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The Role of the Court of Justice in the Development of Agricultural Policy in the European Communities

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THE ROLE OF THE COURT OF JUSTICE IN THE DEVELOPMENT OF AGRICULTURAL POLICY IN THE EUROPEAN COMMUNITIES

I. INTRODUCTION

Twenty-five years ago, the center of power for agricultural policy lay firmly in the national capitals. With the signing of the Treaty of Rome,[1] that authority began a gradual flow from the Member States to the institutions of the EEC, particularly the Commission located in Brussels. The transition is not yet complete and has not been without its setbacks, but most Europeans and all the governments of the Member States now accept and support the reality of a Common Agricultural Policy (CAP). The innovative steps taken by the EEC in attempting to weld the agricultural economies of the several states into a whole have profoundly affected the way each farmer in the EEC operates his business. Proposed major structural changes portend even more profound repercussions in the farming community. The success of this transition may be attributed in part to the particular deftness and skill the Commission has shown in accepting its responsibilities. Credit for any success must also go to the European Court of Justice. The Court has persistently insisted that Member States yield to the goals of Community policy even when the Member State, in a moment of national expediency, might wish to forego the more painful burdens of the transition.

II. A LOOK AT AGRICULTURE IN THE COMMON MARKET COUNTRIES

A survey of the state of European agriculture will quickly illustrate why the leadership of the Member States sought to address the difficulties on a united front. Farms in Europe contrast vividly with those in other western countries. The most obvious difference is size. One survey shows that the average farm ranges from 15 acres in Belgium to about 38 acres in France.[2] While 21 per cent

1. Treaty Establishing the European Economic Community (EEC), March 25, 1957. The authoritative English text of the treaty may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office of Official Publications of the European Communities, 1973). An unofficial English text may be found in 298 U.N.T.S. 3 (1958).

2. Dam, *The European Common Market In Agriculture,* 67 COLUM. L. REV. 209, 210 (1967) [hereinafter cited as Dam]. This article provides an excellent in-depth discussion of the problems encountered in the attempt to move decision-making authority from the Member States to the Community.

of the field crop sales in the United States comes from farms of over 1,000 acres, 21 per cent of German production comes from farms of only 125 acres or over.[3] Over the years, these farms have been divided among the farmers' children with the result that a large number of small plots are often spread over a wide area. In Germany and Luxembourg, for instance, the average plot is only 1.8 acres.[4] Since the European farmer is often reluctant to treat the farm as an asset to be bought and sold, the farmer never has enough land area in one place to make mechanized techniques feasible.

The inefficiency of this kind of production process makes agriculture much more labor intensive than in the United States. By illustration, in 1920 about 27 per cent of the United States labor force was engaged in agriculture, but by 1962, that figure had been reduced to only 8 per cent. In 1920, agriculture absorbed 28 per cent of the French labor force, and in 1962, 21 per cent of all workers were still on the farm. Sicco Mansholt, EEC Commissioner and one of the prime movers in the EEC agricultural policy, once commented that it takes about 23 agricultural workers in Europe to take care of the land that two can handle in the United States.[5]

In the EEC farm incomes are considerably lower than incomes in other sectors, despite extensive government assistance to the agricultural sector. German farm incomes, for example, have only averaged about 70 per cent of non-agricultural wages in recent years. The price of European agricultural products is generally higher also. The market price of wheat in France is generally about 20 per cent higher than the standard United States price while German prices range about 50 per cent higher.[6]

Facing this kind of competitive disadvantage, the European farmer would soon be unemployed absent government assistance. The national governments understandably have been unwilling to permit this large segment of their work force to be idled and so have stepped into the market to protect the farmer from damaging

3. *Id.* at 210, 211.

4. *Id.* at 211.

5. The situation in Italy was even more pronounced. There, 56 per cent of the labor force was engaged in agriculture in 1920; by 1962 that figure had only been reduced to 28 per cent. There is evidence of some progress however. The Community average of workers engaged in agriculture was 13 per cent in 1970, down from 28 per cent in 1950. The EEC prognosticators suggest that this trend will continue.

6. Dam, *supra* note 2, at 213.

foreign competition. An array of protective schemes was devised by the various states to insure that the farmer would have a market for his products and that the consumer would have a good supply of foodstuffs without undue dependence on foreign supplies.[7] Government protection included tariffs, internal taxes, quantitative restrictions, subsidies, import monopolies, and other measures.[8] Much of the cost of these measures was absorbed by the taxpayers since government resources had to be allocated for the direct subsidies. The remainder was paid for by the consumer in higher food prices. Although substantial imports were required to supplement domestic sources, governmental intervention was successful in guaranteeing the farmer a secure, albeit mediocre, livelihood. Agricultural economists reluctantly supported these measures as necessary expedients for economic stability but consistently pointed out that over the long run extensive governmental intervention would keep inefficient farming operations in business and lock in the inadequacies of the existing system. There was general agreement that some major changes would have to be made in agricultural policy if agriculture was to reach a level of competitive productivity.[9]

7. It is estimated that the original six members of the EEC can supply approximately 90 per cent of their agricultural produce needs from their own resources. In the United Kingdom, that figure is something closer to 50 per cent. France is the main agricultural exporter within the EEC. The areas along the Seine River in the Paris Basin are ideally suited to grain production, but France has not yet been able to produce enough to satisfy the demands of the other members of the EEC. The Netherlands, Belgium, Luxembourg, and Italy export significant quantities of several products also. Germany and Italy are the food-deficit countries within the EEC. Germany cannot supply all of her domestic needs in any major product area and Italy has achieved self-sufficiency in wine and poultry only. Although food production has increased substantially within the Common Market, the purchase of foods from non-member sources has also increased substantially. R. BROAD & R. JARRETT, COMMUNITY EUROPE 70-73 (1968).

8. Dam, *supra* note 2, at 214.

9. Interest in developing a European agricultural community began following World War II. In 1950, the Assembly of the Council of Europe recommended to the Committee of Ministers that such an organization be created. While several plans for such an organization were submitted and discussed in the years that followed, the plans that received the most attention were those submitted by Sicco Mansholt, the Dutch Minister of Agriculture, and by Pierre Pflimlin, the French Minister of Agriculture. Both of these plans would have created an international authority and vested it with some sovereign rights.

