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## Article 37 of the EEC Treaty: State Trading under Scrutiny

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# COMMENT

## Article 37 of the EEC Treaty: State Trading Under Scrutiny

Control over international trade often begins at a nation's border, with the regulation of imports by the government. The most common instrument employed is the tariff, a tax levied on goods entering a country.<sup>1</sup> An alternative tool of government policy is state trading, in which the government creates a publicly owned enterprise, or designates a private company, to function as the sole importer of a product.

This comment will focus in depth on the regulation of state trading within the European Economic Community (EEC). Historically, many European nations used state trading as a means of economic planning.<sup>2</sup> However, this form of enterprise poses a special problem for the members of the subsequently-created EEC. State trading hinders the development of a common market among several nations, since goods do not automatically move freely across national boundaries. Instead, both

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<sup>1</sup> Three types of tariffs may be imposed on goods. The ad valorem tariff is a tax calculated by a percentage of the value of the goods being imported. A specific tariff is a flat charge per unit or quantity of the goods. The third type, a tariff quota, provides a different tariff rate depending upon the amount already imported into a country. J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 440 (1977).

<sup>2</sup> Evolution of State Trading Imports (Intra-Europe) Between 1949 and 1958 Expressed in Percent of 1948 Imports

	1949	1958
B.L.E.U.	5.3%	0%
Netherlands	3.3%	0%
France	21.9%	22.0%
West Germany	0%	6.9%
Italy	4.6%	4.6%

Other countries ranged from 0 to 27.5%

Quin, *State Trading in Western Europe*, 24 L. & CONTEMP. PROB. 398, 399 (1959).

imports and exports are subject to the discretion of state trading monopolies selecting trading partners and the level of trade itself.

Concerns for potential discrimination are embodied in the Treaty of Rome,<sup>3</sup> forming the EEC. Article 37 of the EEC Treaty explicitly mandates a policy of non-discrimination in the use of state trading. Article 37 does not prohibit state trading outright, but requires the progressive adjustment of state monopolies to eliminate discrimination against the products of other Member States.

This comment will explore the judicial development of standards applied in analyzing state trading under Article 37. The success of Article 37 in curtailing the harmful effects of state trading is in marked contrast with the attempts to regulate state trading found within the General Agreement on Tariffs and Trade (GATT).<sup>4</sup> In part, this can be explained by the development of judicial rather than political standards for limiting the role of state monopolies within the EEC. The European Court of Justice (ECJ) has chosen to focus on the effects of state trading, banning the practice when used to disguise quotas, but allowing it when necessary to implement national economic goals which do not discriminate against other Member States.

This flexible standard is a promising step towards the general regulation of state trading under GATT. This comment suggests the strengthening of GATT obligations through the negotiation of a comprehensive multilateral agreement on state trading, urging the adoption of a code incorporating the positive obligations of Article 37 as the beginning of effective general regulation of state trading.

## I. THE NATURE OF STATE TRADING

State trading occurs when government acts as a principal in international commerce or authorizes a private enterprise to act on its behalf.<sup>5</sup> A government may use state trading to achieve a number of objectives equally desirable for both market and planned economies.

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<sup>3</sup> Treaty Establishing the European Economic Community, *entered in force* Jan. 1, 1958, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty].

<sup>4</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 194, 61 Stat. A3, T.I.A.S. No. 1700, *as amended in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE [GATT], BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). A list of the numerous treaties which make up GATT can be found in J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 888 app. (1969).

<sup>5</sup> Babon, *State Trading and the GATT*, 11 J. WORLD TRADE L. 334 (1977) [hereinafter cited as *State Trading*]. State trading has been defined as the "purchase on government account, by an agent of the government or by a monopoly under its control, with the intention of eventual resale." Leighton, *An Empirical Study of State Trading*, 29 S. ECON. J. 307 (1963).

State trading can serve to protect domestic products from competition, promote exports, stabilize domestic prices and incomes, or improve the balance of trade by directly determining the components of the trade account.<sup>6</sup> Social and strategic purposes, such as the control of the consumption of tobacco and alcohol, or limitation of trade in weapons systems, may be served through state trading.<sup>7</sup>

A primary difference between state trading and measures like tariffs and quotas is that through state trading, the government establishes both the price and quantity of goods traded, whereas with tariffs, it fixes only the approximate prices of imports, and with quotas, only the maximum quantity importable.<sup>8</sup> Distortions of free trade are introduced through a country's use of market power, either monopoly<sup>9</sup> or monopsony,<sup>10</sup> to enhance the national interest at the expense of its trading partners.<sup>11</sup>

Another difference between state trading and conventional protectionist measures is the predictability of their effect on the trade between countries. If other conditions are held constant, the consequences of imposing tariffs and quotas can be calculated through conventional economic theory.<sup>12</sup> This is not the case with state trading, the effects of which are indeterminate, depending on the goals and market power of the trading partners.<sup>13</sup> Thus, a country exporting to a state trading nation will have a more difficult task in calculating the level of protectionism it faces. Efforts at reducing non-tariff barriers<sup>14</sup> of this sort through

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<sup>6</sup> *State Trading*, *supra* note 5, at 336-37.

<sup>7</sup> *Id.*

<sup>8</sup> Leighton, note 5 *supra*.

<sup>9</sup> Pure monopoly consists of one seller for an entire market. *See generally* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 13-15 (1970).

<sup>10</sup> Pure monopsony consists of one buyer for an entire market. *See* W. SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION 339-42 (1979).

<sup>11</sup> *See* Humphrey, *The Economic Consequences of State Trading*, 24 L. & CONTEMP. PROB. 276 (1959); Leighton, note 5 *supra*.

<sup>12</sup> A tariff produces a protectionist effect which allows domestic industry to expand production. The significance of this effect depends on the amount of the tariff and the nature of the demand for the imported product. The change in the price of the good, and the amount of revenue the government receives will vary with the level of the tariff. A quota produces similar effects on production, price, and consumption, but the importer, rather than the government, may capture the added revenue from the increase in price. *See* C. KINDLEBERGER & P. LINDERT, INTERNATIONAL ECONOMICS 111-12, 518-21 (6th ed. 1978).

<sup>13</sup> For example, the ability of a country using state trading to influence the price it pays for commodities will depend on how many sellers there are, the number of competing buyers, the volume of their purchases, and the volume of purchases by the state trading country. *See* Leighton, note 5 *supra*.

