BELGIAN TREATIES OF COMMERCE IN THE CONTEMPORARY WORLD (1)

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This article examines the significance of the Belgian treaties of commerce, given the exclusive commercial policy of the E.E.C. Belgium has concluded approximately forty treaties of commerce which currently are still in force. Some of these treaties were not concluded in its own name but as a member of the Belgium-Luxembourg Economic Union (the B.L.E.U.) or as a member of the BENELUX (2).

In 1987, Belgium exported one fourth of its production to non-European countries (3). Treaties of commerce are an important base for the commercial relations with these countries.

Since 1969, the E.E.C. has been exclusively competent for the commercial relations of the community. However, the conventional commercial policy of the E.E.C. is far from being completed. Consequently, the E.E.C. is obliged to grant the member states permission to prolonge their treaties of commerce. This « transitional » situation has existed for twenty years and is not likely to disappear in the forseeable future.

Three different forms of external trade relations, which will be elaborated upon below, can be distinguished :

— There exists only a treaty of commerce between the E.E.C. and a third country.
— There exists a treaty of commerce between the E.E.C. and a third country as well as between Belgium and that country.
— There exists only a Belgian treaty of commerce.

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(2) An overview of the Belgian treaties of commerce can be found in SCHERMERS, H., and VAN HOUTTE, H., *Internationaal en Europees Recht*, Antwerpen, Kluwer, 1987, 223-224 ; Besides the treaties, complementary protocols can be found in DE TROYER, I., *Repertorium van de door België afgesloten verdragen 1830-1940*, Brussel, Goemaere, 1973 and *Repertorium van de door België afgesloten verdragen 1941-1986*, Wommelgem, Smits, 1988.

(3) Figures from the *Belgische dienst voor buitenlandse handel*.

Before discussing these three situations in detail, the content of the Belgian treaties of commerce will be considered. Furthermore, some attention will be given to the conventional commercial policy of the E.E.C.

The influence of GATT on commercial relations will not be examined. GATT rules apply automatically to its member states. In such a case, treaties of commerce are important for those areas, not covered by GATT such as establishment and investment provisions, services, and provisions concerning the costs of transportation (4). For those areas which are covered by GATT, treaties of commerce can specify the sometimes vague wording of the GATT rules (5).

1. THE BELGIAN TREATIES OF COMMERCE

a) *Content.*

Listing the Belgian treaties of commerce is certainly not an easy task. Some treaties were not published in Belgium (6), other treaties can only be found in the Dutch « Tractatenblad » (7). A few treaties date from time immemorial. The oldest treaty which is still valid is the treaty of friendship, commerce and navigation between Belgium and Morocco of January 4 1862 (8). The treaty between the BENELUX and the U.S.S.R. of July 14 1971 is the most recent treaty of commerce concluded by Belgium (9).

The older treaties of commerce are called treaties of « friendship, commerce and navigation ». They often commence with language that stresses the friendly relations between both countries. Besides commercial provisions, they contain articles which are not directly related to commerce in its strict meaning such as provisions concerning the right of establishment, the right of information, the right of juridical assistance, tax provisions,

(4) HERMANN, G., « Commercial treaties », *E.P.I.L.*, nr. 8, 88. However, the Uruguay round does deal with « trade related investment measures ». The negotiations concerning services are not carried on between the GATT contracting parties but between the ministers, as representatives of their respective governments. STEENBERGEN, J., « Trade regulations since the Tokyo round » in *Protectionism and the European Community,* VÖLKER, E. L. M. (ed.), Deventer, Kluwer, 1987, 210 ; NAYYAR, D., « Some reflections on the Uruguay Round and Trade in Services », 22 *J.W.T.L.*, 1988, 35-47.

(5) Some treaties specify explicitly that they are rendered inoperative when the GATT rules apply see treaty of commerce BENELUX-Japan, October 8, 1960, g.w. (law of approval) March 15 1962, *B.S.* June 5 1962 ; 2nd protocol : April 30 1963, g.w. September 1964, *B.S.* November 4 1964.

(6) e.g. treaty of commerce B.L.E.U. - Pakistan, March 15 1952 ; treaty of commerce, friendship and navigation between Belgium and the Dominican Republic, August 21 1884.

(7) e.g. treaty of commerce BENELUX-Argentina, November 25 1957, not in *B.S. Tractatenblad.*

(8) g.w. July 11 1862, *B.S.* July 17 1862.

(9) g.w. August 14 1972, *B.S.* May 11 1973.

social security provisions, etc. (10). The versatility of provisions has to be seen in a historical perspective. Most treaties were concluded when international commerce was far less important and specialized than it is now (11). The treaties did not aim at regulating the volume of trade or mentioning specific quotas. Rather, the aim was to install a framework for free trade (12).

In general, the more recent treaties are called « commercial agreements ». More emphasis is put on investment. Furthermore, commercial agreements contain many provisions focusing on companies, whereas the older treaties were more concerned with the interests of individual traders (13).

b) *The most-favoured-nation clause.*

The most used clause in the Belgian treaties of commerce is certainly the most-favoured-nation clause. Sometimes it is put in general terms ; other times it focuses on specific topics such as import, export or transport of goods, navigation, taxes, custom duties. The introduction of the M.F.N. clause in treaties of commerce is a very old practice. In the *Anglo-Iranian Oil Co.* case, the United Kingdom relied on the clause in its treaty of commerce of February 9 1903 with Iran in order to obtain the same treatment which Iran granted to Denmark due to its treaty of commerce of February 20 1934 (14). The clause was a main argument in the *U.S. Nationals in Morocco* case and in the *Barcelona Traction* case (15).

The purpose of the introduction of this clause is to avoid discrimination between third countries (16). One could even interpret its insertion in a treaty as a guarantee for the adaptation to changed circumstances (17).