A series of conferences was held in the early 1950's to discuss these plans and to attempt an agreement on the creation of such an organization. While those efforts were unsuccessful, they did provide a helpful background for the more successful efforts that followed.

A supranational structure was essential to promote meaningful changes, but a variety of complex problems had to be solved before the various national states were willing to give up control of agricultural policy to such an agency. The states wanted assurances that changes would be made gradually and with sensitivity to the unique needs of their individual agricultural interests. The gradient in productive efficiency from country to country was so great in some agricultural sectors that attempts to bring about a rapid modernization might cause severe economic dislocation in the more inefficient areas. The states properly recognized the political pressure that could result from such dislocation and were consequently unwilling to turn over control of agricultural policy without the right to intervene when a crisis occurred in their domestic markets. The agricultural provisions of the Treaty of Rome reflect an attempt to balance these rather complex national and Community interests.

III. AGRICULTURE AND THE TREATY OF ROME: TOWARD A COMMON AGRICULTURAL POLICY

Of all the problems facing Europe, the agricultural dilemma presented one of the ripest opportunities for European cooperation. However, the leaders who met at the Conference of Messina in 1955 were deeply divided on the question of how agriculture was to fit within the larger EEC structure.[10] One group sought to have agriculture treated under the general provisions of the treaty like every other economic sector. Another group wanted agriculture included in the EEC organization also, but wanted the treaty to carve out areas of special treatment for agriculture which would exempt that sector from the free trade and competition rules governing the other areas of the economy.[11]

When the treaty was finally signed, agriculture was subject to all the free trade and competition rules that governed the other sections.[12] However, an escape clause was provided which enabled

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The initial planning for the establishment of the European Economic Community was taken as a result of the resolutions adopted at the Conference of Messina in 1955. The work that followed was compiled and presented in 1956 in the Spaak Report. The proposals outlined in that report provided the basis for discussions that led to the signing of the Treaty of Rome in 1957. 1 CCH COMM. MKT. REP. ¶ 402 at 513-14 (1973).

10. *See* 1 CCH COMM. MKT. REP. ¶ 402 at 514 (1973).

11. *Id.*

12. EEC art. 38.

certain products to be removed from the general provisions of the treaty and given special treatment.[13] This kind of special treatment was available for any product listed in annex II[14] of the treaty if common marketing organizations for that product had been set up by the Commission. Since the treatment accorded the farmer under the agricultural regulations was thought to be superior to the treatment accorded under the general provisions of the treaty, incentive was generated within the farming community for the establishment of the marketing organizations. In the years which followed, marketing organizations were established for most of the product areas listed in annex II.[15] Since that list included virtually every significant agricultural product produced in the Common Market countries,[16] the general treaty provisions now remain applicable only to the relatively unimportant products not included in annex II.[17] The vast number of cases brought to the Court of Justice relating to agricultural questions usually involve matters arising from the Community's complex regulatory mechanisms. Most of this litigation would never have materialized if agriculture had been subjected to the general rules of the treaty. The decision to accord special treatment to agriculture was a clear policy choice by the treaty's signers founded on the fear that agriculture could not survive the dislocations that would result if governed by the general free trade provisions of the treaty.

Article 39 of the treaty defined four objectives for the common agricultural policy: (1) to increase agricultural productivity; (2) to increase the income of the farm population; (3) to stabilize markets; and (4) to insure supplies at reasonable prices. As insurance

13. EEC art. 40.

14. Twenty-four product areas are described in the list, but certain kinds of by-products are specifically excepted from the list. All meat, fish, dairy, and vegetable products are included.

15. Approximately 90 per cent of the Community farm sector is covered by a common market organization. These organizations have the object of providing: (1) common external protection, (2) the removal of obstacles to intra-Community trade, (3) the protection and improvement of farmers' incomes, and (4) the avoidance of distortions of competition caused by national subsidies. The basic policy governing these common market organizations is expressed in article 39 of the treaty. However, the Commission issued regulations governing these organizations relying on article 43. *See* 1 CCH COMM. MKT. REP. ¶ 402 at 517 (1973).

16. *Id.*

17. Those product areas not included in annex II and those areas which are included but for which no common market organization has been established are still subject to the provisions of article 37 governing state trading monopolies. 1 CCH COMM. MKT. REP. ¶ 402 at 514 (1973).

against heavy-handedness, the treaty requires the Community policymakers to consider the social structure and the natural disparities between the various agricultural regions. Further, the treaty requires the EEC to recognize the need to make appropriate policy adjustments gradually with the *caveat* that agriculture is a sector closely linked to the whole economy.[18]

The Community institutions were authorized to devise any measures necessary to carry out the goals of article 39.[19] Common arrangements to regulate imports and exports, aids for production and distribution, price regulation, and other techniques were available to the Commission. More importantly, article 40 authorized guidance and guarantee funds to finance Community agricultural programs.

Although the treaty had created the skeletal framework for a common agricultural policy, specific elements were unresolved. Soon after the adoption of the treaty, the Member States met in Stresa, Italy, to begin formulating a comprehensive Common Agricultural Policy (CAP).[20] In 1960, the Commission prepared its proposals and submitted them to the Council for approval.[21] By 1962, the Council reached agreement on the fundamentals of the CAP and on the timetable for implementation.[22] The policy agreed upon included provisions for the following:[23]

1. *Transition Period.*—A seven year transition period was established from 1 July, 1962, to 31 December, 1969. A decision was made in 1966 to shorten that period and bring the policy into full implementation in 1968.[24]

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18. EEC art. 39.

19. EEC art. 40.

20. 1 CCH COMM. MKT. REP. ¶ 402 at 516-17 (1973).

21. A. WALSH & J. PAXTON, THE STRUCTURE AND DEVELOPMENT OF THE COMMON MARKET 56 (1968) [hereinafter cited as WALSH & PAXTON]. The agriculture chapter of this book provides an excellent summary of the development of the CAP during the 1960's.

22. *Id.* at 56-57.

