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EEC Sanctions Against South Africa: The Common Commercial Policy and Delimitation of the EEC's Powers

I. INTRODUCTION

On September 16, 1986, the nations of the European Economic Community (EEC) reached an agreement involving a variety of sanctions to be imposed by the EEC against South Africa. The agreement included bans on new investments in South Africa, on imports of South African gold coins, or Krugerrands, and on iron and steel products. From a practical standpoint this package of sanctions was almost entirely symbolic.¹ If the package had included a ban on coal imports, as originally intended, it would have had a much more substantial effect. This is due to the fact that South Africa exports two-thirds of its coal to the EEC.² Initially the proposed sanctions agreement included a ban on coal imports.³ The EEC however, removed the measure when West Germany, backed by Portugal, refused to support a ban on coal imports.⁴

Regardless of the effectiveness of the sanctions agreement, it raises issues concerning a Member State's power in areas where the EEC has already acted. This Note will examine whether a Member State may impose unilateral sanctions on South Africa despite the fact that the EEC has already acted in that regard. Initially, the Note will analyze the Treaty of Rome.⁵ Next it will focus on an interpretation of Article 113 of the Treaty of Rome. Generally, Article 113 contains the objective of a common commercial policy. The Note will also look at the exclusivity of the EEC's ability to act, and whether Member States are to have concurrent powers.

II. TREATY OF ROME

In 1957, the Treaty of Rome established the basic structure of the EEC. A central objective of the Treaty, as presented in Article 2, is the harmonious

¹ *No Fire from Kohl*, THE ECONOMIST, Sept. 20, 1986, at 57.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Treaty Establishing the European Economic Community, *done at Rome*, March 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome].

development of economic activities.⁶ Article 113 of the Treaty calls for a common commercial policy based on uniform principles.⁷ Article 113 reads in part:

[T]he common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.⁸

Two questions must be addressed in considering the ability of a Member State to act unilaterally with respect to commercial subjects on which the EEC has already acted. The first question is whether the EEC's sanctions fall within the ambit of the common commercial policy.⁹ If the first question is answered in the affirmative, then the second inquiry regards the degree of exclusivity of the EEC's powers relating to the act in question.¹⁰ The European Court of Justice (European Court) issued two opinions which establish guidelines for use in considering the two questions presented by Article 113.

III. INTERPRETATION OF ARTICLE 113

On November 11, 1975, the European Court issued its first opinion, *Opinion 1/75*.¹¹ This decision was initiated by a request for an opinion of the European Court concerning the compatibility of a proposed draft "Understanding on a Local Cost Standard" with the Treaty of Rome.¹² This opinion revolved around the questions of whether the EEC had the power to conclude the "Understanding on a Local Cost Standard" and, if so, whether its power to do so was exclusive.¹³

In *Opinion 1/75*, the European Court considered the substance of the common commercial policy, and determined that the term was to be applied in a broad, evolving sense.¹⁴ The transaction at issue involved the setting of minimum conditions for export credits. The Court recognized that the transaction fell

⁶ Treaty of Rome, *supra* note 5, at art. 2. See Dawkins, *European Vision of Free Market on Track*, The Boston Sunday Globe, Jan. 11, 1987, at A10, col. 5.

⁷ Treaty of Rome, *supra* note 5, at art. 113.

⁸ *Id.*

⁹ See generally Opinion of the Court (Understanding on a Local Costs Standard) 1/75, 1975 E. Comm. Ct. J. Rep. 1355, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8365 (1976) [hereinafter *Opinion 1/75*].

¹⁰ *Id.*

¹¹ *Opinion 1/75*, *supra* note 9.

¹² *Id.* at 1356-57.

¹³ *Id.* at 1359-61.