Treaties between Belgium and many state-trading countries appear to contain the same clause (18). The relevance of the M.F.N. clause in these treaties is questionable. Because of the ties between government and com-

(10) BLUMENWITZ., D., « Treaties of friendship, commerce and navigation », *E.P.I.L.*, 485-490.

(11) NORTON, J. J., « The renegotiability of United States bilateral commercial treaties with the member states of the European Economic Community », *Texas international law journal*, spring 1973, 372.

(12) HERMANN, G., « Commercial treaties », *E.P.I.L.*, 8, 85.

(13) NORTON, J. J., *l.c.*, 308.

(14) Anglo-Iranian Oil Co. case, July 22 1952, *I.C.J. Reports*, 1952, 108. The Court declared itself not competent because Iran had not yet recognized the competence of the Court when the dispute arose.

(15) *I.C.J. Reports*, 1952, 186-187 ; *I.C.J. Reports*, 1962.

(16) United States Nationals in Morocco case, *I.C.J. Reports*, 1952, 192.

(17) SCHWARZENBERGER, G., « The most-favoured-national standard in British state practice », 22 *B.Y.I.L.*, 1945, 100.

(18) e.g. Treaties of commerce between B.L.E.U. and Czechoslovakia, Romania, Poland, Hungary, Bulgaria, Albania and between the BENELUX and the U.S.S.R.

merce, the clause loses its automatic effect (19). Only the state-trading country will profit from it (20). Sometimes the ties become clear from the treaty itself. The protocol of the treaty of commerce between the BENELUX and the U.S.S.R. of July 14 1971 states that « the commercial representatives of the U.S.S.R. have to trade in the name of the government of the U.S.S.R., when trading in the territories in the BENELUX » (21). The reason for the existence of the clause in these treaties is that many state-trading countries were not yet state-trading countries when these treaties were concluded. In the more recently concluded treaties, there is a political dimension. The clause is being seen by the U.S.S.R. and other state-trading countries as a necessary guarantee to be regarded as an equal trading partner despite their different economic system (22).

The exceptions to the most-favoured-nation clause are numerous. Most important are the protection of people, animals and plants ; frontier states or states having a special relationship (e.g. ex-colonies) ; special treatment because of a customs- or economic union ; economic circumstances ; public security ; moral or humanitarian reasons ; trade in weapons ; war provisions ; national, artistic, historic or archeological possessions ; import or export of gold and silver ; state monopolies ; and even « exceptional or abnormal circumstances » (23).

c) *The national treatment clause.*

Besides the most-favoured-nation clause, the national treatment clause is widely found in Belgian treaties of commerce (24). Art. 17 of the treaty of commerce of February 22 1961 between Belgium and the U.S.A. defines this clause as follows : « National treatment is the treatment within the territory of the contracting party which, in equal circumstances, is granted within that territory to subjects, companies, products or ships of that party. » Mentioning the national treatment clause is an extra guarantee for

(19) KALENSKY, P., « Les pays socialistes et le droit du commerce international », *Recueil des Cours*, colloque 1968, 171 ; Le Baron Boris NOLDE, « La clause de la nation la plus favorisée et les tarifs préférentiels », 39 *Recueil des Cours*, 1932, 84.

(20) Via different techniques there have been efforts to restore this disequilibrium. State trading countries were obliged e.g. to import specific quotas from the country. In its treaty of commerce with the U.S.S.R., the U.S.A. wanted to make the prolongement of the clause conditional on gurarantees concerning human rights in the U.S.S.R. see DOMKE, M. and HAZARD, J. N., « State trading and the most-favoured-nation clause », 52 *A.J.I.L.*, 1958, 56-57 ; SAUVIGNON, E., « La clause de la nation la plus favorisée dans les relations commerciales américano-soviétiques », 87 *R.G.D.I.P.*, 1983, 566.

(21) See above footnote 9.

(22) SAUVIGNON, E., *l.c.*, 552.

(23) Many of the exceptions can be found in article 20 of GATT.

(24) e.g. Belgium-Guatemala, November 7 1924, g.w. April 6 1927, *B.S.* December 7 1927 ; Belgium-U.S.A., February 21 1961, g.w. July 30 1963, *B.S.* September 1963.

the party signatories. In most cases, its application leads to better results of the most-favoured-nation clause (25).

d) *Other provisions.*

The settlement of disputes happens by means of arbitrage (26) or by reference the International Court of Justice (27).

Finally the duration of time for which the treaties are concluded is mentioned. In most cases, the commercial treaties are concluded for a given period of years with a clause of tacit renewal.

e) *Direct applicability of the Belgian treaties of commerce.*

As no exemple has been found of direct applicability of a Belgian treaty of commerce, only a theoretical and not very profound reflection will be given as to the possibile direct applicability of the Belgian treaties of commerce.

Three conditions have to be fulfilled for the direct applicability of a treaty :

1. The treaty has to be internationally valid (according to the provisions of the Vienna Convention on the Law of Treaties of 1969).

This first condition seems to be fulfilled. The treaties discussed in this article all appear to be valid in terms of the Vienna Convention.

2. The provisons have to be sufficiently clear (self-sufficiency) (28).

As to this condition, there is a difference between the respective treaties. Some of them contain only very vague, general clauses ; others are more detailed. For example, the treaty of commerce between the BENELUX and the U.S.S.R. states in art. 1 that « the contracting parties grant each other in all commercial matters the most-favoured-nation clause » (29). The treaty of commerce between Belgium and Sweden, however, states in art. 1 « Subjects of each country will, upon the territory of the other country, obtain the same privileges, liberties, favours and exceptions which are granted, or will be granted later, to the subjects of the most-favoured-

(25) BLUMENWITZ, D., « Treaties of friendship, commerce and navigation », *E.P.I.L.* 7, 485 ; In the recently concluded treaty between Japan and China for the protection of mutual investment, the granting of the clause was considered as an enormous advantage. Similar treaties concluded by China with 23 other countries contained only the most-favoured-nations clause.