<sup>14</sup> An inventory of over eight hundred non-tariff barriers to trade can be found in HOUSE COMM. ON WAYS AND MEANS, 93D CONG., 1ST SESS., BRIEFING MATERIALS ON FOREIGN TRADE AND TARIFFS 54-150 (Comm. Print. 1973).

bilateral or multilateral negotiations are hampered by the inability of parties to quantify the effect of state trading on their national interest.<sup>15</sup>

The actual practices of state trading monopolies can be placed into three main categories. First, the functional equivalent of taxes or subsidies may be implemented through the creation of the differentials between domestic prices and those paid on the world market.<sup>16</sup> Second, the functional equivalent of quotas may be implemented through the determination of the quantities to be imported or exported.<sup>17</sup> Third, a policy of discrimination may be effected through the selection of trading partners.<sup>18</sup>

State trading also introduces the government into the market in direct competition with private firms.<sup>19</sup> Unless private and public firms are bound by common rules of competition, private firms may be at a disadvantage because of the financial resources of the national government supporting public firms.<sup>20</sup> This is a significant problem for the EEC which at the time of its formation, had many state monopolies affecting important segments of the economy, especially in primary products.<sup>21</sup>

## II. STATE TRADING UNDER GATT

The EEC Treaty was not the first multilateral attempt to deal with state trading. Both the draft charter of the International Trade Organization (ITO) and the GATT, although focusing on the reduction of tariffs, had provisions restricting the use of state trading.<sup>22</sup> Gains in trade negotiations are potentially jeopardized if state trading countries retain full discretion in the price and quantity of goods imported. A state trading monopoly's ability to choose its trading partners also calls into question compliance with the Most Favored Nation (MFN)<sup>23</sup> obli-

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<sup>15</sup> See Leighton, note 5 *supra*.

<sup>16</sup> *State Trading*, *supra* note 5, at 334-35.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The effect of competition from public enterprise is a particularly significant problem for the EEC since each Member State relies on nationalized industries to varying degrees.

<sup>20</sup> Article 90 of the EEC Treaty, note 3 *supra*, applies the Community competition rules to both public and private firms. The relationship between Articles 37 and 90 is explored in BENZONI *et. al.*, L'ENTREPRISE PUBLIC ET LA CONCURRENCE 1969 (Semaine de Bruges 1968).

<sup>21</sup> As of 1958, EEC countries used state trading for such commodities as tobacco, wheat, rice, butter, sugar, bananas, salt and alcohol. Ouin, *supra* note 2, at 403-04.

<sup>22</sup> United Nations Conference on Trade and Employment, held at Havana, Cuba, from Nov. 21, 1947, to March 24, 1948, Final Acts and related documents, chapter 4, section D (State Trading and Related Matters) arts. 29-32 (Mar. 1948): GATT Article XVII [hereinafter cited as United Nations Conference].

<sup>23</sup> The MFN obligations of GATT require that:

gation of GATT contracting parties.<sup>24</sup>

A system of state trading runs counter to basic GATT notions concerning the organization of international trade. GATT implicitly assumes that the volume and nature of imports and exports will be largely a function of price.<sup>25</sup> This suggests that the tariff is the principal instrument of regulation by raising or lowering the price of goods.<sup>26</sup> Acting in accordance with the general assumption of free trade, GATT sought to eliminate discrimination in trade,<sup>27</sup> bind tariffs to then current levels, and progressively reduce them to promote a greater volume of trade.<sup>28</sup>

However, the existence of a tariff is unlikely to be central to the decision making of a state trading country. As Professor Dam has observed,

A commitment by such a country to give most-favored-nation treatment cannot be discharged simply by imposing identical tariffs on imports from all countries, for where the importing agencies follow political criteria rather than so-called commercial criteria (such as price and quality) in selecting foreign suppliers, uniformity of customs duties is irrelevant.<sup>29</sup>

In order to prevent the subversion of GATT obligations through state trading, Article XVII imposed three duties on contracting parties. The most critical provision is the requirement of non-discriminatory treatment of trade. Article XVII (1)(a) states: Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by

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any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties.

GATT, *supra* note 4, at art. I.

<sup>24</sup> Domke & Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 AM. J. INT'L L. 55 (1958); Hazard, *Editorial Comment: Commercial Discrimination and International Law*, 52 AM. J. INT'L L. 495 (1958).

<sup>25</sup> J. JACKSON, *supra* note 4, at 35-37.

<sup>26</sup> The principal obligations of GATT, the tariff bindings, are contained in Article II. GATT, *supra* note 4, at art. II.

<sup>27</sup> Principles of non-discrimination are found throughout the GATT, significant examples being the MFN obligation of Article I and the national treatment clause of Article III. *Id.* at arts. I and III.

<sup>28</sup> These objectives of GATT are set forth in the preamble to GATT. *Id.* at preamble.

<sup>29</sup> K. DAM, *THE GATT - LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 319 (1970).

private traders.<sup>30</sup> Secondly, contracting parties to GATT are obligated to limit implicit quotas caused by state trading.<sup>31</sup> Finally, Article XVII(4) requires notification to the CONTRACTING PARTIES of the products which are imported and exported by state trading countries.<sup>32</sup>

Like its predecessor in the ITO draft charter,<sup>33</sup> Article XVII applies to state public enterprise, private enterprise granted exclusive or special privileges, and import monopolies.<sup>34</sup> The non-discrimination clause of Article XVII is defined to require purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. It also requires state trading countries to give the enterprises of the other contracting parties adequate opportunity to

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<sup>30</sup> Article XVII of the GATT reads in part:

1. (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customer business practice, to compete for participation in such purchases or sales. . . .

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment. . . .

5. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1(a) of this Article. . . .

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1(a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

GATT, *supra* note 4, at art. XVII.

<sup>31</sup> GATT, *supra* note 4, at Annex I, Ad. arts. XI, XII, XIII, XIV, and XVII.

<sup>32</sup> GATT, *supra* note 4, at art. XVII(4). GATT uses the term "CONTRACTING PARTIES" when referring to the members of GATT collectively and uses the term "contracting party" when referring to an individual member nation.

<sup>33</sup> See United Nations Conference, *supra* note 22. See generally J. JACKSON, *supra* note 4, at 333-36; Mestmacker, State Trading Monopolies in the European Economic Community, 20 VAND. L. REV. 321, 323-24 [hereinafter cited as Mestmacker].

