAs.

To the extent that Community law does not capture import or export restrictions that violate the FTAs, Roth would deny the jurisdiction of the Commission and instead accord jurisdiction to the antitrust authorities and the courts of the Member States. That conclusion is hardly persuasive, since the FTAs are based "in particular" on the foreign commerce powers of the Community under Article 113 of the EEC Treaty, intended to enable the Community to develop a common commercial policy in foreign trade that also meets the requirements of intra-Community trade. The purposes underlying the foreign commerce powers are thus incompatible with granting adjudicatory power to the Member States—in exclusion of the Commission—for the application of the rules on competition contained in the FTAs. Even if it turns out that the application of Articles 85 and 86 does not suffice to discharge the Community's treaty obligations arising from Article 23 of the FTAs, Roth's jurisdictional scheme is not compelling as a matter of law. The interpretative declarations issued together with the implementing regulations empower the Commission to interpret the EEC rules on competition in accordance with the purposes of the FTAs. In addition, Article 155 of the EEC Treaty enables the Council to confer upon the Commission such powers as may be necessary to implement the FTAs. The Council has that option under Article 155 because the FTAs constitute rules laid down by the Council as to which it may confer upon the Commission the requisite implementing powers. That solution is preferable, in terms of competition policy as well as sound law, to a division of jurisdiction between the Community and the Member States.

CONCLUSION

The view taken throughout this article is that the EEC Treaty establishes an autonomous legal order supported by a strong institutional framework. The regional integration and the uniformity of norms achieved by that legal order are much more advanced than within the general system of international law. The structure and meaning of the FTAs suggest that they form part of that general system and must be interpreted in accordance with its standards rather than those of the Community legal order.

That thesis provides an approach to a variety of problems arising from the FTAs. First, the question of direct applicability should be resolved by reference to standards developed for the Community's other international treaties. By those standards, the FTA rules on competition cannot be considered directly applicable. Second, the significant differences between the FTA rules and the parallel EEC rules on competition—which are directly applicable—negate the argument that the FTA rules should be treated analogously.

Another area of concern is the Community's discharge of its obligations under the FTA rules on competition. The Community's view is that its powers and practice under Articles 85 and 86 of the EEC Treaty suffice to discharge those obligations. That view is subject to question in that the broad treaty-making powers of the Community may not be covered entirely by its executive powers, with the result that the Community might lack power to discharge some of its treaty obligations under international law. Nevertheless, the Commission's practice to date is generally successful in applying the EEC rules on competition in a manner that meets the FTA requirements on competition. If that practice turns out to be inadequate in some future cases, the Commission may be able to assert or may be granted from the Council additional powers to implement the FTAs.