(26) Art. 2 treaty of commerce Belgium-Ecuador, March 5 1887, g.w. February 26 1888, *B.S.* March 1888 ; Art. 29 B.L.E.U. - Yugoslavia, December 16 1926, g.w. December 1926, *B.S.* February 6-7 1928.

(27) BENELUX-Honduras, January 30 1959, g.w. April 27 1960, *B.S.* July 15 1960 ; Belgium-U.S.A., February 21 1961, g.w. July 30 1963, *B.S.* September 21 1963.

(28) VAN HOUTTE, H. and SCHERMERS, H., *o.c.*, 296-297 ; VERHOEVEN, J., « La notion d'applicabilité directe du droit international », *R.B.D.I.*, 1981, 21.

(29) Treaty of commerce BENELUX-U.S.S.R., July 14 1971, g.w. August 14 1972, *B.S.* May 11 1973.

nation » (30). It seems clear that the provision in the treaty with Sweden is more specific than that in the treaty with the U.S.S.R.

Many Belgian treaties of commerce were not subjected to art. 68 of the Belgian Constitution which requires parliamentary approval for treaties of commerce. *A priori,* therefore, they cannot be directly applicable (31). Other treaties were not published in Belgium. They are excluded from direct applicability as well (32).

3. It has to be the intention of the parties to grant direct applicability to the treaty.

In the given example, one could say that in the treaty with the U.S.S.R. vague wording purposely has been used so that it was clear that the intention of the parties was not to grant direct applicability to the treaty. How do we know, however, whether parties did have the intention to grant the Belgian-Sweden treaty direct applicability one hundred years ago because of the sole fact they used more concrete language ? Particular in old treaties, it is very difficult to discern the intention of the parties. In practice, the Belgian judge will have to decide whether a treaty is directly applicable on a case by case basis. An agreement between Belgium and Zaire concerning the granting of an expropriation compensation was granted direct applicability by the Belgian Cassatie Court (33).

The direct applicability of treaties of commerce concluded by the E.E.C. has come up for discussion on several occasions (34). In the Kupferberg case, the Court decided that art. 21, § 1 (which contains a non-discrimination clause) of the free trade agreement with Portugal was directly applicable (35). National courts, however, seem to be more reluctant to grant direct applicability to European treaties of commerce (36).

It would lead us too far afield to examine every single treaty based on its direct applicability. The sole aim is to demonstrate that, in principle, nothing witholds the direct applicability of the Belgian treaties of commerce, provided they comply with the forementioned conditions.

(30) Treaty of commerce and navigation Belgium-Sweden, June 11 1895, g.w. June 25 1895, *B.S.* June 27 1895.

(31) VERHOEVEN, J., *l.c.*, 12.

(32) VERHOEVEN, J., *l.c.*, 12 ; GAUTIER, Ph., « La pratique belge relative aux accords bilatéraux de coopération au développement », 19 *R.B.D.I.*, 1986, 269-270.

(33) Cass., April 21 1983, *R.W.*, 1983-1984, 2315.

(34) The GATT provisions were denied direct applicability (Intern. Fruit, case 21-24/72, *Jur.*, 1972, 1219) ; The 2nd Yaoundé convention, however, has been granted direct applicability (Bresciani, case 87/75, 2/5/1976, *Jur.*, 1976, 129) as well as the association agreement with Greece (Pabst. Richard, case 117/81, 4/29/82, *Jur.*, 1982, 1331 ; see CAEIROS, A., « L'effet direct des accords internationaux conclus par la C.E.E. », *Revue du marché commun,* 1984, 526-538 ; VÖLKER, E. L., « The Direct Effect of International Agreements in the Community's Legal Order », *Legal Issues of European Integration,* 1983, 143.

(35) Case 104/81, October 26 1982, *Jur.*, 1982, 3665.

(36) e.g. Tribunal Fédéral Suisse, January 25 1979, *Bosshard Partners Intertrading A.G. v. Sunlight A.G.*, text in *C.M.L.R.*, 1980, 664.

2. THE CONVENTIONAL COMMERCIAL POLICY OF THE E.E.C.

Art. 113 of the E.E.C. treaty states that, after the expiry of the transitional period, the common commercial policy shall be based on uniform principles, principally in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalization, export policy and protective commercial measures (37). Besides the possibility to take autonomous measures, the conventional competence is explicitly acknowledged as well.

So far, the E.E.C. has concluded several trade agreements such as the free trade agreements with the E.F.T.A. countries, the Lomé conventions, treaties with different countries from the Andes Pact and with some state trading countries (e.g. China and the recent agreement with Hungary) (38).

Some treaties provide for commercial cooperation in general, others focus on a specific product. The treaties of commerce concluded by the E.E.C. are not always based solely on art. 113 E.E.C. treaty but also on other treaty provisions such as e.g. art. 235 (when there are doubts whether the covered material falls within the scope of art. 113) (39).

The exclusive commercial policy of the E.E.C. questions the value of the numerous treaties concluded by the member states with third countries.

A decision of the Council of October 9 1961 provided for the extension of the national treaties during the transitional period (40). When the member states wanted to conclude new treaties of commerce they had to be submitted to a consultation procedure (41).

In 1969, however, when the transitional period ended, the practical elaboration of the common commercial policy was not realized. A new decision of the Council of December 16 1969 authorized the option for the member states to extend their commercial treaties even after the ending of

(37) Notwithstanding the non-limitative enumeration in art. 113 E.E.C. treaty, the notion « commercial policy » has to be limited to areas which are directly relied to the movement of goods between the E.E.C. and third countries, see MEGRET, J., LOUIS, J. V., VIGNES, D., *Le droit de la communauté économique européenne, vol. 6 : politique économique,* Brussel, 1976, 375 ; see above for further elaboration of this controversal issue.

(38) For an overview of these treaties : « Collection of the Agreements concluded by the European Communities », 11 volumes, edited by the European Communities ; VÖLKER, E, and STEENBERGEN, J., *Leading cases and materials on the external relations law of the E.C.,* Deventer, Kluwer, 1985, 382.