<sup>34</sup> GATT, *supra* note 4, at art. XVII(1)(a). For the text of Article XVII(1)(a), see note 30 *supra*.

compete for participation in purchases and sales.<sup>35</sup>

The set of interpretative notes appended to the GATT itself is the principal source available for analyzing the language of Article XVII.<sup>36</sup> These notes specifically exclude the purchase and sale of services from coverage.<sup>37</sup> National marketing boards which lay down regulations for private trade are also exempt.<sup>38</sup> Certain government measures relating to the exploitation of natural resources are deemed not to constitute "exclusive or special privileges" within the meaning of the Article.<sup>39</sup> Finally, government procurement not destined for commercial resale is treated under a less rigorous standard.<sup>40</sup>

The "non-discriminatory treatment" language of Article XVII (1)(a) suggests the application of Most Favored Nation principles to state trading activities.<sup>41</sup> A more theoretically interesting question is whether the Article embodies a national treatment obligation.<sup>42</sup> Here, the commentators tend to disagree. It has been suggested that the general national treatment of GATT Article III(4) is broad enough to include Article XVII in its coverage.<sup>43</sup> Such a conclusion relies on the fact that the only exemption from national treatment within Article III is paragraph 8, covering government purchase *not* with a view to commercial resale, and hence applying national treatment obligations to state trading operations.<sup>44</sup>

Professor Jackson, in his treatise, takes the opposing view, explaining:

The national treatment obligation of Article III applies to internal taxation or regulation, (sic) it is stretching a point to say that this includes purchases or sales. Consequently, it is possible to find that the state enterprise is not subject to a "national treatment obligation" as to its *purchases or sales*, although the contracting party may be limited by the national treatment obligation as to its internal taxation or regulation, portions of which affect activities of the state enterprise.<sup>45</sup>

He concludes that "The enterprise is entitled to discriminate between domestic and foreign products in its purchases or sales, but must do so

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<sup>35</sup> *Id.* at art. XVII(1)(b). For the text of Article XVII(1)(b), see note 30 *supra*.

<sup>36</sup> GATT, *supra* note 4, at Annex I, Ad. art. XVII.

<sup>37</sup> *Id.* at para. 2.

<sup>38</sup> *Id.* at para. 1.

<sup>39</sup> *Id.* at para. 1(a).

<sup>40</sup> GATT, *supra* note 30, at art. XVII(2).

<sup>41</sup> J. JACKSON, *supra* note 4, at 345-47.

<sup>42</sup> The national treatment of GATT Article III requires equal treatment of domestic and foreign goods for purposes of internal taxes and regulations.

<sup>43</sup> K. DAM, *supra* note 29, at 321-22.

<sup>44</sup> *Id.* at 322.

<sup>45</sup> J. JACKSON, *supra* note 4, at 338.



on a 'Most-Favored-Nation' basis".<sup>46</sup>

The relative paucity of GATT disputes involving Article XVII has resulted in largely theoretical interpretation of these obligations, derived from the secondary literature and the interpretative notes. To date, only three disputes under GATT have made reference to Article XVII, and in none of these cases has there been a finding of inconsistency with the article's provisions.<sup>47</sup> The first dispute concerned the Haitian tobacco monopoly, in which the GATT working party found no violation of Article XVII.<sup>48</sup> More than a decade later, a working party considered the so-called "loyalty" rebate program of the British Steel Corporation. The group met only once, and disbanded after the suspension of the rebate program.<sup>49</sup>

The most substantive treatment of Article XVII came in a complaint brought by Uruguay against a number of temperate zone producers of goods ranging from grains and vegetable oils to meats and animal hides.<sup>50</sup> Uruguay complained under Article XXIII of GATT of a series of restrictive trade practices, including state trading.<sup>51</sup> The report of the working party concluded for each country using state trading that there were "*a priori* grounds for assuming that (state trading) could have an adverse effect on Uruguay's exports."<sup>52</sup> However, the panel declined to recommend compensation for Uruguay, and limited itself to urging consultation between the parties to settle their differences.<sup>53</sup>

### III. THE REQUIREMENTS OF ARTICLE 37 OF THE ROME TREATY

Article 37 of the EEC Treaty requires the elimination of discrimi-

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<sup>46</sup> *Id.* at 347.

<sup>47</sup> It is important to note the general history of GATT dispute resolution under Article XXIII. Article XXIII of GATT functions more as a consultation provision than a judicial dispute resolution mechanism. The only instance where the CONTRACTING PARTIES have authorized compensation under Article XXIII for the nullification or impairment of GATT was the dispute over the import restrictions of the United States against Dutch cheese. See *Netherlands Measures of Suspension of Obligations to the United States, Determination of 8th Nov., 1952*, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 32 (1st Supp. 1953).

<sup>48</sup> GATT, Doc. L/454 (1955).

<sup>49</sup> GATT, Doc. L/2958 (1967).

<sup>50</sup> *Uruguayan Recourse to Article XXIII*, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 95 (11th Supp. 1963).

<sup>51</sup> Uruguay also complained that its export trade was restricted by practices such as import license and fee requirements, tax policies, health measures, tariff preferences, quotas and variable levies.

<sup>52</sup> *Uruguayan Recourse to Article XXIII*, *supra* note 50, at 105, 111, 119, 123, 130, 133, 138, 144.

<sup>53</sup> *Id.*

nation among Member States in the importation and marketing of goods by state trading monopolies. The principal obligations of Member States are found in the opening sections of the Article. Section (1) calls for the progressive adjustment of state monopolies of a *commercial nature* to eliminate discrimination.<sup>54</sup> This obligation applies to state commercial monopolies regardless of whether they directly or indirectly affect imports and exports between Member States.<sup>55</sup>

Article 37(1) is complemented by 37(2), obligating Member States to refrain from introducing any new measures which would violate Article 37(1). Under this framework, the Member States have undertaken a dual obligation: "in the first place, an active one to adjust State monopolies, in the second place, a passive one to avoid any new measures."<sup>56</sup>

In addition to its limitation to state commercial monopolies, Article 37 applies solely "to the conditions under which goods are procured and marketed. . . ."<sup>57</sup> State monopolies for services, such as energy

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<sup>54</sup> The full text of Article 37 reads:

1. Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

3. The timetable for the measures referred to in paragraph 1 shall be harmonised with the abolition of quantitative restrictions on the same products provided for in Articles 30 to 34.

If a product is subject to a State monopoly of a commercial character in only one or some Member States, the Commission may authorize the other Member States to apply protective measures until the adjustment provided for in paragraph 1 has been effected; the Commission shall determine the conditions and details of such measures.

4. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialization that will be needed with the passage of time.

5. The obligations on Member States shall be binding only in so far as they are compatible with existing international agreements.

6. With effect from the first stage the Commission shall make recommendations as to the manner in which and the timetable according to which the adjustment provided for in this Article shall be carried out.

EEC Treaty, *supra* note 3, at art. 37. A thorough but dated examination of the language of Article 37 can be found in Mestmacker, note 33 *supra*. See also Van Ginkel, *La Notion Juridique de "Monopole National Présentant un Caractère Commercial" dans L'article 37 C.E.E.*, 13 REVUE DU MARCHÉ COMMUN 248 (1970).

<sup>55</sup> EEC Treaty, *supra* note 3, at art. 37(1). For the text of Article 37(1), see note 54 *supra*.

<sup>56</sup> *Costa v. ENEL*, [1964] E. Comm. Ct. J. Rep. 585, 597, [1964] Comm. Mkt. L.R. 425, 458.

