

## EEC Law - Export Credits - Community has Exclusive Power to Negotiate Export Credit Agreements: Local Cost Standard Advisory Opinion, Re the OECD Understanding of a Local Cost Standard

David Simon

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#), and the [International Trade Commons](#)

---

### Recommended Citation

David Simon, *EEC Law - Export Credits - Community has Exclusive Power to Negotiate Export Credit Agreements: Local Cost Standard Advisory Opinion, Re the OECD Understanding of a Local Cost Standard*, 2 Md. J. Int'l L. 265 (1977).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol2/iss2/18>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## C. Regional Politico-Economic Integration

### **EEC LAW — EXPORT CREDITS — COMMUNITY HAS EXCLUSIVE POWER TO NEGOTIATE EXPORT CREDIT AGREEMENTS.**

*Local Cost Standard Advisory Opinion, Re the OECD Understanding on a Local Cost Standard,*  
[1976] 1 Comm. Mkt. L.R. 85.

For some years, the member States of the European Economic Community (EEC) have been attempting to harmonize their export credit policies,<sup>1</sup> both among themselves and in relation to their primary non-European competitors in export trade, the United States and Japan. Highly competitive export credit

---

1. Export credits are financing credits for international credit (non-cash) transactions. For a good introduction to export credits in general and to the use of such credits in U.S. export transactions, see Middletown, *Export-Import Bank*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 391 (1963). Export credits, like other credits, can vary as to interest rate, term, downpayment and various guarantee provisions. In most western nations, export transactions are financed by governmental or quasi-governmental banking institutions. See di Nola, *The Export Credit Scramble*, WORLD BUSINESS 91 (July-August 1974). The export credit program of the United Kingdom is discussed in IMF SURVEY 82 (March 15, 1976); that of France, in IMF SURVEY 162 (June 7, 1976) and IMF SURVEY 194 (July 5, 1976). Although export credits are, of course, necessary ingredients of international trade, export credit competition figures strongly as a non-tariff distortion of trade. See BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE, 50-55 (1970).

rates have tended in the past decade to introduce significant trade-distorting effects, which the exporting nations have been little able to afford in view of the monetary and general economic difficulties of the past decade.<sup>2</sup>

In the 1960s, the EEC Commission advanced its influence primarily in the direction of the coverage of export credit insurance; those efforts were unsuccessful. In the 1970s, the Commission turned its efforts to the harmonization of export credits, instituting notification requirements as to certain export credit transactions. The Commission's harmonization schemes have likewise been without success.<sup>3</sup> At present, in view of Europe's difficulties with inflation and monetary instability, the harmonization of export credits has become an important condition for the well-being of European export industries. The Community members can no longer afford the trade-distorting effects of an export credit rate war.

These two means of attempting to rationalize export credits — individual negotiations and Community negotiations — came into collision in a local cost<sup>4</sup> export credit agreement negotiated by the individual EEC member States within the Organization of Economic Cooperation and Development (OECD). The EEC Commission asserted that the Community should be the sole negotiator for the EEC member States in export credit negotiations. The Commission reasoned that the Common Commercial Policy clause of the Treaty of Rome<sup>5</sup> required the member

---

2. Commission des Communautés Europeennes, Groupe du Porte Parole, *Note B10(76)234 aux Bureaux nationaux* (23 June 1976).

3. *Id.* See also SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1973 ¶434 (1974); EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1974 ¶372 (1975); NINTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1975 ¶¶422-24, 514-15 (1976).

4. "Local costs" are costs of goods and services that must be purchased in the buyer's country in an export transaction, *e.g.*, civil engineering, purchase of supplies, and wages paid to local staff. The extent of financing available for local costs is a significant variable in export credit competition. For example, that "[t]he U.S. is more restrictive in financing local costs than some of its major competitors" has been cited as a factor in the failure of the U.S. Export Import Bank to compete strongly with the "government supported financing agencies of most other major industrial nations." Statement of John H. James, Chairman, Dresser Industries, Inc., to the President's Export Council on July 13, 1976, U.S. EXPORT WEEKLY No. 15 at N-2 (July 20, 1976).

5. Treaty Establishing the European Economic Community, 298 U.N.T.S. 14 (1958) [hereinafter, Treaty of Rome]. The Common Commercial Policy Clause, art. 113, is quoted *infra* note 10.

States to yield their negotiating authority to the Commission through a Council resolution. Pursuant to article 228<sup>6</sup> of the Treaty of Rome, the Commission sought an advisory opinion from the Court of Justice of the European Communities to settle the dispute over the allocation of authority to negotiate. In the *Local Cost Standard Advisory Opinion, Re the OECD Understanding on a Local Cost Standard*,<sup>7</sup> the Court held that the Community had exclusive power to negotiate international agreements concerning export credit terms, preempting the sovereign power of the individual member States.

In spite of the *Local Cost Standard* opinion, conflict has continued within the community over who may negotiate a Gentlemen's Agreement, as tentative export credit agreements have come to be called. This paper traces the recent history of the European role in international attempts to achieve a Gentlemen's Agreement and analyzes the *Local Cost Standard Advisory Opinion* from a legal and a political standpoint.

Because the Common Market is "biased so as to give priority to imports,"<sup>8</sup> it has in the past been less concerned with export policies than with import (tariff) policies. Thus the historical Treaty-determined evolution of the Community began with the elimination of intra-Community tariff barriers.<sup>9</sup> It is only after the "transitional phase" of Community development that the Treaty of Rome calls for the establishment of a full-fledged "common commercial policy" (art. 113).<sup>10</sup>

---

6. Quoted *infra* note 20.

7. [1976] 1 Comm. Mkt. L.R. 85.

8. European Report, May 4, 1976.

9. Article 8 of the Treaty of Rome provides for an orderly development of the Common Market over a period of 12 years. Three stages of four years each are mandated for the achievement of certain goals. For example, arts. 14 and 15 set out the three-stage program for the reduction and elimination of customs duties between member States. The effect of the expiration of the transition period on December 31, 1969 is complicated by the presence of four sorts of rules within the Treaty of Rome: (1) those which are intended to apply only during the transition period; (2) those which are intended to apply throughout the existence of the Community; (3) those which are intended to apply only after the expiration of the transition period; (4) those subject to express derogations in the Treaty. The expiration of the transition period does not relieve member States or the Community of the duty of carrying out transition-period obligations that had not been completed before the end of the transition period. A. PARRY AND S. HARDY, *EEC LAW* 163 (1973).

