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THE EXTERNAL TRADE POLICY AND PRACTICE
OF THE EUROPEAN ECONOMIC COMMUNITY IN THE
CONTEXT OF THE GATT FRAMEWORK

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Thesis submitted to the University of Glasgow
for the degree of Doctor of Philosophy.

Department of European Law

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To Demetrios

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ABSTRACT

The present thesis examines the effect of the EEC's external trade law and practice on the GATT legal system. Reference is made to the GATT law and to the EEC's law in this field. The question of compatibility of the EEC's external trade law and practice with the GATT system constitutes a central argument. The issue of the participation of the EEC as an entity in terms of international law, in the GATT system is raised and the effects of the EEC's policy on GATT are evaluated. Furthermore, the notion of direct effects of GATT within the Community legal order is examined. The EEC's trade agreements negotiated with all categories of countries, i.e. associated, non-associated (in the context of the GSP), industrialised and state-trading countries in the context of the GATT framework, are considered in an endeavour to evaluate their impact on the GATT legal system. In this context the common Community position with particular reference to the CCP is considered, while the notion of mixed agreements which constitute the majority of the EEC trade agreements, is taken into account.

Finally, the Community's participation in the negotiation of VER agreements within the GATT system (e.g. MFA) and outside it, is examined and the relevant effects are evaluated. It is concluded that the EEC has in legal terms been a major influence in both redefining international legal concepts and developing new forms of international trade rules.

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ABBREVIATIONS

ACP	African Caribbean and Pacific
BISD	Basic Instruments and Selected Documents
BOP	Balance of Payments
CAP	Common Agricultural Policy
CCC	Customs Co-operation Council
CCP	Common Commercial Policy
CCT	Common Customs Tariff
CET	Common External Tariff
CMEA or COMECON	Council for Mutual Economic Assistance
CML Rep.	Common Market Law Reports
CML Rev.	Common Market Law Review
CU	Customs Union
DC	Developed Country
DISC	Domestic International Sales Corporation
ECE	United Nations Economic Commission for Europe
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC or EC	European Economic Community
EFTA	European Free Trade Association
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organisation
FTA	Free Trade Area
GATT or G.A.	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
IMF	International Monetary Fund
ITC	United States International Trade Commission
ICJ	International Court of Justice
ILM	International Legal Materials
ITO	International Trade Organisation

JCM Studies	Journal of Common Market Studies
JWTL	Journal of World Trade Law
LDC	Less developed Country
LLDC	Least developed Country
L Series	eg. L/1234 (1960)
MFA	Multi-Fibre Arrangement
MFN	Most Favoured Nation
MTN	Multilateral Trade Negotiations
NIC	New Industrialized Country
NTB	Non-Tariff Barrier
OMA	Orderly Marketing Arrangements
QR	Quantitative Restriction
S	Supplement
UNCITRAL	United Nations Conference on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VER	Voluntary Export Restraint

CHAPTER 1.

INTRODUCTION

The present dissertation deals with certain legal issues of international trade, in particular with the legal issue of the compatibility of the European Economic Community's (EEC's) external trade law and practice with the General Agreement on Tariffs and Trade (GATT), whilst taking into account the legal, economic, political and social factors which affect such trade. The dissertation further examines the developing legal framework of international trade in this context. It concentrates particularly on the EEC's Common Commercial Policy and its Development Policy in an endeavour to examine the compatibility issue and to evaluate the effects of EEC external trade law and practice on the GATT legal system.

The GATT, established in 1947, supplied the legal basis for free world trade for both developed and developing countries. Since the monetary crisis of 1971 and the oil embargo of 1973, international trade has been generating problems, and there is growing concern about the validity of international trade rules. The emergence of LDCs, as influential powers on the international trade scene, and the unprecedented expansion of Japanese external trade in industrial products, have both contributed to changing the pattern of law on which international trade has been based. The USA, the protagonist in promoting the idea of an International Trade Organisation (ITO) and subsequently of the establishment of the GATT as the main basis for world trade, is considered to be a decisive factor that has shaped the existing international trade system.

The major world trading powers, notably the USA and the EEC, are alleged to have tailored GATT to their own needs and to accommodate their own interests. In that respect GATT has been criticised by LDCs as being an ineffective and inoperative system which fails to respond to their development trade needs. While GATT covers trade for developed and LDCs alike, the political and economic power of DCs is evident in the definition of this relationship. The GATT was intended as a system capable of responding to gradual changes in international trade, but the unforeseen and too rapid changes in world trade patterns in the last decade have called into question the suitability of the GATT system.

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The EEC as the largest trading bloc in the world - engaged in more than 44% of world trade - through its Common Commercial Policy (CCP), (Arts. 110-116 of The Rome Treaty), together with the Community agricultural provisions (Arts. 38-47) and its relationship with third countries (Arts. 228, 238 and Part IV of the EEC Treaty) has an enormous impact on world trade.

The EEC's increasing power and influence in external trade relations, through its extensive preferential framework and its protectionist CAP, have become the centre of criticism from the USA. In this context trade relations and conflicts between the EEC and third countries, DCs and LDCs alike, are examined in the present dissertation and their impact on the GATT legal system is analysed. Moreover, the GATT's contribution to solving related disputes is analysed. The relationship between the external trade law and practice of the European Community on the one hand and international trade law on the other is kept in mind throughout the study.

Part I of the thesis, surveys the legal basis, including the G.A., on which international trade rests, and the provisions of the CCP. The GATT, a global agreement with a membership of eighty-eight (88) contracting parties and another thirty (30) states which apply on a de facto basis the rules, provides the general guidelines for liberalisation of tariffs and trade. It is, in addition, the GATT system which also covers trade in both DCs and LDCs, and in both industrial and agricultural products. As such it has to deal with major trade problems which have been referred to it since the transformation of the OEEC into the OECD. Although agricultural commodities are largely regulated by international agreements outside the GATT framework (coffee, cocoa, sugar, etc.) trade in agricultural products is a particular case within the GATT system. The institutional structure and the main principles (MFN clause, reciprocity and universality) on which international trade is based, have made the GATT the de facto, if not de jure international trade organisation. Tariffs have been largely liberalised within this framework through the seven Multilateral Trade Negotiation (MTN) Rounds, but there is a trend for this achievement to be replaced by Non-Tariff Barriers (NTBs). With all these points in mind, the thesis gives special consideration to the role of GATT in resolving international trade disputes.

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The system providing for the establishment of a Panel or a Working Party for the consideration of disputes, the importance of the CONTRACTING PARTIES acting jointly, the weaknesses of the enforcement machinery and the broad interpretation of international trade rules by Panels or Working Parties, are analysed. The dispute procedure, unable to cope with current trade disputes, is seen in the context of the consultation principle. Improvement of the system and relevant revision through the Codes in MTNs has been sought.

According to the norms and techniques of the GATT, the EEC is called to submit to GATT rules the operation of its Common External Trade Policy. The European Community's Common Commercial Policy, together with its Development Policy, constitute the main and most substantial aspect of the Community's external relations and is designed to strengthen the Community as a bloc. The Common Commercial Policy embraces a whole set of measures intended to regulate international economic relations with third countries, relating to the movement of goods, the supply of services and payments connected therewith. This is related to the import regime, e.g. tariffs, QRS, protective measures, and the export regime, e.g. export subsidies and measures for promoting trade. With due regard to the importance of this point, the thesis treats the external Community trade law and practice as important topics of discussion within the framework of GATT, and this evaluation is undertaken in the light of tenets found in the Preamble and relevant provisions of the EEC Treaty, to the effect that they are to contribute to the harmonious development of world trade and the lowering of customs barriers. The EEC, established as a customs union, has, in fact, contributed to the liberalisation of intra-Community trade but the common front which it has established in relation to the outside world has not been free of criticism. Much of this criticism is directed at specific policies of the Community, which seem to be in conflict with the intentions and provisions of the GATT.