23. *Id.* at 57-63. The provisions of the CAP described in the text are not intended to be a comprehensive outline of the entire CAP. Hopefully, however, this sketch will be sufficient to give the reader a framework for understanding the Court's decisions discussed in later sections.

24. West Germany and the Netherlands had proposed that January 1, 1968, should be the target date for full implementation of the Common Market on both agricultural and industrial goods. France held out claiming that she could not accept a final removal of tariffs on industrial goods until the common agricultural market had been completed. The Member States agreed to compromise on July 1, 1968, still ahead of the dates set out in the Treaty of Rome. *Id.* at 77.

2. *Quality Standards.*—Common quality standards were to be applied to fruits and vegetables marketed within the producing Member States. The exporting Member States had the responsibility to insure that the common standards were met before allowing export.

3. *Harmonization of Prices.*—Prices for most products were to be harmonized between a lower limit based on French prices and an upper limit based on German prices. These standardized or "target" prices were to be set annually by the Commission. The target price did not become the standard sale price of the commodity throughout the Community but it did provide the basis for the variable levy. Through this device the actual market price of a product was close to the target price.

For grain products, "intervention" prices were also set. If the market price fell below this price, government marketing organizations would buy up supplies from the producers at the intervention price and export the commodity or store it until shortages developed.[25]

4. *The Safeguard Clause.*—This was an escape clause which permitted a Member State unilaterally to close its frontier to importation of a product if its home production was jeopardized. This provision applied to all products covered by the CAP. A Member State taking such action was required to inform the Commission of its action immediately, and the Commission in turn was required to decide within four days whether the closure was justified. An appeal from the Commission's decision could only be taken to the Court of Justice.[26]

5. *The Management Committee.*—Management committees were established for certain specified products. Composed of representatives from the Member States, these committees would be consulted by the Commission in the formulation of policies for that product area. While the management committee's function was essentially advisory, referral of a question to the Council was required if the management committee disagreed with the Commission.[27]

6. *Variable Levies.*—The system of variable levies was viewed

25. Dam, *supra* note 2, at 217-40, discusses the levy system and the transition to a single price system in some detail. That discussion suggests that the system devised by the EEC, although a major step forward from the tariff system, has some formidable complications of its own. *See also* 1 CCH COMM. MKT. REP. ¶ 426 at 532 (1973) for a general outline of the complete price system.

26. 1 CCH COMM. MKT. REP. ¶ 426 at 535 (1973).

27. 1 CCH COMM. MKT. REP. ¶ 426 at 536 (1973).

as one of the real innovations of the EEC.[28] The levy was assessed on products entering a Member State from outside the Community and superseded any national tariff measures on that product. The levy was equal to the difference between the target price and the world market price. It fluctuated with the world market price, but consistently kept the price of foreign products equal to the target price. If the domestic price of a product was higher than the target price, the domestic price was forced down by the imported product. By using this device, the Commission achieved, with reasonable certainty, price harmonization throughout the Community. During the transitional period, a system of intra-Community levies was also employed, but the levy rates were designed to insure that products from Member States would have a competitive advantage.[29]

7. *The Agricultural Fund.*—The agricultural programs of the Community were to be financed by a Guidance and Guarantee Fund.[30] The guarantee section of the fund was to absorb most of the fund's budget to finance the Community's price supports.[31] The guidance section was to receive about one-fifth of the budget to finance subsidies to Member States for structural projects such as soil improvement and land reform.

Prior to the end of the transitional period, the money to finance the fund came from retrospective assessments on Member States.[32] Part of each Member State's contribution came from the import levies and part came from direct contributions.[33] The money received through operation of the levies, however, remained the "property" of the collecting Member State.[34] A move by several Member States in 1965 to transfer ownership of the levy receipts directly to the Community precipitated a boycott of the Community by the French who opposed provisions of the plan which would have broadly expanded the voting power of the European

28. *See* note 25 *supra.*

29. WALSH & PAXTON, *supra* note 21, at 61.

30. Although the treaty included precise provisions on some EEC financial institutions, the only reference to an agricultural fund is in article 40 which provides simply that "one or more agricultural guidance and guarantee funds may be set up." Thus, the form and function of the EAGGF have evolved substantially over the years of its existence. 1 CCH COMM. MKT. REP. ¶ 905Q (1973).

31. Norton, *The Heart of the Matter: U.K. and the EEC, the Problem of Agriculture,* 6 TEX. INT'L L.F. 221, 237 (1971).

32. *Id.*

33. WALSH & PAXTON, *supra* note 21, at 60.

34. Dam, *supra* note 2, at 253.

Parliament.[35] After considerable negotiation on the matter the Member States finally agreed to hand over all levies and customs duties to the Community after 1975 along with the proceeds of a value-added tax.[36] This will provide the fund with substantial revenue reasonably independent of national control.

The Commission has gone about the task of forging a common agricultural policy zealously; and an active commitment has been made to achieve long term structural changes in the agricultural community.[37] Much progress has been made in eliminating agricultural customs duties in trade between members. The Community has conducted negotiations with non-member states and signed trade agreements as an international personality.[38] Common prices have been achieved on most major commodity items.[39] A vast body of technical regulations have been issued to govern most of the basic commodities produced in the Community. These major accomplishments should suggest that the delicate transition from national to Community policy is being made with general consensus of the Member States and is producing positive results.[40]

IV. THE COURT OF JUSTICE AS ARBITER

A vast system of regulations quickly developed as the Commission took charge of agricultural policy. These regulations were

35. France was the largest beneficiary of the fund and was in a position to gain the most financially from Common Market ownership of the fund's resources. However, the French strongly opposed any attempts to achieve European political union, and the granting of real power to the Assembly would be just such a step. The Commission, at the urging of some of the Member States, presented this plan which linked the two together. Some view the subsequent French boycott as the most significant crisis in the history of the Community. *See* Dam, *supra* note 2, at 251-56.

36. III A. CAMPBELL, COMMON MARKET LAW 101 (1973).

37. The Mansholt Plan is the major thrust of this effort. This plan seeks to cut down on the number of uneconomical farm units and on the number of people depending on agriculture for their livelihood by consolidating the smaller farms and retraining the surplus labor. To complement this plan, a variety of techniques are employed. Older people are offered an annual supplemental income allowance if they agree to retire and release their land. Younger farmers are offered non-farming jobs in their region. Further, present government programs which stimulate surplusage in certain market areas are being discontinued. *Id.* at 102.

