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Panel Discussion: Europe 1992

Eric Stein

University of Michigan Law School

Jochen A. Frowein

Max-Planck Institute for Comparative Public and International Law

Jacques J.H.J. Bourgeois

College of Europe

Edwin Vermulst

Reinhard Quick

European Council of the Federations of Chemical Industry

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PANEL DISCUSSION: EUROPE 1992*

ERIC STEIN:

I have been given the honor of moderating the discussion of this distinguished panel representing three decades of the European alumni of the Michigan Law School and four discrete legal career areas. The credit for organizing the panel goes to my colleague Professor Joseph Weiler. I shall limit myself to a few more or less frivolous introductory remarks concerning the Single European Act which forms the central legal underpinning for the project "Europe 1992."

Your diplomats and politicians have presented us with a bizarre creature: in front it is a treaty among the twelve member states amending the three constituent Community treaties, and the tail is a treaty among the so-called High Contracting Parties, legalizing a secret, incestuous operation among diplomats.

In a more serious vein, there are at least two ways to look at this conundrum: as the pathetic debris from the ambitious Spinelli draft treaty for a European Union approved by the European Parliament — or, one may take a more benign view and look at the Act as a clever, logical next step according to Jean Monnet's recipe for progressive integration: fix specific, albeit limited, goals with definite deadlines which everyone agrees are necessary, and add only such institutional modifications that everyone agrees are indispensable to achieve these goals. In due course this will lead to another inherently untenable situation which will again force a step in the right direction.

I shall now call on our first panelist, Professor Jochen A. Frowein. Professor Frowein, M.C.L. 1958, has had a distinguished academic career in Germany; he returned to Michigan as a visiting professor and Cooley lecturer, and is presently Director of the Max-Planck Institute for Comparative Public and International law in Heidelberg, Federal Republic of Germany, and Vice-President of the European Commission of Human Rights. As the first speaker, he shall present the broadest perspective of the impact of the 1992 project, that is, its impact on the European constitutional structure.

* This panel discussion was organized in conjunction with a two-day reunion of the European alumni of the University of Michigan Law School. The panel took place in Villa Schifanoia San Domenico Li Fiezoie, (Florence), Italy, on May 19, 1989.

1992 AND THE DEVELOPMENT OF EUROPEAN CONSTITUTIONAL STRUCTURES

JOCHEN A. FROWEIN

1. *Europe Has a Constitution*

a) The constitutional nature of the basic treaties constituting the European Community has always been stressed by Eric Stein. In many important research projects he has compared the system established by the European Community with the constitutional structure of the United States.¹

The economic freedoms enshrined in the Community have created a zone of constitutionally-protected economic liberty. This is of course not a laissez-faire system, but rather a system modeled along the lines of neo-liberal economic theory which became so prominent after the second world war.²

The Single Act has added to the constitutional dimension of the EEC-system. The system of cooperation with the Parliament can be seen as a first step towards democratic legitimacy within the EEC.³

b) The European Convention on Human Rights has set up a system through which common standards for the protection of human rights and fundamental freedoms are being developed within the wider system of the Council of Europe. The impact of the case-law by the Commission and Court can be seen increasingly as a second pillar of European integration.⁴ Although formally separated, there are many informal links between the two systems of integration.

2. *Europe Has No Constitution*

a) Although the success story of the European Community cannot be doubted, Europe still has no coherent system for reacting in a re-

1. 2 COURTS AND FREE MARKETS (T. Sandalow & E. Stein eds. 1982).

2. See E.J. MESTMÄCKER, *EUROPÄISCHES WETTBEWERBSRECHT* 13-16 (1974).

3. The problem of democratic legitimacy has been one of the key issues for the Community system since 1969-70. See Commission of the European Communities, *Report of the Working Party Examining the Problem of the Enlargement of the Powers of the European Parliament: Report Vedel*, BULL. EUR. COMMUNITY, Supp. 4/72 (1972); Herzog, *Zur Legitimation der Willensbildung in den Gemeinschaften*, in 22 *DIE INSTITUTIONELLE ENTWICKLUNG DER EUROPÄISCHEN GEMEINSCHAFTEN IN DEN SIEBZIGER JAHREN, KÖLNER SCHRIFTEN ZUM EUROPARECHT* 35 (1973); Sautter, *Legitimation der Willensbildung in den Europäischen Gemeinschaften und politische Tradition in Frankreich*, in 22 *DIE INSTITUTIONELLE ENTWICKLUNG DER EUROPÄISCHEN GEMEINSCHAFTEN*, *supra*, at 47; Sasse, *Die institutionelle Fortentwicklung der Gemeinschaften*, in 22 *DIE INSTITUTIONELLE ENTWICKLUNG DER EUROPÄISCHEN GEMEINSCHAFTEN*, *supra*, at 61; Frowein, *Zur institutionellen Fortentwicklung der Gemeinschaft*, in 22 *DIE INSTITUTIONELLE ENTWICKLUNG DER EUROPÄISCHEN GEMEINSCHAFTEN*, *supra*, at 83.

4. Frowein, *European Integration through Fundamental Rights*, 18 *MICH. J. L. REFORM* 5-27 (1984).

sponsible manner to European challenges. There is fragmentation in many areas and a European consensus cannot, or can only with great difficulties, be found.⁵

b) There is still no European foreign policy. The development of the European Political Cooperation ("EPC") from a communiqué-based informal structure into a treaty system represents considerable progress. However, foreign policy is still mainly directed by national interests and by national policy makers.⁶

c) There is no European currency and there are no European fiscal powers, although there is considerable debate about the need for a common currency and a united reserve system. The present structure is certainly far from appropriate.⁷

d) There is no constitutional consensus on how Europe should be covered geographically. It is unclear whether Austria could join the EC-system; Switzerland will most likely stay apart from it.⁸ The developments within Eastern Europe may become of great importance for the European constitutional structures.

3. 1992 — *New Trends and Tendencies*

a) There are clear tendencies towards a more perfect union with constitutional underpinnings. The internal market in itself may only be seen as the perfection of the original aims which could not be fully implemented. However, the complete abolition of border controls will have an effect on security cooperation in the widest sense.⁹ The new activities by the Commission in the area of broadcasting and television show how far the EEC may affect the cultural structure in member states.¹⁰

b) There are also clear counter-tendencies. The EEC activities in the area of culture have met with very strong opposition from all the German States (Länder) regardless of their political orientation.¹¹ It is

5. The defense issue probably will again become crucial in this context.

6. See Stein & Henkin, *Towards a European Foreign Policy?*, in 1 *INTEGRATION THROUGH LAW* 3 (Cappelletti, Seccombe & Weiler eds. 1986); Frowein, *Die vertragliche Grundlage der Europäischen Politischen Zusammenarbeit (EPZ) in der Einheitlichen Europäischen Akte*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION* 247 (1987).

7. *Der Delors-Bericht vom April 1989*, 44 *EUROPA ARCHIV* D283 (1989).

8. Austria has formally submitted its application to become a member in July 1989.

9. The implementation of the Schengen Agreement between France, the Federal Republic of Germany and the Benelux countries concerning border controls has run into difficulties because of the need for a system of police cooperation.

10. The proposal for a Directive is before the European Parliament.

11. Very typical in this context is the article by a Bavarian Minister of State, Edmund Stoiber, *Auswirkungen der Entwicklung Europas zur Rechtsgemeinschaft auf die Länder der Bundesrepublik Deutschland*, 42 *EUROPA ARCHIV* 543 (1987).

rather alarming that the Federal Statute giving consent to the Single European Act has created a right for the Federal Council, which is composed of the representatives of the States, to issue findings contrary to the Federal Government in the area of integration.¹² Although an escape clause for cases where urgent needs of foreign policy or integration policy can be claimed by the Federal Government was accepted, the idea that the Federal Council can formally bind the Federal Government is not in line with the constitutional structure and shows a strong counter-tendency against integration.

Another important counter-tendency develops from the model of the "European House." Although Gorbachev may not have great influence on European integration, the developments in Poland and Hungary certainly do. The possibility that we could have liberal democracies with a mixed Marxist economy in Eastern Europe could change European constitutional structures considerably. The German question cannot be separated from that possibility. It may be that this counter-tendency against integration will become more important in the near future.¹³

4. *Prospects*

Where can one see prospects? Will the European Parliament's influence over European politics grow? This does not seem to be clear as yet. The elections for the European Parliament, which will be held next month (in June, 1989) may again be disappointing in many respects.¹⁴

However, there is no other way than to create a European consensus except through a parliamentary process. The governmental structures alone are certainly not sufficient. We will see whether the activity concerning the new Declaration on Fundamental Rights and Freedoms of the European Parliament will contribute to that development.¹⁵

"Europe" already belongs to the constitutional structure of all the

12. According to article 2 of this law, the Federal Council must give advice (Stellungnahme), and its advice is binding on the Federal Government except for compelling foreign policy or integration policy reasons.

13. The creation of the European Community is one of the great achievements of the period when East-West tensions in Europe were high. It is only natural that a new perspective would arise if free systems would be established in Eastern Europe. Specific methods of association of these countries with the EC could then become realistic options.

14. They were disappointing because no European decision could be deduced from the result. This will remain the situation as long as there are no real issues on which parties will compete for the European elections.

15. European Parliament Resolution adopting Declaration of Fundamental Rights and Freedoms, 32 O.J. EUR. COMM. (No. C 120) 51 (1989).

member states of the Community, and to a lesser extent to those belonging to the system of the European Convention on Human Rights.¹⁶ This is a success which, in spite of all problems raised here, should not be forgotten. National courts apply European law; national civil servants meet their colleagues within the Brussels or Strasbourg system, national decision makers have to take the European constitutional framework into account wherever they discuss policy decisions.

It is with great satisfaction that we celebrate here the work of Eric Stein who has accompanied the development of a constitutional framework for a federal-type structure in Europe from the very beginning.

E. STEIN:

Thank you, Jochen, for your thoughtful comment. Our next speaker is Jacques J.H.J. Bourgeois, who was trained first in Belgium. He attended Michigan in 1959-60 and later returned as a Visiting Professor. Thereafter, Jacques has embarked on a most successful career at the Commission of the European Communities, first as an attorney in the Legal Services of the Commission, then in an executive position dealing with financial affairs, only to return to the Legal Services as the Principal Legal Adviser concerned first with foreign affairs of the Community and now with its competition policy. He is also a professor at the College of Europe in Bruges, Belgium, and author of a number of articles on Community Law. He will tell us what "Europe 1992" will mean for non-members of the European Community, the so-called "third countries" such as the United States.

