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# The Relationship between CMEA and EC

by Gottfried Zieger, Göttingen \*

**In early 1970 responsibility for the conclusion of trade agreements was transferred from the individual member states to the EC. Since then the EC has been recognized throughout the world as a contractual partner in its own right within this area. Only the Soviet Union and the CMEA are being difficult accepting these changes in responsibility since 1970. This means that in trade between the EC countries and the state trade countries there exists at present a situation without treaties. Where do the problems lie? What models offer themselves for overcoming this situation?**

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Upon expiry of the transitional period on January 1, 1970 responsibility for the conclusion of trade agreements with third countries has passed from the member states to the EEC. This is laid down in Article 113 EEC Treaty under the brief formula of a "common commercial policy". The trade agreements concluded by the member states are coming to an end. The EEC's responsibility for foreign trade is now undisputed on a global basis. More than 100 states are maintaining accredited diplomatic missions with the European Community in Brussels. Numerous trade agreements have already been concluded with the EC. Important talks in the area of international economics are no longer conceivable without an EC presence.

However, this worldwide recognition of the position of the EEC as an independent contractual partner in the field of foreign trade policy has one exception which interests us here — the Soviet Union is being difficult about accepting this change of competence in Western Europe. This is due, for one thing, to the difficulty its own theory of international law has in recognizing not only states but also international organizations as subjects of international law, and even more in conceding them their own range of competence. In addition, there are political implications.

If we stick to the facts then two observations have to be made in this situation: first, the readiness, proclaimed from the outset, of the European Community to conclude trade agreements with the individual state trade countries as a matter of course, just as with all other countries seeking such agreements. Second, a multiplicity of reflections and a variety of legal enactments designed, by provisional measures, as far as possible to eliminate, or at least mitigate, the economic consequences of that negative attitude on the part of the East.

Immediately prior to the expiry of the transitional period the Council, in a decision of December 16,

1969, stipulated that trade agreements with third countries must in future be negotiated and concluded only by the Community, though two exceptions were conceded at the same time with a view to the East Bloc states — first, existing agreements may be extended by member countries with the previous approval of the Council, provided they do not represent an obstacle to the common commercial policy; second, each member state was permitted also to conclude new agreements until the end of 1972, "provided Community negotiations under Article 113 EEC Treaty are not yet possible". This was specifically aimed at the state trade countries which had declined to enter into negotiations with the Community and it meant, in a sense, an extension of the transitional period for that group of states, with the simultaneous involvement of Community interests. The agreements concluded with the state trade countries under this transitional regime expired at the end of 1974. Only the new EC members were permitted to keep some agreements until the end of 1975. Since January 1, 1975 or 1976, respectively, there has been a situation without agreements.

## Evasion of EEC Trade Policy

The sudden emergence of the concept and practice of cooperation agreements was liable to counteract the Community's endeavours to gain a foothold with a common commercial policy also vis-à-vis the state trade countries. The concept of economic cooperation is by no means new — but the introduction of cooperation agreements as a legal instrument in trade with the East may be described as a new phenomenon.

The actual impulse came from the Eastern side; its exceedingly great interest in this kind of trade

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agreement emerged clearly from the very rapidly proceeding enshrinement of the cooperation idea in a whole series of special laws in the state trade countries. But to the West, too, the concept soon began to seem quite attractive. The suspicion actually arose that certain EC members were continuing their trade agreements with state trade countries more or less unchanged under the new label of cooperation agreements, thereby in practice evading the stipulation of Article 113 EEC Treaty.

This is certainly not the case in that form, although it probably correctly describes the trend. Cooperation agreements, which nowadays also exist with other market economy countries, differ quite appreciably from classical trade agreements. It is therefore probably more correct to say that classical trade agreements are being complemented by cooperation agreements. Under the cooperation agreement between the Federal Republic of Germany and Poland of November 1, 1974, for instance, the principal objective of the treaty is defined as the promotion of "economic, industrial and technological cooperation". These framework arrangements between states cover cooperation agreements between Western and Eastern firms which show a marked diversity of content. They range from licence agreements with the stipulation that payment shall be made in products manufactured on the basis of the licenced process, through the supply of manufacturing equipment against payment in the merchandise thereby produced, to the joint venture, the genuine joint enterprise in the country of the Eastern partner or even in third markets.