10. 1. After the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of

For a variety of reasons, the EEC members have been unsuccessful in establishing a common export policy by means of Community administrative machinery. In general, the member States have preferred to "coordinate" export credit policies rather than subject those policies to a rigid statutory scheme.<sup>11</sup> The aim of a common export credit policy, it is agreed, must be to eliminate the devastating competitive bidding among the exporting nations. Furthermore, it is agreed that the policies of the member States must be coordinated with the export credit policies of the United States and Japan, the two major non-Community exporting nations, to maintain international competitive standing of the member States.

A coordination group for credit insurance policies, guarantees and financial credits was established within the EEC Commission by the Six<sup>12</sup> to foster the exchange of information regarding export credits.<sup>13</sup> Its purpose is the coordination of export credit rates throughout the Community. Under present arrangements, the Nine exchange information and consult on all export credit operations having a duration of greater than five years.<sup>14</sup> The

---

liberalization, export policy and protective commercial measures to be taken in cases of dumping or subsidies.

See also Article 116:

At the end of the transitional period Member States in respect of all matters of particular interest in regard to the Common Market, within the framework of any international organizations of an economic character, only proceed by way of common action.

According to one commentator:

The commercial policy of the Community is the totality of measures which regulate economic exchanges between the Community on the one hand and non-member states on the other. The logic of the Common Market requires that the Member States adopt a common approach to trade with non-members. Failure to do so would result in distortion of trade flows, for, as barriers to the movement of goods between Member States were removed, it would become possible for exporters in third states to circumvent barriers to trade in force in one Member State by exporting via a Member State which operated a less restrictive policy. Similar considerations apply to exports from Member States to third countries.

CAMPBELL, COMMON MARKET LAW SUPPLEMENT 1975 at 940-41. See also A. PARRY AND S. HARDY, EEC LAW at 160-61 (1973).

11. European Report, May 11, 1974.

12. "The Six" are the six original member States: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. With the accession of Denmark, Ireland and the United Kingdom, "the Six" have become "the Nine."

13. Council Decision of 15 May 1962, OFFICIAL GAZETTE No. 52 (30 June 1962); Council Decision of 26 January 1965, OFFICIAL GAZETTE No. 19 (5 December 1965).

14. *Id.* The member States inform each other and the EEC Commission, by telex, of all export credit transactions of longer than five years term, including information

group considers that to increase the scope of this information flow would overburden "information circuits" and that, furthermore, arrangements of less than five years are of sufficiently small scope that they need not be detailed at this point.<sup>15</sup> In 1974 the Nine were engaged in negotiating an export credit agreement within the Organization for Economic Coordination and Development (OECD).<sup>16</sup> Terms proposed by the Nine acting in concert but outside EEC channels were:

— minimum interest rate of 7% on all export credit operations stipulating a duration of over two years;

— maximum duration of credit of 5 years for industrialized countries, 8.5 years for Eastern Europe, and 10 years for developing countries;

— aid credits (credit on projects taking the form of development aid) would be exempt from the common rules.<sup>17</sup>

A proposal by the EEC Commission that the Nine be able to block credit operations on goods and services for export to industrialized or State-trading countries by one of the partners failed to achieve the approval of the Nine and was shelved. In spite of concrete proposals by the Commission, the negotiating States within the OECD, including the Common Market States, continued to conduct their negotiations along purely nationalistic lines.

---

as to the ratios of public and private credits, the interest rate, the interest rebate, reimbursement rate, downpayments, cost represented by credit insurance arrangements, and contractual arrangements. A group consultation can be demanded by any member State or by the Commission, but such a consultation cannot prevent a member State from following its chosen export credit policy.

15. European Report, May 11, 1974.

16. The OECD had been the forum for the negotiation and settlement of earlier, limited export credit arrangements. The Nine adopted a common position (outside Community channels) to conclude OECD industry-sectoral export credit programs on ship exports, nuclear power stations and ground stations for tele-communications satellites. European Report, May 11, 1974. The membership of the OECD includes the primary exporting nations, the United States, Japan, France, Germany, Italy and the United Kingdom. The adherence of all the countries listed is necessary for an export credit agreement to be effective; competitive behavior by any one of the "Big Six" exporters would force the others into resuming competitive practices.

17. European Report, May 11, 1974.

The view of the European Commission on export credits is that:

the harmonization of export credits falls within the field of common policies, and as such, within the ambit of article 113 of the EEC Treaty. Preparation for the international discussions . . . has been conducted within the Community at meetings of the Policy Coordination Group for Credit Insurance, Credit Guarantees, and Financial Credits, and indeed this Group has drafted a text which could serve as a basis for a "Gentlemen's Agreement." It undertook this work on the basis of Commission suggestions. Participation in the talks has however been by the Member States and the Commission, since not all Member States accept that all aspects of export credits are covered by article 113. The Commission has not accepted this argument, but has been anxious on this particular occasion, having regard to the urgency of the issue, that such differences of opinion as exist should not be allowed to impede progress on the substance of the matter.<sup>18</sup>

Thus the Commission's position was that it had the power to conclude Gentlemen's Agreements but that it would not assert the exclusive nature of its power to impede substantive negotiations. At the same time the Big Four (France, United Kingdom, Federal Republic of Germany and Italy) of the European Community continued to negotiate separately with the United States concerning an export credit agreement. France, in particular, claimed that Gentlemen's Agreements are not within the competence, or at least not within the exclusive competence, of the Communities, but are strictly "governmental" (i.e., matters of national competence) measures which the Treaty of Rome left to the States to pursue.<sup>19</sup>

It was this factual setting that led the Commission of the European Communities on July 14, 1975 to submit a request pursuant to art. 228<sup>20</sup> for an opinion to the Court of Justice of