MARKET ACCESS FOR NON-EC GOODS AND BUSINESSES AFTER 1992

JACQUES BOURGEOIS

The question that I would like to address is a fairly simple one. It has been very much in the minds of businessmen, lawyers, and policy makers outside the European Community: will the EC's internal market, when it is completely realized by January 1, 1993, entail for business and people outside that internal market more disadvantages than benefits? In other words, as the press has coined it, will the EC turn itself into a "fortress Europe?" Edwin Vermulst will deal with the

16. Frowein, *Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß*, 18 *EUROPARECHT* 301, 315-17 (1983); Frowein, *The European Community and the Requirement of a Republican Form of Government*, 82 *MICH. L. REV.* 1311, 1321 (1984) (Festschrift in Honor of Eric Stein).

possible implications of the internal market for trade policy. I would like to touch briefly on two points: market access for goods and market access for businesses. They are related to, but different from, trade policy proper. To put matters in perspective, it may be useful to start with a more general comment.

What is happening in the European Community is not just twelve countries building up a customs union. What is emerging is what, for lack of better words, could be called a pre-federation or a confederation, with some sort of government of the union to which these twelve states have granted powers. This results from, and in, what one could call a constitution. In legal terms this is, of course, not new. Jochen Frowein has pointed out that it was there from the very beginning. European integration has, however, acquired a new momentum that makes politically feasible what was already legally possible. This new momentum results from, and is expressed in, the amendments to the European Community's constitution called the Single European Act (but "what's in a name?") and a political program "Europe 1992." While it is giving rise to enthusiasm throughout the European Community ("Europessimism" and "Eurosclerosis" are completely "dépassés"), in third countries it is giving rise to concerns. What these third countries overlook in legal debates about Europe '92 is that the European Community is not a mere customs union. Such an oversight is understandable since it sometimes tends to be overlooked by certain governments in the European Community as well. It implies from a legal point of view, to put it simply, that this entity, relying on the powers that have been transferred to it, is working out and conducting external economic policies that are replacing the external economic policies of the Member States; to that extent the European Community's external economic policies are to be considered in the same way as the external economic policies of, say, Australia, Canada, or the United States of America.

The Australian, Canadian, and U.S. external economic policies cannot be seen as a set of agreements between the provinces and the states that constitute these federations. Likewise, in European Community constitutional law terms, the European Community's common external policies cannot be seen as a set of agreements among its Member States. In international relations this is, of course, fully accepted when Canada, Australia and the United States are concerned. I submit that when dealing with the European Community — even the USSR has now realized that it can no longer be avoided — other states are bound to treat it as an entity. This has certain implications because how the European Community regulates matters in its domestic

sphere is then no less relevant for other states as how Australia, Canada, and the United States regulate matters in their domestic sphere. One of the implications is that, for matters taken over by the European Community, an international obligation not to discriminate is transferred from the Member States to the European Community. This means concretely, *e.g.*, that a possible Most Favored Nation ("MFN") obligation of France to extend its treatment for tax purposes of German companies to other foreign companies becomes an MFN obligation of the European Community and acquires another dimension: the obligation of the European Community to extend the treatment for tax purposes of Swiss companies in the European Community to other foreign companies. The treatment of German companies in France becomes irrelevant, in the same way as the treatment for tax purposes of a New York company in Florida is irrelevant for the U.S.'s MFN obligations with respect to a French company. This principle is widely accepted in the trade field under the customs union exception of article XXIV of the General Agreement on Tariffs and Trade. I submit that it is also valid in other fields, in particular where states establish forms of economic integration that are more ambitious than mere customs unions.

Access for Goods

My first comments concern the access to the EC market for goods, or, to put it another way, the right to sell goods. Will the right to sell goods throughout the European Community be different if the goods originate outside the European Community? Articles 9 and 10 of the EEC Treaty establish the principle that once goods originating in a foreign country have been put into free circulation in one European Community Member State, those goods are assimilated to European Community goods for the purposes of free circulation in intra-Community trade. It means that a U.S. product entering the European Community via, say, Rotterdam, and paying the usual customs duties, is thus in free circulation in the Netherlands and benefits from the same rights to move throughout the European Community as a product originating in the Netherlands. According to the text of the EEC Treaty, no customs, duties nor charges having equivalent effect, and no quantitative restrictions, nor measures having equivalent effect, may be applied to that U.S. product in intra-Community trade.

An interesting question has arisen: to what extent is the assimilation of foreign products also valid for other Treaty rules?

One could think that this is an esoteric legal issue, typical of the EC, providing evidence that the EC is less than a perfect customs

union. It is not. It was in 1976, not in 1878, that, in *Michelin Tires Corporation v. Wages*,¹⁷ the United States Supreme Court found itself still dealing with the question whether a state could lawfully impose a discriminatory tax on tires originating in Canada and imported into the United States through another state. If such issues still arise in a mature federation such as the United States, it is not surprising that they would arise from the establishment of the EC's internal market. In light of the concerns of third countries, the relevant question is how Community law deals with the broader issue of market access of foreign products. Two brief remarks may be useful in indicating at least the general approach.

The first remark relates to taxation of foreign goods. The Court of Justice has quite recently broadened the assimilation of foreign products entering the Community to genuine Community products with respect to discriminatory sales taxes. In *Cooperative Co-Frutta*¹⁸ the question was whether Italy could lawfully levy a consumption tax on Columbian bananas that had entered one Member State, Italy, after having been imported previously to another Member State. Having found that the Italian consumption tax was not a charge having an effect equivalent to a customs duty (in which case it would have been prohibited under the clear wording of EEC article 13 *junctis* articles 9 and 10), the Court held that it constituted internal taxation within the meaning of article 95 of the EEC Treaty. It then went on to say that, under that article, Member States cannot remain free to charge discriminatory taxes on products originating in a third country that are in free circulation in the European Community. The Court rested this interpretation of article 95 not only on "the spirit of the Treaty expressed in articles 9 and 10 and . . . the system of the Treaty,"¹⁹ but also on the ground that "[c]ommercial policy with regard to non-member countries falls within the exclusive competence of the Community."²⁰ This is interestingly reminiscent of the U.S. Supreme Court's reasoning in *Michelin Tires*.

The second remark relates to the impact of intra-Community trade rules on market access of foreign goods. As interpreted by the Court, the prohibition of Member States' measures having an effect equivalent to quantitative restrictions in intra-Community trade (EEC article 30) refers to "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or po-

17. 423 U.S. 276 (1976).

18. *Cooperative Co-Frutta v. Amministrazione delle Finanze dello Stato*, 1987 E.C.R. 2085.

19. *Id.* at 2112.

20. *Id.* at 2112.

tentially, intra-Community trade.”²¹ Even when taking account of the exceptions of article 36 and other EEC Treaty provisions, along with the rule of reason in *Dassonville* and a series of subsequent judgments, article 30 has become a sort of EC interstate commerce clause with far-reaching implications. The question has arisen whether this prohibition has the same scope or effect or whether it applies to all matters where third-country goods in intra-Community trade are concerned, once they have been put in free circulation in one of the EC Member States.

There is no doubt that the assimilation of such third-country goods to goods originating in the EC applies where more or less classical measures of equivalent effect would be applied by a Member State, e.g., as in the case of Ireland imposing an import licensing system on potatoes originating in Cyprus but in free circulation in the United Kingdom.²² Whether this is also the case under the extensive interpretation of the EC interstate commerce clause is unclear. Some doubts are possible in light of earlier opinions of the Court. In the *EMI/CBS* cases,²³ dealing with Member States’ trade-mark legislation, the Court seems to have distinguished between, on the one hand, products bearing a mark applied in a third country, put into free circulation in a Member State and, on the other hand, products bearing a trade mark applied in a Member State. Two views are possible.

According to one view, the prohibition of measures having equivalent effect in intra-Community trade should not apply equally to goods originating in third countries and goods originating in the EC. This is particularly the case under the *Cassis de Dijon* doctrine, which provides that a product lawfully produced and marketed in one Member State must be accepted by another Member State even when it does not meet the requirements of the latter Member State’s legislation, unless that legislation amounts to “mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”²⁴ This doctrine is a product of the EC’s constitution, is based on the underlying solidarity between Member States, and is justified by the automatic reciprocity which is inherent to the EC’s constitution. The Federal Republic of Germany is bound to accept *Cassis de Dijon* lawfully manufactured in France according to French quality rules, simply because the Federal Republic

21. Procureur du Roi v. Dassonville, 1974 E.C.R. 837.

22. Commission v. Ireland, 1985 E.C.R. 1761.

23. EMI Records Ltd. v. CBS United Kingdom Ltd., 1976 E.C.R. 811.

24. Rewe-Zentral AG v. Bundesmonopolverwaltung Fur Braantwein, 1979 E.C.R. 649.

of Germany can expect and claim that its products, lawfully produced and marketed in Germany, will likewise be accepted by France under the conditions of the *Cassis de Dijon*²⁵ doctrine.

The other view relies on the text of articles 9 and 10 of the EEC Treaty and holds that products originating in third countries that have paid the price to enter the EC market, *i.e.*, the customs duty, have to be assimilated to EC goods. If they are lawfully marketed in the Member state of importation, which implies that they meet the quality rules of that Member State, there is no objective reason to deny them the benefit of the *Cassis de Dijon* doctrine. Surprisingly, this issue has not yet arisen in Court proceedings. The Commission has yet to take a position on it.

If the second view prevails, the decisive factor may well be the removal of internal frontiers by December 31, 1992, rather than the interests of foreign manufacturers and the increase in competition. In that event, the establishment of a genuine EC internal market will not be to the sole benefit of EC business and people. Foreign manufacturers will have the opportunity to produce for, and to sell in, that market under the same rules as EC manufacturers. In order to have access to the EC's internal market, foreign manufacturers will, of course, still have to clear the EC's border and will be subject to the EC's external trade policy measures, just as EC manufacturers exporting to foreign markets.

Establishment and Services

My second comment concerns access to the EC's internal market with respect to establishment and services. It is prompted by the concerns voiced in particular by the U.S. Government and American business about the EC Commission's February 1988 proposal for a second piece of legislation on banking and financial services.²⁶ It should be recalled that pursuant to one of the provisions of the EEC Treaty²⁷ a subsidiary of a non-EC company is to be treated as any EC company when it wants to establish a subsidiary in another Member state, provided that the first subsidiary is incorporated in a Member State and has its registered office, its principal place of business, or its central administration there. The same rule applies when such a sub-

25. *Rewe-Zentral AG v. Bundesmonopolverwaltung Für Braantwein*, 1979 E.C.R. 649.

26. *Proposal for a Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions amending Directive 77/780/EEC*, 31 O.J. EUR. COMM. (No. C 84) 1 (1988).