If, in such a cooperation agreement with a state trade country, the EC member undertakes to support and facilitate the exchange of patents, licences, know-how, specialists, technological information, documentation, etc., then surely the competence of the member state can scarcely be disputed. In that respect, therefore, cooperation agreements are something different from what, at first glance, one would regard as coming within the framework of Article 113 EEC Treaty on the general trade policy of the Communities. However, many cooperation agreements also contain obligations directly bearing upon the exchange of goods, i. e. the core of classical trade agreements. This is the case, for instance, whenever specific obligations for the delivery or purchase of goods for or from the cooperation concerned form part of such agreements.

The state trade countries have shown particular interest in what is known as "cooperation on the basis of self-financing" — i. e. the possibility of payment by deliveries of products from the cooperation concerned. There is a marked tendency

to grant a special status to goods originating from such cooperation with a view to their exemption from tariff and quota regulations.

The Communities have, moreover, recorded the existence of cooperation agreements which contain typical elements of trade agreements. Thus the cooperation agreement between Italy and Romania of May 22, 1973 includes Italy's obligation to grant most-favoured nation treatment to the other party, to issue automatically the necessary import licences for cooperation products, and to apply to cooperation projects the most favoured credit terms available in each case. Another instance contains clauses on compensation deliveries which properly belong in a trade agreement.

This is not the place to discuss the exceedingly controversial question of whether, or to what extent, cooperation agreements come under Article 113 EEC Treaty. As there are obvious points of contact and sometimes some overlapping between cooperation agreements and trade agreements, and as "pure" cooperation agreements not touching upon the common trade policy are rare, the Council of the EC in July 1974 — after the European Parliament had repeatedly drawn attention to the dangers threatening the common trade policy from cooperation agreements — issued a decision to the Governments of the member states which provides for mandatory consultation about cooperation agreements. Specific trade agreement clauses, such as most-favoured nation treatment, tariff arrangements, quota arrangements, import regulations, etc., which represent a substantial part of economic agreements under international law, can anyway only be contained in a trade agreement. The pragmatic side-stepping on to the cooperation plane cannot therefore ultimately evade the subject of how, and in what forms, the vacuum in the field of trade agreements between the Community territory and the Eastern states is to be filled.

### **CMEA's Ability to Contract**

In the debate about the legal facilities for such arrangements between EC and CMEA regular reference has been made by the Western partner to the essential differences in competence between the two organizations. It has, in particular, been pointed out that for the CMEA there is no unambiguous definition of specific responsibility for any foreign trade policy of its own. That is actually the case. The CMEA statute has no stipulation matching Article 113 EEC Treaty; the Eastern economic organization altogether has no sovereign rights of its own. Agreements contracted by it would therefore have to be charged not against it but its members. However, within a certain scope, agreements under international law

have already been concluded by the CMEA. Thus, the CMEA concluded an agreement with Finland on May 16, 1973 — i. e. during the validity of the earlier version of the CMEA Statute.

The amendment to the CMEA Statute of June 21, 1974, which admittedly has been in force only since February 13, 1976, now defines the CMEA's ability to contract in a manner also outwardly visible in, among others, Article III. According to this regulation the Council may "in conformity with the present Statute conclude international agreements with the member countries of the Council, with other countries, and with international organizations". It is this last formula that has been newly introduced into the Statute mainly with a view to the European Community.

It has rightly been observed that the introduction of that general clause on external competence reflects the East's intention to juxtapose the CMEA as an "equal" negotiating partner to the EEC. But that has only been partially achieved. The amendment of Statute has not given the CMEA its own specific responsibility for the pursuit of a foreign trade policy analogous to Article 113 EEC Treaty. The legal enactment, the implementation and the execution of the agreements concluded by the CMEA under international law are solely within the competence of the CMEA member states. The CMEA's ability to conclude external agreements is designed to authorize it to assert the rights and duties of its members in its own name, as an international organization indirectly representing those members. Since, therefore, even in dealings by the CMEA it is ultimately the member states alone which are the legal points of reference, it is basically only a question of prestige if the new trade agreements offered by the EEC to the state trade countries are to be concluded not with those countries direct but only with CMEA participation.