<sup>57</sup> EEC Treaty, *supra* note 3, at art. 37(1). For the text of Article 37(1), see note 54 *supra*.

generation and broadcasting, are excluded from coverage.<sup>58</sup> Furthermore, the Article is limited in its application to a body which "either directly or indirectly supervises, determines, or appreciably influences imports and exports. . . ."<sup>59</sup> A national monopoly which organizes the national market in the distribution stage would not be covered by this Article. Hence, national marketing boards are exempt to varying degrees from Article 37.<sup>60</sup>

Several exceptions are found in Article 37(3)-(5).<sup>61</sup> National governments are given considerable leeway to use state monopolies in their agricultural policies.<sup>62</sup> In addition, the obligations of Article 37 are made binding only in so far as they are compatible with prior international agreements.<sup>63</sup>

The major weakness in the Article is the nature of the enforcement process. The language of Article 37 gives the European Commission only advisory powers in setting the timetable for compliance by state trading countries.<sup>64</sup> Consequently, enforcement efforts have shifted to the European Court of Justice.

The European Court is limited to developing the law on a case-by-case basis in accordance with the peculiar mechanics of Article 177 of the EEC Treaty. When the European Court of Justice is referred a case from a national court under Article 177 it may deliver only an abstract interpretation of Community law rather than a decision on the merits.<sup>65</sup> The abstract nature of these rulings has hindered the development of a consistent and effective judicial doctrine interpreting Article 37.<sup>66</sup>

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<sup>58</sup> *Costa v. ENEL*, [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L.R. 425; In *Re Sacchi*, [1974] E. Comm. Ct. J. Rep. 409, [1974] 2 Comm. Mkt. L.R. 177.

<sup>59</sup> EEC Treaty, *supra* note 3, at art. 37(1). For the text of Article 37(1), see note 54 *supra*.

<sup>60</sup> *Pigs and Bacon Commission v. McCarren and Company Ltd.*, [1979] E. Comm. Ct. J. Rep. 2161, [1979] 3 Comm. Mkt. L.R. 389.

<sup>61</sup> Article 37(3) authorizes certain protective measures by non-state trading countries during a twelve year transition period established by Article 8, which expired Jan. 1, 1970. EEC Treaty, *supra* note 3, at art. 37(3). For the text of Article 37(3), see note 54 *supra*.

<sup>62</sup> EEC Treaty, *supra* note 3, at art. 37(4). For the text of Article 37(4), see note 54 *supra*.

<sup>63</sup> EEC Treaty, *supra* note 3, at art. 37(5). This clause applies principally to the German match monopoly established through an agreement with the Swedish government. For the text of Article 37(5), see note 54 *supra*.

<sup>64</sup> EEC Treaty, *supra* note 3, at art. 37(6). For the text of Article 37(6), see note 54 *supra*.

<sup>65</sup> K. LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 32-33 (1974).

<sup>66</sup> The best example of this is found in *Albatros S.A.R.L. v. SOPECO*, [1965] E. Comm. Ct. J. Rep. 29, [1965] Comm. Mkt. L.R. 159, where the Court found that Article 177 barred it from addressing the question of whether the French licensing laws for importing petroleum created a state commercial monopoly within the meaning of Article 37, since such an inquiry would represent an impermissible decision on the merits of the case.

#### IV. CASE LAW ON ARTICLE 37 EEC

In contrast to GATT, a substantial body of case law enforcing Article 37 in the European Court of Justice has arisen to help define the broad language of the Treaty. In 1964, the Court held that Article 37 conferred direct rights upon Community nationals to be enforced through the national and Community courts.<sup>67</sup> This cleared the way for litigation from importers threatened by the tax and trade legislation of Member States.

The early cases dealt with the definition of the type of enterprise covered by Article 37. *Costa v. ENEL*<sup>68</sup> considered the nationalization of Italy's electrical power industry. Costa, a consumer and shareholder of one of the nationalized companies, brought suit urging a broad interpretation of Article 37 to include the government's nationalization decree. He argued that the nationalization produced the same consequences as a legal monopoly in restricting imports and the competitive opportunities of foreign firms.<sup>69</sup> The ECJ rejected this contention, holding that Article 37 applies to state monopolies for goods rather than services.<sup>70</sup> The Court noted,

[Article 37] does not prohibit the creation of any State monopolies, but merely those 'of a commercial character,' and then only in so far as they tend to introduce. . . discrimination. . . . To fall under this prohibition the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States. . . .<sup>71</sup>

The Court continued its restrictive interpretation of Article 37 in *Albatros S.A.R.L. v. SOPECO*.<sup>72</sup> Albatros, an Italian firm, entered into a contract to supply SOPECO, a French firm, with six thousand tons of gasoline.<sup>73</sup> SOPECO subsequently informed its supplier that it had failed to obtain the necessary import licenses, and that the contract could not be performed.<sup>74</sup> Albatros sued in Italian courts, challenging

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<sup>67</sup> *Costa v. ENEL*, [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L.R. 425. In contrast, municipal courts have been reluctant in declaring the direct application of Article 37. *Re German Spirits Monopoly*, [1971] Comm. Mkt. L.R. 687; *Re Import of French Brandy*, [1969] Comm. Mkt. L.R. 164.

<sup>68</sup> [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L.R. 425.

<sup>69</sup> *Id.* at 591, [1964] Comm. Mkt. L.R. at 433.

<sup>70</sup> *Id.* at 598, [1964] Comm. Mkt. L.R. at 459.

<sup>71</sup> *Id.* Subsequent history of this case is found in an Italian domestic case which ultimately voided the nationalization decree, although the court acknowledged that it was not required to do so under Article 37. *Costa v. ENEL*, [1968] Comm. Mkt. L.R. 267.

<sup>72</sup> *Albatros S.A.R.L. v. Societe des Petroles et des Combustibles Liquides (SOPECO)*, [1965] E. Comm. Ct. J. Rep. 29, [1965] Comm. Mkt. L.R. 159.

<sup>73</sup> *Id.* at 30, [1965] Comm. Mkt. L.R. at 159.

<sup>74</sup> *Id.*, [1965] Comm. Mkt. L.R. at 160.

the French petroleum import system which made it extremely difficult for foreign firms to receive import licenses. The Court noted that in abstract Article 37's requirement of "progressive adjustment" did not require the immediate abrogation of conflicting national laws.<sup>75</sup> The Court also held that its jurisdiction under Article 177 of the EEC Treaty,<sup>76</sup> barred it from even reaching the question of whether the French licensing scheme fell within the scope of Article 37.<sup>77</sup>

The exclusive rights of importation, central to state trading, were definitively addressed for the first time in *Pubblico Ministero v. Manghera*,<sup>78</sup> which scrutinized the Italian tobacco monopoly. Criminal proceedings had been instituted against an importer who brought foreign manufactured tobacco into Italy. Upon referral from the national court, the European Court held that exclusive rights of *importation* were incompatible with the requirements of Article 37.<sup>79</sup> This holding was in agreement with the longstanding view of the European Commission in this regard.<sup>80</sup>

Later cases gave the Court the opportunity to look beyond facial discrimination in state trading and examine the actual functioning of national markets for state traded goods. In *Hauptzollamt Gottingen v. Miritz*,<sup>81</sup> the Court struck down a discriminatory tax structure used by the German alcohol monopoly to limit the foreign imports it could no longer directly prohibit. The Court stated:

Article 37(1) is not concerned exclusively with quantitative restrictions but prohibits any discrimination . . . regarding the conditions under which goods are procured and marketed between nationals of Member States. It follows that its application is not limited to imports and exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or not subject to the monopoly. . . .<sup>82</sup>

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<sup>75</sup> *Id.* at 35, [1965] Comm. Mkt. L.R. at 178.

