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The European Community, the United States, and Ireland: An Intermesh of Statutory Provisions

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THE EUROPEAN COMMUNITY, THE UNITED STATES, AND IRELAND: AN INTERMESH OF STATUTORY PROVISIONS

*Finbarr Murphy**

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I. INTRODUCTION

The economy of the Republic of Ireland (Ireland) has undergone a remarkable transformation in the last two decades. The decline in the population of Ireland, which began with the Great Famine of 1845 and continued for 120 years as a result of unabated emigration, ceased in the mid-1960s. Ireland now has the youngest and fastest growing population in Europe. There has been significant growth in the manufacturing and agricultural industries, the latter being the traditional mainstay of the Irish economy. Living standards have risen perceptibly so that, in relative terms, the people of Ireland have learned the meaning of prosperity.

This economic resurgence is due in part to the complete reversal of Irish economic policies at the end of the 1950s. The Irish Government phased out its protectionist trade measures and attempted to create employment by encouraging foreign investment in local industrial enterprises. United States companies have played a major role in this industrial development. The incentives provided by successive Irish governments through the Industrial Development Authority (IDA), an agency of the Government of Ireland, spurred United States corporations to earnestly begin direct investment in Ireland in the early 1960s. Ireland's proximity to and eventual membership in the European Community, however, has undoubtedly been the major factor in attracting United States capital to Ireland.

This Article will outline the effects that Ireland's membership in the European Community has had on direct investment by United States corporations in Ireland. The Article begins with a survey of the diplomatic, commercial, and economic links between the United States and Ireland, and then examines the relationship between the United States and the European Community. The third section reviews the legal and constitutional aspects of

Irish membership in the European Community and outlines the new legal and economic order of which Ireland has become a member. Last, the Article examines the effect that Ireland's membership in the European Community has had on its relations with the United States and assesses the impact of its European Community membership on United States enterprises established in Ireland.

II. DIPLOMATIC, COMMERCIAL, AND ECONOMIC LINKS BETWEEN THE UNITED STATES AND IRELAND

A. Emergence of the Irish State

During Easter week in 1916, the leaders of an armed insurrection in Ireland declared an Irish Republic and appointed themselves to the Provisional Government of that Republic. The rebels put up a heroic struggle but were soon overcome by superior British forces. Most of the leaders were executed and many of the rebels were interned. The brutal suppression of the rebellion and the subsequent ill treatment of the defeated rebels set in motion a chain of events that culminated in the limited independence for much, if not all, of Ireland.

From 1919 to 1921, Ireland again found itself pitted against the British in the War of Independence. In 1919 many of those elected to represent Ireland in the Imperial Parliament at Westminster boycotted that assembly and created the First Dail (Parliament) of Ireland, a body which purported to exercise sovereignty over the Irish people. Following a truce in the War of Independence, the Articles of Agreement for a Treaty Between Great Britain and Ireland¹ (the Treaty) were concluded and ratified by a majority of the First Dail in January of 1922. The Treaty created the Saorstát Éireann, or Irish Free State, and provided that the Irish Free State would enjoy the same constitutional status within the British Commonwealth of Nations that Canada enjoyed at that time.²

The equivalent constitutional status of the Irish Free State and Canada meant that the Parliament of the Irish Free State, the Oireachtas, could not constitutionally enact any law contrary to

1. Dec. 6, 1921, Great Britain-Ireland, 26 L.N.T.S. 9. The Treaty was appended to the Constitution of the Irish Free State (Saorstát Éireann) and enacted by Dail Éireann as Public General Act, No. 1 of 1922.

2. Treaty Between Great Britain and Ireland, *supra* note 1, arts. 1-2.

provisions of the Treaty. The position of the Crown, the oath of allegiance to the Monarch, the retention of certain ports by the British for military purposes, and the partition of Ireland were all matters outside the legislative authority of the Oireachtas. The unacceptability of these restrictive constitutional provisions to the Republicans, an Irish political faction that had opposed ratification of the Treaty from the outset, led to a civil war within Ireland. Although the Republicans lost the war, subsequent Irish governments continued the Republicans' attempts to overcome these restrictive constitutional provisions. In 1931 the enactment of the Statute of Westminster³ significantly redefined the relationship between the United Kingdom and its Dominions (Canada, South Africa, Australia, Newfoundland, New Zealand, and the Irish Free State) by granting the Dominions greater individual legislative authority.

In 1932 Eamon de Valera, a senior leader of the 1916 uprising, came to power and eliminated all traces of the Crown from the Irish Constitution. Moreover, de Valera drafted a new constitution for the new state of Eire (Ireland), which was adopted by referendum in 1937. In 1938 de Valera negotiated the return of the "treaty ports" that had been retained by Great Britain under the Treaty. The policy of neutrality adopted by Ireland during World War II underlined its independence. The final act in the emergence of Ireland as a sovereign independent nation came in 1948 when it left the Commonwealth and declared itself a Republic.⁴

Although the 1922 Constitution of the Irish Free State and its successor, Bunreacht na hÉireann (The Constitution of Ireland), established legislative and judicial institutions that were fundamentally different from those of the British constitutional system of 1922, both Irish constitutions maintained in force all laws in existence when the constitutions were adopted—provided that those laws were not inconsistent with the constitutions.⁵ Thus, the Adaption of Enactments Act of 1922⁶ carried over all Acts of the British Parliament in force on December 6, 1922.⁷ Neither the

3. 22 Geo. 5, ch. 4 (1931).

4. Republic of Ireland Act, No. 22, of 1948.

5. IRISH FREE STATE CONST. of 1922, art. 73; BUNREACHT NA HÉIREANN art. 50 (Ir.).

6. No. 2 of 1922.

7. IRISH FREE STATE CONST., *supra* note 5, at art. 73.

Treaty nor the 1922 Constitution, however, made any reference to the treaty-making powers of the new state.⁸ By implication from the Adaption of Enactments Act and the Irish Free State, after 1937 Ireland succeeded to those treaties concluded between the United Kingdom and other states prior to December 6, 1922. In 1933 de Valera noted that, with regard to British treaties negotiated before Ireland's independence, "the practice . . . here has been to accept the position created by the commercial and administrative treaties of the late United Kingdom . . . until termination or amendment."⁹

B. Treaties Between Ireland and the United States

Formal diplomatic links between Ireland and the United States were established in 1927. The new state considered good relations with the United States to be of great importance. In fact, until 1929 Ireland maintained only three diplomatic agents abroad, one in London, one in Geneva, and one in Washington, D.C. A good diplomatic relationship with the United States was important to Ireland because of the United States emergence as an international power, and the presence in the United States of a large Irish-American community which contributed thousands of dollars to the Irish struggle for independence.

Since 1922 thirty-eight treaties, agreements, conventions, or exchanges of notes have been concluded between the United States and Ireland. These documents can be categorized for purposes of this Article as consular and diplomatic agreements, transportation agreements, nuclear research agreements, economic cooperation agreements, and trade and commercial agreements. The economic cooperation agreements and the trade and commercial agreements in particular have played a major role in the remarkable transformation of the Irish economy in the last twenty years.¹⁰

8. The only specific provisions dealing with state succession related to the assumption by the Irish Free State of an equitable portion of the public debt of the United Kingdom and the obligation to pay just compensation to the public servants discharged by the government of the new state. Treaty Between Great Britain and Ireland, *supra* note 1, arts. 5, 10.

9. Statement by de Valera to Dail Éireann, [1972] 2 Y.B. INT'L L. COMM'N 41.

10. The other documents, some of which are referred to below, when taken in the aggregate, form the foundation for Ireland's solid relationship with the United States and the emergence of the Irish economy. When analyzed individually, however, the other agreements do not approach the importance of the major documents discussed in the text. Consular and diplomatic agreements estab-

A description of the historical setting in which these important documents were established and an overview of some of their significant provisions are provided below to facilitate greater understanding of the United States participation in the renaissance of the Irish economy.

1. *The Organization for European Economic Cooperation*

Immediately after World War II, the United States Government realized that the restoration of European political stability required rebuilding and modernizing the economies of the European countries. This objective could only be achieved by providing substantial financial assistance to all European countries willing to participate in a joint recovery program. The United States Government designed the European recovery program, commonly known as the Marshall Plan, to ensure that the participating

lished and outlined the duties and rights of consular officers. Consular Convention Between the United States of America and Ireland, May 1, 1950, 5 U.S.T. 949, T.I.A.S. No. 2984, 1954 Irish Treaty Series [I.T.S.] No. 5. Transportation agreements dealt with the exchange of air transportation services between the United States and Ireland and the allocation of particular routes to recognized carriers. Agreement Respecting Air Transport Services, Feb. 3, 1945, United States-Ireland, 59 Stat. 1402, E.A.S. No. 460, 1958 I.T.S. No. 4, *amended by Exchange of Notes*, June 2-3, 1947, 61 Stat. 2872, T.I.A.S. No. 1620, 1947 I.T.S. No. 2, *further amended by Exchange of Notes*, Mar. 4, 1958, 9 U.S.T. 307, T.I.A.S. No. 4007, 1958 I.T.S. No. 4. Agreements provided for the civil use of nuclear energy in Ireland, and permitted Ireland to acquire nuclear research training equipment from the United States. Agreement for Cooperation Concerning Civil Uses of Atomic Energy, Mar. 16, 1956, United States-Ireland, 9 U.S.T. 943, T.I.A.S. No. 4059, 1958 I.T.S. No. 19; Agreement for Procurement of Nuclear Research Materials, United States-Ireland, Mar. 24, 1960, 11 U.S.T. 376, T.I.A.S. 4453, 1960 I.T.S. No. 2. The right of licensed amateur radio operators of either country to operate stations in the other country was established in 1968. Exchange of Notes, at 10, 1968, United States-Ireland, 19 U.S.T. 6057, T.I.A.S. No. 6566, 1968 I.T.S. No. 8. An agreement to extend economic cooperation to develop Ireland's economy was entered into in 1948. Agreement Respecting Economic Cooperation, June 28, 1948, United States-Ireland, 62 Stat. 2407, T.I.A.S. No. 1788, 1948 I.T.S. No. 11. An Exchange of Notes in 1955 dealt with Ireland's participation in the United States Investment Guarantee Program. Exchange of Notes, Oct. 5, 1955, United States-Ireland, 6 U.S.T. 3953, T.I.A.S. No. 3405, 1955 I.T.S. No. 15. Two agricultural trade agreements were also concluded in the early 1960s. Agricultural Trade Agreement, May 3, 1962, United States-Ireland, 13 U.S.T. 444, T.I.A.S. No. 5006, 1962 I.T.S. No. 9; Exchange of Notes, Feb. 25, 1964, United States-Ireland, 15 U.S.T. 132, T.I.A.S. No. 5528, 1964 I.T.S. No. 2.

states could attain economic autonomy within a five year period. The major condition imposed by the United States Government was that the European countries form an international organization to execute the Marshall Plan. To meet this condition, representatives from sixteen European countries and the Western military commanders of occupied Germany convened in Paris and formed the Organization for European Economic Cooperation (OEEC).¹¹ The OEEC was designed to promote the development and production of goods in Europe, to create programs for the production and exchange of commodities and services, to establish a multilateral payments system, to study the possibility of creating customs unions and free trade zones, to reduce tariffs and other barriers to trade, to maintain currency stability in the member states, and to optimize the use of its human resources.¹² The OEEC was the forerunner of other organizations designed to promote European economic cooperation. These organizations include the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), the European Economic Community (EEC), and the European Free Trade Association (EFTA). The first three organizations are collectively referred to as the European Community.