In the second part of the study, the crucial issue of association with overseas countries and territories and the compatibility of subsequent practices of existing preferential agreements with the GATT is considered as one of the most problematic areas. The EEC Treaty, based on a customs union, enjoys exception from the MFN clause of non-discrimination under Art. XXIV of the G.A. The provision of Art. XXIV, paragraphs 4-9 of the GATT, that customs unions or Free-Trade Areas or Interim Agreements leading to either of them, are exempted from MFN obligations. The preferential agreements between the EEC and third countries /

countries, particularly the Lomé Convention and the Association Agreements with Mediterranean countries are specifically considered and analysed to the extent necessary to determine their impact on the GATT legal system. The legality of such preferential trade agreements constitutes the first and most problematic area of the Community's compatibility with the G.A. In that respect the GATT Committee had had to examine the commercial aspects of the Rome Treaty in the context of the rules concerning customs union. The favourable or unfavourable effects of the preferential trade agreements on other non-preferred countries and on world trade in general are examined.

The thesis then continues with a discussion of the preferential trade agreements between the EEC and third countries. All of them, e.g. ACP, Mediterranean countries, have been subjected to the scrutiny of GATT Committees, with respect to compatibility with the rules of GATT. The broad interpretations given by the GATT Committees in the first relevant Agreements (EEC - Yaoundé Conventions) have become a precedent for all subsequent preferential arrangements. The interaction of legal, political, social, economic and strategic problems have been taken into account by the Community in its endeavour to expand its trade, to safeguard its preferential agreements and to maintain an open system in international trade. The opposition of third countries, particularly that of the USA, as regards the Community's preferential network, is considered on several occasions in the study. The question of application and interpretation of the GATT rules, especially Art. XXIV, is also examined.

Concerning the EEC's preferential trade or co-operation agreements in Asia, Latin America and elsewhere in the world, they are discussed in the context of the Generalised System of Preferences (GSP), which have been for the benefit of the developing countries, not linked with the Community by any kind of preferential agreement. The GSP is an effort by the EEC to counterbalance the benefits granted to the associated states. It was initiated by the second UNCTAD in New Delhi in 1968 in a form of a waiver from the GATT Art. I obligations. Under it all LDCs' exports have the right of access to the Community duty-free, up to a certain point. In relation to Part IV of /

of the EEC Treaty and Part IV of the GATT agreement differentiation and more favourable treatment is to be granted to the LDCs, with special attention to the least developing countries; the question of discriminatory treatment of some LDCs is one of the concerns in this study, since Association Agreements give more favourable treatment to associated countries. The GSP, by providing only tariff cuts, has not greatly contributed to liberalisation of international trade. It is designed to benefit all LDCs, but the most advanced of them are its major beneficiaries. For the EEC the economic benefits are not so great but there seems to be obvious political, social and diplomatic gains from the operation of the scheme.

The EEC's trade relations with industrialised countries, notably with the USA and Japan, in both industrial and agricultural products, are included in the thesis. Overproduction in both industrial and agricultural products has led to controversies and growing protectionism on all sides. The emergence of Japan as a great economic power and the unprecedented expansion of its industrial exports have created stresses on European and American markets. Weak demand and unemployment in most developed countries, as a consequence of economic recession, has favoured protectionism on the part of all industrialised nations. Consultations and contacts between the EEC on the one hand and with the USA and Japan on the other hand have been frequently taking place in the hope of liberalising trade and further reducing barriers to world trade.

However, the most problematic area of EEC trade relations in the context of the GATT framework concerns subsidies on agricultural exports. These are granted in an effort to promote trade and secure additional export markets. Therefore, the Common Agricultural Policy (CAP) with its export refunds has been the most troublesome area and the major bone of contention, and it is the most difficult question to be discussed. First of all the question concerning the GATT's competence to deal with agricultural trade has to be analysed. The GATT Agreement makes no distinction between industrial and agricultural products, and several provisions for agriculture are specifically provided, e.g. in Art. XVI:3 subsidies to primary products. Since the Kennedy Round and subsequently during the Tokyo Round MTNs, and recently in the GATT Ministerial Conference in November, 1982, Agricultural Committees have been established within the framework of MTNs under the auspices of GATT to study the matter. Trade in certain agricultural commodities is regulated through international commodity agreements such as coffee, cocoa, sugar, etc., but there is still scope left for the GATT to regulate agricultural products.

The USA stresses that agriculture should be included in negotiations within the framework of MTNs under the auspices of GATT, but the EEC is opposed to this view. The question of subsidies granted for the promotion of agricultural trade deserves special attention, since primary products, i.e. products of farm, forest and fishery can be granted subsidies according to the rules of the G.A. The USA and the EEC with respect to agricultural subsidies have on several occasions come to the brink of a 'trade war' due to subsidies granted by both sides. The EEC in particular has in one form or another, directly or indirectly, given subsidies to producers or exporters of agricultural products.

Finally, in the last part of the study, reference to Voluntary Export Restraint (VER) Agreements is made in the context of the GATT Agreement. The question of their legality under GATT, the EEC's participation in negotiating VER Agreements with other countries, and the nature of the products involved is considered. The Multi-Fibre Arrangement (MFA) is the first and unique example of VERs negotiated within the GATT system. The question whether the MFA is to become the precedent for the proliferation of relevant agreements is discussed in this general context. International trade regulation in certain products like textiles has caused particular concern when market disruption has occurred in the importing country through unregulated and too rapid expansion of exports by both developed and developing countries. The MFA is a move towards the multilateralisation and legalisation of exports of textiles and textile products.

Voluntary Export Restraint (VER) Agreements are negotiated bilaterally outside the scope of the GATT (except for the MFA), in complete absence of international supervision, and therefore fail to take account of the interests of third countries. It is submitted in this study that the drift towards bilateral regulation or so-called 'managed trade' may be dangerous if extended to the international community as a whole. VER agreements are also considered in this study in relation to Art. XIX of the G.A. and a possible replacement by safeguards operated within an agreed international framework, or within an improved or revised Art. XIX is discussed.

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These current trends can have a significant impact on the development of international trade rules. The study favours the view that the GATT as an international agreement, constituting the legal basis for free world trade, should play a positive role in putting these arrangements under multilateral control in order to avoid distortions of the international trading system.

International trade law is an extremely complex matter, requiring special attention. The present thesis includes a comparative analysis between European External trade law and International law. The complexity of the subject is kept in mind as a matter, due to various issues. Legal rules, economic aspects, political decisions and diplomatic involvement are interrelated. To extract the legal points from such a legal, economic, political and diplomatic background, is an exceedingly complex matter. The methodology which has been used to carry out research for the thesis had to cope with a number of technical difficulties. The comparative analysis between GATT and EEC law had to face a series of difficulties for various reasons; e.g., scarcity of case law from the ECJ and non-availability of all GATT documents were among the main obstacles in the consideration of the current legal issues. The relationship between GATT and EEC law, and in particular, the question of supremacy and that of direct effects of the GATT rules over the EEC rules, has not been adequately dealt with by the ECJ. Few cases have been referred to the ECJ.

The principal difficulty lies in the fact that the jurisdiction of the ECJ has not been adequately extended to the external sphere of the Community. The other major difficulty is attributable to the GATT's inability, for obvious reasons, to deal with current trade problems in dominant legal terms. GATT was established as a temporary agreement to deal with short-term commercial problems and be soon replaced by the ITO. As a result, studies concerning GATT problems have to face dilemmas. The quotation by Professor Jackson in an introductory page (P.vii) of his book, 'World Trade and The Law of GATT', "Anyone who reads GATT is likely to have his sanity impaired", gives us some idea of the perplexity of the matter.

Extensive recourse to official publications of the EEC has been made throughout the study, as well as to various documents published by GATT and available to researchers. A great number of GATT Panels' or Working Parties' Reports or Recommendations have also been utilised. Interviews /

Interviews with Community officials have greatly contributed to the development of the study. Numerous monographs and articles and miscellaneous publications relating directly or indirectly to the study have also been consulted.

