SEMINAR 10 THE EU's COMMON COMMERCIAL POLICY, including EXTERNAL TRADE POLICY

Barnard: ch 7

I The External Aspects of the SEM

- Common Customs Tariff (CCT)
- Common Commercial Policy (CCP)

II Common Customs Tariff (CCT) (Articles 31 and 32)

- What is it? Uniform system of tariffs
- In place since 1 July 1968 – administered by the Commission and national customs officers – duties become part of the Community's own resources – comprises 3 elements:
  - a nomenclature for the classification of goods
  - rules for the valuation of goods
  - rules for determining origin of the goods
  -

Community Customs Code, Council Regulation 2913/92 OJ 1992 L302/1

NB Once goods have paid their duties then treated for purposes of free movement as Community goods.

III Common Commercial Policy

Cremona: "The Completion of the Internal Market and the Incomplete CCP of the EC" (1990) 28 CMLRev 283-297

A External Relations

Article 47 TEU: The Union shall have legal personality.

The European Union has some form of trade or economic co-operation agreement with virtually every country in the world. This involves a problem of how the EU regulates its relations with the outside world and the principles it has to observe in doing so.
External relations comprise four main areas:

- Common Commercial Policy (CCP) and trade relations Article 206 and 207 TFEU
- Cooperation with third countries and with competent international organisations Article 211 & 212 TFEU
- Association with third countries Articles 198-204 TFEU

Under the external relations heading we shall deal briefly with explicit powers/implied powers and the treaty making procedure. We shall then concentrate on the commercial and trade relations Articles 206 & 207 TFEU.

B Common Commercial Policy (CCP)

The Treaty of Rome (Article 131-135) had required the EEC to develop a CCP, which should aim to contribute to the harmonious development of world trade and to the

progressive removal of barriers. The CCP is meant to integrate the Member States' trade with the outside world into the EU system.
Here we shall deal with the following areas:

- The inseparable link between the internal free movement of goods within the EU and the Commercial Policy of Member States towards third countries.

  Yet, Rules of Origin, adopted as rules for uniform application of CCT are the main tool on principle of uniformity of treatment vis a vis third countries rather than abolition of barriers of integration of Member States.

- Scope of Common Commercial Policy

Article 207 (1) TFEU

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Sociaal Fonds voor de Diamantarbeiders v NV Indiamex et al, Cases 37 & 38/73 [1973] ECR 1606

- Article 207 TFEU – aim to contribute to the harmonious development of world trade and to the progressive removal of barriers.
- Scope: Opinion 1/94 (The GATT Opinion – re services and TRIPS)

A. GATS

36) Relying essentially on the non-restrictive interpretation applied by the Court's case-law to the concept of the common commercial policy (see Opinion 1/78, paragraphs 44 and 45), the links or overlap between goods and services, the purpose of GATS and the instruments used, the Commission concludes that services fall within the common commercial policy, without any need to distinguish between the different modes of supply of services and, in particular, between the direct, cross-frontier supply of services and the supply of services through a commercial presence in the country of the person to whom they are supplied. The Commission also maintains that international agreements of a commercial nature in relation to transport (as opposed to those relating to safety rules) fall within the common commercial policy and not within the particular title of the Treaty on the common transport policy.

37) It is appropriate to consider, first, services other than transport and, subsequently, the particular services comprised in transport.

38) As regards the first category, it should be recalled at the outset that in Opinion 1/75 the Court, which had been asked to rule on the scope of Community competence as to the arrangements relating to a local cost standard, held that 'the field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations' ([1975] ECR 1362). The local costs in question concerned expenses incurred for the

supply of both goods and services. Nevertheless, the Court recognized the exclusive competence of the Community, without drawing a distinction between goods and services.

39) In its Opinion 1/78, cited above (paragraph 44), the Court rejected an interpretation of Article 113 'the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade'. On the contrary, it considered that 'the question of external trade must be governed from a wide point of view', as is confirmed by 'the fact that the enumeration in Article 113 of the subjects covered by commercial policy ... is conceived as a non-exhaustive enumeration' (Opinion 1/78, cited above, paragraph 45).

40) The Commission points out in its request for an opinion that in certain developed countries the services sector has become the dominant sector of the economy and that the global economy has been undergoing fundamental structural changes. The trend is for basic industry to be transferred to developing countries, whilst the developed economies have tended to become, in the main, exporters of services and of goods with a high value-added content. The Court notes that this trend is borne out by the WTO Agreement and its annexes, which were the subject of a single process of negotiation covering both goods and services.