During July of 1948 Ireland ratified both the OEEC Convention,¹³ and a bilateral Economic Cooperation Agreement with the United States¹⁴ that provided the framework for the distribution of aid from the Marshall Plan in Ireland. Between 1955 and 1957, Ireland received nearly six million pounds in assistance from the United States for projects that were proposed by the Irish Government and approved by the United States Government.¹⁵ It is no exaggeration to say that the United States, as the motivating force behind the OEEC, was the mid-wife, if not the progenitor of the remarkable emergence of the Irish economy and the integration of the European economies.

11. Convention for European Economic Cooperation, April 16, 1948, reprinted in U.S. DEP'T OF STATE PUB. No. 3145 (1948).

12. OEEC Convention, *supra* note 11, arts. 2-9.

13. 1948 I.T.S. No. 16.

14. Economic Cooperation Agreement, June 28, 1948, United States-Ireland, 62 Stat. 2407, T.I.A.S. No. 1788, 1948 I.T.S. No. 10.

15. These projects included the establishment of the Agricultural Institute, the equipping of the Institute for Industrial Research and Standards, a scheme for the eradication of bovine tuberculosis, and a scholarship exchange program.

2. *Double Taxation Agreements and the Treaty of Friendship, Commerce and Navigation*

Perhaps the most significant agreements between the United States and Ireland were concluded in 1949 and 1950. In 1949 the two governments concluded the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Convention).¹⁶ Article III of the Convention provides that enterprises based in one country should not be taxed in the other country on profits earned from nonpermanent industrial or commercial enterprises in that country.¹⁷ Pursuant to Article XIII, tax liabilities in one country are allowed as a tax credit in the other country.¹⁸

In 1950 Ireland and the United States concluded the Treaty of Friendship, Commerce and Navigation (FCN Treaty).¹⁹ This agreement, more than any other, provides the legal framework for United States investment in Ireland. The agreement is based upon the principles of "national" and "most-favored-nation" treatment which provides that nationals of either country are permitted to enter the territory of the other country to carry on trade or engage in related commercial activities.²⁰ One of the effects of these principles has been that Irish laws regarding alien employment and registration systems are applied leniently to United States enterprises.²¹ The FCN Treaty also provides that nationals of either country, and the dwellings, offices, factories, and other premises of nationals and companies of either country located in territories of the other country, are to be free from unlawful molestation.²² If accused of a crime, nationals are accorded access to diplomatic or consular representatives.²³ Each country is

16. Sept. 13, 1949, United States-Ireland, 2 U.S.T. 2303, T.I.A.S. No. 2356, 1951 I.T.S. No. 7 [hereinafter cited as Convention]. On the same day the two governments concluded the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on the Estates of Deceased Persons. Sept. 13, 1949, United States-Ireland, 2 U.S.T. 2294, T.I.A.S. No. 2355, 1951 I.T.S. No. 8.

17. Convention, *supra* note 16, art. III, para. 1.

18. *Id.* art. XIII.

19. Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155, 1950 I.T.S. No. 7.

20. *Id.* art. I, para. 1.

21. *Id.* protocol, para. 1.

22. *Id.* art. II, para. 1, art. VIII, para. 1.

23. *Id.* art. II, para. 2.

obligated to accord freedom of transit to nationals of the other country²⁴ and each country must "accord equitable treatment to the capital of nationals and companies of the other [country]."²⁵ Nationals and companies of either country receive "national treatment" when: (1) engaging in commercial, manufacturing, processing, financial, publishing, scientific, educational, religious, philanthropic, and professional activities, except the practice of law;²⁶ (2) obtaining trademarks, patents, and other industrial property rights; (3) seeking access to courts of justice and administrative tribunals; and (4) employing attorneys and other agents.²⁷

For economic policy reasons, article VI allows Ireland to maintain in force provisions regulating manufacturing, processing, and insurance activities.²⁸ Although nationals and companies of either country enjoy national treatment in the acquisition of property by testate and intestate succession or by judicial process, the ownership of real property is subject to the applicable laws of each country.²⁹ Nationals and companies of either country residing or doing business in the other country are not taxed or charged on income, capital, or other transactions to a greater extent than those taxes or charges borne by nationals and companies of the taxing country.³⁰ In fact, nationals and companies of third-party countries may benefit from special advantages through governmental double taxation agreements.³¹ National or most-favored-nation treatment is accorded to products of either country in all matters affecting internal taxation and sales,³² and to financial transactions effected by nationals and companies of either country.³³ Most-favored-nation treatment will be granted to all products with respect to customs duties and similar

24. *Id.* art. XIX. Freedom of transit also applies to the baggage of nationals. *Id.*

25. *Id.* art. V.

26. *Id.* art. VI, para. 1(a). Most-favored-nation treatment applies to the practice of law. *Id.* art. VI, para. 3(b).

27. *Id.* art. VI, para. 1(b)-(d).

28. *Id.* art. VI, para. 4.

29. *Id.* art. VII, paras. 1, 3.

30. *Id.* art. IX, para. 1(b).

31. *Id.* art. IX, para. 3.

32. *Id.* art. XVI, para. 1.

33. *Id.* art. XVII, para. 3.

charges.³⁴ Most-favored-nation treatment will not, however, apply to economic advantages gained by either country through a customs union of which either country, after consultation with the other country, has become a member.³⁵ Regulated and privileged businesses (including those owned by the Government), and any other activities that tend to hinder commerce are also kept under review.³⁶ In addition, the FCN Treaty also provides freedom of navigation for applicable areas in the United States and Ireland.³⁷

Pursuant to article XX, the exceptions provision, either country may impose regulatory measures to restrict the export and import of gold and silver.³⁸ Favorable treatment may be denied to a company that is owned or controlled by nationals of a third state.³⁹ Similarly, the most-favored-nation provisions of the FCN Treaty do not apply to the special advantages accorded by the General Agreement on Tariffs and Trade.⁴⁰ Article XXIII provides that any dispute on the interpretation of the FCN Treaty not satisfactorily resolved by diplomacy, shall, unless otherwise agreed upon, be submitted to the International Court of Justice.⁴¹ Last, the FCN Treaty replaced the provisions of certain agreements concluded prior to Irish independence between the United States, Great Britain, and Ireland; in particular the 1815 Convention of Commerce and Navigation.⁴²

III. RELATIONS BETWEEN THE UNITED STATES AND THE EUROPEAN COMMUNITY

The United States participation in the United Nations forces dispatched to deal with the Korean crisis in 1950 reduced the number of United States troops stationed in Europe. To offset this reduction and to further the rehabilitation of West Germany, the United States pressed for the inclusion of West German forces in the Western European defense structure. France offered a great deal of resistance to this proposal, but the United States

34. *Id.* art. XII, para. 1.

35. *Id.* art. XII, para. 4(c).

36. *Id.* art. XIV, para. 1, art. XV, para. 1.

37. *Id.* art. XVIII.

38. *Id.* art. XX, para. 1(a).

39. *Id.* art. XX, para. 1(f).

40. *Id.* art. XX, para. 2.

41. *Id.* art. XXIII.

42. *Id.* art. XXIV.

persisted in its demands. France broke the impasse with a bold proposal designed both to assuage French fears of German rearmament, and to contribute to the economic reconstruction plans for France and Germany. The French proposal placed German and French coal and steel resources, which were vital to any armaments industry and essential to the proposed economic development of Europe, under autonomous international control. In addition, Germany, France, and any other European nation that wished to join the arrangement, were to establish a common market in coal and steel based on a customs union. The proposal gained support and ultimately resulted in the establishment of the European Coal and Steel Community (ECSC) by representatives of Belgium, France, Germany, Italy, Luxembourg and the Netherlands (the Six).⁴³ The ECSC experiment worked so well that the Six established the European Economic Community (EEC)⁴⁴ and the European Atomic Energy Community (Euratom).⁴⁵ Since 1967 the three European communities have been administered and staffed by the Council of Ministers, the Commission, the European Parliament, and the Court of Justice.⁴⁶ Although the three communities are legally distinct, the administrative institutions and the member states now call this unique institutional phenomenon the "European Community."

The relationship between the United States and the European Community has always been close. The United States maintains a diplomatic mission to the European Community in Brussels and the Commission of the European Communities has a permanent delegation in Washington, D.C. Trade between the United States and the European Community has been particularly important. Member states of the European Community are a principal destination for United States exports, receiving twenty-four percent of all goods shipped from the United States.⁴⁷ The European Community is second only to Canada in the percentage of imports re-

43. See Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

44. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty].

45. Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 298 U.N.T.S. 167.

46. See Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, reprinted in 4 I.L.M. 776 (1965).

47. See generally COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPE INFORMATION, External Relations No. 57 (1982).

ceived from the United States.⁴⁸ The European Community, nonetheless, has persistently recorded a trade deficit with the United States. In 1980 the European Community's deficit with the United States alone amounted to \$25 billion, with an overall trade deficit of nearly \$70 billion.⁴⁹ Enterprises and individuals in the United States and the European Community also account for the largest volume of direct foreign investment in the world.⁵⁰ The greatest share of direct foreign investment by United States and European investors has been in the European Community and the United States.⁵¹ By 1980 United States direct investment in the European Community amounted to \$76.5 billion or 35.9 percent of United States direct investment abroad.⁵² In comparison, European Community enterprises had invested \$37.85 billion in the United States.⁵³

Although the EEC Treaty does not specifically restrict or encourage direct foreign investment in member states, authorities in the European Community generally have a positive attitude toward foreign investment. The legal framework for direct foreign investment by United States investors in Ireland is the bilateral Friendship, Commerce and Navigation (FCN) Treaty, one of which is concluded between the United States and each member state of the European Community.⁵⁴

The European Community normally trades with states or groups of states through the framework of bilateral or multilateral treaties. For example, the European Community separately concluded bilateral agreements with each member of the European Free Trade Association (EFTA) in 1972,⁵⁵ and concluded multilateral conventions with over fifty African, Caribbean, and

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* European subsidiaries of United States corporations recorded sales of \$171.5 billion in 1976. *Id.*

54. For a discussion of the FCN Treaty Between Ireland and the United States, see *supra* text accompanying notes 19-42.

55. See, e.g., Agreement Between the European Economic Community and the Portuguese Republic, July 22, 1972, reprinted in 1 COLLECTION OF THE AGREEMENTS CONCLUDED BY THE EUROPEAN COMMUNITIES: BILATERAL AGREEMENTS, EEC-EUROPE, 1958-1975, at 749 (1977).