International trade law falls within the framework of International Economic law, which is regulated by diplomatic arrangements rather than rules. While the rule of law may in principle play an important part in regulating world trading relations, it cannot be isolated from diplomacy. GATT is the principal trade forum where extensive discussions and deliberations take place. In the context of multilateral trade negotiations conducted within the GATT framework, decisions and recommendations, which have been adopted to supplement and clarify existing international trade rules, are analysed.

The thesis is not intended to be an exhaustive study of the substantive rules contained in the various EEC agreements in the context of international trade rules. The EEC has negotiated a great number of agreements with third countries. The purpose of this study is not to examine the substantive rules of these agreements individually but to examine the EEC practice in the light of the central question as to the compatibility of EEC practice with the international legal framework. Various EEC agreements are examined in order to extract from them information relating to their compatibility or incompatibility with the international trade rules. Obviously, much more research needs to be done in the area of substantive rules; for example, with respect to association agreements as a new developing body of law.

A further clarification in the method of the present study needs to be made. Having regard to the fact that the same legal issues continue to emerge time after time in the controversies over the various practices of the European Community, for example, between the EEC and the USA, it has been decided to deal with the underlying legal issues in the concluding chapter, Chapter 10. This approach enables a more systematic and integrated treatment of the relevant questions, e.g. some of the more important issues like the problem of dispute resolution, the problem of interpretation of difficult legal terms, the status of various agreements in international law and the overall assessment of the EEC practice in the development of its common commercial policy.

PART 1.

LEGAL ASPECTS OF INTERNATIONAL TRADE LAW

CHAPTER 2.

THE LAW OF GATT.

Theories of International Trade

While International Trade has a long history going back thousands of years to the days of the Phoenicians, it is only in the last two centuries that attempts have been made to create a theoretical framework for a systematic treatment and analysis of international trade. Such a systematic treatment and analysis is of importance for the specific topic of the present thesis.

Economic theories of international trade are of significance not only for economists but also for lawyers because there are, in international trade, well-established patterns of behaviour and relationships. These, in turn, involve mutual economic and commercial interests which can also be expressed in terms of rights and obligations. Hence the importance of extracting a few legal concepts from the sphere of economic theories of international trade. These legal concepts in turn will be helpful to assess the legal performance of the EEC in the sphere of external trade, that is in the light of established categories of commercial legal behaviour in general and EEC conformity with them, including the possibility of a Community contribution to the progressive development of current international trade law.

For this purpose we shall briefly survey some of the past and current theories of international trade.

Since the beginning of international trade the price of goods has been the most decisive factor. During the Mercantilist period (16th-17th Century) the establishment and development of trade relations was a principal goal for increasing the power of the state and this could be done through the acquisition and accumulation of precious metals.¹

As for the classical economists, they believed that the natural resources with which each country is endowed was the most important factor for functioning and maintaining the well-being of the country. Adam Smith's theory of comparative advantage is the cornerstone on which the idea of establishing free trade among nations rests. Such free trade enables the increase of national wealth by taking advantage of the principle of the division of labour. He believed a country should exchange the goods in which it has a comparative advantage in terms of absolute labour costs against goods which it (the country) cannot produce at all or it can produce at more expensive rates. Free-trade for Adam Smith meant that all products traded internationally should be produced in those countries where the absolute labour costs are the lowest. Adam Smith epigrammatically stated that "It is the maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy".² David Ricardo developed and supplemented Adam Smith's theory by showing that a country can benefit from trade not under the terms of absolute labour cost in the production of any commodity, but by the comparative cost advantage. In his theory known as the 'labour theory of value' Ricardo, answering the question of competition of more efficient imports, supported the idea that the price of commodities depended upon their comparative labour costs. According to this theory it is the relative or comparative labour cost instead of the absolute labour cost which has to be considered in comparing the production of commodities in two countries.³

Later economic writers like John Stuart Mill and Alfred Marshall went further and supplemented the classical theory as developed by David Ricardo. John Stuart Mill examined the question of international values or the ratios at which commodities would be exchanged for one another. He pointed out that comparative labour costs are an essential element in the gains from international trade, but that 'reciprocal demand' functions have to be taken into account. Marshall in turn went even further by emphasising not only 'reciprocal demand' but also 'reciprocal supply', which played an important role in the specialisation and promotion of trade.⁴

Therefore /

Therefore, the classical economists led by Adam Smith believed that each country must specialise in the production of those goods that it can produce relatively more cheaply and exchange the surplus against the surpluses of other countries, or against goods which the first country cannot produce at all. But none of the above summarised theories can individually provide a sufficient theoretical explanation for analysing the elements of trade between the Community and its international trade partners. For example, the classical school started from the assumption of a single factor (labour): it failed to give a satisfactory explanation of free trade among nations. How countries will specialise, what they will export and import is determined by comparative differences in costs. But what determines the differences in relative labour costs? Ricardo drew attention to the skill of labour and to better machinery, which make labour more efficient, while others suggest that differences in climate, soil, minerals, inventiveness, play an important role in this determination. The classical economists believed that each country should specialise completely in the production of the commodity in which it has a comparative advantage. At the time when the classical theory of comparative advantage was developing, i.e. up to the first World War, the choice was between free-trade and tariff protection. In general, however, the classical writers pointed out the importance of the free-trade doctrine. The problem of protectionism was discussed by writers such as Torens and Edgeworth. As regards this problem, they distinguished it as long-term and short-term. As to long-term tariff protection, they argued that it may cause injury to all those who practice it and benefit none. In particular, countries which do not take part in such practices will suffer greater injury. They considered tariff protection as an effective instrument for trade promotion in the poor countries only. As to short-term tariff protection, they recognised its significance for young countries and infant industries. Their argument was that they should attach great importance to the free-trade approach, while at the same time using temporary protection for young countries or infant industries. However, the argument for tariff protection even on a temporary basis was not favoured among classical economists, on the grounds that /

that protection would become permanent. They saw 'tariff protection not as an intelligent form of economic planning', but as contrary to free trade. Thus, the theoretical framework of the free trade approach prevailed.⁵

However, after the First World War, some modern trade theories developed. The general equilibrium theory, which is also variously termed as neo-classical theory or a factor proportions theory, assumes not a single factor of production (labour) but several others (labour, capital, land, enterprise) in combination, with emphasis on labour and capital. This theory has been developed by Heckscher and Ohlin and assumes, contrary to the classical theory, that all the production functions are similar in all countries.⁶ Heckscher and Ohlin, the initiators of this theory of international trade, considered the endowment of natural resources of a country as important but they considered that labour and capital were the most important factors. They also believed that each country should take advantage of its abundant factor. According to this theory, therefore, each country can specialise in the production of goods which require a large amount of its abundant factor whose costs are cheap, and export them against goods which require the factors of production which are more scarce and dearer. This is the so-called Heckscher-Ohlin theorem, which seems to be a revised model of the classical theory postulated by Adam Smith and his followers, with the only difference being that it involves more than one factor of production. Accordingly, each country should specialise in production of goods in which it has a comparative advantage.⁷

However, the Heckscher-Ohlin theorem has been called into question by a new theory postulated by Leontief for the USA, known as the Leontief Paradox. He follows the neo-classical theory and supports the view that the USA possesses a large amount of labour and a small amount of capital. He, in fact, relied upon the efficiency of its labour and concluded that USA labour is three times more efficient than any other foreign labour and thus the labour supply must be multiplied by three to give the true supply. After this consideration one can find the USA as a labour-abundant country and, therefore, observe that it is the skill (or the human capital) which plays a very important role for USA foreign trade. Nowadays /

Nowadays the importance of skill is a very decisive factor for the development of trade.⁸

This is well expressed in the product-cycle theory of international trade developed by Hirsch in 1967. This theory distinguishes three stages of demand for any one commodity. In the first stage demand is small and therefore production could not be large. A small amount of labour and capital is required. In the second stage, as demand increases more capital, skilled labour, better machinery and new techniques for large production become necessary, and in the third stage, as the demand increases even further product standardisation takes place and large amounts of capital and skilled, as well as unskilled labour, should be combined.