---

18. Reply to written question by Mr. Klepsch, October 22, 1974, 17 O. J. EUR. COMM. (No. C 145) 29 (1974).

19. European Report, April 6, 1974.

20. Article 228(1) of the Treaty of Rome provides:

The Council, the Commission or a member-State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of

the European Communities. The Commission asked the Court to rule on (1) the compatibility with the EEC Treaty of the draft "Understanding of a Local Cost Standard," a limited export credit agreement drawn up under the auspices of the OECD by negotiations between the Big Four and the United States and Japan,<sup>21</sup> and (2) whether the Community has the power to conclude such an agreement and, if so, whether that power is exclusive.<sup>22</sup>

While these questions were before the Court — and while the Council, the Republic of Ireland, Italy, The Netherlands and the United Kingdom were preparing and submitting "observations" to the Court<sup>23</sup> — negotiations among the Big Four, the United States and Japan proceeded apace. These negotiations culminated in the Rambouillet Conference<sup>24</sup> attended by the heads of state of the Big Six.<sup>25</sup> The Rambouillet Declaration of November 17, 1975 announced broad general agreements with respect to currencies, trade, economic revival, energy and relations with developing countries. In paragraph 10 of the Declaration, the conferees affirmed that "we will also intensify our efforts to achieve a prompt conclusion of the negotiations now underway concerning export credits."<sup>26</sup>

In short, the EEC Commission found itself virtually shut out of the negotiations for stabilization of export credit rates, as did the smaller of the States of the European Communities. Furthermore, the Commission was faced with the political reality that the United States and Japan did not recognize the Commission as the proper negotiating representative of the European states with respect to export credits. The Commission, thus in fact, lacked the ability or the power to negotiate an international export credit agreement on behalf of the Community. It was against this background that the Commission requested the opinion of the Court concerning the extent of its powers over export credits.

---

Justice is adverse, the agreement may enter into force only in accordance with Article 236 [which provides for amendments to the Treaty of Rome].

21. See text at *infra* note 51.

22. [1976] 1 Comm. Mkt. L.R. 85, 86.

23. Rules of Procedure of the Court of Justice, art. 106, para. 1.1. See also D. VALENTINE, 1 THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 90-91 (1965).

24. N.Y. Times, Nov. 17, 1975 at 1, col. 8.

25. *I.e.*, France, Germany, Italy, Japan, United Kingdom, United States.

26. N.Y. Times, Nov. 17, 1975 at 1, col. 8.



In the *Local Cost Standard Advisory Opinion, Re the OECD Understanding on a Local Cost Standard*,<sup>27</sup> the Court of Justice of the European Communities held that the Community has exclusive power to participate in international agreements concerning export credit terms, preempting the sovereign power of the individual member States. The Court's opinion was requested by the Commission of the European Communities, pursuant to article 228<sup>28</sup> of the Treaty of Rome, which allows the Commission to refer to the Court questions concerning the compatibility of contemplated international agreements with the Treaty. The exclusive power of the Community arises from the Common Commercial Policy clause, article 113,<sup>29</sup> of the Treaty, which the Court found to embrace export credit policies.

### *The Local Cost Standard Advisory Opinion*

There are no cited precedents in the *Local Cost Standard Advisory Opinion*.<sup>30</sup> In fact, however, the European Court had earlier decided two cases on point. In *EC Commission v. France: Re Export Credits*,<sup>31</sup> the Court held that export credit rates fall within community competence, and in *Re The European Road*

27. [1976] 1 Comm. Mkt. L. R. 85.

28. Quoted *supra* note 20.

29. Quoted *supra* note 10.

30. The Court of Justice is a court in the Civil Law tradition. Although its use of precedent differs, in theory, from that in Common Law courts, the difference is not great in practice. See A. PARRY AND S. HARDY, *EEC LAW 77-78, 91-99* (1973); W. FELD, *THE COURT OF THE EUROPEAN COMMUNITIES: NEW DIMENSION IN INTERNATIONAL ADJUDICATION 14-33* (1964). PARRY AND HARDY, *supra* at 93 assert that:

[T]he question whether a decision of the Court of Justice has validity *erga omnes* is probably without content; on a narrow interpretation, the judgment has no such validity, for it is always open to the Court of Justice to change its view, but until it does so, that decision stands.

Following the Civil Law model, the Court of Justice also makes use of Advocates-General. See generally D. G. VALENTINE, 1 *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 30-35* (1965) for a discussion of the functions of the Advocates-General. Article 63, Rules of Procedure of the Court of Justice requires that judgments of the Court contain, *inter alia*, the name of the Advocate General and an assertion by the Court that "the Advocate General has been heard." Usually, only one Advocate General is assigned to a case; his "Submissions" are published with the decision. See, e.g., *E. C. Commission v. France: Re Export Credits* [1970] Comm. Mkt. L.R. 43 at 46-63. In the *Local Cost Standard Advisory Opinion*, submissions were received from each of the four Advocates General; those submissions were not published with the opinion, and remain unavailable.

31. [1970] Comm. Mkt. L.R. 43.

*Transport Agreement (ERTA): EC Commission v. EC Council*,<sup>32</sup> the Court set forth the criteria according to which Community competence in international negotiations was to be decided.

*EC Commission v. France: Re Export Credits*<sup>33</sup> was an action by the Commission against France under Article 169,<sup>34</sup> grounded in the Commission's claim that France had failed in its Treaty obligations. Against France's contention that export credit rates fall within the national monetary competence of the member States, the Court held that export credits constituted an *aid* within the Treaty and hence fell within the competence of Community institutions.

Factually, the Banque de France had for some years set a rate for export credits more favorable than the market rate for internal credits. On June 12, 1968 the French Government requested that the EEC Commission agree to France's maintaining and increasing the preferential rate applied to export credits.<sup>35</sup> On June 24 and 26, the French Government stated that it was taking preferential measures according to articles 108 and 109 of the Treaty of Rome.<sup>36</sup>

Article 108 provides that when a country incurs difficulties in its balance of payments, the Commission of the EEC shall examine the situation and *recommend* measures for adoption by the afflicted nation; that the Commission shall keep the EEC Council informed of the development of the situation; that the Council shall grant such mutual assistance and issue directives concerning the conditions and details of the assistance; and that, if the Council does not follow the recommendations of the Commission or if the assistance is granted but the measures taken are insufficient, then the Commission shall authorize the State

---

32. [1971] Comm. Mkt. L.R. 335.