27. Treaty Establishing the European Economic Community, art. 58, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11, 15.

subsidiary of a non-EC company wants to provide services in another Member State.²⁸ In other words, once a subsidiary of a Swiss bank is incorporated in France and has its registered office, its principal place of business or its central administration in France, it enjoys, under article 58 of the EEC Treaty, the same treatment as a French bank for the purposes of providing services in Germany or for the purposes of establishing another subsidiary in Germany. The other Member State may not subject the provision of services or the establishment of a second subsidiary to any additional condition on the ground that the first subsidiary is foreign owned. This interpretation of article 58 by the EC Commission was contested in the early days by France. France took the view that article 58 applies only to "genuine" EC subsidiaries: in other words, subsidiaries that are wholly owned by non-EC shareholders or that are managed entirely by non-EC citizens do not come within the scope of article 58, and a Member State, say, France, is not bound to treat such subsidiaries which are established, say, in the Federal Republic of Germany, as German companies. The EC Commission even started court proceedings against France over the French regime on direct foreign investment,²⁹ which was inconsistent with article 58 as interpreted by the EC Commission. The proceedings were dropped in view of certain amendments to the French regime. It will not surprise anybody in this room that this particular issue of Community law was analyzed already in 1968 by the Michigan Law Review.³⁰

It was against this background that the Commission put forward, in February 1988, a proposal for a second directive, the so-called Second Banking Directive, to provide common rules on the establishment of financial institutions and the provision of financial services. These common rules are designed to harmonize the rules of operation so that the right of, say, a German financial institution to establish a subsidiary, say, in France, and its right to provide services in France, could be fully exercised. On that occasion, the question arose, again, whether the opening of the market should benefit third-country banks in the same fashion as it would benefit EC banks. The Commission maintained its position and its interpretation of article 58: article 58 entitles a subsidiary of a foreign bank, once incorporated in one Member State, under one of the conditions of article 58, to have access to the entire EC market under the conditions of the draft directive as any

28. *Id.* art. 66.

29. *Commission v. French Republic*, case 66/69, *dismissed*, 4 BULL. EUR. COMMUNITIES, No. 5, at 117 (1971).

30. *Torem & Craig, Control of Foreign Investment in France*, 66 MICH. L. REV. 669 (1968).

EC bank would have, subject to authorization by the Member State of the first establishment, which would be granted only if Community banks enjoy reciprocal treatment in the country of the parent company. In other words, if, say, the Chemical Bank of New York wants to establish a subsidiary in an EC Member State it would have to obtain an authorization from that EC Member state and the authorization would be subject to reciprocal treatment for Community banks in the United States.

This proposal got a mixed reception in EC Member States. Some Member States thought it was bad policy and branded it as an attempted exercise in protectionism. The irony is that these Member States, when acting on their own, follow precisely the same policy. To them what would be bad policy for the European Community is good policy when pursued on a national level.

In the United States, following an initial reaction of rejection came a second, more sophisticated reaction. What did the EC Commission mean by "reciprocity?" Did it imply that a New York bank would not be authorized to establish a subsidiary in the UK, unless a German bank were given the right to establish a subsidiary in New York and, moreover, unless that New York subsidiary were as free to operate in Florida and California as the New York bank's London subsidiary would be in Germany or Italy? The United States authorities pointed out that granting the same treatment in the U.S. as the treatment that would result from the Second Banking Directive inside the EC would require fundamental changes in the way banks are regulated in the US.

That, of course, was not what the EC Commission sought to achieve by its proposal. In fact, the Commission wanted some sort of effective reciprocity with substantially equal chances for EC banks in third-country markets, taking into account the regulatory system of those third countries. Obtaining effective market access could require more than simply ensuring internal treatment, and the Commission was well aware that this would be a matter for negotiation in each case with the third country in question because the matter is much too complicated to be dealt with by a few general provisions.³¹ The Commission amended its proposal in due course to clarify this point. The reciprocity now required for the purposes of the authorization is "national treatment, . . . the same competitive opportunities as domestic credit institutions in [the] third country [in question] and . . . effective market access. . . ."³² If it appears that this condition is not fulfilled,

31. See, e.g., Gruson & Nikowitz, *The Second Banking Directive of the European Economic Community and its importance for Non-EEC Banks*, 12 *FORDHAM INT'L L.J.* 205 (1989).

32. *Amended proposal for a Second Council Directive on the coordination of laws, regulations*

authorizations are limited or suspended. In addition, negotiations are contemplated with third countries with a view to achieving effective market access and competitive opportunities comparable to those accorded by the Community to institutions of those third countries.³³

A cursory look at the international scene shows that what the EC Commission proposes to do is quite normal. Requiring some form of reciprocity is in fact a fairly generally-accepted practice as is shown in various OECD documents, which, rather than condemn reciprocity, are ambivalent to it. Moreover, it makes sense. It makes sense not only from the point of view of the European Community, but also from a wider perspective. It means that the liberalization of establishment and services of financial institutions inside the European Community can become a tool to liberalize them in third countries as well. In that event the mere selection of a building site for some fortifications of the European Community will have brought down some walls in other countries to everybody's benefit.

E. STEIN:

This was an admirable overview of subjects, some of which are under direct discussion between the United States and the Community. The Commission has proposed some 300 pieces of economic and social legislation (later reduced to 279) as part of "Europe 1992." It occurred to me, if you permit a brief general observation, that what the Europeans are undertaking would be in a sense comparable in the United States to a massive review of the entire legal structure of economic regulation, aimed at dismantling some and expanding other federal regulatory schemes and preempting or invalidating virtually thousands of state statutes. This may be a somewhat exaggerated view of the scope of the European undertaking, but it is in principle what is going on in Europe. If, for instance, the current proposals regarding banking and insurance are fully implemented, there will be substantially freer movement of services in this field than exists now in the United States. And, as Jacques pointed out, the need to assure reciprocity in the treatment of European financial enterprises may lead to pressure on Congress to use its ample federal commerce power to deregulate and reduce state regulation, for instance in the insurance field in which states discriminate even against companies coming from other states of the Union.

and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 32 O.J. EUR. COMM. (No. C 167) 33 (1989) (art. 7(4)).

33. *Id.*

Our next speaker is Edwin Vermulst, a third generation Common Market lawyer. He received his first legal education in the Netherlands and holds an LL.M degree and S.J.D from the Michigan Law School. He has been in law practice in Brussels, but in his "free time" he completed his doctoral thesis of 753 pages on American and European antidumping law that has just been published and should become a leading treatise on the subject. He will deal with another important phase of Community work concerning third countries: its trade policy.

1992 AND THE EC'S EXTERNAL TRADE POLICY

EDWIN VERMULST:

1. *Introduction*

Thank you very much. As Eric Stein already said, since I graduated from Michigan and returned to Brussels, I have spent most of my time in the Far East in Hong Kong, Japan, and Korea, and so I probably know better how the people in those countries think about 1992 than how Europeans perceive it. My impression is that in the Far East there is a widespread fear about 1992, a fear that has been fueled in large part by the media and also by European businessmen who, perhaps, see this as an opportunity to get back at countries such as Japan and Korea which have been difficult to penetrate. The question is whether that fear is justified. I believe it is very exaggerated. What I propose to do is to give you a summary of the development of the EC Commission's views on the external ramifications of 1992, and then I will analyze how 1992 is likely to affect trade in goods and trade in services.

2. *General Review*

As far as the Commission's thinking on the external aspects of 1992 is concerned, one can make a distinction between four phases. The Commission's perceptions have clearly developed over time. In the 1985 White Paper,³⁴ which formed, and which still is, the heart of the 1992 program, there were only short references to external aspects. The Commission mentioned national import quotas — it said that those would have to be abolished by the end of 1992 and that the creation of one Common Market would necessarily lead to more intensive control at the external frontiers essentially for security and safety

34. *Completing the Internal Market*, White Paper from the Commission to the European Council (Milan, June 28 & 29, 1985), COM (85) 310 final (Brussels, June 14, 1985).

reasons. This question of abolition of national quotas has attracted vivid interest, partly created by the Commission itself, because the Commission said in the White Paper that, in abolishing national quotas, there can be considerable difficulties to overcome. Additionally, in the absence of national quotas, import restrictions might have to be implemented at the Community level. Thus, while only some countries currently have national quotas, by the end of 1992, these might have to be replaced by quotas imposed on a Community-wide basis.³⁵

The second phase concerns the concrete measures that the Commission proposed on the basis of the White Paper. Jacques Bourgeois has elaborated on the first draft of the Second Banking Directive. There was a similar reciprocity clause, as far as I know, in the life insurance directive. In the public procurement sector, the Commission also proposed certain measures that might be disadvantageous to third countries.

In the third phase, the Commission started giving some unofficial guidelines on 1992. These were mainly contained in speeches by the then Commissioner for External Relations, Mr. De Clercq, who was in office until the end of 1988. In a speech of May 26, 1988, he said that the completion of the single market must be accompanied by an active trade policy. Mr. De Clercq said that 1992 would open up important opportunities for all firms in the world but added that many additional advantages for third countries could only be obtained on the basis of reciprocity. He referred to three concrete areas: services, technical standards, and public procurement. In a speech later that year in July, Mr. De Clercq recalled that GATT does not cover all international trade and that, in the absence of international obligations, concessions would be negotiated on the basis of reciprocity, preferably multilaterally, but also bilaterally if necessary. External policy measures would be used to give the EC leverage to open up as many markets as it could. You can distill from this that the Commission also wants to use 1992 also as an offensive weapon, as a weapon to force other countries to open up their markets.

Finally, in the fourth phase, in a document titled "Europe 1992: Europe, World Partner,"³⁶ the Commission enunciated its official position on the external aspects of 1992. It established four principles in that paper. The single market will be of benefit to both European and

35. See also Commission Regulation No. 87/433/EEC on Surveillance and Protective Measures, 30 O.J. EUR. COMM. (No. L 238) 26 (1987), where the Commission announced that in sectors such as cars, textiles, electronics, footwear and tableware, the abolition of national measures might have to be accompanied by back-up measures at the Community level.

36. EUROPE 1992: EUROPE, WORLD PARTNER (Oct. 19, 1989).

non-European companies. Secondly, the EC would vigilantly apply the instruments of commercial policy which it has at its disposal. The third principle was that the Community would meet its international obligations. And fourthly, where there are no multilateral rules the EC is not disposed to grant non-EC countries automatic and unilateral access to the benefits of the internal liberalization process unless they can guarantee, even on a bilateral basis, a mutual balance of advantages in the spirit of GATT. I would think this means satisfactory access of EC companies to non-EC markets.

I will now go into more detail about the possible implications of this for trade in goods and trade in services.

3. *1992 and International Trade in Goods*

As far as trade in goods is concerned, there is a number of sensitive sectors in the EC, sectors that have become increasingly vulnerable to competition from third countries, particularly Asian countries. In these sectors it seems likely that trade policy measures will sooner or later be taken, not necessarily as a direct consequence of 1992, but rather as a necessary corollary of the increased liberalization that 1992 will bring. These sectors are electronics, textiles, footwear, and cars.