(39) FLAESCH-MOUGIN, C., « Les accords externes de la C.E.E. (Janvier 1er 1984 — Juin 30 1986), *R.T.D.E.,* 1987, no. 1, 57.

(40) Art. 1 Decision of the Council relative à l'uniformisation de la durée des accords commerciaux avec les pays tiers, J.O. L 11/4/1961, 1274/61.

(41) Decision of the Council concernant une procédure de consultations sur le négociation des Accords relatifs aux relations commerciales des Etats Membres avec les pays tiers et sur les modifications du régime de libération à l'égard des pays tiers, J.O. L 11/4/1961, 1273/61.

the transitional period (42). A consultation procedure with the other member states and with the Commission had to be observed (43).

In exceptional circumstances, the member states could even conclude new treaties of commerce until December 31 1972. The Council could grant the authorization when E.E.C. negotiations based on art. 113 E.E.C. treaty were not yet possible (44). The treaty of commerce between the BENELUX and the U.S.S.R. was concluded in this period. In 1988, almost twenty years after the decision of the Council of December 16 1969, endless lists of treaties, extended according to the procedure set up in the decision of the Council of 1969, are still published in the *Official Journal of the E.E.C.*.

A distinction is made between the extension of « treaties » of commerce and commercial « agreements ».

Treaties of commerce are extended once a year and refer to the older treaties of commerce, friendship and navigation (45).

Commercial *agreements* are extended four times a year. The expiring date of their extension differs, therefore, from treaty of treaty (46).

The distinction between treaties and agreements appears somewhat artificial because it is not always clear what should be regarded as a treaty or as an agreement. Furthermore, concerning the extension of the agreements, the-four-times-a-year extension has hardly been followed. « Strange » situations have arisen from this fact. The decision of the Council of January 27 1986 (47) e.g. states that the agreements with Austria, Switzerland, Tunisia could be extended until March 31 1987 (48). However, not until September 28 1987 was a decision of the Council provided for a new extension of these treaties until March 31 1988 (49). The tardy decision of the Council concerning the extension of the forementioned treaties does not affect their validity. The transfer of competences of the member states concerning commercial policy does not mean that the E.E.C. can question the validity of treaties formerly concluded by the member states. That would

(42) Decision of the Council of December 16 1969 concernant l'uniformisation progressive des accords relatifs aux relations commerciales des Etats Membres avec les pays tiers et la négociation des accords communautaires, O.J. L 326/39 of 12/29/1969.

(43) Art. 2-4 decision of the Council of December 16 1969, Pb. L 326/40-41 of 12/29/1969.

(44) Art. 9 decision of the Council of December 16 1969, Pb. L 326/41-42 of 12/29/1969.

(45) The most recent decision of the Council provides in its art. 1 that « the friendship, trade and navigation treaties listed in the annex may be automatically renewed or maintained in force until December 31 1989 ... (O.J. L 100/33 of 4/19/1988).

(46) e.g. for the extensions in 1987 O.J. L 95/25 of 4/9/1987 ; O.J. L 202/62 of 7/23/1987 ; O.J. L 277/36 of 9/30/1987 ; O.J. L 34/37 of 2/6/1988.

(47) O.J. L 29/22 of 2/4/1986.

(48) None of these treaties contains an E.E.C. provisional clause. Therefore, the period of extension should not go beyond one year, in this case until March 31 1987. Art. 3 decision of the Council of December 16 1969, O.J. L 326/41 of 12/29/1969.

(49) O.J. L. 277/32 of 9/30/1987.

be contrary to the *pacta sunt servanda* principle (50). In addition, art. 234 of the E.E.C. treaty states that « the rights and obligations of the member states resulting from conventions concluded prior to the entry into force of the E.E.C. Treaty, shall not be affected by the provisions of the E.E.C. Treaty. This slovenliness thus does not have a fundamental impact, but does not contribute to the creation of a transparent situation.

3. THE BELGIAN TREATIES OF COMMERCE IN VIEW OF THE EXCLUSIVE COMMERCIAL POLICY OF THE E.E.C.

a) *An uncompleted common commercial policy.*

Art. 113 of the E.E.C. treaty does not foresee concurrent competences between the E.E.C. and the member states. The attainment of a common commercial policy implies, on the contrary, the transfer of the commercial competences of the member states to the Community institutions (51). The *Donckerwolcke* case reaffirms the exclusive common commercial policy (52).

The *autonomous* commercial policy of the E.E.C. provides for the introduction of a common external tariff, the harmonization of provisions concerning agricultural products, provisions concerning import and export of goods, common safeguard clauses (does not exclude national safeguard clauses), anti-dumping provisions and compensatory rights, defense against unlawful commercial practices (53). However, this article concerns only the conclusion of trade agreements under the *conventional* commercial policy. The basic decisions are the decisions of the Council of '61 and '69. The difficulty lies in the practical elaboration of the exclusive competence of the E.E.C. to conclude trade agreements. With many countries the Community has not concluded a trade agreements yet. The conclusion of trade agreements is a time devouring and tiring process. The difficulties in the conclusion of trade agreements with some Eastern countries demonstrate this (54). It is therefore necessary, and to some degree unavoidable, to extend the old treaties concluded by the member in order to avoid creating a vacuum.

(50) Art. 26 Vienna convention on the law of treaties of May 21 1969, *A.J.I.L.*, 1969, 875 ; see also Burgoa case, 812/79, 10/14/1980, *Jur.*, 1980, 2802-2803.

(51) MEGRET, J., LOUIS, J. V., VIGNES, D., *o.c.*, 378-379 ; SMIT, H. and HERZOG, P. E., *The law of the European economic community ; a commentary on the E.E.C. Treaty*, vol. 3, 1986, 66 ; Opinion 1/75 of the Court of Justice, 13 *C.M.L.R.*, 1976, 378.