Pacific states in 1975, 1980, and 1984.⁵⁶ Ironically, no general bilateral agreement regulates trade between the United States and the European Community. Instead, free trade between the two parties has been developed primarily through the General Agreement on Tariffs and Trade (GATT),⁵⁷ to which the United States and all member states of the European Community have acceded. The European Community itself is not a party to the GATT, but the Court of Justice of the Community has held that provisions of the GATT are binding on the European Community because the European Community has assumed control over commercial policies originally exercised exclusively by its member states.⁵⁸ Moreover, during the recent multilateral trade negotiations, commonly called the Tokyo Round, the Commission of the European Communities negotiated on behalf of the European Community as a whole, and the Council of Ministers ratified the resulting agreements.⁵⁹ The United States Congress implemented the Tokyo Round agreements in the Trade Agreements Act of 1979.⁶⁰

The agreements produced by the Tokyo Round provide that the average tariff on industrial products in the European Community will be 3.9 percent, whereas the average United States tariff will be 4.7 percent.⁶¹ The Tokyo Round also produced the Standards Code on technical barriers to trade and an agreement on Government Procurement.⁶² Although there is no general bilateral agreement between the United States and the European Community, individual bilateral agreements have been concluded

56. ACP-EEC Convention of Lomé, Jan. 30, 1976, 19 O.J. EUR. COMM. (No. L 25) 2 (1976); Second ACP-EEC Convention signed at Lomé, Nov. 25, 1980, 23 O.J. EUR. COMM. (L 347) 2 (1980); Third ACP-EEC Convention signed at Lomé, Dec. 8, 1984 (not yet published).

57. Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 188.

58. See *International Fruit Co. NV v. Productschap voor Groenten en Fruit*, 1972 E. Comm. Ct. J. Rep. 1219.

59. Council Decision Concerning the Conclusion of the Multilateral Agreements Resulting From the 1973 to 1979 Trade Negotiations, 23 O.J. EUR. COMM. (No. L 71) 1 (1980).

60. Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of the U.S.C.).

61. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPE INFORMATION, *supra* note 47.

62. See Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Governmental Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5, 7-11 (1982).

on specific topics such as the peaceful uses of atomic energy,⁶³ the supply of nuclear fuels,⁶⁴ and fishing rights in the coastal waters of the United States.⁶⁵

Cooperation between the United States and the European Community also takes place within the Organization for Economic Cooperation and Development (OECD), the Conference on Security and Cooperation in Europe, and the annual western "economic summits"—annual conferences attended by the heads of state of the United States, Canada, Japan, France, West Germany, Italy, the United Kingdom, and the European Community. Furthermore, all member states of the European Community, with the exception of France and Ireland, are also members of the North Atlantic Treaty Organization (NATO).⁶⁶ It is interesting to note that Ireland is the only member state of the European Community that espouses a policy of neutrality, a stance which greatly contributed to the deterioration of Anglo-Irish relations during the recent hostilities in the Falkland Islands.

IV. RELATIONS BETWEEN IRELAND AND THE EUROPEAN COMMUNITY

A. The End of Economic Isolation

During the period immediately following World War II, Ireland participated in the establishment of several international organizations. As noted above, Ireland joined the OEEC in 1948.⁶⁷ The following year Ireland was one of the original signatories to the Statute of the Council of Europe,⁶⁸ and in 1953 it ratified the European Convention for the Protection of Human Rights and Fun-

63. See *Atomic Energy: Cooperation for Peaceful Applications*, entered into force Aug. 27, 1958, United States-Euratom, 9 U.S.T. 1116, T.I.A.S. No. 4091.

64. See *Atomic Energy: Establishment of Joint Program*, Nov. 8, 1958, United States-Euratom, 10 U.S.T. 75, T.I.A.S. No. 4173.

65. *Agreement Concerning Fisheries Off the Coasts of the United States*, Feb. 15, 1977, United States-European Economic Community, 28 U.S.T. 3787, T.I.A.S. No. 8598.

66. France withdrew from NATO in 1965 but maintains organizational links with the NATO command structure.

67. See *supra* text accompanying note 13. In 1960 the OEEC was transformed into the Organization for Economic Cooperation and Development (OECD) and its membership was enlarged to include Canada and the United States. *Convention on the Organization for Economic Cooperation and Development*, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891, 1961 I.T.S. No. 12.

68. 87 U.N.T.S. 102, 1949 I.T.S. No. 9.

damental Freedoms.⁶⁹ Ireland became a member of the United Nations in 1955.⁷⁰ In the 1950s Ireland also acceded to the Convention Establishing a Customs Co-operation Council,⁷¹ joined the European Payments Union,⁷² and became a member of both the International Monetary Fund⁷³ and the International Bank for Reconstruction and Development.⁷⁴

During this period, however, the Irish economy was in a severe recession. De Valera's policy of self-sufficiency, with its protective tariffs and restrictions on foreign investment, was gradually phased out in the late 1940s and early 1950s. State capital expenditures increased significantly during this period and dramatic improvements were made on roads, hospitals, arterial drainage, and other basic infrastructural services. There was, however, no real increase in the production of goods; unemployment and emigration grew while the balance of payments deficit persisted. Not surprisingly, Ireland did not participate in the creation of the ECSC, the EEC, Euratom, or EFTA.⁷⁵ Ireland was one of a group of nations, including Finland, Greece, Iceland and Spain, which became known as the "Forgotten Five" because of their failure to become members either of the EEC or of EFTA.

In 1958 Ireland's Department of Finance undertook a fundamental review of Irish economic policies.⁷⁶ This review was quickly followed by a Government White Paper entitled "Programme for Economic Expansion" (the Programme),⁷⁷ which was designed to outline "the more important contributions, direct and

69. 254 U.N.T.S. 223, 1953 I.T.S. No. 12 (ratifying European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221).

70. 1965 I.T.S. No. 11.

71. 157 U.N.T.S. 129, 1952 I.T.S. No. 11.

72. 1954 I.T.S. No. 12. Text of the Agreement reprinted in 11 EUR. Y.B. 363, 363-415 (1954); see also Biclou, *L'Union Europeenne Des/Paiements*, 11 EUR. Y.B. 151, 151-82 (1954).

73. 1957 I.T.S. No. 6.

74. 1957 I.T.S. No. 7. The International Monetary Fund and the International Bank for Reconstruction and Development were both established by the Bretton Woods Agreements. Dec. 27, 1945, 2 U.N.T.S. 39.

75. EFTA was established on January 4, 1960 by the Treaty of Stockholm, 370 U.N.T.S. 3, which was signed by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. The signatories are often referred to as the "Outer Seven".

76. DEPARTMENT OF FINANCE, ECONOMIC DEVELOPMENT (1958).

77. Oireachtas Pub. No. 4796 (1959) (out of print).

indirect, which the government propose[d] to make to economic development in the years immediately ahead."⁷⁸ The primary objective of the Programme was to increase the growth rate of Ireland's national income in an attempt to reduce emigration and unemployment. It was in the industrial sector, however, that the greatest departure from previous economic policy was observed. Minimal protection was afforded to new, local industries under the theory that the simultaneous expansion of both industrial exports and foreign investment would do more to bolster the Irish economy than propping up the local industries' production of goods for the home market. The goal of increasing foreign investment was given immediate legislative form in the Industrial Development (Encouragement of External Investment) Act of 1958.⁷⁹

Ireland sought to extend these major economic policy changes to the international arena by obtaining membership in one of the two European trading blocks, EFTA or the European Community. In 1961 both the United Kingdom and Ireland applied for membership in the EEC. Negotiations with the United Kingdom broke down twice, once in 1963 and again in 1967, causing the suspension of EEC action on the other applications. No further action was taken on these applications until the major obstacle to British membership in the EEC was removed with the departure of General de Gaulle from the French political stage in 1969. Negotiations resumed in Luxembourg in June of 1970, and by January of 1972 Ireland, Denmark, and the United Kingdom had signed the documents of accession to the European Community.⁸⁰ Ireland, Denmark, and the United Kingdom became member states on January 1, 1973, with the Irish referendum on membership garnering the support of over eighty percent of the electorate. Prior to their membership in the European Community, the United Kingdom and Ireland established an Anglo-Irish Free Trade Area in 1965,⁸¹ and in 1967 Ireland acceded to the GATT.⁸²

78. *Id.*

79. Industrial Development (Encouragement of External Investment) Act, 1958, No. 16 of 1958.

80. See TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 959 (2d ed. 1978).

81. Agreement Establishing a Free Trade Area, Ireland-United Kingdom of Great Britain and Northern Ireland, Dec. 14, 1965, 565 U.N.T.S. 58, 1965 I.T.S. No. 10.

82. 1967 I.T.S. No. 27 (acceding to GATT), *supra* note 57.

B. The Terms of Entry into the European Community

Formal negotiations between the European Community and the applicant states opened on June 30, 1970, when the European Community stipulated that: (1) applicant nations accept the Treaties of Paris and Rome and their political objectives, all decisions made by the European Community since the Treaties came into force, and all choices made by the European Community in the field of development; (2) any problems applicant states had in adjusting to membership in the European Community had to be solved through the establishment of transitional measures rather than by changing the existing rules; and (3) the duration of the transitional periods was to be the same for all applicant states.⁸³

Ireland and the other applicant states accepted these stipulations and the terms of entry into the European Community were set forth in the Act Concerning the Conditions of Accession and Adjustments to the Treaties,⁸⁴ commonly referred to as the Act of Accession. As of January 1, 1973, the date of accession, all the provisions of the original Treaties and all the acts adopted by the institutions of the European Community⁸⁵ were binding on Ireland pursuant to the conditions set forth in the Treaties.⁸⁶

The Act of Accession made the necessary institutional changes in the European Community by assigning Ireland ten seats in the Assembly (European Parliament),⁸⁷ enlarging the Commission to thirteen members,⁸⁸ adding a ninth judge to the Court of Justice,⁸⁹ and allowing one representative of the Irish government to participate in the meetings of the Council of Ministers.⁹⁰

The Act of Accession also designated the economic measures that applicant states had to adopt during the five-year transi-

83. See Brinkhorst & Kuiper, *The Integration of the New Member States in the Community Legal Order*, 9 COMMON MKT. L. REV. 364, 367 (1972).

84. Jan. 22, 1972 [hereinafter cited as Act of Accession], reprinted in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 991 (2d ed. 1978).

85. See *supra* text accompanying notes 55-66.

86. Act of Accession, *supra* note 84, art. 2, reprinted at 997.

87. *Id.* art. 10, reprinted at 1005.

88. *Id.* art. 15, reprinted at 1009.

89. *Id.* art. 17, reprinted at 1010. For a discussion of recent changes in the membership of the Parliament Commission and the Court of Justice resulting from the direct elections of the Parliament and the accession of Greece to the Community, see Schloh, *The Accession of Greece to the European Communities*, 10 GA. J. INT'L & COMP. L. 385 (1980).