38. *Id.* at 101.

39. *Id.* at 114-18.

40. This generally positive picture should not suggest that a unified agricultural policy has not created some problems of its own. The inability of the EEC to find a workable solution to the disparities created by currency revaluations by Member States has been a source of considerable tension. *Id.* at 101, 102.

challenged in a variety of ways, usually by Member States, importers, or exporters.[41] The discussion in the following sections attempts to focus on the Court's response to those challenges in several specific areas. The topical areas selected for discussion are those in which significant litigation has taken place. While the list is not exhaustive, the areas discussed are sufficiently representative to give the reader an insight into the Court's approach to agricultural litigation.

A. *The Relationship of the Agricultural Section to the General Provisions of the Treaty.*

Article 12 of the treaty prohibits new customs duties or charges having similar effect. In annex II of the treaty,[42] a list of agricultural products was excepted from that provision once common marketing organizations were established. In a Court decision construing the relationship between these provisions, Belgium and Luxembourg had imposed a new duty on gingerbread, and the Court disallowed the action.[43] The Commission asserted that gingerbread was not on the list of exempted products in annex II, and thus the general provisions of the treaty applied to that product. The Court rejected the argument that gingerbread was actually on the list of exempted products since the components of gingerbread (rye, sugar, etc.) were on the list. The Court stated that the annex II list of exempted products was to be construed narrowly. A broader construction would remove more than the treaty writers intended from the umbrella of the general treaty provisions.

The safeguard provisions have been challenged as violations of other provisions of the treaty. The safeguard provisions were included in the treaty to permit the Member States, upon approval by the EEC, to temporarily impose tariff and quota devices to prevent major dislocations in a domestic market.[44] A Dutch import

41. References to Court of Justice cases in the footnotes do not cite directly to the regulations because the decision is usually the interpretation of several regulations construed together, and most of the regulations are very short-lived. Reference to them would be confusing and of little value to the reader in understanding the policy choices made by the Court. If one is interested in reading the actual regulations interpreted by the Court, reference to the regulation may be found in the cited decision.

42. *See* note 15 *supra*.

43. Commission v. Luxembourg and Belgium, 8 Recueil de la Jurisprudence de la Cour (Cour de Justice de la Communauté européene) 813 [hereinafter cited as Recueil], 2 CCH COMM. MKT. REP. ¶ 8004, 2 Comm. Mkt. L.R. 199 (1962).

44. *See* note 26 *supra* and accompanying text.

company[45] argued that safeguard provisions designed to protect domestic apple producers would distort competition in violation of article 3(f).[46] The imposition of safeguard tariffs and quotas obviously clashed with the purpose expressed in article 3(f) and elsewhere in the treaty of achieving free trade between Member States. In sustaining the safeguard measures, the Court pointed out that the objectives of the treaty as expressed in article 3 were frequently in conflict. While 3(f) emphasized the development of competitive systems within the EEC, article 3(d) envisioned "the adoption of a common policy in the sphere of agriculture." The special importance of this latter objective was underlined, the Court suggested, by article 39.[47] Since article 42 stipulates that agriculture is subject to the rules of competition "only to the extent determined by the Council," the Commission did not violate the treaty by imposing the safeguard provisions. Similarly, in another case the Court rejected a claim by German importers that additional safeguard levies on dairy products imported from Holland were invalid.[48] The regulations in question were based on article 226, the general escape clause of the treaty, rather than on Commission safeguard regulations. The importers argued that since article 226 was to be applicable only during the transition period, the article was no longer valid because the transition period had ended for milk and dairy products with the publication of Regulation No. 804/68[49] prohibiting the imposition of customs duties and charges having the same effect on those commodities. In rejecting all these arguments the Court pointed out that article 38, paragraph 2 provided for the applicability of the general provisions of the treaty to agriculture. Even though the transition period for various products may end at various times, the Court pointed out that so far as the general treaty provisions were concerned, there was only one transition period—the one provided in article 8. The Court concurred with the conclusions of the Advocate General that by adopting the plaintiff's argument, Community regulations would have the effect

45. NV International Fruit Company v. Commission, 17 Recueil 411, 2 CCH COMM. MKT. REP. ¶ 8142 (1971).

46. "[T]he Community shall include . . . the institution of a system ensuring that competition in the common market is not distorted." EEC art. 3(f).

47. Article 39 sets out the objectives of the CAP. *See* notes 18-19 *supra* and accompanying text.

48. Rewe-Zentrale des Lebensmittel-Grosshandels GmbH v. Hauptzollamt Emmerich, 17 Recueil 23, 2 CCH COMM. MKT. REP. ¶ 8124, 10 Comm. Mkt. L.R. 238 (1971).

49. 2 CCH COMM. MKT. REP. ¶ 8124 at 7391.

of rendering obsolete or rescinding a provision of the treaty. Such a result would be a clear circumvention of the revision procedures of the treaty.[50]

The complex setting of agriculture within the Common Market structure is best illustrated by the Court's decision in *Germany v. Commission.*[51] The Commission had set high tariffs on oranges imported from non-member countries to encourage development of the orange industry in Italy. Germany, incurring substantially higher prices for oranges as a result, requested the Commission to suspend the tariff under the authority of article 25, paragraph 3.[52] The Commission refused and plaintiffs appealed to the Court of Justice claiming that the Commission had abused its discretion by considering the factors outlined in article 39 as well as those described in article 29.[53] Plaintiffs contended essentially that the agricultural sections of the treaty were inapplicable to actions taken under the authority of one of the non-agricultural sections. The Court rejected the argument and found that the Commission could consider the agricultural goals described in article 39 along with the factors described in article 29 when taking this kind of action.[54]

These Court decisions have brought clarity to some of the more ambiguous trouble spots. Agriculture remains effectively subject to the general provisions of the treaty, but the agricultural sections give the Commission the flexibility it needs to deal with problems unique to agriculture.