<sup>76</sup> For a discussion of the limited nature of the court's jurisdiction under Article 177, see K. LIPSTEIN, note 65 *supra*.

<sup>77</sup> [1965] E. Comm. Ct. J. Rep. 29, 34-35, [1965] Comm. Mkt. L.R. 159, 177. A French municipal court, not bound by the restrictions of Article 177, had little trouble concluding the applicability of Article 37 to the French petroleum system. *Re Societe des Petroles Shell-Berre* (Conseil d'Etat June 19, 1964), [1964] Comm. Mkt. L.R. 462, 482.

<sup>78</sup> [1976] E. Comm. Ct. J. Rep. 91, [1976] 1 Comm. Mkt. L.R. 557.

<sup>79</sup> *Id.* at 101, [1976] 1 Comm. Mkt. L.R. at 567.

<sup>80</sup> While not maintaining that these exclusive rights were *per se* prohibited under Article 37, the Commission felt that the abolition of exclusive importation rights was the most effective means of compliance with the requirements of Article 37. *See, e.g.*, J.O. COMM. EUR. (Spec. Ed. 2d) Ser. VI (1974).

<sup>81</sup> [1976] E. Comm. Ct. J. Rep. 217.

<sup>82</sup> *Id.* at 229-30. *Accord*, *Francesco Cinzano & CIA GmbH v. Hauptzollamt Saarbrucken*, [1970] E. Comm. Ct. J. Rep. 1089, [1971] Comm. Mkt. L.R. 374. *Cinzano* held that Article 37

A more equitable system of taxation for spirits not marketed through the German government survived challenge in *Rewe v. Hauptzollamt Landau*.<sup>83</sup> As long as the tax was equally imposed on both domestic and Community spirits, the Court was satisfied that the practice violated neither the tax provisions of Article 95<sup>84</sup> nor Article 37, even where the German alcohol monopoly was indirectly subsidized by the tax payments.<sup>85</sup> As a matter of principle, the Court also noted that satisfying Article 95 alone did not establish compliance with Article 37.<sup>86</sup>

Despite the favorable ruling in *Rewe*, the German alcohol monopoly found itself severely strained by the introduction of spirits imported from other Community nations. German farmers were paid fixed support prices, made possible by the sale of retail alcohol at artificially high prices.<sup>87</sup> The rapid increase in imports from Community nations led to a decline in retail prices and burgeoning losses for the alcohol monopoly.<sup>88</sup>

Substantial tax increases instituted to cover these losses were challenged in *Hansen GmbH and Co. v. Hauptzollamt Flensburg*.<sup>89</sup> In 1976, alcohol taxes were increased from 1500 DM to a total of 1950 DM per hectoliter.<sup>90</sup> On February 25, 1977, Hansen, an importing company, contested the tax owed under the new laws.<sup>91</sup> The case was referred to

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included intervention where a State 'in fact' or 'indirectly' influenced trade between Member States even when it did not control or supervise such trade. *Id.* at 1095, [1971] Comm. Mkt. L.R. at 386. These holdings should be contrasted with *Peureux I*, which held that neither Article 95 nor Article 37 prevented a Member State from taxing a domestic product more heavily than those products imported from other Member States through state trading. *S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saone et du Territoire de Belfort*, [1979] E. Comm. Ct. J. Rep. 897, [1980] 3 Comm. Mkt. L.R. 337.

<sup>83</sup> [1976] E. Comm. Ct. J. Rep. 181, [1976] 2 Comm. Mkt. L.R. 1. A similar holding was reached with respect to a tax increase during the transitional period in *Francesco Cinzano & CIA GmbH v. Hauptzollamt Saarbrücken*, [1970] E. Comm. Ct. J. Rep. 1089, [1971] Comm. Mkt. L.R. 374.

<sup>84</sup> Article 95 prohibits taxation of Community products in excess of that of domestic products or taxation used as a barrier to trade. EEC Treaty, *supra* note 3, at art. 95.

<sup>85</sup> [1976] E. Comm. Ct. J. Rep. at 200-01, [1976] 2 Comm. Mkt. L.R. at 26.

<sup>86</sup> *Id.* at 197, [1976] 2 Comm. Mkt. L.R. at 24.

<sup>87</sup> *Hansen GmbH and Co. v. Hauptzollamt Flensburg*, [1979] E. Comm. Ct. J. Rep. 935, 960, [1980] 1 Comm. Mkt. L.R. 162, 167 (opinion of advocate general Capotorti) [hereinafter cited as *Hansen II*]. It is important to note the distinctions between *Hansen II* and a prior case involving the identical parties where the European Court of Justice had expressed a preference for using art. 95 to judge tax measures effected through state trading. *Hansen GmbH v. Hauptzollamt Flensburg*, [1978] E. Comm. Ct. J. Rep. 1787, [1979] 1 Comm. Mkt. L.R. 604.

<sup>88</sup> [1979] E. Comm. Ct. J. Rep. at 960, [1980] 1 Comm. Mkt. L.R. at 167.

<sup>89</sup> [1979] E. Comm. Ct. J. Rep. 935, [1980] 1 Comm. Mkt. L.R. 162.

<sup>90</sup> A hectoliter is equivalent to 26.4 U.S. gallons.

<sup>91</sup> [1979] E. Comm. Ct. J. Rep. at 938, [1980] 1 Comm. Mkt. L.R. at 165.

the European Court to consider whether state trading measures which were also state aids to national industry should be judged in light of Article 37 or the state aid provisions of Articles 92 and 93.<sup>92</sup> Depending on the answer to the first question the Court was also asked to examine whether the German tax increases were compatible with Article 37(1-2).<sup>93</sup>

The Court utilized Article 37 as the framework to judge all state measures tied to the exercise of a commercial monopoly. *Hansen* held that state measures inherent in the exercise of the exclusive rights of a state commercial monopoly must be considered in light of Article 37, even when these measures are arguably a grant of aid to a producer subject to the monopoly.<sup>94</sup> The Court also held that the marketing of spirits with the aid of public funds at an abnormally low pre-tax resale price, in comparison to those imported from other Member States, was in violation of Article 37.<sup>95</sup>

The second in a set of cases involving the French firm S.A. des Grandes Distilleries Peureux, *Peureux II*,<sup>96</sup> continued the expansive reading of Article 37 before the European Court of Justice. The Peureux company had imported from Italy oranges steeped in alcohol, claimed to be a violation of French law prohibiting the distillation of all imported raw material, with the exception of fresh fruit other than

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<sup>92</sup> The specific questions of law were:

1. Is Article 37 of the EEC Treaty a *lex specialis* in relation to Articles 92 and 93 of the EEC Treaty in the sense that State measures which affect the movement of goods between member-States and, where applicable, between member-States and third countries must be judged in the light of Article 37 of the EEC Treaty even if the State measures contain *inter alia* an aid?