90. See Act of Accession, *supra* note 84, arts. 11-14, reprinted at 1005-08.

tional period.⁹¹ During this period Ireland and the other applicant states were to abolish customs duties, and other equivalent trade charges with the original member states, and to adopt progressively the European Community's Common Customs Tariff (CCT) for all trade with third states.⁹² With few exceptions, quantitative restrictions on the import and export of goods were to be abolished immediately and measures of equivalent effect were to be phased out by the beginning of 1975.⁹³ State commercial monopolies were adjusted during the transitional period to eliminate existing discrimination in the procurement and marketing of goods.⁹⁴ In addition, Ireland was allowed to accelerate the liberalization of their trade terms pursuant to the Anglo-Irish Free Trade Area Agreement.⁹⁵

Also of great importance were the eleven Annexes to the Act, one of which provided, *inter alia*, for amending the existing secondary legislation of the Community to take account of the new membership of Ireland and the other applicant states.⁹⁶ In addition, there were thirty Protocols attached to the Act of Accession. The most significant of these was Protocol 30, which noted that the improvement of the living standards and the working conditions of the peoples of member states and the harmonious development of the economies of the member states were among the fundamental objectives of the European Community; that the Irish Government had embarked upon a policy of industrialization and economic development designed to raise living standards, reduce unemployment, and eliminate disparities in regional development; that the achievement of the objectives of the Irish industrialization and economic development policy was in the common interest of all the member states; and, in particular, that these objectives were to be taken into account in the application of articles 92 and 93 of the EEC Treaty.⁹⁷

91. The bulk of the transitional provisions were devoted to the Common Agricultural Policy. *See id.* arts. 50-107, *reprinted* at 1045-75.

92. *See id.* arts. 31-41, *reprinted* at 1029-36.

93. *Id.* arts. 42-43, *reprinted* at 1036-37.

94. *Id.* art. 44, *reprinted* at 1037.

95. *Id.* art. 48, *reprinted* at 1040-41.

96. Act of Accession, *supra* note 84, annex I, *reprinted in* 15 O.J. EUR. COMM (No. L 73) 47 (1972).

97. Act of Accession, *supra* note 84, protocol 30, *reprinted* at 1265. Articles 92 and 93 of the EEC Treaty specify what state-provided aids are and are not compatible with the Common Market. EEC Treaty, *supra* note 44, arts. 92-93.

The conditions of entry into the European Community were presented to the Oireachtas in a White Paper in January 1972.⁹⁸ In the opinion of the Irish Government, there was no alternative to Ireland's entry into the European Community, particularly in light of the British accession to the European Community. The Irish Government believed that most sectors of Irish industry would be able to withstand the greater competition from European enterprises that European Community membership would entail, because the impact of free trade had been felt for some time with the operation of the Anglo-Irish Free Trade Area Agreement. The Irish Government believed that the growth rate of the Irish economy was unlikely to fall below five percent per annum during the transitional period, farm output was likely to increase by thirty percent, and farm income would probably double in the same time span. The unemployment rate was likely to fall, and while it was clear that consumers would have to pay more for goods, particularly food, price increases were unlikely to exceed one percent per annum. The Irish Government was also particularly pleased with the Protocol:

This Protocol is of far reaching importance for our industrial and regional development, and indeed for the future growth of the economy as a whole. We can now proceed with development plans secure in the knowledge that we will be able to operate an adequate system of development aids and supports and that Community resources will be available to us.

We shall be able to honour commitments already undertaken in respect of export tax reliefs and to continue to grant these reliefs to new firms which begin manufacturing for export. Our industrial incentives will be considered in due course by the Commission after our Accession as part of their continuing examination of the whole structure of State aids through the Community.⁹⁹

Ireland finally acceded to the European Community on January 1, 1973, after adopting the requisite legislative measures.

98. *The Accession of Ireland to the European Communities*, Oireachtas Pub. No. 2064 (1972) (out of print).

99. *Id.* (points 3.27-.30).

C. The Constitutional Amendment and the European Community

Certain institutional functions of the European Community would have clashed with provisions of the Irish Constitution as it stood before 1973. The legislative functions of the Council of Ministers, the executive functions of the Commission, and the judicial functions of the Court of Justice would have conflicted generally with article 6 of the Constitution, which provides that all legislative, executive, and judicial powers of Ireland "are exercisable only by or on the authority of the organs of State established by this Constitution."¹⁰⁰ Moreover, the legal structure of the European Community would have impinged on other provisions of the Irish Constitution. It was decided, therefore, that a brief, comprehensive, blanket amendment should be adopted rather than attempting to create a specific listing of all the relevant articles of the Constitution and risk the possibility of omitting a clause that was incompatible with European Community law.¹⁰¹ The Constitutional amendment¹⁰² states that:

The State may become a Member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.¹⁰³

100. BUNREACT NA HÉIREANN art. 6, para. 2 (Ir.). Further elaborations on the exclusivity of these powers are found in articles 15, 28, and 34.

101. To complete the accession process, Ireland took the following steps: the Oireachtas passed a bill that proposed a referendum to amend the Constitution; a referendum on this proposed amendment was held; the Accession Treaties were approved by Dail Éireann; and the Oireachtas passed a bill to enact into Irish law all the Treaties and the existing secondary legislation.

102. See Lang, *Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty*, 9 COMMON MKT. L. REV. 167 (1972).

103. BUNREACT NA HÉIREANN art. 29, para. 5, cl. 3 (Ir.). Article 29 affirms Ireland's devotion to the ideal of peace, *id.* para. 1, and to the pacific settlement of international disputes, *id.* para. 2. It accepts the generally recognized principles of international law as the basis for relations with other states, *id.* para. 3,

In accordance with the dualist requirement of article 29.6, the European Community Treaties had to be incorporated into Irish domestic law by a legislative act of the Oireachtas. This obligation was met by the enactment of the European Communities Act of 1972.¹⁰⁴ The Act contains only six sections, including definitions in section 1 and short title in section 6. Section 2, the general provision, states: "From the 1st Day of January, 1973, the treaties governing the European Communities and the acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties."¹⁰⁵ Section 3 empowers any Minister of State to fashion the regulations necessary to effectuate section 2.¹⁰⁶ Section 4, as amended by the European Communities (Amendment) Act of 1973,¹⁰⁷ provides a semblance of parliamentary scrutiny over European Community secondary legislation¹⁰⁸ by allowing the Oireachtas Joint Committee on the Secondary Legislation of the European Communities established in July 1973, to recommend the annulment by Oireachtas resolution of any ministerial regulations adopted under section 3.¹⁰⁹ If, within one year, both Houses of the Oireachtas pass such a resolution, the regulations cease to have statutory effect.¹¹⁰ The Irish Government is obligated under section 5 to submit semiannual reports on such regulations to both Houses of the

and it requires all international agreements to which Ireland becomes party to be laid before Dail, *id.* para. 5, cl. 1. It introduces a dualist provision in paragraph 6 that states that "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." *Id.* para. 6.

Paragraph 4 of article 29 provides that the executive power of the state in connection with its external relations is to be exercised by the Government, and permits the Government to avail itself of any organ or procedure of any group or league of nations for the purpose of international cooperation. *Id.* para. 4, cl. 2. The latter provision was included to allow for Irish membership of the League of Nations and the British Commonwealth of Nations.

104. European Communities Act, 1972, No. 27 of 1972, *reprinted in* 10 COMMON MKT. L. REV. 106 (1973).

105. *Id.* § 2, *reprinted at* 106.

106. *Id.* § 3(1), *reprinted at* 106.

107. European Communities (Amendment) Act, 1973, No. 20 of 1973.

108. *Id.* § 4.

109. *Id.*

110. *Id.*

Oireachtas.¹¹¹

D. The Operation of European Community Law in Ireland

Article 2 of the Act of Accession and section 2 of the European Communities Act are nearly identical.¹¹² Their combined effect is to make binding on Ireland all treaties of the European Community and all acts of the European Community institutions which become part of the domestic law of member states. This explanation requires some elaboration.

The legislative, decision-making power in the European Community is divided between the Council and the Commission.¹¹³ The major portion of the legislative power, however, is conferred upon the Council, which is comprised of one representative from the government of each member state. The Commission, as an independent international body,¹¹⁴ has limited legislative powers, but maintains the exclusive right to initiate legislation and formulate policy. The Council and the Commission utilize three different instruments to implement policy: regulations, directives, and decisions.¹¹⁵ Regulations have general application, are binding in their entirety, and directly apply to each member state.¹¹⁶ Directives are binding on the member states only to the extent of the ultimate goals to be achieved; the means by which those goals are attained, as well as the form and method of implementation are left to the discretion of each member state.¹¹⁷ Decisions are binding in their entirety, but only upon those specifically addressed in the decision.¹¹⁸ Regulations are the principal legislative instrument used by institutions of the European Community with some three thousand regulations adopted annually. Regulations most closely resemble the Public General Acts of common law jurisdictions. In contrast to regulations, the legislative effect of directives is not felt until those directives have been transformed

111. European Communities Act, 1972, *supra* note 104, § 5, *reprinted* at 107.

112. *Compare* Act of Accession, *supra* note 84, art. 2, *reprinted* at 997, with European Communities Act, 1972, *supra* note 104, § 2, *reprinted* at 106.

113. EEC Treaty, *supra* note 44, arts. 145, 155.

114. *See id.* art. 157, para. 2.

115. *Id.* art. 189. The Council and Commission also may issue recommendations and opinions, but these statements have no binding force. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

into the domestic law of member states. Although decisions are binding on the addressee, they are not normative in effect.

The Court of Justice has the jurisdiction to review the validity of any adopted instrument. Natural and legal persons, however, have a very limited *locus standi*: they may only challenge decisions that are either addressed solely to them or are of direct and specific concern to them.¹¹⁹ The Court of Justice retains consultative jurisdiction and may give preliminary rulings on treaty interpretations or on the interpretation *and* validity of the acts of European Community institutions at the request of a court or tribunal in a member state.¹²⁰ This consultative jurisdiction can be described as a federal device because the burden of interpreting European Community law is distributed between the courts of member states and the Court of Justice; the procedure also assumes that European Community law may be relied upon in the courts of the member states. The assumption is never challenged in regard to regulations because they are, by definition, directly applicable in the member states.¹²¹ This effect is not, however, attributed to the application of treaties, directives, decisions, and other measures of European Community law. Such measures may be relied upon in the national courts of member states only if they comply with the requirements of the doctrine of "direct effects," a doctrine elaborated by the Court of Justice in a number of landmark decisions in the 1960s and early 1970s.¹²² The requirements of the direct effects doctrine are satisfied if provisions in treaties, directives, or decisions: (1) are clear and precise; (2) are unconditional; and (3) create an unqualified obligation in the member states or the European Community institutions.¹²³ Thus, the legal system of the European Community represents a clear departure from traditional international law because the citizens of the member states are both the objects of and subject to this legal system.

In *van Gend & Loos* the Court of Justice first discussed how European Community law differed from international law in an-

119. *Id.* art. 173.