Increased demand for goods not produced at home and differences in prices of commodities are the principal factors that have led to the development of international trade. All the above described theories may also have contributed to some extent to this effect. Certain writers have attempted to explain how international trade works and how international trade based on the above theories has developed with the ultimate objective to increase benefits for the international community. It is, however, an extremely difficult task for the policy-maker to adopt the views of the economists and at the same time translate them into the normative rules which put into effect the theories, and furthermore make their application possible in legal practice. The classical theory of comparative advantage and specialisation as envisaged by Adam Smith, and further improved by David Ricardo and John Stuart Mill, is the theoretical framework on which international trade is based, in particular the GATT system which has as its foundation this approach. International and regional integration also has its foundation in this theory. In classical and modern economic theories of international trade the free-trade approach on which international trade should be based prevails. Therefore, these theories are favourable to the creation of regional arrangements, whose aim and objectives directed to the free movement of goods within the preference area, coincide with this theoretical framework. Regional arrangements provide the opportunity for the application at regional and in the long run international /

international level of the free trade doctrine. Reductions and elimination of duties and QRs within the preference area will contribute to the gains for the expansion of trade. In particular, customs unions provide greater opportunity for specialisation and increased trade as envisaged in economic theories and for increase in productivity in the trading region as a whole. GATT, which is based on the theoretical model advocated by free-trade thinkers, lays down the provisions for international and regional economic integration and the theory of comparative advantage as they are incorporated in Art. XXIV relating to regional arrangements, and Art. I relating to the Most Favoured National clause respectively. Increasing international trade and specialisation, as developed by regional economic arrangements such as the EEC is to be seen in this context, and their effects must be taken into account.⁹ Both economic theories and the law of GATT, although stemming from different perspectives, result in the same conclusion: the liberalisation of trade. GATT is an attempt to translate the technical and economic necessities in question into the language of normative rules which have a reasonable degree of predictability. In fact, the free trade principle was satisfactorily observed in the first years of the GATT's existence and free world trade developed further through Multilateral Trade Negotiations. Within this framework, the reduction or elimination of tariffs, quotas, subsidies, dumping measures, and other measures having restrictive trade effects, have contributed to the liberalisation of trade. Trade between DCs and LDCs is first and foremost based on the classical theory of comparative advantage and to some extent on the product cycle theory developed by Hirsch. It is regrettable, however, that in recent years the theory of comparative advantage tends to be forgotten. Lately controversy has arisen as to the applicability of classical theories of comparative advantage and free-trade to the developing countries. GATT, which is based on these theoretical models, has found it increasingly difficult to accommodate LDCs' needs and contribute to the solution of their problems. The arguments put forward after the First World War relating to the need for protectionism for infant industries have been taken up again and to some extent have been incorporated into Part IV of the GATT.

Barriers /

Barriers are increasingly erected along national lines as nations under various devices restrict imports and put controls on the flow of goods and on exchanges of technology. Nevertheless, it remains to be seen in this study as to what extent these theories are linked with practice and reality; i.e. to what extent lawyers and diplomats, who have drafted the GATT Agreement and the EEC Treaty, have taken into consideration these economic perspectives and have transformed them into legal rules.

History of GATT

When the International Trade Organisation (ITO), the so-called Havana Charter, failed to be established the General Agreement on Tariffs and Trade (GATT) emerged from within it, as the central instrument or framework in order to regulate world trade.

The GATT was, in fact, a copy of the ITO's Commercial Policy Chapter (Chapter IV) designed to liberalise tariffs, and it was to be eventually absorbed into the ITO when the latter would come into force. The rationale for the creation of the GATT into a separate agreement was that governments wanted to conduct negotiations before the establishment of the ITO and they felt the need for a trade agreement within which such negotiations would be conducted.¹⁰ The General Agreement on Tariffs and Trade (GATT) constituting the legal basis for free world trade, was drawn up by the same officials who drafted the ITO and on the USA initiative. It was adopted in Geneva on 30th October 1947 by twenty-three (23) governments and put into effect on 1st January 1948.¹¹

The USA did not want the establishment of an ITO for domestic policy reasons and "thereby named the G.A. as an agreement never thinking to give it an institutional frame".¹² Obviously the USA was not pleased with the existing trade system which relied upon bilateral trade agreements, and wanted a revision of this system. A more flexible multilateral trade agreement might serve better their commercial interests, especially after the collapse of the Bretton Woods Monetary Conference in 1944. Therefore, after the failure of an establishment of an ITO the GATT agreement came into being as Jackson says 'by default'.¹³

To achieve its objectives some revision of the G.A. had to be made to bring it into line with current world trade developments. In 1954-1955 delegates of the GATT contracting parties met in Geneva and agreed upon a revision of its terms with the view to accept it as a permanent body capable of regulating world trade relations. But this revision just added a few of the ITO provisions. No more obligations than tariff negotiations were included. Many aspects of international trade regulations were still left out of the scope /

scope of the GATT revision.¹⁴

Despite its shortcomings, the existence of the GATT is remarkable. Although the GATT agreement has never been formally ratified, it has in fact, been treated as an International Organisation and it is the only general world agreement ever achieved in this field.¹⁵ The GATT agreement has been provisionally applied through the protocol of provisional application since 1st January 1948.

Therefore, the GATT was to take the place of the non-existent ITO. Its importance grew rapidly in the 1960s and its membership greatly expanded with the influx of LDCs, so that it now includes over one hundred and eighteen (118) members, counting those countries which apply the G.A. on a de facto basis.¹⁶

The GATT covers trade relations of both DCs and LDCs. The latter constitute the majority of its membership. In theory GATT is controlled by a body composed of all its members, a majority of whom are third world states, but in practice the three big partners USA, EEC and Japan, are those which, in fact, control the GATT trading system and as a consequence GATT is mostly concerned with North-North trade problems.

North-South trade problems are not adequately treated by the GATT. In the 1964 GATT amendment, Part IV was added relating to "Trade and Development" problems of the LDCs. Its aim was to help LDCs cope with existing economic difficulties. But even so, this addition has not proved sufficient to provide the legal basis for eliminating disparities between North and South. The LDCs, through their active participation in MTNs conducted within the GATT framework, have contributed to some extent to the improvement of their trade relations. Efforts by the principal LDCs are being made towards the adoption of special conditions to meet their development, financial and trade needs in international fora, such as GATT, UNCTAD, IMF, et al.

A fundamentally important question to be considered relates to the legal status of GATT. What is the legal status of GATT in international /

international law? Is it a treaty? Does it have legally binding effects on the contracting parties? Does it codify customary law?.

The GATT, in order to qualify as an international treaty, should, according to the fundamental principle of treaty law (Art. 26 of the Vienna Convention of the Law of Treaties), have binding effects upon the parties and must be performed in good faith. But treaties such as GATT need to be ratified in order to create rights and obligations upon the contracting parties. Art. XXVI of the G.A. re. to acceptance, entry into force and registration, in paragraph 4 provides: "Each government accepting this agreement shall deposit an instrument of acceptance with the Director General to the CONTRACTING PARTIES, who will inform all interested governments". In the context of this Article and of a well established rule of international law, parties to agreements which they have not ratified in accordance with their domestic practices, are not bound by its rules. In view of these legal provisions the GATT, it can be argued, cannot be a legal instrument, because it has never been ratified by the contracting parties and therefore it cannot produce legally binding effects on them.

Nevertheless, the legal character of GATT has never been questioned. In fact, since the first days of the GATT's existence, the legal question never arose." This can obviously be explained because the GATT was intended to be a temporary agreement, designed to deal mainly with tariffs, and it would be replaced by the ITO soon after. In the light of these circumstances the GATT was never brought before any national parliament for approval. Yet, in no case has any government expressed any negative attitude against the GATT and its legal status. The contracting parties might have felt that there was no need to discuss legal problems since the GATT was only to last a short time. For the ITO, which was intended to be a permanent trade organisation, legal questions were of special importance. The refusal of the contracting parties and mainly that of the USA to ratify the Havana Charter led to the failure of the establishment of the international trade organisation, (ITO).