41) Having regard to this trend in international trade, it follows from the open nature of the common commercial policy, within the meaning of the Treaty,that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113, as some of the Governments which have submitted observations contend.

42) In order to make that conclusion more specific, however, one must take into account the definition of trade in services given in GATS in order to see whether the overall scheme of the Treaty is not such as to limit the extent to which trade in services can be included within Article 113.

43) Under Article I(2) of GATS, trade in services is defined, for the purposes of that agreement, as comprising four modes of supply of services: (1) cross-frontier supplies not involving any movement of persons; (2) consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established; (3) commercial presence, i.e. the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered; (4) the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other member country.

44) As regards cross-frontier supplies, the service is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer's country; nor, conversely, does the consumer move to the supplier's country. That situation is, therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy within the meaning of the Treaty. There is thus no particular reason why such a supply should not fall within the concept of the common commercial policy.

45) The same cannot be said of the other three modes of supply of services covered by GATS, namely, consumption abroad, commercial presence and the presence of natural persons.

46) As regards natural persons, it is clear from Article 3 of the Treaty, which distinguishes between 'a common commercial policy' in paragraph (b) and 'measures concerning the entry and movement of persons' in paragraph (d), that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy. More generally, the existence in the Treaty of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy.

47) It follows that the modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy.

48) Turning next to the particular services comprised in transport, these are the subject of a specific title (Title IV) of the Treaty, distinct from Title VII on the common commercial policy. It was precisely in relation to transport policy that the Court held for the first time that the competence of the Community to conclude international agreements 'arises not only from an express conferment by the Treaty - as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements - but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions' (Case 22/70 Commission v Council [1971] ECR 263, paragraph 16, the 'AETR judgment'). The idea underlying that decision is that international agreements in transport matters are not covered by Article 113.

49) The scope of the AETR judgment cannot be cut down by drawing a distinction between agreements on safety rules, such as those relating to the length of driving periods of professional drivers, with which the AETR judgment was concerned, and agreements of a commercial nature.

50) The AETR judgment draws no such distinction. The Court confirmed that analysis in Opinion 1/76 ([1977] ECR 741) concerning an agreement intended to rationalize the economic situation in the inland waterways sector - in other words, an economic agreement not concerned with the laying down of safety rules. Moreover, numerous agreements have been concluded with non-member countries on the basis of the Transport Title; a long list of such agreements was given by the United Kingdom in its observations.

51) In support of its view the Commission has further cited a series of embargoes based on Article 113 and involving the suspension of transport services: measures against Iraq: Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1), Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 304, p. 1) and Council Regulation (EEC) No 1194/91 of 7 May 1991 amending Regulations (EEC) No 2340/90 and (EEC) No 3155/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1991 L 115, p. 37); measures against the Federal Republic of Yugoslavia (Serbia and Montenegro): Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ 1993 L 102, p. 14); measures against Haiti: Council Regulation (EEC) No 1608/93 of 23 June 1993 introducing an embargo concerning certain trade between the European Economic Community and Haiti (OJ 1993 L 155, p. 2). Those precedents are not conclusive. As the European Parliament has rightly observed, since the embargoes related primarily to the export and import of products, they could not have been effective if it had not been decided at the same time to suspend transport services. Such suspension is to be seen as a necessary adjunct to the principal measure. Consequently, the precedents are not relevant to the question whether the Community has exclusive competence pursuant to Article 113 to conclude international agreements in the field of transport.

52) In any event, the Court has consistently held that a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis (see Case 68/86 United Kingdom v Council [1988] ECR 855, paragraph 24).

53) It follows that only cross-frontier supplies are covered by Article 113 of the Treaty and that international agreements in the field of transport are excluded from it.

B. TRIPs

54) The Commission's argument in support of its contention that the Community has exclusive competence under Article 113 is essentially that the rules concerning intellectual property rights are closely linked to trade in the products and services to which they apply.

55) It should be noted, first, that Section 4 of Part III of TRIPs, which concerns the means of enforcement of intellectual property rights, contains specific rules as to measures to be applied at border crossing points. As the United Kingdom has pointed out, that section has its counterpart in the provisions of Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1). Inasmuch as that regulation concerns the prohibition of the release into free circulation of counterfeit goods, it was rightly based on Article 113 of the Treaty: it relates to measures to be taken by the customs authorities at the external frontiers of the Community. Since measures of that type can be adopted autonomously by the Community institutions on the basis of Article 113 of the EC Treaty, it is for the Community alone to conclude international agreements on such matters.