120. *Id.* art. 177.

121. *Id.* art. 189.

122. See e.g., *van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E. Comm. Ct. J. Rep. 1; *Grad v. Finanzamt Traunstein*, 1970 E. Comm. Ct. J. Rep. 825 (preliminary ruling).

123. See *van Gend & Loos*, 1963 E. Comm. Ct. J. Rep. at 13.

other important respect: "[T]he [European] Community constitutes a new legal order of international law for the benefit of which the [member] states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the [m]ember [s]tates but also their nationals."¹²⁴ The effect of this limited transfer of sovereignty is that whenever the European Community has exercised or transferred sovereignty, member states may no longer act unilaterally or bilaterally. In other words, European Community law takes precedence over conflicting national laws. Moreover, national courts of member states faced with conflicting provisions of European Community law and national law, must give priority to European Community law and, if necessary, must declare the national law provisions to be ineffective.¹²⁵

In Ireland, the constitutional amendment and section 2 of the European Communities Act have placed European Community law in a privileged position. This was confirmed in *Pigs and Bacon Commission v. McCarren & Co. Ltd.*, where the court stated:¹²⁶

The effect of [section 2] is that [European] Community law takes effect in the Irish legal system in the manner in which [European] Community law itself provides. Thus, if according to [European] Community law, a provision of the Treaty is directly applicable so that rights are conferred in individuals which national courts must enforce, an Irish court must give effect to this rule. And, if according to [European] Community law, the provisions of [European] Community law take precedence over a provision of national law in conflict with it, an Irish court must give effect to this rule.¹²⁷

E. A Summary of European Community Economic Law

The Court of Justice has described the European Community as a "new legal order" and some of the more striking constitutional and procedural elements of this new order have been examined above. What follows is a brief outline of the substantive law of the European Community, or what one author has termed

124. *Id.* at 12.

125. This doctrine of "supremacy of Community law" was stated most clearly in the case of *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E. Comm. Ct. J. Rep. 629.

126. (1978) *J. IRISH Soc'y EUR. L.* 26.

127. *Id.* at 109.

the "law of the economy."¹²⁸ Perhaps the best way to understand the European Community is to analyze it in terms of the various stages of economic integration. The European Community is more than a free trade area because it is based upon a customs union and possesses all the characteristics of a common market, but it falls short of an economic union because it does not yet possess a uniform currency and a uniform economic policy.¹²⁹ The European Community is based upon a customs union that covers all trade in goods.¹³⁰ The member states were required to abolish all customs duties, quantitative restrictions, and measures of equivalent effect on imports and exports that existed between themselves.¹³¹ In addition, national trading monopolies had to be adjusted to eliminate discrimination in trade between member states.¹³² The member states were prohibited from imposing on other member states an internal tax on imported products in excess of that imposed on domestic products,¹³³ and member states were eventually required to harmonize tariffs imposed on the products of nonmember states and to adopt a uniform tariff classification system. The abolition of internal duties and quotas and the adoption of the Common Customs Tariff for trade with outside nations was achieved in July 1968.¹³⁴ The Common Commercial Policy¹³⁵ complements the elimination of these discriminatory trade measures by granting to the institutions of the European Community the power to conclude trade agreements with nonmember nations.¹³⁶

Although based on a customs union concept, the EEC Treaty also eliminated restrictions on the free movement of the factors of production in Common Market countries. This included the abolition of restrictions on the movement of labor (wage-earning or salaried personnel).¹³⁷ Restrictions on the movement of property

128. D. LASOK, *THE LAW OF THE ECONOMY IN THE EUROPEAN COMMUNITIES* (1980).

129. See B. BALASSA, *THE THEORY OF ECONOMIC INTEGRATION*, LONDON (1962).

130. EEC Treaty, *supra* note 44, art. 9.

131. *Id.* arts. 12-17, 30-37, 95.

132. *Id.* art. 37.

133. *Id.* arts 95-99. These prohibitions satisfy the direct effects doctrine. See *supra* text accompanying notes 122-23.

134. Reg. 950, 11 J.O. COMM. EUR. (No. L 172) 1 (1968).

135. EEC Treaty, *supra* note 44, arts. 110-116.

136. *Id.* art. 113.

137. *Id.* art. 48. Prohibited restrictions in the movement of labor include

belonging to persons resident in the member states were to be liberalized, but only "to the extent necessary for the proper functioning of the Common Market."¹³⁸ The member states were also required to abolish restrictions on the right to provide services.¹³⁹

The Court of Justice has declared many of the provisions regarding the elimination of restrictions on the free movement of persons, services, and capital to be directly effective and, therefore, capable of being relied upon in the courts and tribunals of the member states.¹⁴⁰ Restrictions on the free movement of goods, the free movement of people, and the supply of services, however, may be justified on grounds of public policy, public security, public health, or public morality.¹⁴¹ The establishment of a workable common market required rules designed to prohibit private enterprises from fragmenting the market between themselves, either by restrictive or monopolistic practices.¹⁴² State enterprises generally are subject to the same rules as private enterprises, except when the state enterprise is carrying out a service of general economic importance to the entire state, such as power generation or transport services, it shall not be obstructed from fulfilling its purpose.¹⁴³ The member states are also prohibited from distorting competition by providing financial or economic aid to certain enterprises or industries within their individual state.¹⁴⁴

Even though the EEC Treaty contains additional provisions for coordinating economic policies among member states,¹⁴⁵ progress

work and residence permit requirements, measures that discriminate in conditions of work and employment such as educational rights, access to housing, and differing social security systems in the member states. *See id.* arts. 48-51. Member states are also obliged to remove obstacles to establishment by non-nationals, and to recognize, on a mutual basis, evidence of formal qualifications. *Id.* arts. 52-58. Article 52 defines establishment as the right to take up and pursue activities under the same conditions as those applicable to nationals of the host state. *Id.* art. 52. According to article 58, the right of establishment also applies to companies having their registered office, principal place of business, or central administration in the European Community. *Id.* art. 58.

138. *See id.* art. 67.

139. *See id.* arts. 59-66.

140. *See, e.g.,* Watson and Belmann, 1976 E. Comm. Ct. J. Rep. 1185, 1193 (Preliminary Ruling).

141. *See* EEC Treaty, *supra* note 44, arts. 36, 48, 56.

142. *Id.* arts. 85-86.

143. *Id.* art. 90.

144. *Id.* art. 92, para. 1.

145. *See id.* arts. 103-109.

towards an economic union has been slow. The establishment of the European Monetary System (EMS) in 1979 was a step in the right direction, although the United Kingdom has not yet joined this system.

The European Community also oversees certain common policies, the most important being the Common Agricultural Policy (CAP),¹⁴⁶ which accounts for sixty-five percent of European Community expenditures.¹⁴⁷ The European Community's social policy includes the operation of a social fund, whose resources may be used to relieve long-term structural unemployment, facilitate re-training programs, and improve working conditions throughout the European Community.¹⁴⁸ Under the social policy, member states ensure that men and women receive equal pay for equal work.¹⁴⁹ Other policies include a regional policy, an educational policy, and an environmental policy. The European Regional Development Fund,¹⁵⁰ established in 1975, makes payments to member states for projects adopted within the context of national regional development plans. Such payments may only be used to match national expenditures.

V. COMMUNITY LAW AND DIRECT INVESTMENT BY UNITED STATES ENTERPRISES IN IRELAND.

The first four parts of this Article have attempted to put direct United States investment in Ireland in context by examining the development of relationships between Ireland and the United States, between the United States and the European Community and between Ireland and the European Community. The examination of Irish law relating to the incorporation of companies in Ireland, Irish tax considerations, and the system of incentives offered by the Industrial Development Authority was intended to familiarize the reader with the Irish legal structure. The remainder of this Article focuses on the principal effects that Ireland's membership in the European Community has on United States enterprises established in Ireland.

146. *See id.* arts. 38-47.

147. Annual Report of the Court of Auditors for 1983, 27 O.J. COMM. EUR. (No. C 348) 153 (1984).

148. *See* EEC Treaty, *supra* note 44, arts. 123-127.

149. *Id.* art. 119. *See also* Defrenne v. Sabena, 1976 E. Comm. Ct. J. Rep. 455.

150. Reg. 724, 18 J.O. COMM. EUR. (No. L 73) 1 (1974).

A. Compatibility of the FCN Treaty with European Community Law

The 1950 FCN agreement between Ireland and the United States is based upon the principles of "national treatment" and "most-favored-nation treatment." These principles initially appear to conflict with the doctrine of "community preference," the privileged status that is applied to all nationals, companies, goods, services, and capital of one member state in all other member states. It is important to note, however, that because of the obligations undertaken by member states, and in light of the limitation of their sovereignty in favor of the European Community, the community preference doctrine applies only between member states. Article 234 of the EEC Treaty partially reflects this dichotomy because it provides that any agreements between member states and third countries concluded before the EEC Treaty entered into force, would not be affected by the provisions of the EEC Treaty.¹⁵¹ The member states, however, are required to take all appropriate steps to eliminate incompatibilities between those agreements and the EEC Treaty, bearing in mind "that the advantages granted under [the EEC] Treaty . . . form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions. . . ."¹⁵²

Whether any of the FCN treaties concluded between the United States and member states of the European Community have been modified pursuant to article 234 is unclear. Modifications to the 1950 FCN Treaty between the United States and Ireland would probably not be necessary as the FCN Treaty does not preclude actions by either party that are specifically permitted by the GATT.¹⁵³ Article XXIV of the GATT permits an exception to the most-favored-nation rule for regional trading arrangements such as free trade areas and customs unions.¹⁵⁴ In addition, the FCN Treaty does not allow advantages gained by one party through a customs union to apply to the other party.¹⁵⁵

151. EEC Treaty, *supra* note 44, art. 234.

152. *Id.* For a recent interpretation of article 234, see Attorney General v. Burgoa, 1980 E. Comm. Ct. J. Rep. 2787, 2803, which discusses the compatibility of the 1964 London Fisheries Convention with the EEC Treaty.

153. FCN Treaty, *supra* note 19, art. XX, para. 2.

154. GATT, *supra* note 57, art. XXIV.

155. FCN Treaty, *supra* note 19, art. XII, para. 4(c).

The EEC Treaty was submitted to the administrators of the GATT in 1957 for approval under article XXIV, but no formal decision as to its compatibility with the GATT has ever been adopted. In the meantime, member states of the European Community have exercised the rights granted to them under the GATT and other contracting parties have pragmatically accepted this practice. It is safe to conclude that the European Community enjoys "de facto" article XXIV status.

Whether these two clauses eliminate any conflict between the requirements of national treatment and most-favored-nation treatment in the FCN Treaty and the community preference principle remains unresolved. In any event, because the European Community authorities have never suggested that any of the FCN treaties be revised in accordance with article 234, the issue is of academic interest.