33. [1970] Comm. Mkt. L.R. 43.

34. Article 169:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter; the State concerned must be given the prior opportunity to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

35. [1970] Comm. Mkt. L.R. 43 at 46.

36. *Id.* at 46-51 (Submissions of the Advocate General).

in difficulty to take protective measures, the conditions and details of which the Commission shall determine.<sup>37</sup>

Under article 109, if a sudden crisis occurs in a State's balance of payments and if a Community decision is not immediately forthcoming, then the State may take unilateral interim protective measures that "shall not exceed the minimum strictly necessary to remedy the sudden difficulties which have arisen." Article 109 further provides that the State so acting shall inform the Commission and other member States and that the Council, acting on the basis of an opinion of the Commission and after consulting with the Monetary Committee, may decide that the State shall amend, suspend, or abolish the protective measures.

In response to France's request for authorization of preferential export credit rates, the Commission authorized the French Government to maintain a preferential rate not to exceed a 1.5 point spread relative to the internal French credit rate. The preferential rate was to be eliminated not later than January 21, 1969. During the relevant time period, the gap between export and domestic rates consistently exceeded 1.5 points, and the Commission brought an action before the Court of Justice under article 169,<sup>38</sup> having fulfilled the procedural prerequisites.

The French Government maintained that adjustment of export credit rates falls within the monetary policies of the member States, and that the States' monetary policies are within their exclusive competence; hence that the Commission's orders were without legal basis. The Court held otherwise, reasoning that the powers of authorization and intervention found in articles 108 and 109 would be rendered nugatory

if it were possible for member-States, under the pretext that their action fell solely within the field of monetary policy, to derogate unilaterally and beyond the control of those institutions from the obligations which fall upon them from the provisions of the Treaty.<sup>39</sup>

---

37. Cf. art. 104:

Each Member State shall pursue the economic policies necessary to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while ensuring a high level of employment and the stability of the level of prices.

38. *Supra* note 34.

39. [1970] Comm. Mkt. L.R. 43, 65.

The Court held that the preferential export credit rate constituted an *aid* within the meaning of article 92 of the Treaty, in which the member States "agreed upon the incompatibility with the Common Market of all aids given by them in any shape which might distort or threaten to distort competition."<sup>40</sup> Hence, under article 108, prior authorization of the Commission was necessary before France could legally institute a preferential rate on export credits.

As to the French unilateral action under article 109 following France's sudden balance of payments crisis, the Court noted that France failed to fulfill the notification requirements of article 109, paragraph 2. The Court opined that where the Treaty allows even a limited derogation from Community duty, the State derogating will be strictly held to the terms of the Treaty.<sup>41</sup>

Thus the Court, finding that France had failed in one of its obligations under the Treaty by allowing an export credit point spread greater than that mandated by the Commission, found that — to some extent at least — export credit levels were within the purview of Community competence.

The leading case concerning the Community's power to conclude international agreements is the "ERTA" case, *Re The European Road Transport Agreement (ERTA): EC Commission v. EC Council*.<sup>42</sup> In the ERTA case the Commission unsuccessfully sought an annulment of a Council decision regarding the negotiations of the member States concerning the ERTA.

In 1967 negotiations were begun to review the 1962 United Nations-sponsored ERTA, which had not yet entered into force for lack of the requisite number of ratifications. The EEC Commission sued to annul a decision taken by the EEC Council according to which the Commission would be excluded from the ERTA negotiations. Negotiations were to be carried on by member States with the non-member States, and the member States (rather than the Community) would become contracting parties. The Council decision further mandated that the Six "act in com-

---

40. *Id.* at 65.

41. The strictness with which this provision has effect contrasts sharply with the Court's usually indulgent attitude toward procedural requirements. See Schermers, *The European Court*, 22 *AM. J. COMP. L.* 444, 447-51 (1974).

42. [1971] *Comm. Mkt. L.R.* 335.

mon, coordinating their position according to the usual procedure in close association with the Community institutions."<sup>43</sup>

The Commission contended that exclusive power was vested in the Community to negotiate and conclude such agreements. The Court of Justice held on the merits that the Council's decision could stand, *i.e.*, that the member States, on the facts of this case, did have the power to conclude the ERTA. However, the Court emphasized that its holding was strictly limited to the facts, and in particular to the fact that the negotiations for the ERTA had begun in 1962, before Community competence had arisen through the completion of the first state of Community development,<sup>44</sup> and that:

At this state of the negotiations, to have suggested to the non-member States concerned that there was now a new distribution of powers within the Community might well have jeopardised the successful outcome of the negotiations.<sup>45</sup>

The legal reasoning up to the point at which the Court took cognizance of the special circumstances that required continuance of intergovernmental negotiations demonstrated the Court's commitment to the policy of Community negotiation of international agreements that affect the common economy. The Court adopted an essentially constitutional mode of argument.<sup>46</sup> Thus to the Council's argument that "since the Community has only such authority as has been conferred on it, an authority to enter into agreements with non-member States cannot be assumed in

43. *Id.* at 339 (Submissions of the Advocate General).

44. *See supra* note 9.

45. [1971] Comm. Mkt. L.R. at 361.

46. That the Court of Justice treats the Treaty of Rome as a *constitutional* document (rather than, strictly speaking, a treaty) is well known. Judge Donner of the Court of Justice has noted that the Court sees itself as:

confronted with the fact that it has to interpret a document which not simply enunciated a set of rules and regulations, but which has set up a body with a permanent responsibility for the well-being of an important segment of industrial society. Such a document must be read and applied in a slightly different way than is the habit with a run-of-the-mill statute.

Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, [1974] Comm. Mkt. L.R. 127, 133. *See also* A. M. DONNER, *THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES* (1968), Feld & Slotnik, "Marshalling" the European Community Court, 25 EMORY L.J. 317 (1976).

the absence of an express provision in the Treaty,"<sup>47</sup> the Court responded:

In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy . . . one must turn to the general system of Community law relating to agreements with non-member States . . . .