56) However, as regards matters other than the provisions of TRIPs on the release into free circulation of counterfeit goods, the Commission's arguments cannot be accepted.

57) Admittedly, there is a connection between intellectual property and trade in goods. Intellectual property rights enable those holding them to prevent third parties from carrying out certain acts. The power to prohibit the use of a trade mark, the manufacture of a product, the copying of a design or the reproduction of a book, a disc or a videocassette inevitably has effects on trade. Intellectual property rights are moreover specifically designed to produce such effects. That is not enough to bring them within the scope of Article 113. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade.

58) As the French Government has rightly observed, the primary objective of TRIPs is to strengthen and harmonize the protection of intellectual property on a worldwide scale. The Commission has itself conceded that, since TRIPs lays down rules in fields in which there are no Community harmonization measures, its conclusion would make it possible at the same time to achieve harmonization within the Community and thereby to contribute to the establishment and functioning of the common market.

59) It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). Those measures are subject to voting rules (unanimity in the case of Articles 100 and 235) or rules of procedure (consultation of the Parliament in the case of Articles 100 and 235, the joint decision-making procedure in the case of Article 100a) which are different from those applicable under Article 113.

60) If the Community were to be recognized as having exclusive competence to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.

61) Institutional practice in relation to autonomous measures or external agreements adopted on the basis of Article 113 cannot alter this conclusion.

62) The Commission cites three cases in which, by virtue of the 'new commercial policy instrument' (Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, p. 1), which was itself based on Article 113 of the Treaty), procedures were opened to defend the Community's intellectual property interests: Commission Decision 87/251/EEC of 12 March 1987 on the initiation of an international consultation and disputes settlement procedure concerning a United States measure excluding imports of certain aramid fibres into the United States of America (OJ 1987 L 117, p. 18); notice of initiation of an 'illicit commercial practice' procedure concerning the unauthorized reproduction of sound recordings in Indonesia (OJ 1987 C 136, p. 3); notice of initiation of an examination procedure concerning an illicit commercial practice, within the meaning of Council Regulation (EEC) No 2641/84, consisting of piracy of Community sound recordings in Thailand (OJ 1991 C 189, p. 26).

63) The measures which may be taken pursuant to that regulation in response to a lack of protection in a non-member country of intellectual property rights held by Community undertakings (or to discrimination against them in that field) are unrelated to the harmonization of intellectual property protection which is the primary objective of TRIPs. According to Article 10(3) of Regulation No 2641/84, cited above, those measures are: the suspension or withdrawal of any concession resulting from commercial policy negotiations; the raising of existing customs duties or the introduction of any other charge on imports; and the introduction of quantitative restrictions or any other measures modifying import or export conditions in trade with the non-member country concerned. All those measures fall, by their very nature, within the ambit of commercial policy.

64) The Commission also relies on measures adopted by the Community in relation to Korea within the framework of Council Regulation (EEC) No 4257/88 of 19 December 1988 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ 1988 L 375, p. 1). Since Korea had discriminated between its trading partners as regards protection of intellectual property (see the nineteenth recital in the preamble to the regulation), the Community suspended the generalized tariff preferences in respect of its products (Article 1(3) of the regulation).

65) That argument is no more convincing than the preceding one. Since the grant of generalized preferences is a commercial policy measure, as the Court has held (see the 'Generalized tariff preferences' judgment in Case 45/86 Commission v Council [1987] ECR 1493, paragraph 21), so too is their suspension. That does not in any way show that the Community has exclusive competence pursuant to Article 113 to conclude an agreement with non-member countries to harmonize the protection of intellectual property worldwide.

66) In support of its argument, the Commission has also cited provisions relating to the protection of intellectual property in certain agreements with non-member countries concluded on the basis of Article 113 of the Treaty.