B. Benefits from the Customs Union

The remainder of this Article assumes that United States enterprises in Ireland have been established through subsidiaries registered under Irish company law. Subsidiaries so registered have access to the market in the Community Customs Territory¹⁵⁶ under exactly the same conditions as those affecting an ordinary Irish company. Therefore, customs duties, quotas, or charges having an equivalent effect may not be levied by other member states against goods manufactured in Ireland. Other member states may, however, impose internal taxes on goods of Irish origin provided that this tax does not exceed the tax imposed on competing domestic products. Similarly, United States subsidiaries, like ordinary Irish companies, are subject to European Community legislation dealing with the importation of goods from nonmember nations. This legislation includes the rules on the origin of goods,¹⁵⁷ standards for the valuation of goods for customs purposes,¹⁵⁸ and the Common Customs Tariff.¹⁵⁹

In the operation of its business in Ireland, a United States subsidiary is entitled to avail itself of industrial property protection

156. Reg. 1496, 11 J.O. COMM. EUR. (No. L 238) 1 (1968).

157. Reg. 802, 11 J.O. COMM. EUR. (No. L 148) 1 (1968).

158. Reg. 803, 11 J.O. COMM. EUR. (No. L 148) 6 (1968).

159. Reg. 950, 11 J.O. COMM. EUR. (No. L 172) 1 (1968).

legislation including the Trade Marks Act of 1963,¹⁶⁰ the Copyright Act of 1963,¹⁶¹ and the Patent Act of 1964.¹⁶² The EEC Treaty permits restrictions on the free movement of goods within the European Community on several grounds,¹⁶³ one of which is the protection of industrial and commercial property rights. This exception is designed to enable individuals or enterprises to rely on national legislation that prohibits "passing off," infringements of patent rights, and other unfair competition practices.¹⁶⁴ Nevertheless, the Court of Justice has consistently condemned the use of industrial property rights to prevent parallel imports. The Court of Justice has ruled that if a company enjoys patent protection for its product in member states A and B, the company cannot prevent a third party who has legitimately purchased quantities of the patented product on the market in member state A, from importing and distributing those goods in member state B.¹⁶⁵ It would undoubtedly benefit the patent owner to be able to use his patent rights to prevent the importation of goods by the third party in order to personally take advantage of price differences in member states A and B. According to the exhaustion of rights doctrine formulated by the Court of Justice, however, use of patent rights in this way would amount to a disguised restriction of trade under article 36 of the EEC Treaty.¹⁶⁶ The existence of ten different regimes of industrial property protection legislation in the ten member states obviously inhibits the smooth operation of the single market established by the EEC Treaty. One of the long-term objectives of the European Community, therefore, is to replace that divergent national industrial property legislation with rules that can be uniformly applied throughout the European Community.¹⁶⁷

160. Trade Marks Act, 1963, No. 9 of 1963.

161. Copyright Act, 1963, No. 10 of 1963.

162. Patent Act, 1964, No. 12 of 1964.

163. See EEC Treaty, *supra* note 44, art. 36.

164. See *Parke, Davis & Co. v. Probel*, 1968 E. Comm. Ct. J. Rep. 55.

165. See *Centrafarm BV v. Sterling Drug Inc.*, 1974 E. Comm. Ct. J. Rep. 1147, 1163.

166. Under the exhaustion of rights doctrine, when a patent owner exercises its exclusive right to manufacture and release its product into a specific market, it "exhausts" its rights and may not prevent importation of its own product into the specific market. See *id.* at 1162-63.

167. See, e.g., Convention for the European Patent for the Common Market, 19 O.J. EUR. COMM. (No. L 17) 1 (1976).

C. The Right of Establishment and Freedom to Provide Services

Article 52 of the EEC Treaty defines freedom of establishment as "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies and firms, under the same conditions laid down for its own nationals by the law of the country where such establishment is in effect."¹⁶⁸ Pursuant to article 53 of the EEC Treaty, a member state is not allowed to introduce any new restrictions on the right of nationals of other member states to establish in its territory.¹⁶⁹ Article 52 requires member states to abolish existing restrictions on establishment before the end of the transitional period, including restrictions on the establishment of agencies or subsidiaries by nationals of other member states.¹⁷⁰ Article 54 directs the Council of Ministers of the European Community to draw up a general program for the abolition of restrictions on establishment, and empowers the Council to adopt directives to implement this general program.¹⁷¹

It is important to note that establishment not only includes the business activities of companies and firms in the strict sense, but also applies to all business organizations formed under civil or commercial law, with the exception of nonprofit companies.¹⁷² The Council is empowered to issue directives regarding the mutual recognition of diplomas, certificates, and other evidence of formal qualifications, and to coordinate the legal or administrative provisions of member states that regulate the activities of self-employed persons.¹⁷³

Article 54 of the EEC Treaty grants priority to any European Community action that liberalizes rules concerning the acquisition of land and buildings by nationals of other member states and eases conditions governing the entry of personnel from a parent company into managerial posts of agencies, branches, or subsidiaries established in the territory of another member state.¹⁷⁴ It is particularly significant that article 54 recognized the need to

168. EEC Treaty, *supra* note 44, art. 52.

169. *Id.* art. 53; *see also supra* note 137 and accompanying text.

170. EEC Treaty, *supra* note 44, art. 52.

171. *Id.* art. 54, paras. 1-2.

172. *See id.* art. 58.

173. *Id.* art. 57, paras. 1-2.

174. *Id.* art. 54, para. 3(e)-(f).

coordinate the safeguards which companies or firms require for the protection of their own interests as well as for the interest of others.¹⁷⁵ As a result of this stipulation and article 220 of the Treaty,¹⁷⁶ the European Community has made considerable progress in its efforts to harmonize the company laws of member states. The principal result of these efforts has been the adoption by the Council of seven of the eight directives proposed by the Commission since the end of the 1960s.¹⁷⁷ The directives cover the following issues: the disclosure required of companies, the validity of obligations entered into by companies, and the nullity of companies;¹⁷⁸ the formation of public limited companies and the maintenance and alteration of their capital;¹⁷⁹ the merger of public limited companies;¹⁸⁰ the annual accounts of companies;¹⁸¹ the division of public limited companies;¹⁸² the consolidated accounts of companies;¹⁸³ and the approval of persons responsible for carrying out statutory audits of companies.¹⁸⁴ The only Commission proposal the Council did not adopt dealt with the structure of public limited companies and the allocation of powers and obligations within those organizations.¹⁸⁵ This proposal encountered

175. *Id.* para. 3(g).

176. Article 220 requires that member states, when negotiating with each other, ensure the mutual recognition of European Community companies. *Id.* art. 220.

177. The final legislative versions are recognized by numbers that were assigned to the draft proposals. The sequence of adoption has not followed this numerical order.

178. Directive 151, 11 O.J. EUR. COMM. (No. L 65) 8 (1968). This directive was implemented in Ireland by the European Communities (Companies) Regulations, 1973, No. 163 of 1973.

179. Directive 91, 20 O.J. EUR. COMM. (No. L 26) 1 (1977). This directive has been implemented in Ireland by the Companies (Amendment) Act, 1983. The Commission successfully sued Ireland for failing to implement the directive within the specified time limits. *Commission of the European Communities v. Ireland*, 1982 E. Comm. Ct. J. Rep. 3573.

180. Directive 855, 21 O.J. EUR. COMM. (No. L 295) 36 (1978).

181. Directive 660, 21 O.J. EUR. COMM. (No. L 222) 11 (1978). The Commission has commenced proceedings against Ireland under article 169 of the EEC Treaty for failing to implement the directive within the specified time limit.

182. Directive 891, 25 O.J. EUR. COMM. (No. L 378) 47 (1982).

183. Directive 349, 26 O.J. EUR. COMM. (No. L 193) 1 (1983).

184. Adopted by the Council in March 1984; see Commission Information Memo P25 (March 1984). For text of the draft, see 22 O.J. EUR. COMM. (No. C 317) — (1979).

185. 15 O.J. EUR. COMM. (No. C 131) — (1972); Bulletin of the European

significant political opposition, particularly in Britain and Ireland, because it would have introduced a two-tier board structure common to German companies, in which the concept of *Mitbestimmung*, (worker co-responsibility), plays an important role.¹⁸⁶ The Commission recently issued a less controversial version of the original proposal.¹⁸⁷ Another Commission proposal which has yet to be introduced to the Council, relates to the procedures that the European Community would require for informing and consulting with the employees of "undertakings with complex structures"—European Community jargon for transnational or multinational corporations.¹⁸⁸ This proposal, known as the "Vredeling Directive," also encountered significant political opposition and was amended twice in 1983.¹⁸⁹

Articles 52, 53 and 57 of the EEC Treaty have been held directly effective by the Court of Justice.¹⁹⁰ The rights established by the articles, however, are subject to the exceptions listed in articles 55 and 56.¹⁹¹ Article 59 of the EEC Treaty requires the

Communities, Supp. No. 10 (1972).

186. The two-tier system is composed of a management organ, which functions in a manner similar to that of a board of directors, and a supervisory organ. The latter appoints members of the former. Members of the supervisory organ are chosen by the workers and by that organ. The system's purpose is to utilize worker input in the operation of a company. 26 O.J. EUR. COMM. (No. C 240) 2 (1983).

187. Amended Proposal, *id.*; Bulletin of the European Communities, Supp. No. 6 (1983).

188. 15 O.J. EUR. COMM. (No. C. 131) — (1972); Bulletin of the European Communities, Supp. No. 3 (1980).

189. 26 O.J. EUR. COMM. (No. C 217) 3 (1983); Bulletin of the European Communities, Supp. No. 2 (1983). Two other draft measures relating to company laws should be noted. In 1968 the original member states concluded, under the authority of article 220 of the EEC Treaty, a Convention on the Mutual Recognition of Companies and Bodies Corporate. See Bulletin of the European Communities, Supp. No. 2 (1969). Although the Convention was concluded sixteen years ago, the four newest member states have yet to ratify it. A proposal for a *Societas Europea*, initially championed in 1967 by Professor Pieter Sanders of Rotterdam University, was first formally considered by the Commission in 1970, and a revised draft regulation that would create a new form of European company was published in 1975. See Bulletin of the European Communities, Supp. No. 4 (1975).

190. *Reyners v. Belgium*, 1974 E. Comm. Ct. J. Rep. 631 (Preliminary Ruling) (article 52); *Costa v. ENEL*, 1964 E. Comm. Ct. J. Rep. 585 (Preliminary Ruling) (article 53); *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris*, 1977 E. Comm. Ct. J. Rep. 765 (Preliminary Ruling) (article 57).

191. See EEC Treaty, *supra* note 44, arts. 55-56.

abolition of restrictions on a member state's right to provide services to nationals who are established in different member states than those in which the recipient of the services is located.¹⁹² Although services are normally offered for a price, they are not covered by the provisions governing the free movement of goods, capital, and persons.¹⁹³ These services include industrial, commercial, craft-oriented, and professional activities. The freedom of a member state to provide services is a residual category within the EEC Treaty that implies an element of impermanence because the service in question may not be offered on a regular basis. The Court of Justice has held the first paragraphs of articles 59 and 60 to be directly effective.¹⁹⁴ A number of restrictions remain, however, on the right to provide services apart from the restrictions connected with activities of an official nature and restrictions based on public policy, public security, or public health.¹⁹⁵

The EEC Treaty does not attempt to regulate the establishment of nationals or firms from nonmember states in member states. Article 58 provides:

Companies constituted in accordance with the law of a Member State and having their registered office, central management main establishment or within the Community shall, for the purpose of applying the provisions of this Chapter, be assimilated to natural persons being nationals of Member States.