(52) Case 41/76, 12/15/1976, *Jur.*, 1976, 1938.

(53) Official Journal of the E.E.C., *Directory of Community legislation in force and other acts of Community Institutions*, 1988, 546-567.

(54) *Financieel Economische Tijd*, 3/24/1988.

b) *The « transitional period » : three situations.*

1. There exists only a treaty of commerce between the E.E.C. and a third country.

With the following countries there exists only an E.E.C. treaty : *Bangladesh ; China ; Egypt ; Finland ; India ; Iceland ; Lebanon ; Austria ; Mexico ; Sri Lanka ; Indonesia, Malaysia, Singapore, Thailand* (in ASEAN) ; *Colombia, Peru* (in Andes Pact) ; *Costa Rica, Nicaragua, Panama* (Central-American countries). To be complete, the association agreements with *Cyprus, Malta* and *Turkey* have to be mentioned as well as the agreements with the A.C.P. countries (the Lomé conventions) (55). With *Algeria, Jordan* and *Syria,* there exist common cooperationagreements containing, however, many trade provisions (56). Because of many different reasons, Belgium did not conclude treaties of commerce with some countries. The late recognition of China (in the beginning of the seventies) made it impossible for Belgium to conclude a treaty with the P.R.C. as an individual state (57). In other cases, there was a treaty of commerce between Belgium and a third country but the treaty relationship has endend because of the entry of the country to the E.E.C.

Recently, some treaties of commerce with EFTA countries have been renounced. The renunciation of the BENELUX agreement with Finland (58) came into effect on August 12 1987, with Austria (59) and Switzerland (60) on April 1 1988, with Norway (61) on May 1 1988. The renunciation of the BENELUX agreement with Sweden (62) will come into effect on March 1 1989. The BENELUX agreements are totally superceded by the Community free trade agreements of 1972 and 1973. Therefore, this renunciation did not cause many difficulties. With Norway and Sweden there still exists a Belgian treaty of commerce (63) and with Switzerland a B.L.E.U. agreement (64). Hence, these treaties belong in the second situation.

(55) There exists only with Ethiopia a treaty of commerce. For an overview of these treaties see above footnote 38.

(56) Algeria : April 26 1976, O.J. L 263/78 ; Jordan : January 18 1977, O.J. L 268/77 ; Syria : January 18 1977, O.J. L 269/78.

(57) E.E.C. treaty with China : O.J. L 123 of 5/11/1978, replaced by the trade and cooperation agreement O.J. L 250/1 of 9/19/1985. XIAO ZHI YUE : « E.E.C. - China : Ten years after the first trade agreement », 22 *J.W.T.L.*, 1988, vol. 2, 5-23.

(58) November 8 1955, not published in the *B.S.*

(59) June 29 1957, not in *B.S. Tractatenblad,* jrg. 57, nr. 128.

(60) June 21 1957, not in *B.S. Tractatenblad,* jrg. 57, nr. 126 and jrg. 61, nr. 67.

(61) May 28 1957, not in *B.S. Tractatenblad,* jrg. 57, nr. 100.

(62) April 27 1957, not in *B.S. Tractatenblad,* jrg. 57, nr. 102.

(63) Norway : June 27 1910, g.w. August 16 1911, *B.S.* September 1911 ; Sweden : June 11 1895, g.w. June 25 1895, *B.S.* June 27 1895.

(64) August 26 1929, g.w. June 20 1930, *B.S.* July 14-15 1930.

When there has never existed a Belgian treaty of commerce, or when an existing treaty has been revoked, the commercial relationship with the country is completely regulated by the Community (65).

2. There exists a Community trade agreement as well as a Belgian treaty.

With *Algeria, Bolivia, Brazil, Canada, Ecuador, El Salvador, The Philippines, Guatemala, Honduras, Hungary, Israel, Yugoslavia, Marocco, Norway, Pakistan, Uruguay, Venezuela, Sweden* and *Switzerland* there exists a Community and a Belgian treaty.

Art. 59 and art. 30 of the Vienna convention on the law of treaties are relevant in solving this situation. Art. 59 states the conditions on which the first treaty shall be considered as terminated if a later treaty is concluded on the same subject (66). When art. 59 is not applicable, art. 30 states which rules of interpretation have to be applied when both treaties stay in force.

Art. 59 states that the first treaty shall be considered as terminated when it appears that the parties had this intention or when the provisions of the later treaty are so far incompatible with those of the earlier treaty that the two treaties are not capable of being applied at the same time (67). It is often difficult to find out what is the intention of the parties (68). However, it does not seem to be possible to conclude from one single fact that the parties had the intention of terminating their old treaties when the Community concluded commercial agreements with those countries. The list with the extensions of the treaties in the Official Journal points precisely to the opposite. Furthermore, the national reflex of the member states does not seem to have disappeared yet (see below).

The eventual incompability between the Belgian and the Community treaties is never so great that this would lead to an automatic termination of the Belgian treaties. Furthermore, there are often gaps in the Community treaties, so that it is necessary that the Belgian treaties remain in force. This can be illustrated by an example :

As has been said before, the treaty of commerce between the BENELUX and Switzerland of 1957 has been renounced. At the same time, there were negotiations with Switzerland concerning the renounciation of the treaty between the B.L.E.U. and Switzerland of August 26 1929 (69). Art. 8 of this treaty concerns the free movement of commercial travellers in both

(65) That is to say, for those areas for which the E.E.C. is competent. Concerning possible residuarian competences of Belgium see *infra*.

(66) Because of the substitutionprinciple the E.E.C. is the successor of the member states in matters where the member states are no longer competent : Third International Fruit Company case, 12/12/1972, *Jur.* 1972, 1227-1228, note KAPTEYN, P. J., *S.E.W.*, 1973, 491.

(67) Vienna convention on the law of Treaties, May 21 1969, *A.J.I.L.*, 1969, 875.