In the electronics sector, there is a combination of strategies at work, strategies pursued both at the company level and at the level of the Commission. The companies are concentrating more and more and merging to gear up for 1992. Secondly, they are increasingly sourcing and producing outside of Europe. In some cases the European companies that complain about Asian dumping practices are setting up factories in the same countries, either for sourcing the parts or for making the complete products, and then exporting them to Europe. Thirdly, they probably will continue to have recourse to antidumping measures to strengthen their manufacturing operations in Europe as long as they are there. In 1985 there were cases against typewriters, photocopiers and deep freezers; in 1986 against microwave ovens; in 1987 against compact disc players, dot matrix printers, daisy wheel printers, VCRs, EPROMs, DRAMs, and mobile telephones; and in 1988, against video tape and color televisions. The whole sector is essentially being targeted product by product for antidumping action.

The EC Commission is also very active. It is actively supporting high-definition television through the sanctioning of national funding for research and development and pressing for adoption of the European standards as the world standard, and it is promoting the develop-

ment of information technology products such as computers and telephones through research programs such as Esprit.

As far as the textiles sector is concerned, in November, 1988, the Commission presented a report on trends in this sector in which it made a distinction between long-term trends and short-term trends.³⁷ For the long term, the Commission saw positive signs. There had been technical progress through automation and use of electronics, and a tendency towards design and manufacture of higher quality products. For the near future, the Commission perceived a very worrisome trend: the increase in imports from Asian countries and from South American countries. In the field of textiles, the Commission seems to take an aggressive approach instead of a purely reactive one. The Commission noted that many of the developing countries have made progress in liberalizing their own markets and that as long as this continues, the EEC is willing to liberalize its own market further. That might eventually even mean the abolition of the multifiber arrangement. (However, the EEC textiles industry is opposed to this.)

In the footwear sector the Commission has until recently taken a laissez-faire approach, possibly because of the existence of industry-to-industry arrangements with major Asian suppliers. The European footwear producers, however, have been very active: they have noted that imports have grown by sixty-nine percent in three years. They want the Commission to do something about this. As a result of industry pressure, the Commission adopted safeguard measures against exports of shoes by Korea and Taiwan to France and Italy on February 29 and June 30, 1988. On August 17, 1988, the Commission decided to open a safeguard investigation into the trend of footwear exports from these countries to the Community as a whole.

In the automobile sector, there has been much ado recently about inward investment by Japanese companies in the EC. In 1988, a conflict erupted between France and England about how much local content Nissan cars produced in England needed to be able to qualify as European products. As far as I know, France has backed down for the moment from its initial stance that at least eighty percent EC value-added was needed.

The common denominator of the activities in all these sectors is a combination of internal action aimed at restructuring by the companies themselves and by the EC Commission, and at the same time, active use of trade policy instruments as a means of giving the EC

37. *Report on the Textile and Clothing Industry (presented by the Commission), COM (88) 653 Final (Nov. 21, 1988).*

industry breathing space for a couple of years in order to bring this restructuring to a satisfactory end.

The most important Community trade policy instrument has been the antidumping action.³⁸ The number of antidumping actions and the importance thereof in terms of trade value affected has increased exponentially since 1980, and the focus is shifting from countries such as Japan to developing countries such as, a few years ago, Korea, and now Indonesia, Hong Kong, and Taiwan.

Additionally, the EC lawmakers have strengthened the antidumping law itself. In June, 1987, the EC Council adopted an amendment, enabling itself to strike out at certain circumvention tactics it perceived to take place within the EC. If an antidumping duty is imposed on imports from a certain country, there is a stimulus for the producers in that country to shift production to another country to avoid paying the duty. In many cases, such producers went to a third country or to the EC. Japanese companies very often went to the EC. The EC institutions targeted that practice and decided that, under certain circumstances, such intra-EC production constituted circumvention of antidumping duties.³⁹

In 1987 and 1988, there were also origin investigations in Hong Kong and in the United States, where Japanese manufacturers of photocopiers had set up plants. In the case of the U.S. plant of Ricoh, the Commission found that the value added in the United States was not sufficient to confer U.S. origin on the product, and therefore it continued to be a Japanese product, subject to the antidumping duties imposed on Japanese photocopiers in 1987.⁴⁰ In the case of the Hong Kong plant of Mita, the Commission reached the opposite conclusion.

Finally, in 1988, a new antidumping regulation was adopted which pretended to be merely technical, but which in fact further strengthened the antidumping law.⁴¹

38. This has been the case not only in the EC, but also in other jurisdictions such as the United States, Canada and Australia. See *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* (J. Jackson & E. Vermulst eds. 1989).

39. For more details, see, e.g., Van Bael, *Japanese Investment in the EEC: Trojan Horse or Hostage*, *INT'L FIN. L. REV.* 10 (June 1987).

40. On July 11, 1989, the Commission adopted a regulation defining the origin of photocopiers which was essentially tailor made for the Ricoh situation. See *Commission Regulation No. 2071/89/EEC on the Origin of Photocopying Apparatus*, 32 O.J. EUR. COMM. (No. L 196) 24 (1989).

41. Bellis, Vermulst & Waer, *Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies*, 23 *J. WORLD TRADE* 21 (1989).

4. 1992 and International Trade in Services

The final sector left to discuss is trade in services. Trade in services is not covered by GATT, and therefore the Commission has felt fairly free to do what it wants. Jacques has explained what the Commission has done in general under the 1992 program in the services field. As far as trade policy is concerned, the Council in 1986 already adopted a regulation on unfair trade practices in maritime transport.⁴² Maritime transport is another sector which is suffering difficulties in the EC. This led the EC to adopt a regulation to deal with what it perceived to be unfair trade by third countries in the shipping sector. The Community institutions took certain elements of the countervailing duty law and certain elements of the antidumping law and mixed them together to be able to impose regressive duties, *i.e.*, duties imposed at the EC border, on foreign shipping companies which engaged in "unfair" practices.⁴³ The EC has gone ahead unilaterally in this respect. It has not negotiated or discussed this in GATT, so it is not clear whether it will extend this concept of unfair trade in shipping services to other sectors, or whether shipping services will remain unique in this respect, with the EC authorities waiting until a multilateral agreement is reached in GATT on how unfair trade in services should be treated. In any event, if no multilateral consensus can be reached, it seems likely that the increased liberalization in the EC service industries as a result of 1992 will be accompanied by similar unilateral EC action in other service sectors.

E. STEIN:

Thank you, Edwin, for the informative statement which displays a happy combination of learned knowledge and practical experience. I shall now call on our final panelist, Dr. R. Quick (LL.M. 1984), who holds an important position in the private sector as Head of the Legal Affairs Department of the European Council of the Federations of Chemical Industry (CEFIC) in Brussels.

42. See Bellis, Vermulst & Musquar, *The New EEC Regulation on Unfair Pricing Practices in Maritime Transport: A Forerunner of the Extension of Unfair Trade Concepts to Services?*, 22 J. WORLD TRADE 47 (1988); Elsner, *Unfair Pricing Practices in Maritime Transport*, 23 EUR. TRANSP. L. 590 (1988).

43. On January 4, 1989 the Council imposed a redressive duty on containerized cargo transported in liner service between the Community and Australia by the Korean company Hyundai. See *Council Regulation (EEC) No. 15/89 Introducing a Redressive Duty on Containerized Cargo*, 32 O.J. EUR. COMM. (No. L4) 1 (1989). The case is discussed in Vermulst, *Commercial Defense Actions and Other International Trade Developments in the European Communities: 1 July 1988 - 30 June 1989*, 1 EUR. J. INT'L L. (forthcoming 1990).

THE EUROPEAN CHEMICAL INDUSTRY AND 1992:
VIEWS OF A GLOBAL INDUSTRY

REINHARD QUICK

When Lord Cockfield presented the White Book on the completion of the Internal Market, the European chemical industry was relatively indifferent as to the success of such a program. Many thought of it as another political goodwill initiative which would undoubtedly fail. This skepticism can be explained. The European chemical industry is the world leader. It uses Europe as its home base but it does not concentrate on Europe alone; it competes successfully on a global scale. Furthermore, many of our companies had learned to live with all the inconveniences of Europe's fragmented markets.

The political support that Lord Cockfield's White Book in fact received throughout the EEC made the chemical industry also jump on the train. It developed a kind of 1992 euphoria. 1992 was the word of the day and the chemical industry's whole-hearted support of the completion of the internal market became an integral part of our position papers.

Then the Cecchini report was published and, although it demonstrated real and potential gains for market integration, some of our experts foresaw only modest gains for the chemical industry. Cecchini was useful to the discussions within the industry because it re-introduced an element of reality and forced us to substantiate the political support for the Internal Market with arguments or criticism based on what the industry really needed.

1. *The Cecchini Report*

Let us have a closer look at the predictions of the report. Considering the four different stages of integration specified in the report, it is worth noting the relative effect of each one, as measured by potential addition to gross domestic product.

The first one — the removal of barriers of trade — is the one that attracts the most attention. The lifting of border restrictions, the harmonization/approximation of the value-added tax ("VAT"), the free movement of goods and people — these things have great public impact. They have also a great impact on the chemical industry. The magnitude of the problem becomes apparent with one figure: the chemical industry has an intra-Community trade worth 70 billion European Currency Units (One ECU equals approximately \$1.10) in 1988. Even if the Cecchini report predicted only a modest economic gain as a consequence of the removal of barriers to trade — 0.2 per-

cent in GDP — the abolition of frontier-related controls is a prerequisite for other gains to be achieved by the creation of the internal market. It is for this reason that the chemical industry has, in the past, made several political statements on the internal market, such as its support for the Commission's proposals on VAT.

The second measure, namely, the removal of barriers to production, such as differing technical standards, will have a much greater impact. Here Cecchini predicts a two percent jump in GDP. The chemical industry, with the exception of pharmaceuticals, is not one of the sectors most affected by technical trade barriers, and is not a pioneer as far as standardization or certification is concerned. It can live with the "new approach;" it is, however, worried about too many legislative efforts to harmonize standards. A more simple and direct way would be to meet the European standards, which are now being established by the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC). It is important to us that the details of industrial specification is left to industry to determine. The remaining two and one-half years until 1992 will have to be used in that direction, and I am afraid that industry has to become more active if it wants to stop bureaucrats from suggesting legislation.

The third step — economies of scale — will bring another two percent jump in GDP. For the industry, this is the single biggest driving factor in the quest for world markets, and a large domestic base provides a vital head start. A word of caution might be appropriate here. A large domestic base is certainly helpful, but the example of the Swiss chemical industry demonstrates that it is not necessary to become a world leader.

The European Chemical Industry Federation ("CEFIC") is not the proper forum for discussing the strategies our member companies will follow in order to get the size needed to achieve the necessary economies of scale to compete.

Fourthly, Cecchini predicts another two percent jump in GDP by way of increased competition. As with the third point, one could again take a note of caution. Such a jump in GDP will only happen if the competitive forces are allowed to operate effectively. Industrial policies, state aids, and national restrictions on mergers may reduce Cecchini's predictions considerably. The chemical industry backs the Commission's policy to subject state aids to closer scrutiny, and is also in favor of a Community-wide merger control, if it avoids double controls.

To end this first point, I would like to repeat that, whatever deci-

sions are made, the decisionmakers have to take into account that the chemical industry has to compete on a global scale, and that it is worldwide competition that counts, not just the competition within the EEC.