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50. 2 CCH COMM. MKT. REP. ¶ 8124 at 7396-97, 10 Comm. Mkt. L.R. at 251-52. Article 236 defines the procedure for amending the treaty. The Advocate General argued that the plaintiff's interpretation of the law here would actually effect a revision of the treaty by the Commission. 2 CCH COMM. MKT. REP. ¶ 8124 at 7400, 10 Comm. Mkt. L.R. at 243.

51. Germany v. Commission, 9 Recueil 269, 2 CCH COMM. MKT. REP. ¶ 8016, 2 Comm. Mkt. L.R. 369 (1963).

52. EEC art. 25(3): "In the case of the products listed in Annex II to this Treaty, the Commission may authorize any Member State to suspend, in whole or in part, collection of the duties applicable or may grant such Member State tariff quotas at a reduced rate of duty or duty free, provided that no serious disturbance of the market of the products concerned results therefrom."

53. Article 29 outlines several factors that should guide the Commission as it exercises its responsibilities under the treaty—in this case, as it takes actions described in article 25(3).

54. 2 CCH COMM. MKT. REP. ¶ 8016 at 7319, 2 Comm. Mkt. L.R. at 391-92. The Court stated in its opinion that "Article 39 cannot, of course, be given the same importance as Article 29. But it does set limits on its application inasmuch as the objectives set forth must be taken into consideration . . . ."

B. *Export/Import Licenses* (Bonding requirement and *force majeure*)

An integral part of the Community regulatory process is the internal export and import licensing system. An individual or a corporation desiring to move goods from one Member State to another must procure a license before he can complete the transaction. The record kept of licenses issued provides the Commission with a reliable basis for analyzing market trends. More importantly, however, the licenses give the Commission reliable data on future transactions. When licenses are procured by an importer or exporter for a particular transaction, he is required to post a bond guaranteeing that he will actually complete the transaction. The amount of the bond depends upon the nature of the transaction. If the refund amount is set in advance, the Commission may require a higher bond than is required in other situations. Because of this penalty for non-performance, licenses procured usually reflect anticipated imports and exports with some accuracy. The license system was thought to be a more effective system than the alternative approaches suggested.[55] The licensing system in general and the forfeiture provisions in particular have survived numerous legal attacks.

A broad challenge to the whole licensing program was brought before the Court by a defaulting importer in 1970.[56] The plaintiff there alleged that the entire system was illegal and articulated a number of approaches to support the argument. First, he contended that the system violated the "principle of proportionateness" which is a basic right guaranteed by the German Constitution. Under this principle, the injury to commercial interests should not be out of proportion to the value derived from the existence of the regulation, in this case, the availability to the Commission of information indicating market trends. In dismissing this argument the Court held that the uniform application of Community law required uniform interpretation by national legal

55. *See* note 9 *supra*. Two alternative approaches to the bonding system had been proposed. One would have created a system of fines for violation of export/import regulations. The other would have required importers and exporters to simply report their transactions to the proper agency as they occurred. The first was rejected as being too cumbersome to administer. The second was rejected because it would not provide the necessary data until the transaction was completed, too late to be useful in predicting future transactions.

56. Internationale Handelsgesellschaft mbH v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 16 Recueil 1125, 2 CCH COMM. MKT. REP. ¶ 8126 (1970).

systems. Rights claimed under a national constitution have no bearing on the legality of a Community act.[57] However, the Court suggested that certain basic rights exist under Community law as well, "inspired by the constitutional traditions common to all Member States," and carry over into Community law.[58] The Court found, however, that none of those basic rights had been violated by the licensing system. Regulation No. 120/67 endowed the Commission with the responsibility of watching the market closely and projecting trends based on their observations, and authorized the Commission to take any measures necessary to obtain information. The Court held that the licensing system devised by the Commission effectively fulfilled the stipulations of the regulation. The burden created by the bonds was not, in the Court's view, excessive. In finding that the licensing system is a reasonable means of achieving the objectives of Regulation No. 120/67, the Court apparently answered the "basic rights" argument but the Court never expressly indicated whether the "principle of proportionateness" is one of the basic rights common to all Member States and therefore a right also guaranteed under Community law.[59] The decision does establish the legality of the licensing system in principle and upheld the viability of the CAP.

Commission regulations usually provide that the duty to import or export is extinguished and the bond returned to the importer in circumstances characterized as *"force majeure."*[60] The general concept of *force majeure* is well established in civil law but construed in a narrow, technical fashion.[61] The cases suggest that the Court

57. 2 CCH COMM. MKT. REP. ¶ 8126 at 7424.

58. 2 CCH COMM. MKT. REP. ¶ 8126 at 7425.

59. 2 CCH COMM. MKT. REP. ¶ 8126 at 7425-27.

60. 1 CCH COMM. MKT. REP. ¶ 428 (1973).

61. The concept of *force majeure* has been given this definition: "According to the concept of *force majeure,* a contract will be rescinded . . . and no liability will be incurred by a party to it for the non-performance by such party of his obligations under the contract, by reason of an event which could not have been reasonably foreseen by the parties at the time the contract was entered into. Performance of the contract must be absolutely impossible, and must not be merely onerous for a party in order to constitute *force majeure."* David, *Frustration of Contract in French Law,* 28 J. COMP. LEG. & INT'L L. (3d ser.) 11 (1946), *as cited in* 3 TEX. INT'L L.F. 275 (1967). This article compares the application of the doctrine of *force majeure* (or impossibility of performance) in the United States, France, Germany, and the Nordic countries. The author suggests there that the doctrine as construed in France required absolute impossibility, and was consequently applied more strictly than in the common law countries.

of Justice has broadened the doctrine to encompass a broader range of circumstances. The *Schwarzwaldmilch* case[62] reflects this more flexible view. There the Court suggested that the application of the doctrine should depend upon a balancing of the public interest in obtaining reliable market information against the need, also in the public interest, of not hampering trade with obligations that are too burdensome. The Court's concept of *force majeure* required the presence of three elements: (1) a highly unusual event that anyone acting prudently and with the care of an ordinary businessman would have considered highly improbable; (2) consequences unavoidable through the exercise of reasonable care; and (3) a causal relationship between the improbable event and the importer's failure to perform.[63] The Court determined that the burden of proof is on the importer to establish these elements.[64] Under this interpretation of *force majeure,* circumstances not specifically enumerated by regulations may excuse a failure to conduct the import operation. Later decisions have consistently recognized this more flexible standard, but have refused to expand it beyond factual events operating independently on the importer for fear that the utility of the licensing system would be impaired.[65] An importer claiming *force majeure* must do so without delay,[66] and a Member State which allows the defense must notify the Commission that it has done so.[67]