(68) CAPOTORTI, F., *Convenzione di Vienna sul diritto dei trattati*, Padova, Cedam 1969, 60-61.

(69) g.w. June 20 1930, *B.S.* July 14-15 1930.

countries. Switzerland invoked that his subject was not covered by the E.E.C. treaty and that these advantages had no law base anymore when the B.L.E.U. treaty would be renounced. Begium still could have relied on its treaty of establishment with Switzerland of June 4 1887 (70). However, Luxemburg was not a party to this treaty. Because of art. 8 of the treaty, the B.L.E.U. agreement with Switzerland of August 26 1929 remained in existence. The Commission did demand the inclusion of the E.E.C. clause in the old treaty. This means that the treaty cannot now, but also not in the future, countermand the E.E.C. policy.

Another example of a lacuna is the lack of a most-favoured-nation clause in the Community agreements with Norway, Sweden and Switzerland. The Belgian treaties of commerce do contain the most-favoured-nation clause.

Because one can conclude that the conditions of art. 59 have not been fulfilled, the Belgian treaties have to remain in force besides the Community treaties unless they are explicitly renounced (cfr. first situation).

When the old treaties are not terminated according to art. 59, art. 30 has to be applied. Art. 30 of the Vienna convention on the law of Treaties states that the earlier treaties apply to the extent that their provisions are compatible with those of the later treaty (71). This rule has to be followed here. Art. 234 of the E.E.C. treaty encourages the member states to take all appropriate steps to eliminate any incompatibility found to exist. The demand of the Commission to insert the E.E.C. clause in certain cases, has to be seen as an elaboration of this rule.

Furthermore, some treaties concluded by the E.E.C. state explicitly that they have priority of the old treaties concluded by the member states. The treaty of commerce between the E.E.C. and Uruguay states in art. 6 that « the provisions of the agreement shall be substituted for those provisions of agreements concluded between Member States and Uruguay are incompatible with or identical with them » (72). Most Community treaties, however, do not contain this clause.

3. There exists only a treaty of commerce between Belgium and a third country.

(70) g.w. May 15 1888, *B.S.* May 18 1888.

(71) Art. 30 can only be applied after it has been established that the parties did not have the intention to terminate the previous treaty according to the provisions of art. 59. SINCLAIR, Sir Ian, *The Vienna convention on the law of Treaties*, Manchester, University press, 1984, 184-185 ; ROSENNE, S., *The law of treaties*, Leyden, Sijthoff, 1970.

(72) Regulation nr. 3260/'73 of the Council of November 6 1973 on the conclusion of the trade agreement between the European Economic Community and the Eastern republic of Uruguay, O.J. L 333/1 of 12/4/1973.

With *Albania, Bulgaria, Chili, Haiti, Iran, Liberia, Japan, Yemen* (73), *New Zealand, Poland, Paraguay, Rumania* (74), *Tunisia* (75), *Czechoslovakia, U.S.A., U.S.S.R.* and *South Africa,* there exist only Belgian treaties of commerce to date (76).

Necessary extension of the Belgian treaties of commerce ?

The recent recognition by COMECON of the E.E.C. gives rise to serions expectations of Community agreements with member states of COMECON (77). With Hungary the E.E.C. concluded a trade agreement very recently (78). With Czechoslovakia and East Germany negotiations are being held (79). Bulgaria wants to establish diplomatic relations with the E.E.C. (80). The U.S.S.R. is interested in establishing diplomatic relations with the E.E.C. as well as cooperation in many different areas, but not to conclude a trade agreement. Poland has asked already for the establishment of diplomatic relations (81).

The main reason why there does not exist a Community trade agreement with Japan, lies in the fact that Japan refuses to include a selective safeguard clause in an E.E.C. treaty (82). This selective safeguard clause can be found, however, in the agreements of some member states with Japan. The BENELUX-Japan trade agreement of 1960 states that « When the import of Japanese goods bring substantial damage to inland goods because of unforseeable circumstances, the BENELUX can temporarly suspend the import of these goods, when no solution by way of an agreement can be found » (83). After the Donckerwolcke case of 1976, however, the BENELUX can no longer invoke this clause without authorization of the Community. However, because of the lack of a Community safeguard clause, the authorization will be granted in most cases. Sometimes this is the only way to prevent events such as the Japanese car invasion. In this way, Italy was empowered to maintain its previously established quota for the import of Japanese cars, even after the transitional period. The image

(73) With Yemen there exists a Community cooperation agreement (based on art. 238 E.E.C. treaty) with trade provisions : October 9 1984, O.J. L 26/85.

(74) Between the Community and Rumania a « Joint Committee » has been set up to discuss all aspects of the economic relations between both partners : July 28 1980, O.J. L 352/80.

(75) Also with Tunisia, there exists a Community cooperation agreement with trade provisions : April 25 1976, O.J. L 265/78.

(76) For an overview of the Belgian treaties of commerce, see SCHERMERS, H. and VAN HOUTTE, H., *o.c.*, and DE TROYER, I., *o.c., supra* footnote 1.

(77) *De Standaard* 5/25/1988 ; on the relationship between the COMECON and the E.E.C., see BEL, J., « Les relations entre la communauté et le conseil d'assistance économique mutuelle », *Revue du marché commun,* 1988, 313-316.

(78) *Agence d'Europe,* n° 4860, September 26 1988, 5.

(79) *Financieel Economische tijd,* 6/30/1988.

(80) *Financieel Economische tijd,* 6/15/1988.

(81) *De Standaard,* 8/31/1988.

(82) KAPTEYN, P.J. and VERLOREN VAN THEMAAT, *Inleiding tot het recht van de Europese Gemeenschap,* Deventer, Kluwer, 1987, 552.

(83) Second protocol Oktober 8 1960, g.w. March 15 1962, *B.S.* June 5 1962.

of the Community as Common Market is not exactly promoted in Japan by such policies (84).