The term "companies" means companies under civil or commercial law including co-operative companies and other legal persons under public or private law, with the exception of non-profit-making companies.¹⁹⁶

Therefore, the issue of how to treat companies or firms from non-member states that have been established in member states is left to the discretion of each member state.

In Ireland, the FCN Treaty of 1950 regulates the establishment

192. *Id.* art. 59.

193. *Id.* art. 60. The free movement of services is governed instead by articles 74-84 relating to transport. *Id.* art. 61.

194. *Van Binsbergen v. Bedrijfsvereniging*, 1974 E. Comm. Ct. J. Rep. 1299.

195. EEC Treaty, *supra* note 44, art. 66. The right to provide transport services is governed by the provisions of the Common Transport Policy. *Id.* arts. 74-84. The liberalization of banking and insurance services connected with the movement of capital can only be effected in tandem with the liberalization of capital movements.

196. *Id.* art. 58.

of United States corporations in Ireland.¹⁹⁷ Any United States corporation established in Ireland and registered under Irish company law is free to set up an agency, subsidiary, or branch in any other member state, and to provide services elsewhere in the European Community. The right of establishment and the freedom to provide services under European Community law, however, will not apply to unincorporated, self-employed United States nationals in Ireland, or to United States nationals employed by a United States company established in Ireland. Although "the Council may, acting unanimously on a proposal from the Commission, extend the provisions of [article 59] to nationals of a third country who provide services and who are established within the [European] Community,"¹⁹⁸ the Council has not implemented this power and consequently, United States nationals must reestablish themselves in other member states under the appropriate FCN Treaty. Furthermore, under the terms of the Aliens Act of 1935¹⁹⁹ and the Aliens (Amendment) Order of 1975,²⁰⁰ self-employed United States nationals and United States nationals employed by United States companies established in Ireland must be in possession of a work permit issued by the Minister for Labour. In keeping with the Protocol to the FCN Treaty of 1950, however, permits are not withheld from United States personnel engaged in a managerial capacity.

The harmonization of rules enabling nationals of one member state to acquire and use land and buildings situated in the territory of other member states was one of the priorities for European Community action in the area of establishment.²⁰¹ With the exception of several directives of minimal significance adopted in regard to the Common Agricultural Policy, little progress has been made in this area. The Aliens Act of 1935 permits aliens in Ireland to acquire, hold, and dispose of real and personal property under the same conditions as citizens of Ireland,²⁰² but the Oireachtas has the power to confer property rights and privileges on any group of persons, whether defined as citizens or nationals,

197. See *supra* text accompanying notes 19-42.

198. EEC Treaty, *supra* note 44, art. 59.

199. Aliens Act, 1935, No. 14 of 1935.

200. Stat. R. and O. No. 345 of 1946.

201. See EEC Treaty, *supra* note 44, art. 54, para. 3(e).

202. Aliens Act, 1935, *supra* note 199, § 3(1).

of which the alien is not a member.²⁰³ Similarly, the FCN Treaty provides that the ownership of real property is subject to the laws of Ireland and the United States. The buying or leasing of land in towns or cities in Ireland is unrestricted, but those persons who are not "qualified persons" and who desire to purchase land not situated "in a county borough, borough, urban district or town" (agricultural land) must receive the written consent of the Land Commission.²⁰⁴ Until recently, there were ten categories of qualified persons including: Irish citizens;²⁰⁵ persons resident in Ireland for seven years;²⁰⁶ persons acquiring the land exclusively for use in an industry other than agriculture;²⁰⁷ bodies corporate established by statute;²⁰⁸ and persons acquiring land for residential purposes if the area of land involved does not exceed five acres.²⁰⁹ For grant-aided United States companies seeking to purchase or build on such agricultural land in Ireland, it was necessary to obtain governmental consent either by a ministerial certificate²¹⁰ or via a "transfer" from the Industrial Development Authority, a statutorily established corporate body.²¹¹ Because it differentiated between Irish citizens and nationals of other member states, the qualified person requirement violated European Community law. Commission proceedings commenced against Ireland under article 169 of the EEC Treaty prompted the Irish Minister for Agriculture to amend the Land Act of 1965, and adopt regulations for an "Additional Category of Qualified Persons" on May 30, 1983.²¹² Pursuant to this statutory instrument, a purchaser of agricultural land does not have to apply for the consent of the Land Commission if the purchaser is a citizen of a member state of the European Community and is exercising the right of establishment as a self-employed person under article 52 of the EEC Treaty. The enactment of this statute led the Commission to terminate the action it filed against Ireland in the Court of Justice of the Euro-

203. *Id.* § 3(3)(d).

204. Land Act, 1965, No. 2 of 1965, § 45.

205. *Id.* § 45(1)(i).

206. *Id.* § 45(1)(ii).

207. *Id.* § 45(1)(iii). These persons must be certified by the Minister for Industry and Commerce.

208. *Id.* § 45(1)(vi).

209. *Id.* § 45(1)(ix).

210. *Id.* § 45(1)(iii).

211. *Id.* § 45(1)(vi).

212. Stat. Inst. No. 144 of 1983.

pean Community.²¹³

D. Competition Policy

The EEC Treaty also contains two important prohibitions designed to ensure that parties to business transactions do not restrict, distort, or prevent competition in the Common Market.²¹⁴ The application of these two prohibitions has generated a large corpus of case law.²¹⁵ Article 85 specifically prohibits agreements or concerted practices that restrict, distort, or prevent competition in the Common Market and that affect trade between member states.²¹⁶ These prohibited concerted practices include: (1) directly or indirectly fixing purchase or selling prices; (2) limiting or controlling production, markets, technical development, or investment; (3) sharing markets or sources of supply; (4) applying dissimilar conditions to equivalent transactions; or (5) conditioning the conclusion of contracts on the other parties' acceptance of conditions unrelated to the subject matter of such contracts.²¹⁷ Exemptions from the prohibitions of article 85 are allowed if the agreement (1) improves production, distribution, or technological progress; (2) allows consumers a fair share of the resulting benefit; (3) does not impose on the participants conditions irrelevant to the attainment of the agreement's objectives; and (4) does not afford the participants an opportunity to eliminate market competition for a substantial part of the products that are the subject of the agreement.²¹⁸

Article 86 prohibits the abuse by one or more participants to an agreement of any dominant position held in the Common Market

213. 26 O.J. EUR. COMM. (No. C 283) 7 (1983); see also Laffoy, *Section 45 of the Land Act, and the Right of Establishment in the European Communities, 1965, 1982-83 J. IRISH Soc'y EUR. L. 26*; Murphy, *Section 45 of the Land Act, 1965, and the Right of Establishment in Community Law, 1982-83 J. IRISH Soc'y EUR. L. 32*.

214. See EEC Treaty, *supra* note 44, arts. 85-86. Article 87 empowers the Council to adopt measures to implement articles 85-86.

215. In addition, the Commission publishes an annual review of the competition policy, which is published as a separate annex to the Annual General Report of the European Communities. The First Report on Competition Policy was published in 1972.

216. EEC Treaty, *supra* note 44, art. 85, para. 1.

217. *Id.*

218. *Id.* para. 3.

in so far as that abuse affects trade between member states.²¹⁹ Prohibited abuses include those practices listed above in connection with article 85. The principal implementing measure enacted under article 87 is Regulation 17 of 1962,²²⁰ which provides that the Commission is to act as the administrative enforcement agency. Under Regulation 17, the Commission has the power to order the termination of offending practices.²²¹ This power has been used to prevent and control mergers,²²² to terminate market sharing agreements in which trademarks were used to prevent parallel imports,²²³ and to order a manufacturer to continue to supply a purchaser.²²⁴ The Commission also has the power to impose fines of up to ten percent of the annual turnover of the participating enterprises. In one recent case, the Commission imposed a fine totalling nearly 4.5 million Irish pounds.²²⁵ Regulation 17 also allows an enterprise to secure a "negative clearance," which is a certification by the Commission that the enterprise's agreements do not fall under article 85(1) of the EEC Treaty.²²⁶ Enterprises with agreements that fall within the scope of article 85(1) must notify the Commission of those agreements in order to obtain an exemption under article 85(3).²²⁷ When granting an exemption, the Commission has the power to attach whatever conditions it considers necessary under the circumstances. The Council has also adopted enabling regulations under which the Commission is empowered to issue group or category exemptions.²²⁸ The Commission has exercised this power by

219. *Id.* art. 86.

220. 5 J.O. COMM. EUR. 204 (1962).

221. *Id.* art. 3.

222. *See, e.g.,* Continental Can Co. v. Commission, 1973 E. Comm. Ct. J. Rep. 215.

223. *See, e.g.,* Consten & Grundig v. Commission, 1966 E. Comm. Ct. J. Rep. 299.

224. *See, e.g.,* Commercial Solvents Corp. v. Commission, 1974 E. Comm. Ct. J. Rep. 223.

225. *In re* "Pioneer" Hi-Fi Equipment, 23 O.J. EUR. COMM. (No. L 60) 21, 27 Common Mkt. L.R. 457 (1980). The initiation of proceedings and the imposition of fines by the Commission is subject to a general limitation period of five years. Reg. 2988, 17 O.J. EUR. COMM. (No. L 319) 1 (1974).

226. Reg. 17, *supra* note 220, art. 2.

227. *Id.* arts. 3-4. The formalities for notification are outlined in Regulation 27 of 1962 and the procedure at Commission hearings is provided for in Regulation 99, 6 J.O. COMM. EUR. 2268 (1963).

228. Reg. 67, 10 J.O. COMM. EUR. 849 (1967).

adopting exemptions for exclusive distribution agreements²²⁹ and specialization agreements.²³⁰ After a thorough review of the operation of competition policy legislation, the Commission revised and updated the category exemption for specialization agreements and divided the old category exemption for exclusive distribution agreements into two new measures: categories on exclusive distribution agreements²³¹ and categories on exclusive purchasing agreements.²³² The Commission has also proposed regulations that would apply the EEC competition rules to the air and sea transport industries.²³³ In addition, the Commission has occasionally indicated policy directions by issuing notices on such topics as commercial agents,²³⁴ minor agreements,²³⁵ cooperation between enterprises,²³⁶ and subcontracting.²³⁷

Because articles 85 and 86 have been declared directly effective,²³⁸ they may be implemented by national institutions, including courts and domestic antitrust enforcement agencies, unless the Commission has already initiated proceedings under Regulation 17. National authorities may also enforce national rules on competition only to the extent that the enforcement does not interfere with the uniform application of European Community law. The Restrictive Practices Act of 1972²³⁹ and the Mergers, Takeovers and Monopolies (Control) Act of 1978²⁴⁰ are the laws that restrict unfair competition practices in Ireland.