62. Firma Schwarzwaldmilch GmbH v. Einführ- und Vorratsstelle für Fette, 14 Recueil 549, 2 CCH COMM. MKT. REP. ¶ 8062, 8 Comm. Mkt. L.R. 406 (1968). In his conclusions, Advocate General Gand discusses the concept of *force majeure.* 2 CCH COMM. MKT. REP. ¶ 8062 at 7961-62, 8 Comm. Mkt. L.R. at 409-10. The plaintiff-importer had a license to import powdered milk into Germany, but was unable to deliver due to factory equipment failure. Plaintiff contended that mechanical breakdown should fall within *force majeure.*

63. 2 CCH COMM. MKT. REP. ¶ 8062 at 7958-59, 8 Comm. Mkt. L.R. at 416-17.

64. 2 CCH COMM. MKT. REP. ¶ 8062 at 7959, 8 Comm. Mkt. L.R. at 417.

65. *See, e.g.,* Firma E. Kampffmeyer v. Einführ- und Vorratsstelle für Getreide und Futtermittel, [1974] European Court Reports 101 [hereinafter cited as E.C.R.], 2 CCH COMM. MKT. REP. ¶ 8261 (1974); Internationale Handelsgesellschaft mbH v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 16 Recueil 1125, 2 CCH COMM. MKT. REP. ¶ 8126 (1970).

66. Einführ- und Vorratsstelle für Getreide und Futtermittel v. Wilhelm Pfutzenreuther, [1974] E.C.R. 589, 2 CCH COMM. MKT. REP. ¶ 8262 (1974).

67. Getreide-Import GmbH v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 16 Recueil 1107, 2 CCH COMM. MKT. REP. ¶ 8123 (1970). Although notification is required of the Member State by EEC regulations, failure to notify the Commission has no legal effect on the liability of the parties.

C. *Tariff Regulations and Intervention Rules*

A significant number of agricultural decisions by the Court have dealt with clarifications of EEC tariff regulations. These situations often arise when an importer attempts to bring a product that does not precisely conform to existing tariff categories across national borders. The most illustrative example of this situation occurred when an importer cleared through customs a quantity of turkey tails. The importer sought to have the product classified as "edible offals," but the German customs office, seeking to collect a higher levy, chose to characterize the product as "poultry parts."[68] In responding to the referred questions, the Court emphasized the importance of uniform interpretation of Community regulations. These regulations, the Court declared, may only be interpreted according to Community law since they must have the same meaning in all Member States. While a Member State may interpret a tariff heading, it may only do so by observing Community law, and may not enact binding rules of interpretation.[69] The Court has responded similarly to a substantial number of cases raising the issue.[70]

The Court has also insisted on resolving disputes which have arisen in the interpretation of intervention rules. The intervention system is a market device operated by the Member States and financed by the Community. A national intervention agency purchases farm products from producers when the price for the product falls to a predetermined "intervention price."[71] If the mechanism functions properly it insures stabilized markets and helps guarantee a fair standard of living for farmers. The Court views the proper functioning of the intervention system as so critical to Community agricultural policy that it has carefully negated every at-

68. Hauptzollamt Hamburg-Oberelbe v. Firma Paul G. Bollmann, 16 Recueil 69, 2 CCH COMM. MKT. REP. ¶ 8098, 9 Comm. Mkt. L.R. 141 (1970).

69. 2 CCH COMM. MKT. REP. ¶ 8098 at 8402, 9 Comm. Mkt. L.R. at 153.

70. *See, e.g.*, Heinrich P. Brodersen Machf. v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 17 Recueil 1069, 2 CCH COMM. MKT. REP. ¶ 8154 (1971) (defining "pearled barley"); Firma Gunter Henck v. Hauptzollamt Emmerich (3 cases), 17 Recueil 743, 2 CCH COMM. MKT. REP. ¶ 8145 (1971) (defining "grains, kibbled, of corn"); 17 Recueil 767, 2 CCH COMM. MKT. REP. ¶ 8146 (1971) (defining "coarse meal of corn"); 17 Recueil 779, 2 CCH COMM. MKT. REP. ¶ 8147 (1971) (defining "grains, kibbled, of millet"); Hauptzollamt Bremen-Freihafen v. Bremer Handelsgesellschaft, 16 Recueil 427, 2 CCH Comm. Mkt. Rep. ¶ 8093, 9 Comm. Mkt. L.R. 466 (1970) (defining "cassava flour").

71. *See* note 25 *supra* and accompanying text for an explanation of the intervention system.

tempt by the Member States to make binding decisions regarding intervention policy.

In one instance, Commission regulations provided that wheat could be sold to the intervention agency by "any holder" of wheat in certain predetermined lots. The French intervention agency issued regulations which narrowed that right permitting only approved purchasing organizations to sell to the intervention agency.[72] The French agency argued that this regulation was a justified refinement in the definition of the term "holder" arising out of the special circumstances of the French grain market. The Court, however, refused to permit the term "any holder" to be narrowed by the French agency. For the system to work as it should, the Court emphasized that the intervention market must be as accessible to as many producers as possible to permit the unhampered movement of grain. The French regulation could have had the effect of impeding participation in the intervention market by grain producers whom the agency was initially designed to assist.[73] The Court chose to preclude this constricting interpretation by denying the Member State agencies the authority to interpret the Community regulation.