2. *External Aspects*

That leads me to my second point: the external aspects of 1992 as seen by the chemical industry. Here again, I would like to give you just one figure: the European chemical industry exports, extra-EEC, amounted to 51 billion ECU in 1988. If you remember that intra-Community trade in chemicals amounts to 70 billion ECU you can immediately see that our industry, because of its dependency on international trade, cannot espouse protectionism. The global quality of the chemical industry is not only seen by import and export figures: twenty-five percent of the European chemical industry belongs to U.S. companies and roughly twenty-five percent of the U.S. chemical industry belongs to European companies. A further aspect of our openness lies in the fact that our toughest competitors are also our best clients. Thus, there is no point in asking for protection.

When asked about the importance of the Uruguay Round compared with 1992, the answer is simple: the two goals cannot be valued separately, they are complementary. The chemical industry will profit from both a more liberal multilateral trading system *and* the completion of the internal market, which also has to be an open market.

Our actions do not end with such general statements. We have conducted a survey of existing national quotas for chemicals, and we have seen that there are still some, but luckily not very many, quotas in the Member States. Such quotas cannot exist any longer after 1992; the Community has to develop an all-embracing common commercial policy. The result of this survey is encouraging. Most of our members have said that they could live without this protection and, even more encouraging, they have said that in areas where some form of temporary protection is needed, such protection should only be granted if the prerequisites of the safeguards clause are met. Here again we could convince the industrialists of the need to be consistent when addressing the subjects of the Uruguay Round and 1992. In the context of the former, the chemical industry has voiced its dislike of grey-area measures. It has to honor its commitment also in the context of 1992.

There is, of course, demand for protectionism in the EEC, in particular in relation to 1992. I do hope that the Community proves with deeds that the internal market will not close in on itself.

3. *Over-Legislation*

Let me move to a different subject, namely the bitter pills of 1992. By bitter pills I mean the tendency to over-legislate, along with the inability of industry, though critical of this tendency, to develop the consensus necessary to influence the decision-making process. So far, I might have given you the impression that the chemical industry does not have any problems with 1992. Well, there are some, and let me cite some troubling examples.

We have said that an efficient internal market will help to sustain the chemical industry's competitiveness in the world. Efficiency, as we understand it, also means less bureaucracy and reliance on entrepreneurial responsibility. In some cases, however, we are faced with over-legislation.

We sometimes have to fight an overly-active Commission which is trying to regulate many aspects of industrial decision making, such as in the draft directive concerning general product safety. It is indeed questionable whether the obligation of economic operators to monitor product safety has to be enforced by Community rules, when other Community and Member States' instruments having an effect on product safety are already in force. Should we instead follow the U.S. judicial developments when regulating liability issues? Can one really impose on an economic operator a general no-fault liability regime for damages caused by waste, which goes so far as to make the operator responsible for situations in which he no longer has control over the waste? I don't think we can. Parallel to the tendency to over-legislate are examples of under-legislation. One is the draft directive on patentability of biotechnological inventions, which does not go far enough. We have two problems with the draft. One is that it generally excludes plant and plant materials from patentability. The other is the very broad provision on compulsory licenses, which is not restricted to cases of abuse.

Next, I come to distortions in the market caused by state intervention, such as price controls. These controls are inconsistent with a genuine internal market. We should let the market forces work. Is it acceptable that, because of state intervention, prices for pharmaceuticals will settle down to the level of the lowest common denominator? If such a pricing and licensing system were applied to the post-1992 pharmaceutical industry, the big drug companies would shift their research and development centers to markets outside the Community with higher prevailing drug prices. Another market distortion is caused by the lack of an open market in Europe for energy products, with prices varying widely as a result. This can lead to considerable

distortions in costs for energy-intensive industries, such as the chemical industry.

When speaking about bitter pills, I also must mention that there are areas where industry cannot reach a consensus. If we take the example of the proposed European company statute, I think that the chemical industry will have a hard time arriving at a truly European position. The German industry representatives are against it. They fear that the alternatives on workers' participation in company management would lead to a "company flight" from Germany, and companies would be founded outside the Federal Republic in order to circumvent the strict German law on workers' participation. Other European chemical industry representatives are against the proposal because, in their view, it allows too much workers' participation.

4. *Conclusion*

In relation to the proposals of 1992, I would like to cite four questions which Denis Henderson, the Chairman of ICI, raised as a test of relevance:

1. Will the proposals actually assist the process of creating wealth?
2. Will they add to or lessen the administrative burden?
3. Will they increase or decrease flexibility of operations?
4. Will they help us to compete internationally?

The result of this test of relevance is that the chemical industry sees potential opportunities in 1992, but it is also concerned that the requirements of industry are duly taken into account by Community policy.

E. STEIN:

Thank you Reinhard for your most interesting comments. Before opening the floor to questions I should like to take advantage of my position as Chairman and call on my colleague, Professor John J. Jackson, the Hessel E. Yntema Professor of Law at Michigan, and ask him to let us have the benefit of his broad expertise, particularly from the perspective of American trade policy.⁴⁴

E. STEIN:

Thank you, John. The floor is now open for questions.

44. Due to a technical error in the recording of the conference, the editors regret that they have been unable to recover Professor Jackson's statement. We apologize for any confusion that may result from references to Professor Jackson's lost comments.

QUESTION AND ANSWER SESSION

H. HERMANS:

I would like to ask a question of Jacques Bourgeois. He made clear to us, on the basis of the *Cassis de Dijon* case,⁴⁵ that, once a product from a third country has come into, say, Germany, the German rules on safety regulations, or on the composition of the product may not hinder the product if it has been in free circulation in any of the other Common Market countries. Now this of course would lead to the tendency of third country products to come in where the safety regulations are easiest. If they are easiest in, say, Greece, then my question to you would be how strict is the rule that they have to be in free circulation in Greece before they can enter Germany. The foreign products must fulfill the Greek conditions as the minimum, but do they have to be transported to Greece before they go to Germany in fact, or can they only pass through Greece? Can only a sample go through Greece and the bulk directly to Germany? If it is stamped on them "Greek requirements are fulfilled," is that enough? To what extent is the requirement that an American product wanting to go to Germany under Greek conditions must fulfill the Greek conditions and to actually be in free circulation in Greece a real burden for the product, which may make it easier to fulfill the German requirements and go directly to Germany? If you could enlighten me on that point, I would be grateful to you. Thank you.

J. BOURGEOIS:

Let me first say that the *Cassis de Dijon*⁴⁶ doctrine has a certain number of safeguards built into it, but that has no bearing on the distinction between a product originating in a Member State and a third country product. There are thus exceptions to the *Cassis de Dijon* doctrine. Secondly, the *Cassis de Dijon* doctrine applies when there is no Community-wide harmonization of the rules of production and marketing. Subject to this the *Cassis de Dijon* doctrine implies accepting the risk that a third country manufacturer uses the least restrictive Member State as its home base to sell throughout the Community. But an EC manufacturer could also use the least restrictive Member State as its home base. As to your second more technical question, there are two possible situations. In the first situation where there is a form of certification, there should be no major problem. In the second

45. *Rewe-Zentral AG v. Bundesmonopolverwaltung Für Braantwein*, 1979 E.C.R. 649.

46. *Rewe-Zentral AG*, 1979 E.C.R. 649.

situation without certification, there is indeed a risk that compliance with the quality rules of the Member State of entry is not effectively verified. One of the ways to deal with it is to require that the product be effectively put on the market in that Member State of entry.

H. HERMANS:

Does your answer then not militate in favor of unified rules of manufacturing in order to avoid distortions within the Common Market where the most favorable state is chosen by all importers?

I have a second question: there is doubt in my mind about article 58. If a company is established in the Community, in principle, it is considered an EEC company, but what I have seen in practice is that, in many instances, in order to be admitted to a committee — for instance the Committee on Technical Standards — the company which is established in the EEC must be a manufacturer in the EEC. I would like to have your views on that.

J. BOURGEOIS:

As to the first question, this is indeed a position that can be taken and a position that has been taken. It is a question of balance, and the Commission has, after *Cassis de Dijon*,⁴⁷ opted for a more liberal approach, based on mutual recognition, saying what is good enough for a Greek consumer should be good enough for a German consumer, subject to the safeguards of the *Cassis de Dijon* doctrine itself, which may be important and which entail derogations from the free circulation of goods. That is, in fact, deregulation in a wider EC market. Establishing harmonized rules is not excluded, e.g., precisely for matters covered by the exceptions of the *Cassis de Dijon* doctrine. In fact, a series of harmonized rules has been proposed by the EC Commission.

As to the question about article 58, that article states that, for the purposes of the right of establishment, companies incorporated in one Member State and having their principal place of business, etc., in that Member State are to be treated as companies of that Member State. The same applies for the freedom to provide services. But the EEC Treaty does not go further. I can imagine that, for certain consultative bodies, EC subsidiaries of foreign companies are not assimilated to EC companies. It may be unwise, but it is not inconsistent with article 58 of the EEC Treaty.

47. *Rewe-Zentral AG*, 1979 E.C.R. 649.

R. BROWN:

I wanted to raise a question for Jacques Bourgeois and Edwin Vermulst about establishing a subsidiary in a country within the EEC and the use of that subsidiary as a means of circumvention. Specifically, I refer to the Nissan auto case in the U.K. where that issue has been raised, with the percentage of EEC content in their automobiles being brought into question. The U.K. is arguing that Nissan's actions are proper. France is, of course, arguing very strongly against this. The matter is not settled yet, as I understand it, and it seems to involve circumvention. According to what you say, there should be no question about this. What is your answer to that?

J. BOURGEOIS:

I think we should make a distinction here with respect to the example cited. What I want to say is that if the Nissan subsidiary in the UK wants to create another subsidiary in France, it is entitled to do so. The question that arises here is whether the cars assembled by Nissan in the UK can be considered as cars originating in the European Community. Why is that relevant? It is because there still are exceptional provisions that deal with a situation where the trade policy of the European Community is not yet uniform, where one Member State is entitled to maintain certain restrictions vis-à-vis direct third-country imports, while the import regime vis-à-vis third countries in another Member State is free. This is the situation in the automobile sector: direct imports of cars from Japan into Italy are subject to restrictions. And in order to prevent circumvention, there is a provision under the EEC Treaty that allows Italy to be authorized by the Commission to limit this intra-Community trade in Japanese cars. That is the so-called article 115 procedure. It is in this connection that the question arises, whether a Nissan car assembled in the UK is a Community car or not. If it is not a Community car, then France can be authorized by the Commission to stop the imports of Nissan cars from the UK. In order to decide whether it is a Community car, one has to apply the rules of origin, according to which the place of the last substantial transformation confers the origin. This is a vague criterion. According to France, less than eighty percent added value is not a substantial transformation, while according to the UK, sixty percent added value is enough. As long as the Commission does not rule on this in an implementing regulation, or the Court does not interpret this vague criterion, there will be a dispute about it. That is not directly linked, as I would see it, to article 58.