The reasons for the lack of a common trade agreement with other third countries are very diverse. With the U.S.A., there only exist sectorial agreements (85). With other countries, there do not exist Community trade agreements for political reasons.

It seems clear that the extension of the bilateral trade agreements is necessary where no Community agreements exist in order to avoid creating a vacuum. The only condition for the extension of the treaties is that they are not hindrances for the application of the Common commercial policy. This is stated in the decision of the Council of December 16 1969 (86).

Contradictions between the extended treaties and the Common commercial policy.

Once the treaties have been extended, many problems can still arise. The regulation n^{r} 586/82 of the Council of March 15 1982 changed the import regulation for certain products originating in the U.S.S.R. (87). The quotas for goods enumerated in the annex were diminished by 50 %. The reason for this was that the Community wanted to sanction the U.S.S.R. because of the Polish crisis in the beginning of 1982 (88). The BENELUX quotas were published in the Belgisch Staatsblad in application of the Community regulation (89). The introduction of the BENELUX quotas, however, was completely contrary to the treaty of commerce between the BENELUX and the U.S.S.R. of July 14 1971 (90). Art. 5 of the treaty states that « no treaty party can introduce or maintain limitations or prohibitions concerning the import from the territory of the other country or the export of the other country, which are not applied under similar circumstances to all other countries ». The Commission demanded therefore the renouncement of the BENELUX treaty with the U.S.S.R.. The BENELUX refused for different reasons. It stated that e.g. Italy and Greece had similar agreements which in that case had to be renounced as well and this did not occur. Furthermore, the renouncement would only have taken effect at the end of

(84) See the article of BRONCKERS, M. C., « Een juridische analyse van beschermende maatregelen tegen Japanse importen in de Europese Geneenschap », *S.E.W.*, 1982, 670- 692.

(85) e.g. wine : July 6 1983, not published ; Canned fruit and dried grapes : December 13 1985.

(86) Art. 3 of the decision of the Council of December 16 1969 concerning the uniting, O.J. L 326/39 of 12/29/1969.

(87) Regulation n^{r} 596/82 of the Council of March 15 1982 amending the import arrangements for certain products originating in the U.S.S.R., O.J. L 72/15 of 3/16/1982, extended until December 1983 : regulation n^{r} 3482/82 of 12/23/1982, O.J. L 365 of 12/24/1982.

(88) After general Jaruzelsky came into power on December 13 1981, the ministers of foreign affairs condemned on January 4 1982 the events in Poland and the violation of the Helsinki Act, see LOUIS, J. V., « La communauté et ses états membres dans les relations extérieures », 6 *Journal of European integration*, 1983, 217.

(89) *B.S.* 2/22/1983, 2469.

(90) *B.S.* 5/11/1973, 5987.

1983 by which time it would have been too late. Finally, the BENELUX stated that a vacuum would exist when it renounced its agreement as the conclusion of a Community trade agreement was not very likely in the given the circumstances.

This remained a theoretical problem as the U.S.S.R. did not react after publication of the BENELUX quotas.

These examples demonstrate that bilateral treaties can fill in the gaps when Community agreements do not exist. On the other hand it becomes clear that the bilateral treaties can also be a hindrance for the establishment of a truly commercial policy.

4. PRESENT-DAY COMPETENCE FOR BELGIUM ?

Because of the controversy concerning the exact content of the common commercial competence, it is not simple to define the residual competence of Belgium (91). The Council and the Commission of the E.E.C. give different definitions concerning the Common commercial policy. The Commission states that art. 113 focuses on « every measure which influences the international trade » (92). The Council on the contrary, demands an additional subjective element, namely the intention to influence the trade (93). The Court of Justice of the E.E.C. does not interpret art. 113 in a strict sense (94). We can conclude that every measure which influences directly the import or export of goods or has in view the rendering of services with an economic character, falls under the commercial competence of the E.E.C. (95). In summary, the provisions concerning the exchange of goods and the payments therefore, the exchanges of services (96) and related provisions, custom provisions, and procedures for import and export licences all fall under art. 113 of the E.E.C. treaty.

(91) The European Court of Justice has discussed art. 113 E.E.C. treaty in different cases. For an enumeration see SMIT, H. and HERZOG, E., *The law of the European Economic Community : A Commentary on the E.E.C. Treaty*, vol. 3, 1986, 64.

(92) LOUIS, J. V., *l.c.*, 233.

(93) KAPTEYN, P. J., and VERLOREN VAN THEMAAT, P., *o.c.*, 527 ; see the position of the Council in case 45/86, 3/26/1987, *Weekoverzicht Hof van Justitie van de Europese Gemeenschap*, March 16-20 and 23-27 1987, nr. 7/87, 13 ; Avis 1/78 de la Cour de Justice de la C.E.E., *Recueil 1979, 2887*.

(94) Massey-Ferguson case 7/12/1973, *Jur.*, 1973, 908. A new attempt has been made to solve the dispute between the Commission and the Council see case 45/86, Commission v. Council March 26 1987.

(95) LE TALLEC, G., « La politique commerciale de la C.E.E., ses conséquences sur l'action de la communauté et des états membres », *Revue du Marché Commun*, 1971, 176.

(96) Treaties with Mexico (July 15 1975, *O.J.* L 247/75), Brasil (December 19 1973, *O.J.* L 102/74), Argentina (December 8 1971, *O.J.* L 249/71), Uruguay (April 2 1973, *O.J.* L 333/73), China (April 3 1978, *O.J.* L 123/78) all contain provisions concerning services. BOURGEOIS, J. H. J., « The Common Commercial Policy, scope and nature of the powers », in *Protectionism and the European Community*, VÖLKER, E. L. M. (ed.), Deventer, Kluwer, 2nd edition, 1987, footnote 6, p. 4.

Subsidies, government procurement, technical barriers are covered by art. 113 when their primary aim is to influence trade.