Several aspects of the European Community's competition policy are particularly relevant to United States corporations established in Ireland. First, the European Community has jurisdiction to apply the rules of the European Community Treaty to those companies located outside the European Community whose be-

229. Reg. 2779, 15 O.J. EUR. COMM. (No. L 292) 23 (1972).

230. Reg. 3604, 25 O.J. EUR. COMM. (No. L 376) 33 (1982).

231. Reg. 1983, 26 O.J. EUR. COMM. (No. L 173) 1 (1983).

232. Reg. 1984, 26 O.J. EUR. COMM. (No. L 173) 5 (1983).

233. See 1982-1983 ANN. REP. COMPETITION POL'Y OECD MEMBER COUNTRIES 87, 87-88.

234. 5 J.O. COMM. EUR. 2922 (1962).

235. 20 O.J. EUR. COMM. (No. C 313) 3 (1977).

236. 11 J.O. COMM. EUR. (No. C 75) — (1968).

237. 22 O.J. EUR. COMM. (No. C 1) 2 (1979).

238. See *Belgische Radio en Televisie v. SV SABAM*, 1974 E. Comm. Ct. J. Rep. 313.

239. Restrictive Practices Act, 1972, No. 11 of 1972.

240. Mergers, Takeovers and Monopolies (Control) Act, 1978, No. 17 of 1978.

havior has effects inside the European Community.²⁴¹ Second, article 85(1) generally does not apply to arrangements between parent and subsidiary companies because competition between a parent and its subsidiary cannot be restricted.²⁴² Third, article 85(1) does not apply to agreements of minor importance²⁴³—agreements in which the combined annual turnover of the participating enterprises, including the turnover of all parent and subsidiary companies, does not exceed 50 million units of account.²⁴⁴ Last, to violate article 86 of the EEC Treaty, an enterprise must either have a dominant position in the Common Market or dominate a substantial part of that market. Ireland may be considered a “substantial part” of the Common Market for certain goods.²⁴⁵

E. Control of State Aid

European Community regulation of state aid is governed by articles 92-94 of the EEC Treaty. These provisions ensure that the level of competition in the European Community is not distorted by state grants of assistance to certain geographical areas or industries within a member state.²⁴⁶ These articles of the EEC Treaty are of great significance to United States enterprises in Ireland that are aided by grants from the Irish Government.

Article 92 of the EEC Treaty provides that any aid granted by a member state through state resources that affects trade between member states, and distorts or threatens to distort competition by favoring certain enterprises or interfering with the production of certain goods, shall be incompatible with the furtherance of the

241. See *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E. Comm. Ct. J. Rep. 619, 661-63.

242. See 12 J.O. COMM. EUR. (No. L 165) 12 (1969).

243. See *Volk v. Établissements J. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, 302.

244. 20 O.J. EUR. COMM. (No. C 313) 3 (1977). European and other currency equivalents are fixed daily. See, e.g., 26 O.J. EUR. COMM. (No. C 347) 1 (1984) (currency equivalents as of Dec. 29, 1984).

245. For example, the Guinness group enjoys 93% of the Irish market for stout, the national beer. In one recent case, *Cadbury Ireland, Ltd., v. Kerry Cop Creameries, Ltd.*, I.L.R.M. 77, the court ruled that Kerry County was not a substantial part of the Common Market for the purposes of article 86.

246. EEC Treaty, *supra* note 44, arts. 92-93. Article 94 allows the Council to adopt any appropriate regulations to implement articles 92 and 93. *Id.* art. 94.

Common Market.²⁴⁷ Although "aid" is undefined in the EEC Treaty, the Commission has indicated that subsidies, tax exemptions, interest rate reductions, loan guarantees on favorable terms, the provision of land or buildings free or on terms favorable to the recipient, and loss indemnities would be examples of actions that might constitute aid.²⁴⁸ Article 92 applies not only to aid that is granted directly by the state, but is also applicable to aid channeled through quasi-state agencies such as the Industrial Development Authority in Ireland. Seven general categories of aid, however, do not fall within the language of article 92. Three of the categories are compatible with the Common Market concept because they do not significantly affect the level of competition in the Common Market: (1) social aid granted to individual consumers; (2) relief aid granted to the victims of natural disasters; and (3) aid granted to those areas of the Federal Republic of Germany that are affected by the division of Germany (Zonenrandgebiet).²⁴⁹ The four remaining types of aid *may* be compatible with the Common Market: (1) aid to promote the economic development of areas in which the standard of living is abnormally low or serious unemployment exists; (2) aid to promote an important project of common European interest; (3) aid to facilitate the development of certain economic activities or certain economic areas provided that the aid does not affect trading conditions in a manner contrary to the common interest of the European Community; and (4) other aid specified by decision of the Council.²⁵⁰

The most important of the seven types of permissible state aid is that which is used to facilitate the development of certain specified economic activities or economic areas. In 1971 the Commission began to issue guidelines for the coordination of aid granted for the development of certain economic areas, resulting in the current guidelines, which became effective on January 1, 1979.²⁵¹ These latest guidelines, issued in the form of a Commission Communication, are expressed in terms of either the net grant equivalent of the initial investment or the cost per job. The

247. *Id.* art. 92, para. 1.

248. Reply to Written Question 48, 6 J.O. COMM. EUR. 2235 (1963).

249. EEC Treaty, *supra* note 44, art. 92, para. 2.

250. *Id.* para. 3.

251. Communication of Dec. 21, 1978, 22 O.J. EUR. COMM. (No. C 31) 9 (1979).

guidelines limit the amount of aid that each region of the European Community can grant. For central regions such as Germany and the Netherlands, the total amount of aid is limited to twenty percent of the initial investment. Intermediate regions such as France and parts of the United Kingdom are limited to thirty percent, while the limit in Ireland is seventy-five percent of the initial investment, with another twenty-five percent in other aid that can be paid over a minimum of five years.²⁵² The Commission Communication also discouraged operating aid, as opposed to initial investment aid, and emphasized the requirement of regional specificity, which mandates that investment aid not be applied to the entire territory of a member state.²⁵³

Article 93 of the EEC Treaty establishes the administrative procedures for dealing with new or existing state aid.²⁵⁴ The Commission must keep all existing systems of state aid under review.²⁵⁵ If the Commission decides that certain aid is not compatible with the goals and policies of the Common Market, it may require the member state that initiated the aid to abolish or alter the aid within a specified time period.²⁵⁶ If the member state fails to abolish or alter the aid in question, the Commission is empowered to bring the matter before the Court of Justice.²⁵⁷ The member state must notify the Commission of any new or revised state aid in sufficient time to enable the Commission to evaluate the aid and submit its comments.²⁵⁸ The member state that initiated the aid may not effectuate its proposed measures until this notification procedure has been completed. Failure to comply with the notification requirement may result in the recipient enterprise's obligation to repay the proffered aid.²⁵⁹ The requirement that a member state cannot implement new aid without Commission ap-

252. *Id.* at 10.

253. *Id.* at 9-10.

254. EEC Treaty, *supra* note 44, art. 93.

255. *Id.* para. 1.

256. *Id.* para. 2.

257. *Id.* This procedure is similar to article 169 of the EEC Treaty, which allows the Commission to initiate proceedings against a member state before the Court of Justice for failure to comply with its obligations under the law of the European Community. *See id.* art. 169.

258. *Id.* art. 93, para. 3.

259. *See, e.g.,* Commission v. Federal Republic of Germany, 1973 E. Comm. Ct. J. Rep. 813, 826.

proval is directly effective,²⁶⁰ and private parties who have been aggrieved by the granting of unapproved aid to other parties may initiate court proceedings in the relevant member state to terminate the aid. The other requirements of articles 92 and 93 are not directly effective;²⁶¹ consequently, national courts do not have the power to declare existing systems of aid contrary to article 92.

How these rules will be applied in Ireland and, in particular, the current status of Protocol 30,²⁶² are questions of vital importance to United States enterprises based in Ireland. While the terms of the Protocol are quite clear, the objectives of the Irish Government in relation to economic expansion and raising the standard of living must be assessed in the context of articles 92 and 93. In retrospect, the Irish Government's statement in the White Paper of 1972 seems curiously optimistic: "We shall be able to honour commitments already undertaken in respect of export tax reliefs and to continue to grant these reliefs to new firms which begin manufacturing for export."²⁶³ This statement refers to the system of Export Sales Relief that Ireland used to attract *foreign* manufacturers to Ireland.²⁶⁴ The Commission was never convinced that Export Sales Relief was compatible with article 92, but neither did the Irish Government ever admit its incompatibility, particularly in light of Protocol 30. Although the Commission never adopted a formal decision under article 93, a compromise solution of a new export sales tax of ten percent was introduced in the Finance Act of 1980.²⁶⁵ Because it applies to all manufacturing enterprises, this export sales tax is not state aid within the meaning of article 92. In addition, firms approved by the Industrial Development Authority (IDA) prior to December 12, 1980, will continue to benefit from export sales relief until 1990.

Equally important is the Commission's determination of the status of financial aid granted by the IDA under the Industrial

260. See, e.g., *Costa v. ENEL*, 1964 E. Comm. Ct. J. Rep. 585.

261. *Capolongo v. Maya*, 1973 E. Comm. Ct. J. Rep. 611, 621.

262. Act of Accession, *supra* note 84, protocol 30, *reprinted* at 1265; see *supra* text accompanying notes 96-99.

263. *The Accession of Ireland to the European Communities*, *supra* note 98.

264. The export sales relief system was introduced in part III of the Finance (Miscellaneous Provisions) Act, 1956, No. 47 of 1956, and extended and amended on numerous occasions thereafter.

265. Finance Act, 1980, No. 14 of 1980.

Development Act of 1969.²⁶⁶ This aid includes grants for fixed assets,²⁶⁷ grants for the reduction of interest,²⁶⁸ training grants,²⁶⁹ research grants,²⁷⁰ and grants to secure reduction of factory rents.²⁷¹ Although the financial aid granted by the IDA qualifies under article 92 as state aid which may be compatible with the Common Market under category (1) or (3),²⁷² that aid will be within the limitations set by the 1978 Commission Communication if the total value of the grants awarded to any one enterprise does not exceed seventy-five percent of the cost per job or net grant equivalent. This requirement should create little difficulty for the Irish Government because the most generous aid offered by the IDA never exceeds this ceiling. In conclusion, the 1978 Commission Communication does not have binding legal effect under article 189 of the Treaty, and, therefore, existing systems of aid, including IDA packages, can always be reviewed and declared incompatible by the Commission under article 92.

266. Industrial Development Act, 1969, No. 32 of 1969.

267. *Id.* § 33.

268. *Id.* § 36.

269. *Id.* § 39.

270. *Id.* § 40.

271. *Id.* § 46.

272. *See supra* text accompanying note 250.