Questions have been raised regarding the draft of the second banking directive which requires third countries to grant reciprocity to EC credit institutions. I think that the proposal goes a bit further than requiring national treatment: it also states that EC credit institutions must have effective market access. Furthermore, negotiations are contemplated to secure competitive opportunities comparable to those accorded by the Community to the credit institutions of that third country.

The first draft referred to reciprocal treatment without defining it; it could in fact have meant "mirror-image" reciprocity which would have made it very difficult, if not impossible, for the U.S. to negotiate with the European Community. This "mirror-image" reciprocity was not intended originally anyway. Effective market access is something more than national treatment and something less than "mirror-image" reciprocity.

E. STEIN:

This shows what a potentially potent protectionist instrument the Community would have by combining the rules of origin, the rules for local content, the import quotas, and technical regulations; if you can, as John Jackson indicated, manipulate these four little instruments you can really have a pretty nice protectionist device. But I don't think that that's really in the cards, that the Community would want — and could afford — to engage in this sort of policy. Dr. Quick has indicated that the world has become a village and one would assume that it is in everyone's interest to play the competitive game according to the acceptable rule.

E. VERMULST:

Of course, by 1992, those national quotas, the quotas that countries like France and Italy have on cars, should be abolished. By that time, the whole issue of origin will become moot because then, wherever a car is imported into the Community, it will be in free circulation. Secondly, the old French position that Nissan had to have at least eighty percent U.K. content is of course an outrageous unilateral interpretation of origin rules and has no precedent in any other rules. It's just a unilateral French position.

F. REICHERT-FACILIDES:

May I touch briefly on two topics? The first one is a political topic arising from the viewpoint of those countries which Professor Jackson

has referred to as the locked-out countries, this time, locked-out countries within Europe, especially Switzerland and Austria. We have quite a few colleagues here from Switzerland, and of course we would be interested in hearing something from them about the very decided viewpoint of their country towards not applying for EEC membership. Austria has rather hesitatingly taken a different view. It is going to apply for membership in the Community, but has not yet done so, and the prospects for its application's success are not easy to judge. Professor Frowein has taken the view today that its chances are not wonderful. Anyhow, as an observer of the Austrian scene, I would think that it is a good step, this Austrian application, for at least two reasons. It puts this country in the position of a procedural partner towards the Community. I think it has a stronger right of information and a stronger right of discussion than a stranger to the Community. Second, things are changing. The Community process is dynamic, and reasons that might today speak against Austrian membership may appear in a different light two or three years from now when, for instance, in the prospect of closer combination with the Eastern European states, Austria has quite a tradition of experience to offer. This is my first point, the political one.

The second point is a predominantly legal or technical one with an internal Community bearing: the role of private law in the process leading towards '92. What has private law to do with the internal market? Well, the harmonization of private law may impact the creation of the market. Very briefly, some alternatives. The first one would be the harmonization of private laws forming an impediment to free competition. The second would be, to the contrary, competition, not only with products but with the conditions under which these products can be sold. Under private law aspects, a stronger liability for the producer makes for more competition within the market. As we have different products, one could argue that it is better for the consumer if he can choose between different private law models — a viewpoint which has been taken or which is still being taken, for instance, in the field of insurance law, which Professor Stein has touched upon. The third aspect would involve solving the problem by means of private international law, providing at least that, before every European court, private international law as harmonized could be applied. Thus, at least in every court, one and the same private law material order would apply, which would be much more than what we have now under the different private international law systems. The fourth and last possibility would be to create at least a common European

order publique in private law, to create some identical minimum standards in private law culture.

To conclude, it would be extremely interesting to hear the opinion of one or another member of this panel on these private law points. As to my very personal view, I have only indicated the private international law solution combined with the creation of a common European order publique, which I think would present the most promising aspects.

E. STEIN:

As I understand it, the Austrian Government has not made up its mind whether to apply for Austrian membership in the Community, but there is every indication that it will. The role of the Soviet Union with respect to this decision will be interesting.⁴⁸ There is also the question of the relationship between the Community and the other five members of the European Free Trade Association which includes, in addition to Austria, the Scandinavian states and Switzerland. These countries have been pressing the Community for a broadening of their current agreement with the Community that would allow them to profit as much as possible from the ongoing liberalization of the Community market. And this of course is of interest to other "third countries" that do business with Europe.

Now Mr. Buechner is next on my list.

B. BUECHNER:

For the position of Germany, I would like to refer to Professor Frowein's presentation. We heard a lot about the influx of goods into the Community, but what about the influx of people? I am specializing in asylum and in immigration, and I wonder if Europe will be a fortress after 1992 against people, against people who flee from political persecution and against people who come from other countries in order to work in the Community, and I wonder if I will be without a job after that time.

J. FROWEIN:

Just very briefly to respond to that, I would be quite astonished if you should really be out of a job by that time. I suppose you will be faced with a very difficult and complex question. There is no doubt, for instance, that in the Federal Republic of Germany, which has the

48. Editors' note: subsequent to the panel discussion Austria filed its application on July 17, 1989. The application of Turkey and Morocco are also pending.

only constitutional rule in the world which gives a full individual right to asylum to anybody who comes and can prove that he is persecuted for his political ideas or other political reasons, many people at this moment think that some harmonized European solution must be found before 1992 arrives. As far as I can see, however, we are far from having any acceptable proposals on the books at the moment. Within the Federal Republic, I think there is another stream of thought. The second stream finds it unacceptable that the development of the European Community should lead to the abolition of one of the most important, let's say, fundamental decisions of the constitution makers in 1949, which was of course taken on the background of what had happened in Germany from 1933 to 1945. Now what the solution will be I don't know yet, but I think this is a very important and very difficult issue.

P. MACKAY:

As a citizen of New Zealand, which is a very locked-out country and a resident in the Community, I have two concerns upon which I would like the panel to comment. The first one is that I have become concerned as I have listened to the discussion that we are really talking about the interests of producers here. It seems to me that there is a possibility that the interests of consumers, who are of course real people in the Community, do get sidetracked. Antidumping duties and reciprocity have two effects, don't they? The problem is, it seems to me, that a lot of European consumers want to buy cheap Japanese photocopiers or Japanese cars, and the question is, should they really be denied that opportunity. It seems to me that the second question is what effect this has on third world countries or small countries like New Zealand. If you just look at a European-wide situation, you are really ignoring the damage that can be done economically, for example, to the agricultural policy of countries like New Zealand. I just wondered what comments the panel might have on these issues.

E. STEIN:

The way the world is changing — when I was getting into this field fifteen years ago, no New Zealander would talk about the Community without talking about New Zealand butter. You have seen how the world has changed. And of course the consumers seem to be short-changed everywhere. I think it has been a generally-accepted rule that the consumers were the least well-organized interest group in Europe. I have a feeling that is also changing, although I don't know how strongly. But obviously this is a very important interest and it suffers.

In the United States, we suffer from our own restrictions — I have just seen some figures on steel, and the special restrictive agreements on imports of steel cost us I don't know what percentage of the price of the automobile. So that is a very pertinent observation.

M. HANSEN:

This discussion could give rise to a lot of questions I think, but let me leap with one. Jacques, John was speaking about your optimism before and we have heard a lot about what the Commission has been doing in numerous initiatives in recent years. There is incredible momentum and my question is really what does the panel think about the powers of the Commission in an atmosphere such as the present, where there is in fact very little Parliamentary control, and where there is virtually no openness in the administration.

J. BOURGEOIS:

Before addressing the question let me say two things. Last year I sat on a panel in Germany trying to draw comparisons between the U.S. Constitution and the EC "Constitution." Surprise! The American academic was Terry Sandalow of the University of Michigan Law faculty. Recently, a Belgian magazine published a picture of a Member of the European Parliament working on a draft EC bill of rights with a team of advisors. Surprise! One of these advisors was Joseph Weiler of the same faculty. Maybe one of the areas in which we can learn something from U.S. constitutional practice is transparency in the decision-making process. In going over the procedures the Commission of the European Communities was using by way of transparency in the decision-making process, I came up with more than I would have expected. For instance, the Commission has the power to adopt implementing antitrust legislation. Whenever the Commission intends to do so, it publishes a draft in the Official Journal and invites comments from all the people concerned. The most recent examples are in the aircraft and maritime transport sectors. Secondly, when the Commission investigates antidumping allegations or antisubsidy countervailing duty ("CVD") cases, it announces the investigation and invites all interested parties to submit comments. By interested parties, the Commission means much more than just the importers, the domestic producers, the complainants and the exporters. In fact, if you look at the legislation, it means that even consumers have the right to submit comments in these proceedings. They don't do it very often, but that's another matter. The decision-making process is in fact much more open than one would expect of a European administration,

and when I say European administration I mean a British, French, German, Spanish or Italian administration. In fact, when you look at what is happening with respect to decision-making processes at the national level in matters that are now taken up Community-wide, I think the process is much more open than it used to be at the national level. That is an important element. It is probably not open enough, I agree, but it is already much more open than it used to be at the national level in a whole series of matters.

R. BROWN:

You remember, the franchisers were very worried but they came to Europe and found complete openness; they had meetings with all the key people in the European Community, and they felt that it was much more open than in America. Americans got 96.5 percent of what they wanted, the Americans from the outside got that.

E. STEIN:

My experience in talking to American lawyers and business people has been that it is difficult to find where to go in Brussels. If you identify the proper person in the Commission, you will usually find openness and cooperation. There are something like 12,000 officials in Brussels and the problem is to find the right person, the right Jacques Bourgeois. That has been my experience, as a rule, in talking to American lawyers.

Dr. Quick would like to add a few comments.

R. QUICK:

I would like to comment on the question from the colleague from New Zealand regarding the interest of the consumer and whether that should be taken into account when applying the Community's trade instruments. I think I would agree to take it into account in cases of the Safeguards Clause, Regulation 288, because here we deal with fair imports. I disagree completely with his view that we should rely on consumer interest when applying the antidumping or countervailing duty law. This is not only because we deal with unfair trade, but also because of the inherent risk of a discriminatory application of the law. The chemical industry has always seen the subjects of antidumping or countervailing duty as technical issues. Do not let politics or politicians get involved in such issues. The cases Edwin referred to, particularly those in the electronics industry, have made the whole subject controversial on a political level. If we bring politicians into the game,

then politicians will speak for consumer interests, and in some cases the antidumping duty will be reduced and in others not. Hence, the resulting application of the law can only be discriminatory. I would fear that if you take account of the consumer interest, the complaining industry will flex its political muscle even more strongly, and, who do you think will win in the end? I am afraid that we should not stress the consumer interest too much in the discussion of what is the Community interest in the antidumping and countervailing duty law. Our industry has always said that it could live with the Community interest, but if you ask them today whether they would accept taking into account consumer interests, I think they would flatly say: "No! We don't want them." Dumping is dumping, and if there is dumping, there should be measures against it because it is unfair trade. That, incidentally, is exactly what the U.S. does since there is no U.S. public interest provisions in the antidumping and countervailing duty law.