To determine in a particular case the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions.<sup>48</sup>

The Court's reasoning was ultimately a preemption argument: once the member States turn to the Community for the solution of a particular problem and the Community in fact responds to that problem by issuing Regulations, then:

This Community authority excludes the possibility of a concurrent authority on the part of the member-States, since any initiative taken outside the framework of the common institutions would be incompatible with the unity of the Common Market and the uniform application of Community law.<sup>49</sup>

Thus, absent special circumstances, once the member States have yielded up some degree of initiative, the Community has the power to conclude international agreements within the purview of its activities. Those special circumstances here included (1) that the negotiations had been carried on before the Community was in a position to enter them and that the delicacy of the negotiations could be jeopardized by switching negotiators in the middle of negotiations; and (2) that, during the negotiations, the Commission had failed formally to lodge its complaint of nonrepresentation.

The *Local Cost Standard Advisory Opinion*<sup>50</sup> utilized the analytic concepts of the *Export Credit* decision and the *ERTA* decision.

---

47. [1971] Comm. Mkt. L.R. at 354.

48. *Id.*

49. *Id.* at 356.

50. [1976] Comm. Mkt. L.R. 85.

The OECD draft "Understanding on a Local Cost Standard" required that "All officially supported contracts related to exports on credit terms shall, save as hereinafter provided, be subject, in respect of local costs, to the following Standard."<sup>51</sup> The Standard is in three parts:

(1) The participating States agree not to cover local credit for more than 100% of the value of goods and services exported;<sup>52</sup>

(2) "The governments further agree not to grant their support under clause 1 above for credits or credit guarantees for local costs carrying interest rates or maturity terms more favorable than those supported for the exports of goods and services to which such local costs are related";<sup>53</sup>

(3) Local costs are defined as "expenditure for the supply of goods and services from the buyer's country."<sup>54</sup>

The Understanding goes on to exclude certain transactions (military and certain transactions where a developing country is the importer), to define allowable derogations from the standard and the reporting mechanism for such derogation, and to set out two general provisions:

(1) an information-exchange provision and

(2) a provision requiring review of the Understanding after one year and allowing participating governments to withdraw on three-months' notice.

The OECD group responsible for the Understanding issued a statement on February 11, 1975 that all delegations were considered to have agreed to the Understanding and that, "As regards the draft as a whole, there only remains to be clarified the form of the participation in the Understanding by the European Economic Community."<sup>55</sup> On December 19, 1974 the EEC Com-

---

51. *Id.* at 87. Note that the Understanding applies only to government-supported credits. Unsupported credits granted by private institutions are not subjected to this regime.

52. *Id.* Thus if export credits are extended on a \$1-million transaction covering the full \$1-million costs, additional credit for local costs may not exceed \$1-million.

53. *Id.*

54. *Id.*

55. *Id.* at 88.

mission conveyed to the EEC Council a recommendation that the Council adopt the following decision:<sup>56</sup>

In the course of arriving at an agreement with the Organization for Economic Cooperation and Development for a Local Cost Standard, the Commission shall express the Community's position in accordance with the Directives annexed.

It shall act in accordance with the Special Committee referred to in article 113 of the Treaty which shall assist it in its task.<sup>57</sup>

Thus, in essence, the Commission asked the Council to give it (the Commission) the power to enter into the Understanding. The advisory opinion under discussion here concerns the power of the Community to undertake such negotiations, to the exclusion of the member States.

The Court took jurisdiction under article 228(1),<sup>58</sup> construing the term "agreements" in that article to cover the OECD Understanding at issue. The Court considered that the Understanding was an agreement within the meaning of the article because it was "an undertaking entered into by entities subject to international law which has binding force."<sup>59</sup> The requirement of binding force is satisfied because the Understanding sets forth a standard and defines the exceptions and allowable derogations, which implies that the Understanding is intended to bind the participating States. Furthermore, without deciding on the compatibility of the terms of the Understanding with the Treaty of

---

56. *Id.* at 86. The Commission can act as negotiator for the Community only after it has been so authorized by a decision of the Council. *See* art. 113(3), quoted *infra* note 61. The rationale for this procedure lies in the responsibilities of the members of the Commission and the Council: Commission members have an undivided duty to serve the Community; they are independent of any national government (art. 157(2)). Council members, on the other hand, are representatives of their respective national governments (art. 146). Their duty is thus jointly a duty to represent their home government and the duty to act in the interests of the Community (art. 145). Representation of national interests is ensured by requiring a decision of the Council before the Commission is empowered to act as international negotiator for member States' interests.

57. [1976] Comm. Mkt. L.R. at 87. The "Directives annexed" are the draft OECD Understanding.

58. *Supra* note 19. Article 235 is the provision for amendments and modifications of the Treaty.

59. [1976] Comm. Mkt. L.R. at 89.



Rome, the Court provided a broad constitutional<sup>60</sup> mode of analysis to be applied for determining compatibility:

The compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.<sup>61</sup>

The Court's analysis of the power of the Community to conclude the Understanding proceeded along constitutional lines. The analysis began with articles 112 and 113 of the Treaty. Article 112 provides that "Member States shall . . . progressively harmonize the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted." Article 113 provides that "the common commercial policy shall be based on uniform policies, particularly in regard to . . . export policy." The Court quoted articles 112 and 113 in support of its position that export credits fall within the "aid for exports" (art. 112) that is to be the subject of "progressive harmonization" among the member States. This position, of course, is consistent with the position taken in *EC Commission v. France*.<sup>62</sup> The Court goes on to cite articles 113<sup>63</sup> and 114<sup>64</sup> to support the proposition that

the Community is empowered, pursuant to the powers which it possesses, not only to adopt internal rules of Community law, but also to conclude agreements with third countries pursuant to article 113(2) and Article 114 of the Treaty.<sup>65</sup>

---

60. See *supra* note 46.

61. [1976] *Comm. Mkt. L.R.* at 90.

62. [1970] *Comm. Mkt. L.R.* at 43. See text accompanying note 32 *supra*.