The fact, however, remains that the GATT agreement has in practice been treated as an international treaty having legally binding effects on the contracting parties. Although the GATT agreement /

agreement has never been ratified by the contracting parties it has been tacitly accepted by them and its rules have been put into practice for a number of years. In the light of this consideration we can conclude that the legal status of GATT is peculiar under the rules of international law. The customary law concept plays an important part in this issue. The fact that the GATT creates rights and obligations upon the contracting parties, rests upon customary law. Having regard to the fact that the GATT agreement has been tacitly accepted as the legal instrument to regulate tariffs and trade relations, and that it has been practiced continuously and generally without interruption, means that the process of creation of customary law has been accomplished. The GATT has therefore created law under the concept of customary international law. GATT can be considered as a law-making treaty; it established through the MTNs new rules, which regulate, and are to regulate, the future of international trade practices. It creates rights and obligations upon the contracting parties and also has an important effect on non-parties as well.¹⁷

Therefore, the GATT is not a legal instrument strictu sensu according to international law, but in practice it has been accepted as such by the international community. In fact, the GATT agreement itself constitutes a codification of some existing rules of customary law. For example, it incorporates the MFN principle, which was an accepted principle of international law contained in commercial agreements since the 12th century. Furthermore, it establishes through its practice customary international law on trade matters. This is in accordance with the rules of international law, which provide that in certain circumstances practices of states acting under the auspices of international institutions might contribute to the development of customary law. State practice within GATT shows some evidence that states act in the belief that they are bound by its rules.

As will be shown in the body of this thesis, the main weakness of GATT is that it does not provide for an effective dispute settlement system, enabling a progressive clarification and applicability of normative terms such as NTBs, which are but vaguely defined in the main body of the GATT text. Without this deficiency the argument for the overwhelmingly legal nature of GATT would have been much stronger.

The Institutional Structure of the GATT

As regards its institutional structure, GATT is a de facto if not a de jure international organisation dealing with commercial (tariff and trade) matters. It is named as an Agreement, particularly to meet the interests of the USA and comply with its domestic policy. The GATT has become the central international organisation governing trade and tariff relations, although it was to last "but for a few years time".¹⁸

The CONTRACTING PARTIES¹⁹ as a body is the principal organ and is the decision and policy making body. It may enter into consultation with any contracting parties concerned in a dispute, and if it finds any inconsistency with the G.A. it may ask for modifications. If damage to the trade of any contracting party has been caused, the CONTRACTING PARTIES make appropriate recommendations in order to secure conformity with the GATT provisions within a certain period of time.

The CONTRACTING PARTIES should act jointly on various matters. They have also the power to make interpretations of the G.A. that are binding on all members: e.g. according to Art. XXV:5 the CONTRACTING PARTIES "may waive an obligation imposed upon a contracting party by this Agreement", under certain conditions. A Council of Representatives of all contracting parties is an auxiliary body to the CONTRACTING PARTIES and helps the latter in performing its functions under the provisions of the GATT.²⁰ The "Consultative Group of 18" composed of representatives of eighteen members, established in 1975, meets once every three months with the responsibility of reviewing recent developments in trade policies and international trade.²¹

Moreover, the establishment of Committees in GATT has been considered very important. In the 1960 Session of the CONTRACTING PARTIES, several committees were appointed, notably on Industrial Products, on Trade and Development, on Balance of Payments Measures, on Agriculture, on Anti-Dumping Practices, and others. Inter-sessional committees were also established in order to deal with matters arising between the CONTRACTING PARTIES' sessions.²² Finally, the GATT is furnished with a Secretariat, although in the text of the G.A. there is no relevant provision. Very weak at the beginning /

beginning, due to historical factors, it was strengthened and enlarged during the Dillon and Kennedy Rounds.

The GATT text is composed of thirty-eight (38) Articles, divided into four parts. Part One (I) incorporates the first two Articles relating to the MFN clause. Part Two (II) contains the Commercial Policy provisions, which constitute the GATT's substantive Code of Good Behaviour in Trade Policy. Part Three (III) contains the procedural provisions and some substantive provisions, including the troublesome Art. XXIV. Finally Part Four (IV), added during the 1964 GATT amendment, is related to "Trade and Development" of the LDCs.²³

One of the most striking elements in the GATT and one of the most disputed areas in the conduct of world trade, is the incorporation within the G.A. of the regulation of Regional Economic Arrangements, provided for in Art. XXIV. In fact, when GATT was established in 1948, no regional arrangements were in existence apart from the customs regime between Germany and Austria,²⁴ the Benelux (Belgium, The Netherlands and Luxembourg) Customs Union, and a preferential arrangement between India and Pakistan.

Although no other regional arrangements had appeared in the interwar period, the idea of establishing such arrangements seems to have been cultivated in the minds of economists and politicians of that time. RAs, creating large markets, had been seen as steps towards free and non-discriminatory trade. The theory of comparative advantage and specialisation which implies closer collaboration among nations and unrestricted trade in larger markets, had been the seed for the later established regional arrangements. It was envisaged that free world trade could be better achieved not at international level at once, but through smaller economic groupings. The experience of the customs regime between Germany and Austria and the Benelux Customs Union, indicates that their trade creating effects would be deployed further. Specifically in the protocol signed in Vienna on March 19th, 1931, Austria and Germany agreed to enter into negotiations for a treaty to assimilate the tariff and economic policies of their respective countries. GATT Art. XXIV emerged from this background and had been seen by the GATT founders as an attempt to enhance the world trading system.

THE GATT MAIN PRINCIPLES

In the GATT legal system we can distinguish three important principles which underlie the whole structure of the Agreement:

1. The MFN clause, the most important non-discriminatory principle in the GATT,
2. The principle of reciprocity, and
3. The principle of universality.

The Most Favoured Nation (MFN) Principle

The concept of the Most Favoured Nation (MFN) treatment is not a new one. Its development goes back to the 12th century and appears often since then in bilateral trade agreements. Thereafter it has become a rule in world trade agreements and almost a necessary element contained in most world trade agreements of the 20th century.²⁵

As bilateral trade agreements passed to a wider multilateral concept, particularly after the Second World War, the MFN principle became even more significant. Its importance was recognised during the ITO preparatory negotiations, when it was proposed that the MFN clause be included in the charter as well as in the GATT Agreement.²⁶ Art. I of the GATT Agreement contains the major MFN commitment in GATT and it is considered to be the most important provision on which the GATT is based; the Most Favoured Nation clause constitutes the central principle of non-discrimination in GATT.

Art. I of the GA. describes the MFN principle as "... any advantage, favour, principle or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Under this clause "each member of the GATT is obliged to treat the other GATT members at least as well as it treats that country which receives its most favourable treatment with regard to imports or exports".²⁷ When, according to the MFN principle, the contracting parties decide to apply this standard to each other, they become at the same time granting and beneficiary /

beneficiary states. The MFN treatment by a GATT contracting party to any country must be granted to all GATT members and if granted in the context of MTNs to all participating countries, even to non-GATT contracting parties.

Several exceptions to the MFN clause are, however, provided and it can be said that the MFN principle is riddled with exceptions, the most important of which is found in the provisions of Art. XXIV relating to the formation of customs unions and free trade areas, which is considered the most troublesome exception to the GATT rules. Problems have arisen, for example, when the EEC was formed, based on a customs union and in the course of negotiations of the EEC's agreements with third countries. Also, preferences existing prior to the establishment of GATT between two or more territories are allowed under Art. I:2 to continue.²⁸ This preferential treatment is accorded to a certain category of countries, including the former dependent territories in their relations with their former colonial powers. The developed countries, in fact, wanted to preserve their preferences with their former dependent territories over which they exercised economic and political control. Some other exceptions are provided: e.g. in Art. XIV which allows discrimination in the application of QRs imposed for balance of payments reasons, Art. VI which permits the imposition of countervailing duties and Art. XXIII:2 which permits retaliation against a country which has nullified or impaired benefits under the G.A. As far as LDCs are concerned, they have obtained on several occasions exceptions from the MFN obligations. The MFN clause does not apply to most trade relations between developed and developing countries. In the G.A. in 1948 no special mention of differential and more favourable treatment to LDCs was made, but shortly after, need for such a treatment became inevitable. Thereby, Part IV of the G.A. was added in 1964 entitled 'Trade and Development' of the LDCs. It provided for differential treatment to be granted to LDCs and it envisaged that the MFN principle should not apply to certain types of international trade relations for a certain period of time. The particular problems of LDCs, i.e. lack of technology, skilled labour, export opportunity difficulties, were recognised, as well as the need for expanding their trade and accomplishing their development needs.