¹⁴ A. PARRY & J. DINNAGE, PARRY & HARDY: EEC LAW 425, 426 (1981). See also *Opinion 1/75*, *supra* note 9, at 1362-63.

within the context of export policy.¹⁵ Furthermore, the Court expanded that category to include measures concerning credits for the financing of local costs linked to export operations.¹⁶

The European Court stated that the EEC, when implementing measures covered by Article 113, is empowered, usually through the Organization of Economic Cooperation and Development (OECD) to initiate internal rules of EEC law as well as to conclude agreements with countries outside of the EEC.¹⁷ The Court explained that a commercial policy involves the combination and interaction of internal and external measures, with no individual measure having priority over the others.¹⁸

In the second opinion, *Opinion 1/78*, the European Court also addressed the interpretation of Article 113 and the scope of the common commercial policy.¹⁹ The Court established conclusively that it is no longer possible to interpret Article 113 restrictively. The Court defined restrictive as limiting the common commercial policy to the "use of instruments intended to have an effect only on the traditional aspects of external trade."²⁰ The term "traditional aspects" presumably refers to those aspects of commercial policy specifically enumerated in Article 113.²¹ In addition, the Court endorsed the use of an expansive reading of Article 113 by claiming that the power of the EEC to implement a commercial "policy" based on "uniform principles" required the administration of external trade from a wide perspective.²² Accordingly, the Court held that the subjects listed in Article 113 under the heading of commercial policy was not exhaustive.²³ The Court concluded by stating that "[a] restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries."²⁴ This broad interpretation seems to be in accord with an early statement by one Commentator that "the commercial policy [means] all measures intended to regulate economic

¹⁵ Export policy is mentioned explicitly in Article 113 as falling within the common commercial policy. See text accompanying note 8.

¹⁶ *Opinion 1/75*, *supra* note 9, at 1362.

¹⁷ *Id.* at 1362-63.

¹⁸ *Id.* at 1363.

¹⁹ *Opinion of the Court 1/78* (International Agreement on Natural Rubber), 1979 E. Comm. Ct. J. Rep. 2871, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8600 (1979) [hereinafter *Opinion 1/78*]. The agreement in question involved an attempt to achieve a balanced growth between supply and demand for natural rubber in an effort to stabilize prices in the long run for both exporters and importers, as well as to ensure a reliable supply for importers. *Id.*

²⁰ *Id.* at 2913.

²¹ See text accompanying note 8.

²² *Opinion 1/78*, *supra* note 19, at 2913.

²³ *Id.*

²⁴ *Id.*

relations with the outside world."²⁵ Another Commentator concluded that the scope of the common commercial policy includes at least all measures affecting the movement of goods.²⁶

In light of the European Court's *Opinion 1/78*, the recent package of sanctions enacted by the EEC raises issues concerning whether a Member State, apart from the EEC, may simultaneously impose similar sanctions against South Africa. The first question is whether the sanctions agreement falls within the scope of Article 113. As discussed previously, an application of Article 113 results in a need to discern the meaning of common commercial policy. The sanctions amount to restrictions on trade with a non-member country and therefore appear to fall within the scope of commercial policy. Thus, due to the broad definition of commercial policy used in *Opinion 1/75* and *Opinion 1/78*, such a sanctions agreement appears to qualify as common commercial policy. Although such an agreement which is intended to regulate external trade, is not mentioned in the Article 113 list, according to *Opinion 1/78* it may still fall within the scope of the Article.²⁷

It is also possible, however, that the sanctions agreement could be viewed as a foreign policy measure enforced through commercial policy. Should the sanctions agreement be held to be outside the common commercial policy, a possibility of disturbances in intra-community trade due to a disparity in the degree of sanctions levied against South Africa would still exist.²⁸ Given this possibility and the wide scope of the commercial policy, precedent indicates that the sanctions agreement falls within the scope of common commercial policy even if considered a foreign policy measure.

IV. EXCLUSIVITY

The second issue addressed in *Opinion 1/75* was whether the EEC's power is exclusive with regard to the actions it formulates.²⁹ In *Opinion 1/75*, the Court based its answer to this question on the premise that the common commercial policy of Article 113 should be viewed in the context of EEC operations and for the protection of the EEC's common interests.³⁰ With these views in mind, the various Member States must seek to adapt their own particular interests to

²⁵ 1961 (II) HAGUE RECUEIL 90, cited in le Tallec, *The common commercial policy of the EEC*, 25 INT'L & COMP. L.Q. 732, 738 (1976).