63. Article 113 provides, in pertinent part, that:

3. Where agreements with third countries require to be negotiated, the Commission shall make recommendations to the Council, which will authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

64. Article 114 provides that:

The agreements referred to in article . . . 113 shall be concluded on behalf of the Community by the Council acting during the first two stages by unanimous vote and subsequently by a qualified majority vote.

65. [1976] *Comm. Mkt. L.R.* at 92.

Without further argument, the Court thus finds Community power to conclude the OECD Understanding.

The Court's analysis of exclusivity begins with the proposition established above, namely, that the subject matter of the Understanding is within the scope of the "common commercial policy prescribed by article 113 of the Treaty."<sup>66</sup> Referring solely to articles 113 and 114, the Court reasons its way to the proposition, "The Community has exclusive power to participate in the Understanding on a Local Cost Standard referred to in the request for an opinion."<sup>67</sup> From this proposition the Court proceeded to opine that the Community's power is exclusive with respect to export credit agreements in general, and further, that the Community has exclusive power as to all agreements concerning common commercial policy.

The Court's reasoning proceeds from constitutional principles regarding the nature of the EEC. Exclusivity is grounded in the fact that:

any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortions can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.<sup>68</sup>

From this statement it follows immediately that the Community's power must be exclusive; for any unilateral action would result in the likelihood of trade distortions, hence action must be multilateral; but the multilateral action must embrace all the member States, hence it is a Community action.

### *Critique of the Opinion*

Surely, the *Local Cost Standard Advisory Opinion* is one of what Judge Donner calls the constitutional decisions,<sup>69</sup> resulting from an expansive reading of the Treaty and supplying missing express terms from the Treaty's broad language. Surely also, the Court could have gone the path of the *ERTA* decision, de-

---

66. *Id.* at 93.

67. *Id.* at 94.

68. *Id.* at 93.

69. See *supra* note 46.

claring that export credits had been the subject of such long negotiations, predating the second stage of Community development, that changing negotiating teams would jeopardize whatever progress had already been made. The fact that the OECD understanding was already a *fait accompli*, complete except for ratification, need not have influenced a Court intent on cleaving to the safe path of the *ERTA* case reasoning, for the *ERTA* was itself in substantially the same posture when that decision was handed down. The Court instead moved toward continuing the expansion of Community powers — a trend that has a long history in the actions of the European Court.<sup>70</sup> Nevertheless, the rigor of the Court's reasoning leaves something to be desired, for by assuming from the beginning that export credits constitute state aid under article 112, the Court assumes what must be established. It will not be gainsaid that this proposition was established in *EC Commission v. France, Re Export Credits*;<sup>71</sup> but the two cases are so readily distinguishable — the earlier case involved only internal adjustment of export credits, while the later involved an international agreement — that the proposition could well have been reversed in the *Local Cost Standard* opinion. Or, should the Court not have wished to reverse its position on the nature of export credits, it could have reasoned that article 113, paragraph 1<sup>72</sup> is not self-executing but only directory. The Court could have reasoned that the Community is not automatically empowered to conclude international agreements, but that the Treaty rather directs the member States to conclude agreements themselves but within the teleologic framework of the Community. Under this reading, article 113 (3),<sup>73</sup> which authorizes the Community to negotiate with third parties, would be taken to mean that there is a residual power in the Community, to be invoked when the States fail to conclude an economically necessary agreement, or that the Community is empowered to enter only into international agreements of a scope consonant with a more limited notion of community. Thus the phrase "require to be negotiated" in article 113(3) would be taken to require a high degree of necessity or a low quantum

---

70. Schermers, *The European Court*, 22 AM. J. COMP. L. 444, 445 (1974); Feld & Slotnik, "Marshalling" the European Community Court: A Comparative Study in Judicial Integration, 25 EMORY L.J. 317 (1976).

71. [1970] Comm. Mkt. L.R. 43.

72. Quoted *supra* note 10.

73. Quoted *supra* note 63.

of Community participation. In short, the Court, had it so desired, could have, temporarily or permanently, partially or completely, removed export credit agreements with third parties from Community competence, leaving such agreements to the sovereign power of the member States.

From the political circumstances surrounding the *Local Cost Standard* opinion, it might be thought that the Court should have left the member States to conclude agreements, either with the concurrence of the Community or separately but harmoniously. For many years the Community had been unable to arrive at a satisfactory export credit draft agreement. The OECD agreement is quite limited, and it might be argued that the Court should not have tied the hands of the member States as to further agreements that the Community would clearly not be able to reach by consensus. The effects of such a decision would subvert the Common Commercial Policy, however. First, as a matter of economics, the big countries are able to assume greater risks in the credit market than the smaller countries; those States with the broadest economic base are best able to assume market risks. Therefore, if the Community allowed the Big Four to negotiate without the "little Five," the needs of the latter would tend to be neglected — ultimately to the detriment of the entire Community. In view of the likelihood of this possibility, the Court's *Local Cost Standard* opinion may be seen as an attempt to serve both the interests of the smaller States of the Community as well as the Community itself. Nevertheless, the fact remains that the Community has been politically unable to reach a consensus with respect to export credit policies.

The greatest thrust of the *Local Cost Standard* opinion lies neither in its quality as a constitutional decision nor in its effect on export credit policy, but in its construction of the "Common Commercial Policy" clause of article 113 of the Treaty of Rome. Going beyond the *Export Credit* decision and the *ERTA* decision, the Court enunciated a doctrine of the enforceable community nature of commercial policies in international relations. In so doing, the Court was not acting in a vacuum, of course; it was instead setting goals toward which the other institutions of the Community were already moving.<sup>74</sup> Thus the EC Council

---

74. The tendency toward community has been consistently counteracted by nationalistic inertial tendencies, especially on the part of France. The Export Credit decision exemplifies France's consistent attempts to retain control of policies which the Treaty

has defined commercial exchanges, governed by articles 110 to 116 and within Community competence, to include:<sup>75</sup>

- (a) Import policy
  - (i) Tariff policy
  - (ii) Quota policy
  - (iii) Common measures to deal with unfair or harmful trading practices on the part of non-member States
- (b) Export policy
  - (i) Aids to exports
  - (ii) Restrictions on exports
  - (iii) Export promotion