2. If Question 1 is answered in the affirmative:

a) Is Article 37(2) in conjunction with the first subparagraph of Article 37(1) of the EEC Treaty on the prohibition of discrimination between nationals of member-States regarding the conditions under which goods are procured and marketed to be interpreted as also covering State measures which entail an identical increase in the tax on consumption on imported and domestic goods, the income from which is credited to the general budget and is indirectly intended to compensate for the losses of a State monopoly of a commercial character which are incurred because certain producers are paid an excessive price which does not accord with market conditions within the Community and because at the same time the selling prices for the products purchased at the excessive prices have been reduced?

b) Is Article 37(2) of the EEC Treaty prohibiting the introduction of measures which restrict the scope of the article dealing with the abolition of customs duties to be interpreted as also including measures of the kind referred to in Question 2(a)?

*Id.* at 939, [1980] 1 Comm. Mkt. L.R. at 165-66.

<sup>93</sup> *Id.*, [1980] 1 Comm. Mkt. L.R. at 166.

<sup>94</sup> *Id.* at 953, [1980] 1 Comm. Mkt. L.R. at 185.

<sup>95</sup> *Id.* at 955, [1980] 1 Comm. Mkt. L.R. at 186.

<sup>96</sup> S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saone et du Territoire de Belfort, [1979] E. Comm. Ct. J. Rep. 975. For a description of *Peureux I*, see note 82 *supra*.

apples, pears or grapes.<sup>97</sup> The French authorities construed the statute as prohibiting this particular import, since the oranges had been preserved in alcohol, and thus fell outside the fresh fruit exception to the import ban.<sup>98</sup> Peureux challenged this interpretation and the underlying compatibility of the statute with the EEC Treaty. The European Court held that the statute was incompatible with both Article 37 and Article 30 of the EEC Treaty.<sup>99</sup>

Despite the reach of Article 37 beyond simple import restrictions, the European Court has refused to subject every aspect of state trading to scrutiny under this Treaty provision. The limits of Article 37 were most recently spelled out in a second case involving the importer Rewe, known as the *Cassis de Dijon* case.<sup>100</sup> Rewe challenged a German regulation prohibiting the importation of spirits with an alcohol content of less than 30 percent. Although the import ban was defended as a health measure, this regulation had the effect of banning the importation of certain low alcohol liqueurs, popular in other Community states. The European Court held that Article 37 did not prohibit such a regulation since it affected a practice not related to the commercial nature of the state trading enterprise. The Court said:

It should be noted . . . that Article 37 relates specifically to State monopolies of a commercial character. That provision is therefore irrelevant with regard to national provisions which do not concern the exercise by a public monopoly of its specific function—namely, its exclusive right—but apply in a general manner to the production and marketing of alcoholic beverages, whether or not they later are covered by the monopoly in question.<sup>101</sup>

## V. THE IMPACT OF ARTICLE 37 ON TRADE WITHIN THE EEC

A fundamental controversy over the application of Article 37 is whether its provisions mandate the eventual elimination of state trading within the EEC. However desirable this result may be on policy grounds, it must be noted that the explicit language of the Article calls merely for the “progressive adjustment” state trading to eliminate discrimination and not the abolition of state commercial monopolies. Politically, it also seems unlikely that France, Germany and Italy would

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<sup>97</sup> *Id.* at 977.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 987.

<sup>100</sup> *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

<sup>101</sup> *Id.* at 662, [1979] 3 Comm. Mkt. L.R. at 508.



have agreed to abolish important sectors of their economies at the time of the EEC Treaty.

Commentators unhappy with the scope of Article 37 have suggested greater reliance on the stricter provisions of Articles 30 through 36 in enforcement efforts.<sup>102</sup> The ultimate question raised by Article 37 is whether discriminatory practices can be eliminated without altering the structure of state trading enterprises. The ECJ has never addressed this question directly, nor has the Court been entirely consistent as to what practices are permissible.

The Court, instead, has removed almost all the economic incentives for state trading, without ruling these enterprises out of existence. Although the final decision to abolish a particular state commercial monopoly has been left to the national legislatures, the court's manner of interpreting the language of Article 37 has left itself open to the charge that its rulings have gone beyond the literal language of the treaty. Eliminating exclusive rights of importation was interpreted as a signal of the end of state trading itself.<sup>103</sup>

The Court has also demonstrated its willingness to use Article 37 to judge more subtle, less facial forms of discrimination effected through state trading. The holdings in *Miritz*<sup>104</sup> and *Hansen*<sup>105</sup> inquired deeply into the actual performance of the German alcohol market. The German alcohol monopoly could not structure that market as it wished since the Court's blocking of the tax initiatives eliminated a major source of revenue needed to pay the subsidies to German farmers. These holdings took away both the incentive and the means for the state monopoly to continue to function as a true state trading enterprise, judicially transforming it into a mere distributor for domestically produced spirits.

The Court now uses Article 37 as the framework to judge all forms of state commercial monopolies within the EEC, regardless of whether they produce effects covered by other treaty provisions. Since the ECJ has focused on the practices of these enterprises rather than prohibiting them outright, the Court need not worry about all forms of state trading equally. The distortions caused by state trading vary with the goals and market power of the governments involved. Recognizing that state

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<sup>102</sup> See Note, *Recent Case Law on Article 37 EEC*, 17 COMM. MKT. L. REV. 251 (1980); Wyatt, *New Light on Article 37*, 1 EUR. L. REV. 307 (1976).

<sup>103</sup> *Amaducci & Appfel, L'Affaire Manghera: Vers la Fin des Monopoles des Tabacs Manufactures?*, 19 REVUE DU MARCHÉ COMMUN 427 (1976).

<sup>104</sup> *Hauptzollamt Gottingen v. Miritz*, [1976] E. Comm. Ct. J. Rep. 217.

<sup>105</sup> *Hansen GmbH and Co. v. Hauptzollamt Flensburg*, [1979] E. Comm. Ct. J. Rep. 935, [1980] 1 Comm. Mkt. L.R. 162.

trading appears in many forms, the ECJ has applied two different standards in judging state trading practices.