E. VERMULST:

Of course, Reinhard and I are rather on opposite sides of the fence because he works for the European chemical industry and I work mainly for foreign import-export firms. It has been my experience that political influence had been exerted, until a few years ago, only by the domestic industries, which brought to bear political interests on the EEC institutions to find certain dumping margins and to reach certain results, to accept or reject the undertakings. Until a few years ago, foreign companies did not do that, but they have learned, of course, to play the game. By now, they are exhorting their importers and consumers to write letters to the Commission to point out that certain measures also have an impact on consumers, and not just on the producing industry. What I have heard from people in the Commission, however, is that if a thing like that happens, they call the domestic industry and say, "Okay, I've just received a letter from a Community importer saying that it is not in his interest to impose protective measures, so why don't you supply me with five letters saying that it is in the interest of the EEC."

J. JACKSON:

The notion that you can insulate antidumping or various fair trade laws from political influence is absurd. In fact, there is a lot of this going on in the U.S. system. The U.S. system has a number of safeguards that the European system does not have, including a much heavier layer of appeal to the courts, which of course has transactional costs, but also has some fairness insurance advantages, and so on. I

think one of the fundamental things that we are learning is that the so-called level playing field idea and fair trade laws are often used as an excuse by the politicians to rig the system against imports; that is one of the things that we are learning in the antidumping area in particular. The whole antidumping law sits on a very shaky intellectual foundation. But even more shaky are the detailed calculations that are made by the so-called disinterested caseworkers in all the major systems that use it. There are four major countries that use it in a significant way, and those detailed calculations are taken in such a way that there is very little question in my mind that there is a tilt against imports. Now, one of the things that is happening in Europe is the development of a very constructive and more informed debate on just that question than has actually occurred in the United States. This has begun to be played out in the pages of the *Financial Times* of London. I encourage you to watch for that debate. It's going to continue. Several people tackled me while I was in London, talking about various works that they have underway.

R. LAUWAARS:

First, I found food for thought when John Jackson was speaking and describing the European integration process and the time over which it had been going on. He was speaking about a decade or two or three. I was thinking that the difference was General DeGaulle. You may have your own thoughts about that.

A more serious point is, you could say, the matter of reciprocity. I've been a participant in some heated discussions with American colleagues about, in particular, the notion of reciprocity. Those discussions took place in the fall of this year, and I think it might be useful to stress that there has now been a change, if I have understood Jacques Bourgeois correctly, and we should make a sharp distinction between what Jacques called "reflective reciprocity" (what you could call "mirror reciprocity") that is, a requirement that EEC firms should have exactly the same rights in the United States as U.S. firms or subsidiaries of U.S. firms have in the internal market of the EEC, and national treatment. The latter notion means that an EEC firm should have the same rights in the United States as a U.S. firm, and U.S. firms should have in the EEC exactly the same rights as an EEC firm. Is it correct to say that there has been a change in attitude with respect to the two notions of reciprocity that have been presented by the Commission in its proposals?

Is it true that, in the latest version of the banking directive proposal, you can find references to both notions of reciprocity, but that the

most important one, and the one which is the core of the directive on this point, is reciprocity in the meaning of national treatment?

J. BOURGEOIS:

Does what Richard Lauwaars is saying about the change due to the Commission's amendment of the second banking directive as proposed mean that the sole requirement would be national treatment? I think that the proposal goes a bit further than that, because it says that the EEC credit institutions must have effective market access and competitive opportunities comparable to those accorded by the Community to the credit institutions of that third country. I think that it is going a bit further than just national treatment.

E. STEIN:

The proposal requires first that the financial institutions of the Community must enjoy in the third country national treatment; second, that they must be given the same comparative opportunities as domestic credit institutions have in the third country; and third, that they must be afforded effective market access in the third country. You have these three elements there and the Commission could, if it wanted to do so, manipulate them very nicely, so I don't feel that there has been such a great change in the drafting of the banking directive proposal. Do you agree with that?

J. BOURGEOIS:

I think that the first draft spoke about reciprocal treatment without defining it, and that could in fact have meant a mirror reciprocity, which would of course have made it impossible for the U.S. to negotiate with the European Community on that question. Such mirror reciprocity was not intended at the beginning. What I meant to say is, well, what do your banks get from access?

S. VLACHOS:

I would like to refer mostly to Professors Stein and Frowein and to ask some questions about the Single European Act. It appears to me, and I would like to be corrected if I am wrong, that the Single European Act could be considered as a constitutional or a pre-constitutional document, in other words as a document of fundamental value, in the sense that it greatly transforms the Common Market from a "market" to a "community" by creating, perhaps at a very initial stage, a federal or quasi-federal state. When you have, for the first

time, regulations with provisions concerning foreign policy, and hints in those provisions about national security and so forth; when you have environmental, research and development provisions, and others that certainly go beyond the concept of a market as such; when you have an upgrading of the EEC parliament (which before the Act was not even called a parliament) requiring its consultation in many instances, don't you think that this Act tends to open, or rather, opens a transitory stage of an undetermined period — it may be five, ten or twenty years — whereby, with the creation of a common European currency, the Community is pushed toward becoming a federal state?

J. FROWEIN:

I fully agree with my friend and colleague, Spyros Vlachos. We both belong to the 1957-58 class, which is well represented here. We are now, I think, all together five, which is quite amazing, the foreign students group. Now, I fully agree with Spyros Vlachos that the Single Act is of course, and was intended to be, an additional constitutional document. But let's not close our eyes when we evaluate the progress. The foreign policy that used to be a merely Community-based sort of gentleman's agreement, is now part of a treaty system, but it is not part of the EEC system, properly speaking. States were eager not to have foreign policy mixed up with the Community system, thus showing us that our governments are still very reluctant to give up real power. Let me make one other point in the context of EEC foreign jurisdiction: is it not somehow troublesome that in spite of the very interesting developments outlined by John Jackson, who saw a sort of increasing power base for the contact with the world outside Europe, we still have not really implemented article 113, because in many respects we still prolong the situation which existed before by a continuation of the earlier treaty system? Of course, concerning new treaties, the Community is fully competent, but in many areas no treaties were in fact concluded, and the old system is still being prolonged. If you take the *ERTA*⁴⁹ judgment in which the Court defined the Community treaty-making power in very broad terms, it is probably the only big one by the Court which has not had real consequences in fact. We frequently describe it to our students as the third or fourth step of integration, but the consequences of it, I think, were rather limited; indeed, the Commission stated in a famous report to the House of Lords that in fact it is difficult to find clear

49. Commission v. Council, 1971 E.C.R. 263.

examples where the Community jurisdiction was only based on that judgment.

E. STEIN:

Just a footnote to the most helpful remarks by Spyros Vlachos and Jochen Frowein. The Court of Justice has defined the treaty-making powers of the Community in the broadest terms at the expense of the national treaty powers of the Member States. The Member States in the Council have refused to go as far as the Court would let them go in the direction of exclusive Community power, and have insisted that when it comes to subjects other than the traditional commercial policy, the treaties must be in the form of the so-called "mixed agreements," that is, both the Community and the Member States must be parties. My colleague, Professor Joseph Weiler, suggested that we have here a novel *confederal* pattern of treaty power that generally does not exist in other divided-power systems such as federations. In federations, the inexorable tendency has been for the federal authorities to assert exclusive power in the foreign affairs field. In Europe, because of the unique situation, a different pattern of shared federal and state power is emerging.

J. BOURGEOIS:

May I add something? The article by Joseph Weiler to which Eric is referring has been published in a book called *Mixed Agreements*, and one of the co-editors of the book is Professor Henry Schermers of Leiden, who is with us today.

J. DROLSHAMMER:

There has been a gentleman from Austria and an American gentleman living in Switzerland saying something about Switzerland. Let me say a few words. In Switzerland, people are a little worried that EEC countries are monopolizing Europe as a notion. I think everybody in Switzerland very much thinks and believes that they are part of Europe. If you try to analyze the relationship, you have to start from the very basic economic facts. Switzerland, most likely, from an economic point of view, is more integrated into the EEC than some of the EEC countries themselves. The EEC is the largest trading partner of Switzerland, but Switzerland is the second largest trading partner of the EEC in absolute figures, making up, I think, almost eighty percent of the trade deficit between the EEC and Japan. Now, with that background, Switzerland, after 1972, based upon the so-called "develop-

ment clause" in the Free Trade Treaty, has very pragmatically developed its relationship with the EEC. There have been about 130 treaties concluded in the meantime. The "wave" after 1985 certainly has hit Switzerland as well. Last fall, the Federal Council issued a very basic position paper. Of course, the basic position is no accession to membership in the Community — if you read between the lines — at least not half the time. The basic position is a pragmatic, very intensive approach by bilateral and multilateral means. Most recently, using the vehicle of the European Economic Space which is based upon the Luxembourg Declaration of 1985, after the Delors speech on the future relationship between the EEC and European Free Trade Association ("EFTA"), ministers got together in Oslo last fall, and you will see very intensive negotiations in the near future.

I would like to point out a few interesting aspects. Switzerland's more difficult problem is the Uruguay Round because the Swiss have a special agricultural regime which GATT will force them to change; this will create just as difficult an internal problem in Switzerland as the relationship with the EEC.

A second remark: Switzerland has recently introduced a test of "Euro-compatibility" as regards all of its new legislation. Therefore, there is a lot of direct and indirect harmonization taking place. The Swiss legislature cannot afford any longer to disregard developments within the EEC. A similar mark in that direction is the sociological fact that Swiss multinational firms, which, because of the "effects" principle, have to address various foreign standards when they determine how to behave in the markets, usually behave on the Swiss market according to the stiffest and strongest foreign rules. So, there again, you have a very "direct" indirect effect.

Let me end with a remark with respect to education. Switzerland presently, in my view, does not have enough people that can cope intellectually with the mass of problems coming up right now. I was with you, Professor Stein, in 1970-71. I had to go all the way to Ann Arbor to hear for the first time something about EEC law, and I can tell you it has not become much better in Switzerland in the meantime.

E. STEIN:

Maybe lawyers trained in EEC law should be our new export industry. We need one. Speaking of Swiss agriculture, one has to go to Switzerland to see the problem. In the 1960's, when the debate raged in Switzerland over its position toward the EEC, my wife and I were invited by the Swiss government to tour the country and to see why the Swiss agriculture cannot be made subject to the common agricul-

tural policy. A member of the Federal Council told us: "Our farmers manicure the country for us and for tourists. They are manicurists, and therefore we cannot accept a policy that would force them to leave the land in the interest of cost efficiency."

The next speaker is Dr. Meng from the Heidelberg Max Planck Institute.