In this connection attention should be drawn to two aspects to be borne in mind when the CMEA is involved: first, the new Statute envisages contracting ability by the CMEA only in those areas which are in harmony with the Statute. Key questions of trade policy, such as tariffs, quotas, import and export regulations, are not covered even in the amended CMEA Statute. The central items of classical trade agreements could not, therefore, be agreed solely between the CMEA and the EEC. Second, the CMEA Statute, just as the OEEC/OECD, acknowledges the principle that only those members are bound by legal actions of the organization who have shown their interest; by declaring their non-interest member states may avoid CMEA obligations. This means uncertainty on the question of the real extent of validity of agreements concluded with the CMEA.

### First Contacts

The subsequent period witnessed the first tentative approaches and soundings between CMEA and EEC. The initiative came from the East. The major political character attached to such a fundamental decision is revealed by the fact that in the Eastern literature it is invariably linked with a statement by Brezhnev of March 20, 1972, in an address to the 15th Trade Union Congress in Moscow, when he said that the USSR in no way ignored the reality of the situation that had come into being in Western Europe, including the existence of such an economic grouping of the capitalist countries as the Common Market. That recognition of the reality of the Common Market was related to the degree of readiness on the part of the EEC countries to acknowledge the realities which had come into being in the Eastern part of Europe, more particularly the interests of the CMEA countries. There is scarcely any mention of the fact that as far back as 10 years ago Khrushchev had warned against closing one's eyes to European integration, linking it with the question of the chances of peaceful economic competition between states of different social structures and between their economic associations.

The reason behind this tentative Eastern approach is the fact that the EC member countries had only until the end of 1972 the competence for the conclusion of new trade agreements with the state trade countries. Besides, by 1972 the preparations had begun in Helsinki for the Conference on Security and Cooperation in Europe (CSCE).

Brezhnev's declaration was welcomed by the European Parliament and bracketed with the specific declaration that the Community had always been ready to recognize the realities in other parts of the world. The Conference of the Heads of State and Governments of the Community in October 1972 also reacted positively to the Eastern statement and stated its determination to promote a policy of cooperation with the countries of the East.

Six weeks after the start of the CSCE proper, and even before its second round in Geneva, Fadeyev, the CMEA Secretary General, paid a call on the Danish Foreign Minister as the acting Chairman of the EC Council of Ministers in Copenhagen on August 27, 1973; the visit was described as "private". He proposed meetings between delegations of both groupings to examine joint possibilities of cooperation between the two organizations. Fadeyev lent emphasis to that proposal by inviting the then President of the European Commission to Moscow for a visit in September of the same year. The EC maintained its reserve and instead,

in February 1975, sent to CMEA headquarters a delegation of senior officials of the Commission, headed by the Director-General for Foreign Relations. Admittedly, the envisaged detailed negotiations did not come about, any more than the issue of a joint press communiqué. An invitation of the EC Commission to the CMEA to continue the talks in Brussels was, true enough, accepted in principle but has not so far materialized.

#### Offer of Agreement by the EEC

Following the extension of the "closed season" for trade agreements by individual EEC members until the end of 1974, the Council in November 1974 decided to invite all the state trade countries individually to enter into negotiations for the conclusion of a trade agreement with the Community, enclosing a model agreement. It is interesting that the model contained all the customary items in an agreement, from the granting of most-favoured nation treatment in tariff matters to the readiness to discuss further progress towards the liberalization of EC imports, to clarify payment and finance problems on a case-to-case basis, and to set up mixed commissions to watch over the implementation of the agreements. One single

reservation in the model agreement refers to the principles and mechanisms of the common agricultural policy; on this point it is expressly stated that these cannot form the subject of negotiations. That, too, is in line with the EC attitude on this issue vis-à-vis other countries. There is, therefore, no discriminatory element to be found in that draft agreement. The fact that, so far, the state trade countries have nevertheless totally ignored that offer — China alone has accepted the offer and most recently concluded a trade agreement with the Community — must ultimately have political reasons which cannot be pursued further in this article.