The Court's strongest stance has been its outright ban on exclusive importation rights.<sup>106</sup> In contrast, state trading used to subsidize national industries has been treated less harshly and is prohibited only on a showing of actual discrimination against the trade of Member States.<sup>107</sup> The consequences of these two different uses of state trading are distinctive enough to justify a dual standard. The quantitative restrictions resulting from exclusive rights are nearly universally condemned because of the increase in price and accompanying decrease in welfare surplus derived from the imposition of quotas.<sup>108</sup> On the other hand, subsidies produce effects of a more indeterminate nature, not necessarily detrimental, depending on whether savings are passed along to consumers.<sup>109</sup> Compared to quotas, the pernicious effect of subsidies rests more on the priorities of the critic, who must balance the interests of trading partners against a domestic government's need to address national problems. To apply an outright ban to subsidies unduly limits a government's ability to address genuine needs, whether it be regional development or economic stabilization.<sup>110</sup>

The European Court of Justice has generally been consistent in adhering to a two tier standard for judging state commercial monopolies. In judging practices other than direct import restrictions, the Court has searched for some showing of actual discrimination against the trade of other Community nations. *Peureux II*<sup>111</sup> continues the absolute ban on explicit import restrictions, while in other recent cases the Court still permits the State to pursue policies through state trading that encourage imports from other EEC states.<sup>112</sup> These cases suggest that future taxation schemes will be overturned under Article 37 only if the taxes tend to discourage the importation or marketing of Commu-

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<sup>106</sup> *Pubblico Ministero v. Manghera*, [1976] E. Comm. Ct. J. Rep. 91, [1976] 1 Comm. Mkt. L.R. 557.

<sup>107</sup> *Rewe v. Hauptzollamt Landau*, [1976] E. Comm. Ct. J. Rep. 181, [1976] 2 Comm. Mkt. L.R. 1.

<sup>108</sup> C. KINDLEBERGER & P. LINDERT, *supra* note 12, at 518.

<sup>109</sup> J. JACKSON, *supra* note 1, at 442.

<sup>110</sup> Different standards in judging quantitative restrictions and subsidies are used throughout the EEC Treaty, note 3 *supra*. Compare EEC Treaty Articles 30-34 with EEC Treaty Articles 92-94.

<sup>111</sup> *S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saone et du Territoire de Belfort*, [1979] E. Comm. Ct. J. Rep. 975.

<sup>112</sup> *S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saone et du Territoire de Belfort (Peureux I)*, [1979] E. Comm. Ct. J. Rep. 897, [1980] 3 Comm. Mkt. L.R. 337.

nity products.<sup>113</sup>

The Court deviated considerably from this standard in *Cassis de Dijon*.<sup>114</sup> A complete ban on the importation of certain liqueurs was sustained as falling outside the commercial nature of monopolies addressed in Article 37.<sup>115</sup> Yet it would seem that an outright ban of a competitive alcoholic beverage in a state trading industry would be an exercise of commercial decision making. A statute's alleged usefulness as a health measure is but one factor in evaluating the necessity of resorting to quantitative restrictions. The burdens of intra-Community trade must be weighed against the putative public health value of such a measure.<sup>116</sup>

Overall, the decisions of the ECJ, along with the administrative actions of the European Commission<sup>117</sup> have had the effect of eliminating outright a number of state trading industries. Unlike the Court, the Commission has expressed its preference for the outright abolition of state trading in relation to other EEC states.<sup>118</sup> The Commission's 1971 Report on Competition Policy reported the actual or promised abolition of Italy's commercial monopolies on salt, cigarette papers, flints and lighters, as well as France's monopolies on matches and certain fertilizers.<sup>119</sup> Most recently, the Italian government, in response to longstanding Commission urgings, abolished the state monopoly on

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<sup>113</sup> Hansen GmbH and Co. v. Hauptzollamt Flensburg, [1979] E. Comm. Ct. J. Rep. 935, [1980] 3 Comm. Mkt. L.R. 162; Hauptzollamt Gottingen v. Miritz, [1976] E. Comm. Ct. J. Rep. 217; Rewe v. Hauptzollamt Landau, [1976] E. Comm. Ct. J. Rep. 181, [1976] 2 Comm. Mkt. L.R. 1.

<sup>114</sup> Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein, [1979] E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

<sup>115</sup> *Id.*, at 662, [1979] 3 Comm. Mkt. L.R. at 508.

<sup>116</sup> Such a balancing is routinely undertaken in United States constitutional law in judging state laws based on health grounds under the Commerce Clause. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *Cf. Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966) (overturning Tennessee's labeling and licensing requirements for out of state meat as unduly burdensome and discriminatory to interstate and foreign commerce).

<sup>117</sup> The European Commission is the executive body of the EEC. Its powers are derived from numerous places in the EEC Treaty. It is most analogous in its authority to the Federal Trade Commission in the United States. Article 37(6) gives the Commission advisory powers with respect to the Member States' obligation to adjust their state monopolies of a commercial nature. Article 169 authorizes the Commission to bring compliance actions in the European Court of Justice. *See generally*, E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 38-42 (1976).

<sup>118</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, *THIRD REPORT ON COMPETITION POLICY* 103 (1974).

<sup>119</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, *FIRST REPORT ON COMPETITION POLICY* 152 (1972).

saccharin and artificial sweeteners.<sup>120</sup>

The Commission enthusiastically reported in 1976 that "as a result of the Commission's action, almost all monopolies have been eliminated throughout the Community."<sup>121</sup> In light of the continuing activity of the ECJ in regard to Article 37, this is certainly an overstatement. Today, the Commission and Court are still embroiled in enforcement actions directed against the French tobacco, alcohol and petroleum monopolies, and the Italian match and tobacco monopolies,<sup>122</sup> and the problems caused by the accession of state-trading countries into the Communities.<sup>123</sup>

## VI. TOWARDS A GATT CODE ON STATE TRADING

In view of the overall success of Article 37 in limiting the discretion inherent in state commercial monopolies, it is surprising that Article 37 has never been suggested as a basis for regulations of wider application. Even excluding questions of East-West trade, state trading monopolies still play a significant role in the economies of the industrialized and lesser developed countries belonging to GATT.<sup>124</sup>

The need for addressing this problem is twofold. First, the infrequent application of GATT Article XVII has deprived it of any major impact on the present contracting parties to GATT. Second, any further expansion of GATT to include socialist economies must find some mechanism that will allow market and planned economies to trade on competitive terms. Without such an accommodation, any further expansion of East-West trade will be shortlived.

However, it would be simplistic to argue that GATT can immediately benefit from a wholesale borrowing of the EEC standards for limiting state trading monopolies. It is important to realize that the relative ineffectiveness of Article XVII is not merely the product of its language, but the nature of GATT. Unlike the EEC, GATT has an

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<sup>120</sup> 13 BULL. EUR. COMM. (No. 3) 32 (1980).

<sup>121</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 137 (1977).

<sup>122</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 127-30 (1980). See, e.g., French Tobacco Monopoly Revises Distribution, Press Release from the Commission of the European Communities, No. IP (80) 106, Brussels, April 30, 1980, reprinted in, 3 COMM. MKT. REP. (CCH) ¶ 10,222 (May 28, 1980).