A review of the cases dealing with this particular area suggests that the Court is attempting to confine the latitude of Member State decision-making to achieve Community uniformity. Member States cannot deviate from Community rules unless the rules expressly provide for such a deviation,[74] but must provide and operate the administrative mechanism while the power to make interstitial interpretations of the governing regulations lies entirely outside their authority. This approach insures uniform application of rules. The tenor of the Court's opinions suggests that this uniformity is really the paramount goal. A necessary corollary of this approach, however, is that the Court will be required to decide a substantial number of cases requiring the interpretation of relatively ephemeral regulations. Conceivably, every dispute over the interpretation of a tariff heading could be referred to the Court for resolution. While a large number of referrals could bulge the Court's caseload with trivial matters, such referrals will also neces-

72. Syndicat National du Commerce Extérieur des Céréales v. Office National Interprofessionnel des Céréales, 16 Recueil 1233, 2 CCH COMM. MKT. REP. ¶ 8122 (1970).

73. 2 CCH COMM. MKT. REP. ¶ 8122 at 7371-72.

74. *See, e.g.*, Hagen OHG v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 18 Recueil 23 (1971).

sarily hamper the Member State's administration of Community regulations with additional bureaucratic entanglements. At least for the present, the Court has balanced the competing interests and chosen to accept these liabilities in order to achieve much-desired uniformity.

D. *Refund Cases*

Created as a part of Council Regulation No. 19 of April 4, 1962,[75] the refund system permits Member States to grant refunds to exporters who ship certain kinds of products to other Member States and third countries. The payments to exporters are designed to stimulate interest in shipping surplus goods to non-EEC countries. The refund compensates for the difference in the Community price and the lower world market price. By structuring the incentives in this way, the Member States reduce the possibility that they will be caught trying to outbid each other on refund premiums with little or no net decrease in the total surplus of the product.[76] In certain instances, the exporter may wish to "lock in" the amount of his refund. However, he must pay a higher bond premium in order to obtain this additional security. The administering authority can fix the refund by declaring in advance the market price of the exported product. In this way, the exporter does not risk price fluctuations that might occur between the contract date and the date of the export.[77]

Another device used to shape economic objectives is the production refund. This mechanism is used to keep the price of certain products low enough that the producers of those products do not lose their standard industrial markets. The refund is paid to the producer by the Member State in whose territory the product was used in the industry for which it was intended. In one instance the Community granted a production refund on broken rice intended for use in the brewing industry to keep the price sufficiently low so that brewers would not seek rice sources elsewhere. In a case arising under the regulation, the Court made clear that the pro-

75. Council Regulation No. 19 of April 4, 1962, [1962] Official Journal of the European Communities 933, art. 20(2).

76. *See* Firma E. Kampffmeyer v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 18 Recueil 213, 2 CCH COMM. MKT. REP. ¶ 8182 at 8459 (1972) (comments by the Commission interpreting regulation 19/62).

77. Einführ- und Vorratsstelle für Getreide und Futtermittel v. Gunther Henck, 16 Recueil 1183, 2 CCH COMM. MKT. REP. ¶ 8128 at 7459 (1970) (construing Commission Regulation No. 102/64).

ducer of the product and not the using industry was the rightful claimant of the refund.[78] While a producer might assign his right to the refund to the industry, the industry had no standing to sue for the refund in their own behalf.[79]

Community regulations closely govern the refund operation. The Member States administer the program, but they have no authority to modify Community regulations governing the refund system. The Court struck down an attempt by the German Government to establish a six-month statute of limitations on refund applications.[80] While the Member States may for administrative reasons require the application to be submitted in a particular form, the Court explicitly declared that the exporter cannot be penalized for his failure to follow the form by denying him the refund. The Court emphasized that uniform application was necessary to prevent exporters from being treated differently by the various national systems.[81]

The exporter or importer must meet certain quality standards to receive the refund. These regulations and the Court decisions construing them require the Member States to follow Commission regulations with particularity in order to assure uniform application throughout the EEC.[82] The national courts have the responsibility for interpreting the validity of any particular inspection, taking into consideration the nature, characteristics, and packaging of goods, and any other evidence of legal remedies the exporter may bring under national law.[83]

VII. Levy Cases

One of the most fertile areas of Community litigation has been the interpretation of the variable levy.[84] Because it is so intimately connected with every financial transaction between Member States, the Court has frequently been called upon to interpret its provisions.

78. Birra Dreher SpA v. Amministrazione della Finanze dello Stato [1974] E.C.R. 201, 2 CCH Comm. Mkt. Rep. ¶ 8264 (1974).

79. [1974] E.C.R. at 213, 2 CCH Comm. Mkt. Rep. ¶ 8264 at 9171-17.

80. Schluter & Maack v. Hauptzollamt Hamburg-Jonas, 18 Recueil 307, 2 CCH Comm. Mkt. Rep. ¶ 8186 (1972).

81. 2 CCH Comm. Mkt. Rep. ¶ 8186 at 8511.

82. *See, e.g.*, NV Vereenigde Oliefabrieken v. Produktschap voor Margarine, Vetten en Olien, 18 Recueil 1031, 2 CCH Comm. Mkt. Rep. ¶ 8195 (1972).

83. 2 CCH Comm. Mkt. Rep. ¶ 8195 at 8633-34.

84. *See* notes 28, 29 *supra* and accompanying text for an explanation of the variable levy.

The amount of the levy is set by the Commission and collected by the Member States as a product moves into the Member State from third countries. (The intra-Community levies were completely removed at the end of the transition period, December 31, 1969). Two factors determine the amount of the levy, the free-to-frontier price of the product at the border and the threshold price in the importing state. The levy is equal to the difference between the two. The Court has been confronted with litigation challenging the Commission's calculation of both of these price systems.

The threshold price, the first factor in determining the amount of the levy, is designed to equal the target price when the cost of marketing the product is added to it.[85] Importers seeking to reduce the levy have argued that the Commission underestimated the costs of marketing their product, thus causing the threshold price to be set too high. In one instance, an importer attempted to show that his marketing costs were substantially more than the standard estimate set by the Commission. In denying the importer's argument, the Court held that marketing costs are calculated on a flat rate based on a standard cost that every importer of the product would incur in such a transaction rather than on the actual cost incurred by a particular importer for a specific delivery.[86] However, the Court has also said that marketing costs include only those costs incurred in carrying out the procedures and legal formalities necessary to import the products in question and in transporting those products to the first wholesale marketing stage in the area to which the basic target price applies.[87]

The second factor in the variable levy is the free-to-frontier price. This price is determined by adding the cost of freight, insurance, and other costs (not including duties or levies) to the actual price of the product being imported. It is set every Friday for the following week by the Commission on the basis of prices most favorable to the importing Member State based on representative prices and taking into account the lowest marketing and shipping costs to the frontier crossing point for the marketing area of the

85. *See, e.g.*, Getreide-Import GmbH v. Einführ- und Vorratsstelle für Getreide und Futtermittel, [1973] E.C.R. 919, 2 CCH COMM. MKT. REP. ¶ 8222 (1973).