Apart /

Apart from exceptions provided for in the G.A. several others have been made possible during the Multilateral Trade Negotiations. The LDCs under various schemes have achieved exceptions from the MFN application, e.g. the 1971 GSP's waiver, permitting LDCs to deviate from MFN obligations in GATT and recently in 1980, the establishment of the GATT Enabling Clause, which entitles LDCs to differential and more favourable treatment. In fact, the MFN principle is weakened by an attempt in GATT to accommodate the interests of developed and developing countries alike. Nevertheless, in the context of MTNs major trading nations like the USA and the EEC have demanded a kind of reciprocity to be assumed by some LDCs, notably the NICs, whose level of economic development is advanced.

However, except for the MFN principle of non-discrimination among the GATT members, there are some other equivalent provisions envisaged in the G.A. notably Art. XVII:2, referring to state-trading enterprises. It states that "each contracting party shall accord to the trade of other contracting parties fair and equitable treatment", and Art. XIII, entitled 'Non-discriminatory administration of QRs', requires the application of the principle of non-discriminatory treatment.²⁹ But, according to those provisions, promising non-discrimination to the trade of the contracting parties is not meant to include necessarily all the advantages of the MFN clause.

The MFN clause's purpose is to establish equality among all the GATT parties. The ICJ, considering the principle of non-discrimination, held that "the intention of MFN clauses is to establish and to maintain at all times fundamental equality without discrimination among all countries concerned".³⁰

Comparing the MFN clause and the general principle of non-discrimination we can observe that the latter is much more general in character and governs the political, economic, cultural and other relations of states, whereas the MFN clause is attached solely to economic relations involving a contractual relationship. This means that states may grant and expect equal treatment in their international economic relations to and from their partners within a general non-discriminatory system. In the concept of MFN clause, because of its conventional character, more advantageous conditions can be claimed through bilateral, or more frequently now, multi-lateral trade negotiations.³¹

The /

The MFN clause is of special character and its significance and importance has been recognised as the fundamental basis on which international trade should be conducted. In some agreements there has been included a 'general clause' which stipulates MFN treatment in all matters relating to trade, navigation and all other economic relations. However, the MFN principle has currently been weakened to a great extent. It is designed to establish equality among the nations, but its application today, to States at differing levels of economic development, is an extremely complicated matter.

The Principle of Reciprocity

Reciprocity is the second most important principle envisaged in the G.A. It implies mutuality of gains in MTNs by providing equivalent concessions to the parties involved and, in fact, complements the MFN clause. It is nowhere explicitly defined in the G.A., although reference is made inter alia to 'compensatory adjustment or/to substantial equivalent concessions'. Reciprocity was a necessary element of USA bilateral trade policy during the 1930s. From this bilateral level and on the USA initiative it was introduced on a multilateral level in the G.A., and tariff negotiations were conducted on this basis in spite of difficulties in valuing and comparing tariff concessions.

As provided in Art. XXVIII (bis) 1 of the GATT, MTNs conducted "on a reciprocal and mutually advantageous basis are of great importance to the expansion of international trade". During the Dillon Round, however, the USA claimed to have succeeded in getting concessions from the EEC. In that these concessions exceeded those made by the USA to the tune of \$200m., in turn the EEC claimed that reciprocal concessions were almost equivalent.³² The USA administration uses reciprocity as an instrument to invoke the national interest when complaints from particular sectors are raised.³³ In the Kennedy Round when the system of linear-tariff cuts was introduced, reciprocity became even more important in the bargaining process.

In theory, reciprocity applies only to tariffs but not to QRs. QRs in general are prohibited by the G.A. save as otherwise provided /

provided - e.g. Art. XI for BOP reasons. In the GA, nevertheless, QRs are allowed in exceptional circumstances with the view to their elimination in a short period of time without reciprocal concessions. But, in practice, a decision has been taken that QRs and other NTBs be included in the reciprocal negotiations. The MFN is, however, the standard which is applied in negotiations on QRs.

Indeed, within the multilateral system, the request for reciprocity caused difficulties for the LDCs who wanted to protect their infant industries. A resolution, adopted at the GATT Committee III of May 6, 1964. meeting, made recommendations to the DCs not to expect reciprocity from the LDCs.³⁴ During the Kennedy Round the Ministers also agreed that in trade negotiations every effort shall be made to reduce barriers to exports of LDCs, but that DCs cannot expect reciprocity from the LDCs. To this end Part IV of the GA, added in the 1964 Amendment, provides for in Art. XXXVI:8 that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade by less developed contracting parties".³⁵

Therefore, the principle of non-reciprocity was established in GATT for the LDCs, although the attitude of the DCs has not been favourable. During the Tokyo Round Negotiations, the principle of non-reciprocity for the LDCs was reiterated, but DCs started to press the more advanced of the LDCs, notably the NICs to assume some kind of reciprocity. The former argued that the latter's economic position had improved and therefore negotiations should be conducted to some extent on a reciprocal basis. For example, the USA, as far as tropical products are concerned, made offers provided that the LDCs should make reciprocal concessions. However, Brazil and Argentina have already undertaken concrete steps in that direction. In contrast, the EEC had not immediately demanded reciprocal concessions.³⁶ According to the Tokyo Round Declaration, however, LDCs are not expected to make reciprocal concessions which are inconsistent with their development, financial and trade needs. In theory, the same principle of non-reciprocity for the LDCs was reiterated /

reiterated in the recent GATT Ministerial declaration, according to which the CONTRACTING PARTIES '... urge contracting parties to implement more effectively Part IV and the decision of 28 November 1979 (Tokyo Round) regarding "differential and more favourable treatment, reciprocity and fuller participation of developing countries"'.³⁷

This insistence of the NICs on non-reciprocity is, nevertheless, under question. There have been arguments that their refusal to accept reciprocity has led to increased protectionism in DCs and therefore it turns out to be more detrimental to the LDCs' economies, in particular to least developed countries. Certain NICs, like Hong Kong, S.Korea et al, should therefore make some reciprocal concessions with the view to a substantial liberalisation of LDCs' trade within the GATT framework.

The Principle of Universality

The GATT Agreement in principle accommodates the interests of both developed and less developed countries. It is addressed to all countries wishing to apply for membership, and it does not distinguish between the different groups of countries.

When the G.A. was drawn up in 1947 it was adopted by DCs and it has mainly been addressed to the DCs' trade problems. But, as the LDCs emerged gradually as competitors on the international trade scene, it was made necessary for their interests to be accommodated into the GATT. Therefore, the 1964 amendment was mainly included to meet this problem and Part IV of the G.A. was added entitled "Trade and Development" and designed to meet the trade and development needs of the LDCs.

Accession to GATT, therefore, is open to all countries wishing to join it. Accession can be effected :

1. by signing the original GATT Agreement in Geneva in Geneva in 1947, or
2. by following the procedure of Art. XXXIII. In this respect an application to the GATT Secretariat is enough to enable the interested party to join under certain conditions /

conditions provided for in this Article, or

3. by following the procedure of Art. XXVI:5 concerning the accession of the newly independent countries being under sponsorship for a certain period of time and being on a de facto basis parties to the agreement.

To date, the GATT Agreement has become almost universal. Parties to it include almost all the industrialised countries and most of the LDCs. It also incorporates most Socialist countries. From the Eastern European Bloc all countries, apart from the USSR, have joined. Czechoslovakia was the first to join and retained its membership since 1955. Bulgaria is the only one having an observer status. Cuba also is a GATT contracting party, while China remains still out of this framework.