<sup>123</sup> Jalles, *State Monopolies of a Commercial Character (Article 37 of EEC Treaty) and their Importance in Connection with Portugal's Accession to the European Communities*, 10 GA. J. INT'L & COMP. L. 411 (1980).

<sup>124</sup> M. CAMPS, THE CASE FOR A NEW GLOBAL TRADE ORGANIZATION 57 (Council on Foreign Relations 1980). See also D. GHAI, CURRENT PROBLEMS OF ECONOMIC INTEGRATION (United Nations 1973).

extremely large membership composed of nations separated by geography, levels of development, and type of economy.<sup>125</sup> Since GATT does not have a well developed executive or enforcement arm, consultation and unanimous action, rather than majority vote, are required for effective decision making. This view of GATT is an equally plausible explanation of the failings of Article XVII apart from the weakness of the substantive law being applied.

The weakness of GATT as an institution is reflected in the nature of agreements, or side codes, produced in the 1979 Tokyo Round of negotiations.<sup>126</sup> The codes created a new set of consultation measures and procedures for unilateral actions by code signatories,<sup>127</sup> but created few new positive obligations. The negotiation of a comprehensive side code to limit state trading with enforceable new obligations would represent a step that GATT has so far been unwilling to take.

The dispute resolution code of the Tokyo Round may be a key accomplishment in this regard.<sup>128</sup> The establishment of a well-defined

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<sup>125</sup> The failure of an International Trade Organization to come into existence has left GATT as a treaty without a highly developed institutional structure to implement the substantive obligations agreed to by the parties. In contrast, the EEC Treaty itself sets forth the functions of an executive, judiciary, and to a lesser extent, a legislative branch. See generally Thompson, *Symposium on the European Economic Community—An Introduction*, 3 NW. J. INT'L L. & BUS. 287 (1981).

<sup>126</sup> The side code has replaced actual amendment of GATT because of the practical difficulties of the amendment process governed by GATT Article XXX which requires two-thirds, and sometimes unanimous, approval. Further, any amendments that are approved are binding only against those contracting parties accepting them. See Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 L. & POL. INT'L BUS. 21 (1980).

<sup>127</sup> The Tokyo Round produced five codes:

- 1) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, GATT Doc. MTN/NTM/W/299/Rev. 1 reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, pt. 1, 96th Cong., 1st Sess. 7 (1979) (Customs Valuation Code);
- 2) Agreement on Government Procurement, done Apr. 11, 1979, GATT Doc. MTN/NTM/W/211/Rev. 2, reprinted in H.R. Doc. No. 153, supra, at 69;
- 3) Agreement on Technical Barriers to Trade, done March 29, 1979, GATT Doc. MTN/NTM/W/192/Rev. 5, reprinted in H.R. Doc. No. 153, supra, at 211;
- 4) Agreement on Implementation and Application of Articles VI, XVI and XXIII of the General Agreements on Tariffs and Trade, done Apr. 12, 1979, GATT Doc. MTN/NTM/W/236, reprinted in H.R. Doc. No. 153, supra, at 259 (Subsidies Code);
- 5) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done Apr. 9, 1979, reprinted in H.R. Doc. No. 153, supra, at 311 (International Antidumping Code).

For a discussion of the agreements themselves and their expected impact on international trade, see deKieffer, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*, 2 NW. J. INT'L L. & BUS. 901 (1981); *Symposium on the Multilateral Trade Agreements* (pt. 1-2), 11 L. & POL'Y INT'L BUS. 1257-1526 (1979), 12 L. & POL'Y INT'L BUS. 1-334 (1979); (Symposium) 13 CORNELL INT'L L.J. 145-290 (1980).

<sup>128</sup> See deKieffer, note 127 supra.

mechanism for the resolution of disputes between contracting parties is a vital step in the evolution of a jurisprudence for GATT which would permit judicial rather than political solutions to disagreements where national interests are at stake. Significantly, the creation of this dispute resolution code comes at a time when contracting parties are increasingly unable to reconcile their differences through conciliation.<sup>129</sup> The growth of a formal dispute resolution system within GATT holds out the possibility of the enforcement of judicial standards in decision making, and hence the promise of fashioning a comprehensive state trading code.

However, one commentator has already concluded that GATT Article XVII, alone, would be an insufficient foundation for such a code.<sup>130</sup> An alternative to the drafting of entirely new standards and interpretations for such a code is the incorporation of the language and doctrine of Article 37. The seeds for a state trading code are contained in the positive obligation of Article 37(1) to adjust state monopolies to prevent discrimination, replacing the murky and ineffective standards of Article XVII.

In addition to strengthening the requirements of GATT in this area, the dual standards used in interpreting the language of Article 37 seem suitable to the needs of GATT. The deference given to the use of state trading to implement subsidies would sidestep what has been a major divisive issue for the contracting parties.<sup>131</sup> At the same time, such a code would continue to emphasize GATT's prohibition on the use of quotas.<sup>132</sup>

The narrow scope of Article 37 suggests a greater acceptance and implementation compared to the current broad but fuzzy provisions

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<sup>129</sup> See *GATT Asked to Settle 13 Trade Disputes in '80*, Wall St. J., April 23, 1981, at 26.

<sup>130</sup> M. CAMPS, note 124 *supra*.

<sup>131</sup> The issue of subsidies is a diplomatically sensitive one since they invariably involve foreign governmental action. The contracting parties of GATT have been particularly split on this issue between the industrialized and the lesser developed nations. Amendments to GATT Article XVI added obligations against using an export subsidy on primary products which results in obtaining more than "an equitable share of world export trade in that product . . ." and prohibited subsidies on the export of non-primary products which result in an export price lower than the comparable price of like goods which are not exported. The lesser developed countries objected to the distinction between primary and non-primary goods, thereby working to the detriment of economies dependent upon the export of raw commodities. To date, the amendments to Article XVI have been accepted, and are binding upon, the industrialized nations within GATT. J. JACKSON, *supra* note 1, at 754-56.

<sup>132</sup> Compare GATT Article XI with GATT Articles VI and XVI. Article XI is a general prohibition on the use of quantitative restrictions for both imports and exports. Articles VI and XVI prohibit only export subsidies, and deal with the problem by authorizing countervailing duties as a response for injured contracting parties.

governing state trading. The limitation of Article 37 to state commercial monopolies provides sufficient precision for use in dispute resolution, a major failing of Article XVII of GATT.<sup>133</sup> The focus on commercial activity would preclude regulation of politically sensitive monopolies used for strategic and fiscal purposes.

A GATT code on state trading would direct enforcement efforts towards the other substantive obligations, which may be impaired through the widespread use of state trading. A state trading code would also be the beginning of a path towards a mechanism for fruitful trade between market and planned economies, each based on divergent and seemingly irreconcilable premises.

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<sup>133</sup> See notes 47-53 and accompanying text *supra*.

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