86. [1973] E.C.R. at 926, 2 CCH COMM. MKT. REP. ¶ 8222 at 9036.

87. In this case, the Court found that the cost of plant inspections, control costs, the cost of customs clearance, bank charges, expenses relating to the presentation of documents, and expenses relating to security that must be posted were not included in the calculation of marketing costs. [1973] E.C.R. at 926, 2 CCH COMM. MKT. REP. ¶ 8222 at 9036-37.

importing Member State in greatest need of additional supplies.[88] Thus, a larger estimate of allowable costs by the Commission will mean that the importer will pay a smaller amount in levies. Here also, the Court has held that the relevant cost is the cost which is generally borne by exporters up to the frontier, not those costs actually incurred by an exporter for a particular transaction.[89]

Since the levy is established and governed by the Commission, it is intended to be applied uniformly to all the Member States.[90] Although the levy system gives agricultural transactions a treatment unique from that accorded other kinds of transfers in the EEC, the Court has found the levy to be a legal exception to those treaty provisions since it is specially designed to achieve the goals described in article 39 of the treaty.[91]

To insure the Community character and uniformity of application of the levy system, the Court has had to resolve the disputes which arose under the system. Reflecting this commitment to uniformity, the Court has held that the Member States must collect the levy in precisely the fashion prescribed by EEC regulations.[92] Since the Member States are responsible for the administration of the levy system, the Court permits some flexibility in prescribing measures that prevent evasion of the levy. Such police measures may not, however, subject importers to any additional conditions that are not compatible with the criteria forming the basis of Community rules.[93]

Since the levy varies from week to week, the Commission has established a procedure which enables an importer or exporter to have the levy set in advance,[94] eliminating the risk that a future

88. *See, e.g.*, Gesellschaft für Getreidehandel AG v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 18 Recueil 1071, 2 CCH COMM. MKT. REP. ¶ 8192 at 8587 (1972).

89. 2 CCH COMM. MKT. REP. ¶ 8192 at 8592.

90. *See* Firma Max Neumann v. Hauptzollamt Hof/Saale, 13 Recueil 571, 2 CCH COMM. MKT. REP. ¶ 8059 at 7909 (1967).

91. 2 CCH COMM. MKT. REP. ¶ 8059 at 7908.

92. Belgium v. NV Cobelex, 18 Recueil 1055, 2 CCH COMM. MKT. REP. ¶ 8187 (1972) (an importing Member State must collect the "third country" refunds (a special pricing arrangement designed to make Community products competitive with products from non-member states) immediately after the refunds have been paid, not at some later date upon which the importing state is free to decide).

93. *See* Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-St. Annen, 17 Recueil 49, 2 CCH COMM. MKT. REP. ¶ 8132, 10 Comm. Mkt. L.R. 260 (1971).

94. This so-called "levy set in advance" is similar to the refund procedure discussed in note 77 *supra* and accompanying text. The Court found this provision

levy increase may make transactions unprofitable. In proper circumstances, the importer or exporter may have the levy rescinded. The Court has determined, however, that such a rescission will not entitle the merchant to a refund on portions of the product already exported.[95]

Most of the questions decided by the Court regarding the levy have been relatively trivial.[96] (Some of the cases not discussed here in the text are indicative of the obscurity of the questions the Court has had to resolve). These cases illustrate once again that the Court's greatest interest is in achieving a uniform interpretation and application of Community rules.

VIII. CONCLUSION

The Court of Justice spends a very significant portion of its time deciding cases related to the CAP.[97] This is partly a reflection of the size and importance of farming and farming-related industries in the European economy. But such an explanation is inadequate to describe why most of the decisions handed down by the Court involve the interpretation of relatively insignificant regulations often applying only to the most obscure fact situations. Few of the decisions discussed here can be characterized as major decisions. When these cases are viewed as a unit, however, they take on significance. They reflect a policy choice made by the Court that agriculture is going to be a Community enterprise governed by uniformly applied Community law and that the Member States will have no significant role in policy matters involving that area of the economy. Most of the cases decided by the Court involving agricultural problems could have been decided fairly and competently by the courts of the Member States. But to give Member States flexibility in interpreting and applying Community rules

to be legal under EEC articles 40 and 43 in *Deutsche Tradax GmbH v. Einführ- und Vorratsstelle für Getreide und Futtermittel,* 17 Recueil 145, 2 CCH COMM. MKT. REP. ¶ 8130 (1971).

95. Cooperatieve Vereniging "Necomaut" GA v. Hoofdproduktschap voor Akkerbouwprodukten & Produktschap voor Granen, Zaden en Peulvruchten, 16 Recueil 921, 2 CCH COMM. MKT. REP. ¶ 8112, 10 Comm. Mkt. L.R. 138 (1970).

96. *See* Paul Craeynest & Michel Vandewalle v. Belgium, 16 Recueil 905, 2 CCH COMM. MKT. REP. ¶ 8111 (1970); Deutsche Getreide- und Futtermittel Handelsgesellschaft mbH v. Hauptzollamt Hamburg-Altona, 16 Recueil 1055, 2 CCH COMM. MKT. REP. ¶ 8121, 10 Comm. Mkt. L.R. 205 (1970).

97. Of the eighty-nine cases decided by the European Court of Justice since November 15, 1972, fifty-two have involved questions relating to the Community regulation of agriculture.

would, in the Court's view, permanently encumber the achievement of the meaningful common agricultural policy sought by the treaty. While the national states may be gaining policy-making power generally, the Court, particularly in the agriculture decisions, is exerting a consistent influence to insure that the decision-making authority flows the other way.

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