However, an indirect answer may be seen in the draft agreement transmitted to the EC by the CMEA on February 16, 1976. Thus the dialogue between the two organizations, which had been bogged down since 1975, has got going again.

On the Western side the East's offer of an agreement, addressed in its content throughout to the EEC member states and continuing to disregard the competence of the Community, has been acknowledged with great reserve. The EEC's note in reply, presented on November 17, 1976 in Warsaw to the Polish Deputy Premier Olszewski, as

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the acting President of the CMEA Executive Council, contains — it is understood — the EEC's agreement in principle to have a framework agreement with the CMEA, with the rider, however, that its offer of November 1974 to the individual state trade countries continues to be valid. The EEC offer, therefore, concerns only a skeleton agreement with the CMEA, to be supplemented by arrangements between the EEC and the state trade countries. Only thus can appropriate account be taken, in the Western view, of the divergent specific competences of the two organizations. Demands for most-favoured nation treatment and liberalization are countered by virtually the same arguments as in the talks at the CSCE, i. e. that the foreign trade instruments in the state trade countries performed a totally different function from those in the market economy systems of Western Europe. It is emphatically pointed out that a realistic understanding of the reciprocity principle must be ensured by a balance of mutual advantages.

The EEC's reply therefore contains neither a response to the CMEA's demand for most-favoured nation treatment nor to the call for preferential treatment in matters of credit. Any special regulation in the agricultural area is likewise ruled out. These problems, as before, must be left to agreements between the EEC and the CMEA states.

In consequence, the draft agreement of the EEC confines itself to areas which are of no immediate commercial policy relevance. It contains stipulations concerning a more intensive exchange of information, for instance in the fields of economic programmes, and of trade and economic statistics. Environmental problems and questions of standardization are also touched upon — all of them problems without particular political explosive power but making allowance for the specific pattern of competences in the CMEA.

All that has transpired about the East's reaction to this counter draft of the EEC is the fact that the Polish Deputy Premier approached the British Ambassador in Warsaw in February 1977 with a message for the British Foreign Minister who was then the acting President of the Council of the EEC. In a note dated August 19, 1977 counter suggestions from the Eastern side went to Brussels by the same route. In May 1977 CMEA consultations took place in East Berlin. In June 1977 the EC Council met in Luxembourg. It is believed that the Eastern note of April was examined there and, in that context, a reply from the EC was formulated. Nothing has been disclosed officially about its content. It is known, however, that a readiness to hold talks was expressed and that September was proposed for them. In fact, the

Romanian Deputy Premier, who was then chairing the CMEA Executive Committee, accompanied by a CMEA delegation which included representatives of all CMEA countries, entered into talks in Brussels in September 1977. His opposite number was the Vice-President of the European Commission, Haferkamp. It is believed that agreement was reached on a formal resumption of negotiations in 1978.

### **„Mixed Agreements” Proposal**

The Eastern idea will probably be a mixed agreement, that is an agreement in which the CMEA and CMEA member states on the one side will face the EC and the EC member states on the other. This would, admittedly, clarify which CMEA member participates in the agreement, i. e. exhibits interest. On the other hand, such a mixed agreement would blur the competences: who — the CMEA or a CMEA member state — would be responsible for implementation in each individual instance, to whom should the EC address itself in the event of an infringement of the agreement? It would not be very desirable, for instance, in the event of a market disturbance in relations between the GDR, Bulgaria and Poland vis-à-vis Italy, to mobilize the entire machinery, i. e. all CMEA states and the CMEA itself, thereby inevitably magnifying the matter instead of discreetly clearing it up on the lowest level between those actually affected.

Most importantly, under the EEC Treaty there would be no basis for ranging the member states alongside the EC since these member states no longer possess any individual competences in the sphere of trade policy. It would therefore probably be the most correct and the best way to agree, in a skeleton agreement between the two organizations, anything that conforms with the common standard of specialized areas; this means, therefore, the general competences acknowledged to be possessed by the CMEA in accordance with the EC proposal. Commercial policy questions proper would subsequently have to be the subject of agreements between the EC and the individual state trade countries.