NON-TARIFF BARRIERS TO TRADE

As the GATT Agreement was to be a Chapter of the ITO Charter (Chapter IV), it was designed to liberalise only commercial policy matters and in particular tariffs. In this respect, however, its operation has been quite successful. It is worth mentioning that after the Tokyo Round only textiles had tariffs which amounted to more than 10%, but other NTBs, such as quotas and several other devices designed to protect domestic industries, have increasingly taken the place of tariffs and constitute at the present the most serious obstacle to trade liberalisation. Therefore, NTBs as such should be considered in this study.

Quantitative Restrictions

Quantitative Restrictions (QRs) or quotas, are administrative measures which restrict primarily the importation of goods beyond some specified amount permitted, in respect of quantity or value, that is less than the free-trade quantity. QRs in contrast to tariffs have no long history. The problem of QRs came up in particular after the Second World War, when the post war economies felt the need to protect their domestic industries, to keep up employment, and to improve their balance of payments situation. The USA in general preferred tariffs to quotas for controlling imports. Its policy until the late 1970s was against the use of QRs. During the ITO preparatory negotiations and the early days of GATT, the USA opposed the application of QRs and any other measure having equivalent effect. Finally, it was accepted in the text of the GA, that QRs may continue to be used as long as they could be justified by balance of payments reasons.³⁸ Japan maintained QRs on balance of payments grounds which were partially removed in 1963, after extensive consultations with the IMF. The Japanese still maintain under various devices many NTBs for controlling their imports.³⁹ Japan is the only industrialised country which has imposed until now import restrictions on industrial products. Residual import restrictions imposed by other industrialised countries had ultimately been reduced by 1968 to a relatively small list of products, mostly agricultural.⁴⁰

It is regrettable, however, that after the USA monetary crisis /

crisis of 1971 and the oil embargo of 1973, NTBs and, in particular, QRs have increasingly been used by industrialised countries. A revival of various NTBs devices (eg. quotas) has greatly damaged free-world trade. An example of quotas is the establishment of VER Agreements, i.e. textiles, electronics, et al, whose proliferation creates serious obstacles to the free movement of goods. Quotas are applied by the EEC in its relations with both sets of countries - industrial and third world countries alike. (See Chapter 9, p.272)

VER Agreements are considered in the context of the GATT, as regards their contribution to the development of the EEC's trade relations with third countries. The legal aspects of NTBs are therefore discussed in this section as a necessary prerequisite for evaluation and better understanding of current world trade problems.

The GATT Approach to QRs.

The GATT Agreement in general prohibits the use of QRs as a barrier to free trade, with a few exceptions under special circumstances. This prohibition is indeed one of the GATT's greatest achievements. Arts. XI - XIV of the GATT are related to QRs. (See Appendix I.). Those four (4) Articles took up a very great part of the GATT negotiations and are the longest and more detailed set of GATT rules. Extensive discussions held especially during the London preparatory negotiations and the drafting of the Articles, led to the "London Compromise".⁴¹

Article XI, entitled "General elimination of QRs" is very broad, applying to all kinds of NTBs, including all kinds of industrial and agricultural products. It prohibits the use of quotas or any other measures having equivalent effect on the importation or exportation of goods. It however provides for a number of exceptions to the general requirement to eliminate QRs, with particular reference to paragraph 2 (c) relating to agricultural and fisheries products. This exception is of particular importance since trade in agricultural products is the most problematic area in international trade relations. Indeed, most of the QRs maintained by the DCs today are to be found in the agricultural sector, where the GATT rules are not very influential /

influential and its efforts to promote liberalisation have not been very successful. Another important exception relates to LDCs, who insisted on the maintenance of QRs for industrialisation purposes, and no serious attempt has been made to push them towards the abolition of QRs.⁴²

Nevertheless, Art. XII entitled "Restrictions to safeguard the balance of payments" is the most significant exception to Art. XI. It was especially designed and incorporated into GATT in order to help the post-war economies for a limited period of time to overcome their difficulties, and therefore it was not to be used after the Balance of Payments (BOP) crisis had passed. Recourse to Art. XII in the 1960s was not as frequent as in the 1950s. Thereafter, Japan was the only developed country which invoked Art. XII. This Article, however, could have been invoked in 1962 by Canada, in 1964 by the UK, in 1968 by France, in 1971 by the USA, but all these countries had found another solution by the imposition of surcharges rather than QRs.⁴³ The exception to the use of quotas is made quite clear in Art. XII:2(a)(i) and (ii), where "QRs are permitted if they are necessary to forestall a threat of or to stop a serious decline in its monetary reserves, and in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves". In theory it should be "an imminent threat" or "a serious decline to a country's monetary reserves" so that a contracting party may institute or maintain QRs and even in that case they "shall not exceed those necessary" and once imposed "shall be progressively relaxed as the conditions improve and be maintained only to the extent that the conditions ... still justify their application". (Art. XXI:(2)(a)(b)). QRs are also justified in order to help contracting parties to maintain or restore "equilibrium in their balance of payments". (Art. XII:(3)).

In fact, Art. XII reintroduces quotas for BOP reasons which are forbidden in general under Art. XI. Art. XII is an escape clause not only to Art. XI but also to Art. XIX. QRs on balance of payments grounds, as provided for in Articles XI - XIV may be imposed as long as the economic position of the country concerned justifies them, and as long as other international economic institutions, in particular the IMF, in relation to the GATT rules, allows their use.⁴⁴

As far as the LDCs are concerned, there is a special provision. Art. XVIII relating to governmental assistance for economic development, is equivalent and corresponding to Art. XII:2(a).

Art. XIII in connection with Art. XII permits the use of QRs, but it tries to ensure that those quotas must not be used in a discriminatory manner. It is related to global quotas which should be applied uniformly to all third countries and is one of the most important non-discriminatory principles embodied in the GATT. The MFN clause does not seem to cover adequately the problem of application of global quotas, and hence Art. XIII was especially drafted to deal exclusively with QRs.

The problem of QRs in GATT has recently led to talks on "negotiating QRs". Particular reference was made during the Dillon MTNs, to NTBs and more explicitly to the quotas provided for in Art. XI:2(c) relating to agricultural products. During the Kennedy Round some progress was made in this sector, but during the Tokyo Round MTNs a significant achievement towards the abolition of all NTBs, including quotas, was made. A number of Codes on NTBs were established, including industrial and agricultural products.⁴⁵ Moreover, during the GATT Ministerial Meeting in November, 1982, the CONTRACTING PARTIES decided on the establishment of a group in order to review existing QRs and other NTBs, to consider their conformity with the G.A., with a view to achieve elimination of QRs which are not in conformity with the G.A., or bring them into conformity. Also, to achieve progress in liberalising other QRs and NTBs, it was provided that special attention should be paid to the particular export interests of the LDCs.⁴⁶ As regards the latter the elimination of quotas would be a contributory factor to their development trade needs, although it is not the only way towards industrialisation and development.

OTHER NON-TARIFF BARRIERS

The substantial reduction of tariffs in international trade resulted in the increase of imports and, therefore to a large extent in the fulfillment of the aims and objectives of the G.A. Unfortunately as soon as that beneficial effect took place, various other measures in the form of non-tariff barriers emerged. During the Dillon Round particular reference was made to NTBs and since then NTBs have become the most controversial issue. As was the case with QRs during the Kennedy Round Negotiations some progress was made on this aspect: the Anti-Dumping Code was established.⁴⁷ During the Tokyo Round substantial progress towards the elimination of existing NTBs was achieved. A number of codes on NTBs were established dealing with Subsidies and Countervailing Duties,⁴⁸ Customs Valuation,⁴⁹ Import Licensing,⁴⁹ Technical Barriers to Trade⁵⁰ and Government Procurement⁵¹ aiming to supplement and clarify the operation of existing GATT provisions with the ultimate view to the elimination of barriers of international commerce.⁵² In the external trade relations of the European Community their subject matter has not given rise to controversies and their implementation has not been problematic.