Furthermore, the *ERTA* case and various Council decisions make it clear that the "power of the Member States to regulate trade relations with non-Member States and international organizations has passed to the Community."<sup>76</sup> The *Local Cost Standard* opinion should be viewed as defining in part the present boundaries — both with respect to jurisprudence and to economics — of the term "trade relations," rejecting the (French) view that monetary and credit policies are expressions of governmental rather than Community matters, and accepting instead the view that:

any unilateral action on the part of the member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.<sup>77</sup>

---

of Rome envisions as being within Community competence. France has also been reluctant to incorporate EEC law into its domestic law. See Simon, *Enforcement by French Courts of European Community Law*, 90 L. Q. REV. 567 (1975). The Italian courts, on the other hand, have openly embraced Community law and make wide use of the referral procedures under which national courts may refer questions to the European Court. See, e.g., *Amministrazione delle Finanze v. S.A.C.E. SpA*, [1975] 2 Comm. Mkt. L.R. 267, 271-72 (Tribunale, Brescia).

75. CAMPBELL, COMMON MARKET LAW SUPPLEMENT 1975 at 941.

76. *Id.* at 942.

77. [1976] 1 Comm. Mkt. L.R. 85, 93.

There is no doubt, then, as to the consonance of the *Local Cost Standard* opinion with Community goals. However, the Community is itself a recent creation, and the prerogatives of sovereignty are not lightly given up. It is important, therefore, to consider not simply jurisprudential implications of the opinion, but its manifest practical effect as well. The Community has itself no enforcement powers similar, say, to the enforcement powers of the United States federal government with respect to the actions of the states that are united therein. In the European Community, the efficacy of Community law depends, more than in any national government, on the consent of the governed, that is to say, on the consent of the member States. In considering Community actions, then, one must take account of the extent to which the member States manifest their acquiescence; for, should the Community too grossly overstep its bounds of competence, it runs the risk of becoming a nullity whose decisions are ignored.

The *Local Cost Standard Advisory Opinion* has made little difference, in fact, on the export credit negotiations among the Big Six nations. On June 9, 1976, Stephen DeBrul, the President of the U.S. Export-Import Bank (Eximbank), announced an international consensus on export credit rates.<sup>78</sup> The agreeing States — the United States, Germany, the United Kingdom, Italy, France, Japan and Canada — avoided the dictates of the *Local Cost Standard* opinion by “reaching a consensus” rather than “coming to an agreement”; in other words, the agreeing States reached a consensus, through bilateral negotiations,<sup>79</sup> that each State would unilaterally tailor its export credit guidelines to the restrictions reached by consensus. Thus, Mr. DeBrul announced at a press briefing:

For several years you've heard a lot about a Gentlemen's Agreement. Our announcement today encompasses some of the general objectives of the Gentlemen's Agreement; but it is not an agreement. Our efforts, to reach agreement, which started over two years ago, unfortunately could *not* be completed at this time. And it is for this reason that we are now acting unilaterally in making this announcement.<sup>80</sup>

---

78. U.S. EXPORT WEEKLY (B.N.A.) No. 111 at E-1, M-1 (June 15, 1976).

79. European Report — Economic and Monetary Affairs, June 18, 1976 at 1.

80. U.S. EXPORT WEEKLY (B.N.A.) No. 111 at M-2 (June 15, 1976).

In spite of this disclaimer of "agreement," the formal "Declaration of Official Support for Export Credits by the Export-Import Bank of the United States"<sup>81</sup> frankly states that the revised terms are the result of the negotiations following the Rambouillet Declaration and that "[f]rom these discussions a number of guidelines have emerged which could be observed unilaterally and which generally would result in somewhat higher minimum interest rates on officially-supported credits from competitors and shorter terms on some credits from Eximbank."<sup>82</sup> The terms reached by these multiple bilateral negotiations limit the export credit terms that may be supported or offered by government banks; the effective period in which these terms are to operate is one year, from July 1, 1976 to June 30, 1977. Hopefully at the latter date, the major exporting nations will be able to agree formally, within whatever administrative mechanism, to impose further restraints on the competition for export credits. Under the terms adhered to by Eximbank, and by the other States:<sup>83</sup>

1. Cash downpayments will be a minimum of 15 percent of the export contract value.

2. The minimum blended (*i.e.*, government-supported and private) competitive interest rates will be not less than 8 percent for credits over 5 years to highly developed countries, 7¾ percent to intermediate countries, and 7½ percent to the less developed countries. Shorter-term (2 to 5 years) credits are 7¾ percent to highly developed countries and 7¼ percent to all others.

3. Maximum repayment terms are 10 years to less developed countries and 8½ years to other countries. If a credit of over 5 years duration is given to a developed country, other (unspecified) export financing agencies will be notified in advance.

4. If Eximbank extends any of the guidelines above, it will inform other (unspecified) agencies 7 days in advance and will allow an additional 9 days for discussion. In addition, so-called "credits mixes" — export credits joined with development aid — are regulated in certain instances; (1) where the grant element exceeds 25 percent of the credit, there is no restriction; (2) if the grant element is less than 15 percent, notice and consultation

---

81. *Id.* at M-1.

82. *Id.*

83. *Id.*

are required; (3) if it is between 15 and 25 percent, notification must be made after the credit is granted. The guidelines, finally, do not apply to agricultural commodities, aircraft, and nuclear power plants.

In a statement before the President's Export Council, Mr. DeBrul stated that "Eximbank's financing is somewhat less competitive today than it has been, but that the recent unilateral declarations on export credit terms should help to improve the bank's competitive position."<sup>84</sup> The improvement in the Eximbank's competitive position would have been impossible had the agencies of the other agreeing countries all made substantially identical unilateral declarations.<sup>85</sup> In addition, some of the smaller exporting nations, for example, Sweden, Switzerland<sup>86</sup> and Belgium<sup>87</sup> indicated their intention to follow the terms of the multiple unilateral declarations.<sup>88</sup>

The unilateral declarations do, however, fall short of the original terms hoped for in the Gentlemen's Agreement negotiations; with respect to most of these unachieved goals, the United States remains at a competitive disadvantage among its export competitors. Thus, unlike several other countries, Eximbank offers no insurance against inflation or foreign exchange losses; it is less generous in its financing of local costs than many of its competitors; it does not provide low-cost working (pre-financing) capital.<sup>89</sup> Furthermore, at least one American businessman has expressed doubt that the unilateral declarations would be adhered to.<sup>90</sup> It is clear that the declarations have no binding force; in fact, because they are expressly unilateral, even their political or moral force is unquestionably diluted. The effect of the declarations will thus depend on each State's ability to withstand the pressure to increase its competitive position by means of export credit manipulation.