Provisions converning free trade of people, freedom of establishment and free movement of capital are not covered by art. 113 of the E.E.C. treaty (97).

From these rules, we can conclude that e.g. provisions concerning tax discrimination for the import of goods from third countries as well as measures concerning payments focusing on the movement of goods (thus not measures concerning payments in general) are also treated by art. 113 (98).

Everything that can be categorized under the common commercial policy according to the rules mentioned above, does no longer belong to the competence of the member states ; in principle. Yet, there is still a margin of competence for the member states wherever common rules have not yet been established. The provisions concerning services in the bilateral treaties e.g. are still important where those provisions are not included in the Community agreements (this is also self evidently true when Community agreements do not exist yet).

Furthermore, a state can still impose quantitative restrictions for certain goods or grant export credits (99). Art. 1 of regulation 2603/69 states, as a general rule, that the export of the Community is free. Art. 10 of this regulation has temporarily limited the range of this provision for certain products until the Council brings about a common regulation for those products. In this way the United Kingdom was allowed to impose restrictions for the export of oil to Israel (100). In such a case, the member state has to comply with the consultation-coordination procedure of the decision of December 16 1969 (101). This implies that when a state objects against an imposed quota, the Community and not the member state has to render account (102).

Where common regulations do not exist for those areas in which the E.E.C. is principly competent, the national provisions fill in the gaps.

(97) Classification according to BOURGEOIS, J. H. J.,*l.c.*, above footnote 96.

(98) LE TALLEC, G., *l.c.*, 174 ; see also for an elaboration of the question what the commercial policy of the E.E.C. covers FLAESCH-MOUGIN, C., *Les accords externes de la C.E.E., essai d'une typologie*, Brussel, 1979, 140-145.

(99) LE TALLEC, G., *l.c.*, 174 ; VÖLKER, E. L. M., « The major instruments of the common commercial policy of the E.E.C. », *o.c.*, 53-54.

(100) Bulk oil / Sun case, 174/84, 2/18/1986, *S.E.W.*, 1987, 145.

(101) O.J. L 326/41 of 12/29/1969 ; see also Bulk oil / Sun case, 55-61. Feenstra, J. J. advances the consideration in its note under this case that the Community does not take this requirement very seriously ..., *S.E.W.*, 1987, 153.

(102) BRONCKERS, M. C. E. J., « Een juridische analyse van beschermende maatregelen tegen Japanse importen in de Europese Gemeenschap », *S.E.W.*, 1982, 675 ; The import of goods from third countries (with the exception of state trading countries, China and Cuba as well as concerning textile wherefore other regulations exist) is regulated in regulation no. 288/82 , *O.J.* L 35/1, 1982.

The real residual competence of Belgium, however, is in those areas not covered by art. 113 E.E.C. treaty. As demonstrated before, the Belgian treaties of commerce contain many such provisions.

5. CONCLUSION

Despite some minor exceptions, Belgium is no longer competent for its trading matters. Bit by bit the E.E.C. is trying to harmonize its external commercial policy. The Commission asked the E.F.T.A. countries to review their treaties of commerce in order to remove all commercial provisions. The A.C.P. countries and the Mediterranean countries are encouraged to do the same. The recent recognition of the E.E.C. by COMECON will also strenghten the European influence in the East European countries.

However, the realization of a harmonized external commercial policy will take some time. Bearing the European Act and 1992 in mind, activities will first be concentrated on the strenghtening of the internal market (103).

Furthermore, the member states still seem reluctant to give up their competences concerning commercial relationships with third countries. This can be demonstrated in different ways. After 1969, when member states were no longer competent to conclude commercial treaties by themselves, they tried to evade this restriction by concluding economic « cooperation agreements » (104.). In 1974, this practice was prohibited (105). The conclusion of « mixed agreements » demonstrates as well that member states are not willing to give up their relationship with third countries (106). The fact that the Council uses a more strict definition of « commercial policy » than the Commission points in the same direction (107).

Belgian treaties of commerce will remain an important basis for commerce with third countries where no Community treaties exist. In those cases where a Community treaty does not exist, the Belgian treaty can complement the Community treaty. One has to keep in mind that Belgium is still competent for those areas which are not covered by art. 113 E.E.C. treaty.

(103) Titel 5 art. 130a, O.J. L 169/9 of 6/29/1987 ; see also EECKHOUT, P., « De Europese Akte, 1992 en de interne markt », *R.W.*, September 3 1988, 1-8.

(104) GAUTHIER, PH., « La pratique belge relative aux accords bilatéraux de coopération au développement », 19 *R.B.D.I.*, 1986, 245.

(105) Decision of the Council of July 22 1974 for the institution of a procedure of consultation concerning treaties of cooperation between the member states and third countries. *O.J.* L 208/23/24 of 7/30/1974.

(106) Based on art. 228 E.E.C. treaty. It is clear that the technique of the mixed agreements does not promote the idea of a unified Europe. Therefore, they are heavily criticized, LOUIS, J. V., *l.c.*, 223.

(107) See above.

Belgian treaties of commerce have always been treated like a half-sister. Many treaties were not submitted for parliamentary approval under art. 68 of the Constitution, although they had to. The pretext was that it concerned only « provisional » trade agreements. It is funny when one finds out that many « provisional » trade agreements currently in force are at least fifty years old (108). As mentioned before, many treaties have never been published in Belgium.

This poor treatment is not wholly justified. The Belgian treaties of commerce are currently still an important complement to the Community treaties. Merchants would be wise to be aware of the provisions of these treaties. The direct applicability of some provisions can be invoked more often.

(108) e.g. B.L.E.U. - Albania February 19 1929, *B.S.* May 31 1929 ; B.L.E.U. - Bulgaria February 8 1926, *B.S.* February 21 1926 ; B.L.E.U. - Chili August 27 1936, *B.S.* October 27 1936 ; B.L.E.U. - New-Zealand December 5 1933, *B.S.* February 3 1934.