A debatable question might be whether the CMEA should be granted something like observer or consultative status in the bilateral negotiations of the EC with the individual state trade countries. Also debatable would be the idea of juxtaposing the state trade countries as a whole as negotiating partners to the EC. That sort of thing happened, for instance, in the Association Agreements and the subsequent Preferential Agreements between the EC and the ACP states in the Lomé Agreement. One might also visualize the CMEA as a kind of spokesman jointly authorized by the CMEA states.

Naturally, the East would have to reflect that any such collective action would clearly diminish the prospects of any individual East European country to achieve any differentiated better terms for itself, according to whether its foreign trade problems are of interest at the time, for instance in the area of the agricultural market, or else a differential treatment of those CMEA members which belong to GATT.

The choice of models offered here has so far been concerned merely with the question of whether the EC should be confronted by the state trade countries individually, collectively, or with the participation of the CMEA. On the side of the EC the problem of EC member state participation in agreements with the East does not arise. There is just one single instance of a mixed treaty conceivable, one which would provide for the participation of the EC member states on the EC's side: that situation would arise if one could see one's way to fitting the cooperation agreements of the member states into such a general agreement package between East and West. In that way, on the Western side, conflicts of competence between the EC and its member states could be defused in a pragmatic manner. At the same time this would ensure content parallelism in the cooperation agreements. But just that point raises doubts on whether this is really desired either by the East or by the EC member states. Such a general agreement package would, of course, suffer from the above-mentioned misgivings concerning inflexibility and imprecise demarcation of responsibilities in detail.

The better way, therefore, would probably be the conclusion of a framework agreement between the EC and the CMEA, as well as the conclusion of mixed agreements between the EC (i.e. with the participation of the EC member states) and the individual state trade countries on trade policy and cooperation. The wide range of possible options of agreements between the two sides in itself shows that these are ultimately political and not merely legal problems and that, for this reason, they call for political decisions.

#### **An End to the Situation without Agreements**

The question of reciprocal recognition of the two economic organizations, in particular recognition of the EC as a subject of international law furnished with its own sovereign rights, has probably gone cold by now, even though perusal of the CMEA draft agreement of 1976 still reveals a deliberate reserve on the part of the East vis-à-vis the European Community.

This prolonged tough jockeying for positions, not only in the area of prestige but of politics, has produced specific consequences for West-East

trade. These concern not only the question of whether trade with the Eastern states will in future continue to be operated with the individual state trade countries or only via the CMEA switchboard in Moscow. Indeed the question is of importance also from a practical point of view; the Eastern planning system is at the same time an economic system with an enormously dense network of juridical arrangements which are of relevance also to foreign trade relations. The present situation without any agreements — as far as trade agreements between the state trade countries and Western Europe are concerned — does not properly fit into this pattern of universally juridically buttressed agreements.

Liquidation of the tense situation between the two integrated spheres would result in a substantial improvement of starting positions for practical trade with the East. Above all, there would probably be an increase in information and consultation. With relations governed by international law it would, for instance, be conceivable for the Western side to be informed about CMEA planning and integration projects, together with their effect on inter-system economic relations, at an earlier stage than in the case of bilateral agreements, let alone in a situation without any agreements at all. That would surely be to the advantage of both parties.

These reflections are supported by certain experiences made with the above-mentioned cooperation agreement between the CMEA and Finland. That agreement similarly contains no customs policy or trade policy stipulations such as characterize the main tenor of the agreement between the EEC and Finland of October 5, 1973. The agreement throughout resembles the draft of a framework agreement which the EC has submitted to the CMEA. In the case of Finland the framework agreement, in which the CMEA participates, has similarly been followed by free-trade agreements between Finland and the individual CMEA countries. Here, too, we have a point of comparison with the EC proposal of November 1976. In particular, however, attention should be drawn to a whole string of consequential arrangements between Finland and the CMEA which have led, in numerous specialized fields, to agreements on the provision of information and scientific-technological cooperation.

It would therefore be conceivable for the relationship between the CMEA and the EC, which was considered somewhat critically at the beginning of this article, to develop into genuine partnership relations in which the sober calculations of the businessman and entrepreneur might succeed in making the differences between the political systems appear less important.