---

84. U.S. EXPORT WEEKLY (B.N.A.) No. 115 at N-1 (July 20, 1976).

85. *Id.*

86. European Report, June 18, 1976.

87. European Report, July 9, 1976.

88. One of the EEC's reasons for asserting *community* competence in export credit negotiations was the protection of the smaller member States. The fact that the smaller States are being drawn into the current "agreement," with little negotiating power of their own, demonstrates the need for such protective measures.

89. Statement by John V. James, Chairman, Dresser Industries, Inc., U.S. EXPORT WEEKLY (B.N.A.) No. 115 at N-2 (July 20, 1976).

90. *Id.*



While the negotiations for the consensus were occurring, the EC Commission was not idle. During the winter of 1975-76, the tone of the Community press releases became increasingly pessimistic. In a meeting of the EC Council on February 16, 1976, France firmly refused to accede to the Court of Justice opinion; Germany and the United Kingdom professed that they refused to become involved in "legal wrangling," and asserted that their only concern was to move toward concrete compromise.<sup>91</sup> Sir Christopher Soames, External Affairs Commissioner of the EEC Commission said that, despite apparent Community jurisdiction over export credits, the Commission would never be able to get a mandate to negotiate from the Council and that "The Commission may not like this, but . . . it would have to lump it."<sup>92</sup> Sir Christopher suggested a two-pronged course of action to reassert the jurisdiction of the Commission: once an Agreement was formally reached, the Commission should (1) sue the member States involved for infringing on Community prerogatives and (2) at the same time send a proposal to the Council embodying the substance of the Agreement.<sup>93</sup> Sir Christopher's suggestions, of course, do nothing for the smaller states that were excluded from the negotiations in the first place, and in fact would force a false consensus on the Community. Sir Christopher conceded that such a course of action would, in fact, probably result in a practical void in Community policy, in view of France's "outright opposition" to Community control of export credit rates and of the reservations of Germany and the United Kingdom along the same lines.<sup>94</sup> In short, Sir Christopher suggests that the outer limit of Community common-commercial-policy jurisdiction has probably been reached and that to attempt to force an extension of that jurisdiction beyond those limits by calling on the Court of Justice once again would place serious strains on the Community's political fabric.

In July 1976, the Commission began proceedings under article 169 of the Treaty of Rome against France, Germany, the United Kingdom and Italy before the European Court of Justice for infringement of the Treaty of Rome.<sup>95</sup> Under the proceedings,

---

91. European Report, February 18, 1976.

92. European Report, March 6, 1976.

93. *Id.*

94. *Id.*

95. European Report, July 24, 1976.

the Commission granted the States under article 169 sixty days to present their "observations" to the Court; the Commission alleged that the export credit "consensus" was illegally arrived at, in view of the *Local Cost Standard Advisory Opinion*.<sup>96</sup> The Commission further indicated that it would drop the action if the member States, through the Council, would agree to the exclusivity of the Community jurisdiction and allow the Commission to propose the terms of the consensus in its own name. Such a resolution had earlier been presented to the Council, where it was blocked by the negative vote of France.<sup>97</sup>

As a final Community maneuver, the European Parliament is in the process of preparing three reports on export credits, the Couste report on export aids, the Nyobord report on a European Export Bank, and the Spicer report on Community competence in external economic relations.<sup>98</sup>

#### CONCLUSION

In conclusion, the *Local Cost Standard Advisory Opinion* has generated difficult problems for the European Community. The Court's constitutional interpretation of the common commercial policy clause of the Treaty of Rome has highlighted the difficulties in establishing such a policy. Nevertheless, for the Community to move forward, it was no doubt necessary for the Court to take the stance it took. Perhaps the best solution to the export credit question would involve the creation of a European Export-Import Bank, like the American Eximbank. However, such an achievement may well prove impossible in the near future, in view of France's intransigence and in view of the well-known sluggishness of the "technocracy" of the Community. For the present, the unilateral declarations of export credit limitations are the firmest basis on which to build a more permanent export credit arrangement. Any such arrangement will require the participation of the major exporting countries of the EEC, and there is little doubt that where the Big Four go, the smaller countries will have to follow. At issue, then, is not whether there will be a full-fledged Gentlemen's Agreement, but whether the Common

---

96. European Report, September 16, 1976, at 12.

97. *Id.*

98. *Id.*

Commercial Policy will arrive at its maturity. The latter question remains at this point unpredictable.

On March 14, 1977, the finance ministers of the EEC member States agreed to standardize export credit terms granted by member States.<sup>99</sup> Applicable interest rates range from 7.25 to 8 percent, depending on whether the credit is granted to a less developed or an industrialized country; repayment terms range from 5 to 10 years; a downpayment of 15 percent is required in all cases; and the agreement is subject to semi-annual review. The last provision is the only particular in which the present agreement differs from the earlier-negotiated Gentlemen's Agreement. This decision brings the EEC as a whole in line with the Gentlemen's Agreement and the concerted unilateral export credit arrangements. Because the decision was made as a Community decision, any further judicial examination of the processes whereby agreement was reached is unlikely.<sup>100</sup>

*David Simon*

---

99. *Journal of Commerce*, March 15, 1977, at 10, col. 1.

100. In a recent interview, Claude Cheysson, the European Community's commissioner in charge of aid and development, maintained that world recovery from the recent economic recession could best be accomplished through investment in Third World markets. He added, however, that:

The problem with attempting recovery through such means is that it is still being done in the old style, through export credits, which is nonsense. Those developing countries with their potentially huge markets already have passed their indebtedness capacity. It is sheer hypocrisy to increase export credits to India and such countries when we know they can't be repaid. Why pretend it is