²⁶ Kapteyn, *The Common Commercial Policy of the European Economic Community: Delimitation of the Community's Power and the European Court of Justice's Opinion of November 11, 1975*, 11 TEX. INT'L L.J. 485, 494 (1976) [hereinafter Kapteyn].

²⁷ *Opinion 1/78*, *supra* note 19, at 2913.

²⁸ *Id.*

²⁹ *Opinion 1/75*, *supra* note 9, at 1363.

³⁰ *Id.* at 1363-64.

those of the other Member States.³¹ Unilateral actions by Member States to ensure the separate satisfaction of their own interests in external relations, which act concurrently with the EEC actions, risk compromising the effective defense of the EEC's common interests.³² Therefore, in a field which is covered by the common commercial policy, it is impossible for the EEC and the Member States to exercise concurrent powers.³³ Accordingly, the European Court in *Opinion 1/75* stated:

To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community [EEC] intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.³⁴

In *Opinion 1/78*, the European Court went further and determined what the exclusivity arrangement would entail should the agreement in question not be covered solely by the common commercial policy.³⁵ In the facts addressed in *Opinion 1/78*, the agreement, an International Agreement on Natural Rubber,³⁶ also fell within the ambit of general economic policy.³⁷ The Court stated that if the agreement comes at least in part under the common commercial policy, then it could not be withdrawn from the competence of the EEC in the name of general economic policy.³⁸ The Court in *Opinion 1/78* did note, however, that if a Member State were to finance economic clauses in the agreement, separate participation by that Member State in the agreement in question would be justified.³⁹

In the situation examined in this Note, the question of a Member State's ability to impose sanctions unilaterally is likely to turn on the degree of exclusivity of the EEC's action. Assuming, *arguendo*, that the sanctions package does fall within the scope of Article 113, it would appear on its face to be an exclusive measure. The European Court clearly stated, in *Opinion 1/75*, that EEC acts relating to common commercial policy exclude unilateral actions by the Member States. In *Opinion 1/78*, the Court stated that the fact that the measure in

³¹ *Id.* at 1364.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Opinion 1/78*, *supra* note 19, at 2914.

³⁶ *Id.* at 2911.

³⁷ *Id.* at 2914.

³⁸ *Id.*

³⁹ *Id.* at 2918.

question did not fall completely under the common commercial policy would not be enough to defeat the exclusivity of the EEC's ability to act.

An argument in favor of allowing unilateral actions by Member States is that the risk to common commercial policy considered by the European Court in *Opinion 1/75* does not apply to this case. The Court, in *Opinion 1/75*, was concerned that allowing unilateral actions would jeopardize the effective defense of the EEC's common interests. The Court stated that allowing the Member States to have concurrent powers in this sphere would distort the institutional framework and endanger the mutual trust within the EEC.

V. CONCLUSION

The Member States have an interest in speaking with one voice to the rest of the world.⁴⁰ In the sanctions agreement examined here the common interest of the EEC was ostensibly to send a signal to South Africa that the present apartheid system would not be tolerated any longer. In other words, the Member States have an interest in the EEC's unified foreign policy, rather than its commercial policy. The EEC's interest would not change if it chose some other non-commercial vehicle through which to express its displeasure with the South African apartheid system. The fact remains, however, that economic sanctions are the most effective means of dealing with South Africa at this point in time. Furthermore, it is unclear how a Member State that chooses to impose harsher sanctions unilaterally would endanger the common commercial interests of the EEC and compromise mutual trust among the Member States. Should this problem eventually come before the European Court, the question which would have to be answered is essentially as follows: should the Court look to the policy which the EEC is setting forth, in this case a foreign political policy, or should it look to the vehicle through which the EEC is imposing that policy? If the Court looks to the latter then it will undoubtedly rule against any Member State which attempts to impose unilaterally harsher sanctions against South Africa. If the Court agrees with the former notion, however, then Member States will probably be free to impose harsher sanctions on their own.

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⁴⁰ See generally Kapteyn, *supra* note 26, at 486.