67) It should be noted that those provisions are extremely limited in scope. The agreement between the European Economic Community and the People's Republic of China on trade in textile products, initialled on 9 December 1988 (OJ 1988 L 380, p. 2), and the agreement between the European Economic Community and the Union of Soviet Socialist Republics on trade in textile products, initialled on 11 December 1989 (OJ 1989 L 397, p. 2), merely provides for a consultation procedure in relation to the protection of trade marks or designs in respect of textile products. Moreover, the three interim agreements concluded between the Community and certain east European countries (Agreement with Hungary of 16 December 1991 (OJ 1992 L 116, p. 2); Agreement with the Czech and Slovak Federal Republic of 16 December 1991 (OJ 1992 L 115, p. 2); Agreement with the Republic of Bulgaria of 8 March 1993 (OJ 1993 L 323, p. 2)) all contain identically worded clauses (Articles 35, 36 and 37 respectively) calling upon those countries to improve the protection of intellectual property in order to provide, within a given time, 'a level of

protection similar to that provided in the Community' by Community acts. As the French Government has rightly observed, clauses of that type are binding only on the non-member country which is party to the agreement.

68) The fact that the Community and its institutions are entitled to incorporate within external agreements otherwise falling within the ambit of Article 113 ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property does not mean that the Community has exclusive competence to conclude an international agreement of the type and scope of TRIPs.

69) Lastly, it is indeed true, as the Commission states, that the Agreement with the Republic of Austria of 23 December 1988 on the control and reciprocal protection of quality wines and 'retsina' wine (OJ 1989 L 56, p. 2) and the Agreement with Australia of 26 and 31 January 1994 on trade in wine (OJ 1994 L 86, p. 3) contain provisions relating to the reciprocal protection of descriptions of wines. The names of Austrian wine-growing regions are reserved exclusively, within the territory of the Community, to the Austrian wines to which they apply and may be used only in accordance with the conditions laid down in the Austrian rules (Article 3(3) of the agreement). A similar provision is contained in the agreement with Australia (Article 7(3)).

70) However, as is plain from the preamble to Council Decision 94/184/EC of 24 January 1994 concerning the conclusion of an Agreement between the European Community and Australia on trade in wine (OJ 1994 L 86, p. 1), that agreement was reached at Community level, because its provisions are directly linked to measures covered by the common agricultural policy, and specifically by the Community rules on wine and winegrowing. Moreover, that precedent does not provide support for any argument in relation to patents and designs, the protection of undisclosed technical information, trade marks or copyright, which are also covered by TRIPs.

71) In the light of the foregoing, it must be held that, apart from those of its provisions which concern the prohibition of the release into free circulation of counterfeit goods, TRIPs does not fall within the scope of the common commercial policy.

- ## Common trade rules: regulation of imports and exports

- The Common Customs Tariff, which applies common rules to the import of products from third countries (Council Regulation 260/87 [1987] OJ L 256/1 which has been updated regularly)
- Common rules on imports (Council Regulation 260/2009 [2009] OJ L 84/1)
- Common rules on exports (Council Regulation 1061/2009, [2009] OJ L 291/1)
- Rules on exports of dual-use goods, that is, products which may be of both civil and military application (Council Regulation 428/2009 [2009] OJ L 134/1) - we shall discuss them later in the course;
- Generalised System of tariff Preferences (GSP), that is, a set of rules which subjects imports from developing countries to a preferential regime (the more recent measure is Council Regulation 732/2008 [2008] OJ L 211/1 which applies the GSP system in the 2009-2011 period, as amended by Regulation 512/2011 [2011] OJ L 145/28).

Commission v Council, Case 275/87, OJ (1989) C66/ 16.3.1989

Trade Agreements (Preferential agreements, the different treatment to its trading partners; vis a

vis, EC Trade Policy towards Mediterranean countries, Developing countries – Latin America, Asia, the Lome Convention. The EU/EFTA Free Trade Area. Trade relations with the US and Japan).

EU's role in WTO, OECD etc

C EU Trade defence measures

Safeguard measures and other Community measures (Anti-dumping rules and countervailing duties, legislation concerning the protection against illicit commercial practices).

- The Basic Regulation: Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51.

- Anti-subsidy rules products (Council Regulation 597/2009 [2009] OJ L 188/93)
- Safeguard measures (Council Regulation 3285/94 [1994] OJ L 275/1)
- Rules enabling the EU to impose countervailing duties on imports from countries which raise obstacles to the access of EU products to their market (Council Regulation 3286/94 [1994] OJ L 349/71, amended by Council Regulation 125/2008 [2008] OJ L 4/1)(Trade Barriers Regulation).

Review of trade defence policy

- Communication from the Commission – *Global Europe – Europe's trade defence instruments in a changing global economy* - A Green Paper for public consultation (COM(2006) 763 final
(http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131477.pdf)