W. MENG:

Listening this morning to the complaints about overregulation and about countertendencies, it came to my mind that there is one counterforce that is still quite silent. Perhaps the army has not yet lined up what it may be able to do. I am speaking of the labor unions. We haven't seen much interest from this side yet, but this might change — and they will give us a hard time then. 1992 is not yet finished in that respect. It affects social standards, and those standards are quite different in the twelve Member countries. They are cost factors, so you have to do something with them: either harmonize them or open up the competition.

Take our German standards regarding workers' participation in company management. They are unprecedented in Europe, I think, and you can hardly conceive that the other governments will all be ready to accept such standards. Great Britain, for example, is completely opposed to it. As far as the Community is concerned, you have, as yet, a very vague statement by the Economic and Social Council about a "Social Charter," and you have an even more evasive statement by Jacques Delors about the legal significance and normative character of such a charter. So I don't have much hope for harmonization.

Then, take the second solution, namely, competition. This would mean that there would be some tendency to adopt the lowest common denominator for social standards. Thinking about the situation in Germany, however, I can hardly imagine that the labor unions would be ready to give up terrain on this question. Those are vested rights in our country and I think it would cause social unrest if we had to revert to the lowest common denominator. So there is some motivation for the labor unions to unify in the remaining three years and to find a common position. If this common position is found, everything pertaining to company law and changing rules about free services will become much harder to resolve because there will be a lot of claims by the labor unions that will not easily be accepted by the governments.

E. STEIN:

There is a newsletter published by a respectable Washington organization, the Bureau of National Affairs, which predicted that in the first year, 1993, 39,000 companies in Europe will have difficulties and 500,000 workers will lose their jobs. I have no idea where they got the figures and whether they are accurate, but that's one element supporting what Mr. Meng has said.

R. RAITH:

I have just one remark on the antidumping issue which we addressed before. I am in the antidumping division of the Commission and thus have the pleasure to see the arguments that are brought forward from industry, from the exporters, and I would like to draw your attention to the fact that, in cases where there is a strong consumer interest, where the consumer is not the final, private consumer but where the consumers themselves are powerful industries, they are a major, maybe *the* major party to the case. I myself am conducting the DRAM and EPRIM antidumping proceedings, and I can tell you that I spend much more time with the consumers than I spend with any other group of parties involved, so it really depends on whether you are speaking of paintbrushes from China which are sold in big chain department stores to the final hobby painter, or whether you are speaking about semiconductors which are sold to huge powerful companies like IBM. Therefore, I tend to disagree with Edwin's remark that the consumers are only puppets of either the EC producers or of the exporters. IBM is certainly neither the puppet of the Japanese DRAM exporters nor of the European DRAM producers. And just in brackets, coming back to the free movement of goods argument, I would like to put a drop of vinegar into the *Cassis de Dijon*⁵⁰ principle by pointing out what should be clear in our minds, that even if a product from a third country is introduced into free circulation in the EEC, it will not be treated for all purposes exactly like a European product. This issue has come up very recently and was of great concern to the electronics manufactures association of the United States. In fact, they were in Brussels a couple of weeks ago because the rules of origin are still a very important factor. If you have, say, semiconductors of United States origin, this may be decisive for the origin of the product into which they are finally put. It might be of crucial importance for the origin of a work station or a computer and this, in turn, will be crucial for the treatment in the trade, say, between the

50. *Rewe-Zentral AG*, 1979 E.C.R. 649.

EEC and EFTA because, if the product is considered as not being of EEC origin, then it does not qualify for the privileges if exported to EFTA. In the framework again of antidumping proceedings, rules of origin may be crucial as well because, in the circumvention area, the origin of components is essential in order to establish the value ratio for the parts and materials used. So rules of origin will continue to play an important role even after 1992.

E. STEIN:

Actually the Texas firm that is involved in this problem, I understand, is seriously thinking of setting up an operation in Europe, and is making up its mind where it will build.

M. PUTTFARKEN:

I have a question concerning free trade and services. It was mentioned that there is a first regulation on shipping, on maritime trade and on countervailing duties against dumping in that trade. How would you establish dumping here? There are two different situations. One is our scapegoat, the Soviet and other Eastern block fleets employing their own labor below cost and then selling their transportation at cut-rate prices in order to earn hard currency. This is what we suspect, although a recent study has found shipping to be one of the few profitable branches of the Soviet industry. The second situation may be more important in this context. German or other European shipping companies bring their ships under foreign flags (Cyprus, Liberia, or Panama), employ cheap labor under those flags and below European standards, labor from the Philippines or Kiribati or somewhere else, and then sell transportation within Europe at cut-rate tariffs. Would this be dumping? If so, what are the criteria for a company being European, as this scheme operates through wholly-owned foreign subsidiaries at Singapore or Panama or Monrovia? Finally, and depending perhaps on the criteria, would not the idea of a unified European market push in two directions, the first one obviously being, "Foreigners, please keep out," but also in the opposite direction, being, "Europeans, please keep within. Stay within under the standards of your labor market and labor law, trade unions and social security, taxation and the whole international framework of competition?"

E. VERMULST:

Under this regulation, a very hybrid regulation, the objectionable

practice is the provision of subsidies in any form whatsoever. For example, exclusive cargo reservation schemes can be subsidies. The point is, how do you measure such subsidies? It's very difficult, so what the Council has done is to borrow the surrogate producer concept from the antidumping law and use that to measure the benefit of the subsidy. They look at the price charged by the foreign producer accused of having received a subsidy; they compare that to the rate charged by a shipper in another country which has not received such subsidies, and then the price difference — the margin of undercutting — can be the basis for the imposition of redress of duties. It was primarily aimed at the Soviet Union, and at the nonmarket economies, but the first case has been against Korea, and, in that case, redress of duties has been imposed.

With respect to the second question about the EC shippers flying foreign flags, I think that essentially a complaint could be brought against those shippers, but it would have to be brought by a European industry, and they may not find it in their interest, if they only engage in that practice, to cut off their own head.

C. SPILLMAN:

I have a very easy question and this goes to Mr. Vermulst. We are talking of the consumer advantages, and I hear and read that, in 1993, consumer prices in the Common Market shall go down between ten and thirty percent. In the transportation sector, they talk about thirty percent price cuts. Am I the only one who hears that, or do you hear that, or think that? If this is true, we will have even twice or three times as many companies who go out of business immediately.

E. STEIN:

Mr. Donner is our last speaker. Mr. Donner is an official of the Netherlands University of Justice and the son of the first President of the European Court of Justice, whom we were able to welcome with us yesterday.

J. DONNER:

I hope you won't hold against my father what I'm going to say. I just want to draw attention to one aspect of the discussion here, that the whole development towards 1992 is somewhat lopsided and concentrated on trade. Here I want to agree with others' remarks that this fascination with the progress that has been made in the field of goods is endangering the whole project by outdistancing the political

acceptability and other aspects that are necessary for a consolidation of the success. It has been asked, where are the consumers. Now it's not only the consumers. Professor Frowein already indicated a growing resistance in a German Länder to the developments within the Community. I must say I'm working with the Dutch government. The Dutch have traditionally been one of the most Community-minded countries and still, there, there is a growing resistance in political classes to a loss of control. With the *Cassis de Dijon* philosophy, which is essential to the construction of the case, there is a growing feeling of losing control over producers who can use the diversity within the Community to their own profit, and to the detriment of consumers and the labor force. There is another aspect as well. The whole integration at the moment is product-led. The other, social aspect, the free movement of peoples, is completely left out of the Community development at the moment. It is not left out of the Single European Act of 1986 but it does not fall under the majority rule. I am personally involved in discussions over the framework of the Shenger Agreement, which is a sort of precursor to the free movement of persons throughout the Community. Free circulation of persons has its own precursors. There you get into the real problems of the next development of the Community: judicial cooperation, police cooperation and how they can be controlled. Therefore, I would also very much doubt whether the Single Act can be considered a constitutional document, even though there were some advances made in foreign policy, especially with all the reservations concerning public security and public interest which became significant as soon as they started to deal with free circulation of persons. In another respect, I think, that success is on clay feet as long as the Community does not have the necessary instruments of power. At the moment, there is a slow progression in proposals from the Commission for having direct competence within the Member States and having the authority to provide direct legal protection within the Member States. There, the resistance is largest to the whole development, and I think that progress is going to be made. It will certainly not be made before 1993, but the whole development will take place after 1993. Those are the most significant indicators of a permanent success in the field because otherwise it always has the risk of falling apart.

E. STEIN:

One comment on the last statement. Mr. Donner, who is on the staff of the Netherlands Ministry of Justice, has raised the important question of assuring the free movement of people, not only of workers,

in the Community, in connection with the plan for a complete removal of internal frontier controls as part of the Project 1992. This might require extensive harmonization of national regulations in such matters as visas, police cooperation, checks on foreigners, asylum, hot pursuit, etc. In fact, as he suggested, the Single European Act, which introduces majority voting for harmonization of national legislation on most subjects concerning the internal market, specifically excludes the free movement of persons from this liberalization provision. Mr. Donner also referred to the so-called Schengen agreement which was negotiated by France, West Germany, and the Benelux countries. In that agreement, the parties agreed to abolish all border controls between them as a "precursor" — as Mr. Donner put it — to an all-Community agreement, in other words, to blaze a trail that the other wary Member States would follow. But I am told that there has been a last minute hitch with the Schengen treaty.

I should like to conclude this lively discussion by raising four questions bearing upon the success of Europe 1992.

The first one concerns the legislative program. I am told that forty-seven percent of the proposals that the Community was to enact as part of the program have already been adopted, including such important texts as the provision for complete freedom of capital movement. Now the question here is, first of all, how firm these provisions are, how many derogation clauses, and reserved national safeguard clauses there are which will be invoked, what postponements and special arrangements will be made for instance for the newcomers Spain, and Portugal or for Greece. Also, some of the most controversial proposals, such as the drafts on indirect tax harmonization, final liberalization of financial services and removal of all physical frontiers inside the Community are still on the table. That is the first set of questions.

The second question concerns the implementation of those measures, principally in the form of "directives," that have already been enacted by the Council. There has been a dramatic increase in cases where the Commission has had to sue the Member States before the Court of Justice because they failed to transform the directives into the respective national legal orders within the established deadlines. As the number and importance of the adopted directives increases — and it is bound to do so — so will the problem of getting the national parliaments and administrations to implement them and apply them properly.

The third question is the one raised by Dr. Meng: to what extent will the unavoidable adverse impact on jobs and on smaller business hold back the progress toward creating a real home market?

The fourth — and perhaps the most important — question relates to the response of European business. Will the management be prepared to plan on a global basis and modify the structures with a view to meeting increased competition not only within Europe but also on a worldwide level? We have already seen some substantial restructuring particularly among French, British and Spanish enterprises (with some considerable activities by the Japanese), but the verdict is not in as yet on this issue.

One last comment. The faculty of the University of Michigan Law School deliberated on how to grade this panel. After a lengthy consideration it was decided, contrary to all established precedents, to grade all the panel members A+. Thank you.