These Codes/agreements and some other codes/agreements or arrangements are the product of the Tokyo Round multilateral trade consultations and negotiations, the only exception being the Anti-Dumping Code, which is the result of the Kennedy Round. They have been brought within the GATT framework. They are considered as constituting an extension and improvement of the system and they aim at strengthening the GATT. These Codes are rather an attempt to implement the GATT and the contracting parties accepting or acceding to them are subject to their provisions. According to the decision of 28th November 1979 (Tokyo Round) the contracting parties to GATT which have not accepted nor acceded to those agreements are not affected by their provisions. It was agreed that parties which have not signed the Codes would be able to participate in the Code Committees as observers.

It is important to note that the legal status of the Codes is not very clear. Do they have the same legal status as GATT? Do they have legally binding effects on the contracting parties? The Codes contain rules which rather indicate acceptance by signature or later accession /

accession, or at least by practice, i.e. the parties which have signed or acceded to the Codes act in a way as if they were bound by their provisions. These Codes are negotiated under the auspices of GATT and it would indicate that they represent an expression of a creation of customary law because the two criteria of practice would have been met, and that they create rights and obligations on the contracting parties which have accepted or acceded to them.

If they do not constitute legal rules in a strict sense, what are they? What is their legal content? One interpretation is that they fulfill an important function by pointing towards future meaningful developments, which may transform these codes into clear legal standards. At the present stage they induce (based on the consent of the interested parties) voluntary adherence to them, and therewith usefully serve the interests of international trade. Another interpretation may be sought in the explanation that these Codes constitute agreements by virtue of the signatures attached thereto independently of the classical or conventional requirement of ratification. Be that as it may, it should be added, however, that as long as they do not involve a binding procedure for the settlement of possible disputes they may be compared with the concept of lex imperfecta in civil law.

Special reference is only made to the Subsidies and Countervailing Duties Code because subsidies in exported products, especially in agricultural products, are held as having an adverse effect on the liberalisation of international trade.

Codes on Subsidies and Countervailing Duties

Although not in themselves illegal under the GATT rules subsidies on agricultural products cause distortion in international trade and contribute to the depression of world markets. Subsidised agricultural exports by the EEC have become a major area of friction between the EEC and third countries, in particular the USA.

Subsidies are an economic advantage granted to an industry by a government in the form of money, goods, services, relief from taxation or other charges, such as social security contributions in a way which go beyond a simple support for production or export, and therefore discriminate and distort trade.⁵³

No /

No comprehensive definition is possible. However, several attempts have been made to determine what measures constitute subsidies, particularly export subsidies. In Chapter IV of the ITO Charter (Commercial Policy) subsidies were regulated, although in the 1940s they were not seen as a major obstacle to trade and therefore the ITO provisions on subsidies are not very strict. The element of serious prejudice was considered. Export and production subsidies were distinguished and Art. 27 envisaged special treatment for primary products. Art. 28 provided that "no form of subsidy was to be applied which operated so as to maintain and acquire more than an equitable share of world trade in any commodity". Arts. 27 and 28 were actually transferred to the GATT Subsidies Art. XVI in 1948 and during the Review Session in 1955.⁵⁴

A panel in 1948 considered the matter. In 1960 also, a GATT Working Party drew up a list of practices considered to be export subsidies, but this list cannot be considered as exhaustive.⁵⁵ During the Kennedy Round the issue of subsidies and countervailing duties became more precise. A Working Party, established in 1967, continued to study subsidies and countervailing duties and this resulted during the Tokyo Round in the adoption of an agreement on interpretation and application of Arts. VI, XVI and XXII of the G.A., known as the Subsidies and Countervailing Duties Code, which entered into force on 1st January 1980.⁵⁶

Subsidy is a very complex issue and the subject of one of the most constant tensions in international trade relations. Subsidies are widely used by almost all countries, either to support production, or promote exports, especially in the present economic climate of slackening demand and high unemployment.⁵⁷

The consideration of what constitutes a subsidy and the criteria of a calculation of a subsidy and the determination of which subsidies distort trade is a very sensitive issue.

The question of what exactly constitutes a subsidy was one of the most crucial issues in the DISC (Domestic International Sales Corporation) case.⁵⁸ In this case, the EEC filed a complaint under Art. XXIII:2 of the GATT against the USA DISC tax practices, arguing that these tax practices were inconsistent with Art. XVI:4, prohibiting the grant of export subsidies and therefore that they constituted /

constituted export subsidies. The most controversial issue was whether this tax measure is a subsidy within the meaning of Art. XVI:4 of the G.A. The Panel which was established, based its findings on the 1960 GATT Working Parties' list of practices that were accordingly defined as subsidies, but in its Report it did not come to any clear conclusion about the issue concerned. Professor Jackson in an analysis of this case,⁵⁹ expresses the view that the "question of DISC tax practices being a subsidy is a very close one" and he further commented that "The Panel somewhat inconsistently and necessarily used some extraordinary broad language which, if utilised in future disputes, could carry the interpretation of 'subsidy' very far indeed".

At the same time parallel USA complaints against tax practices of France, Belgium and the Netherlands were brought before the GATT Panels, which found that the practices concerned were inconsistent with the prohibition on the use of export subsidies.⁶⁰ Disagreements on this matter between the EEC and the USA have not been resolved, despite the establishment of the Subsidies Code which deals with some of these fundamental issues.

It seems, however, that indecisiveness and inconclusiveness of the Panels is due to political influence rather than to jurisprudence or other reasons. Broad interpretation, as it is found in Panel Reports, appears to be damaging to the whole GATT System. Such a broad interpretation is an expression of the non-application of the law mixed up with a degree of political interference.

(a) Subsidies as provided in the GATT.

Art. XVI of the G.A. regulates the operation of subsidies. Section A, Subsidies in general, provides no general prohibition of production subsidies, but an obligation to limit subsidies when there has been a serious prejudice to another party. Accordingly, if a contracting party maintains "any form of income or price support which operates directly or indirectly as to increase exports ... or reduce imports it shall notify (it) to the CONTRACTING PARTIES". Moreover, "in any case in which it is determined that serious prejudice to the interests of any contracting party is caused or threatened by any such subsidisation, the contracting party shall discuss with the other contracting party or parties or with the CONTRACTING PARTIES, the possibility of limiting the subsidisation".

Therefore /

Therefore, production subsidies in general are not prohibited while, on the other hand, they must not be used to cause injury to other countries and distort world trade. In 1978 during the Tokyo Round a compromise formula regarding production subsidies was reached, and it was recognised that certain practices may have adverse effects.⁶¹

Section B of Art. XVI of the G.A. added in the 1955 Review Session, exclusively deals with export subsidies. It absolutely prohibits the grant of export subsidies in industrial products. Primary products, e.g. farm, forest and fishery products, are differentiated and export subsidies on those goods are permitted. Paragraph 3 provides that "contracting parties should seek to avoid the use of subsidies on the export of primary products" and in any case "such subsidy shall not be applied in a manner which results in ... having more than an equitable share of world export trade in that product account being taken of the shares of the contracting parties, during the previous representative period".

The definition of a primary product is a crucial question. Primary products are considered those of farm, forest, fishery (minerals and now excluded). But what about processed primary products? Are cotton textiles a primary or an industrial product? A primary product is understood to undergo only "such a processing as is customarily required to prepare it for marketing in substantial volume in international trade".⁶² Is therefore, wheat flour according to this definition a primary product? A very recent dispute between EEC and the USA over USA subsidised sales of wheat flour to Egypt raised this question. (This case is later discussed in Chapter 6, p.191).

However, according to Art. XVI, paragraph 3, export subsidies on primary products are permitted as long as they do not take more than an equitable share of the world export trade in that product based on the previous representative period, which is deemed to be the last three years. The phrase "more than an equitable share" raises a most crucial interpretative problem. What is equitable? Can it be considered as equivalent to fair? Who has the authority to determine that question?

A Working Party in the 1955 Review Session produced some recommendations adopted in the form of interpretative notes to Art. XVI:3.⁶³ Several Panels have studied the problem to discover and evaluate /

evaluate these difficulties. Their Reports are the only source for guidance in answering this question. In 1958 a Panel on Subsidies commenting on Art. XVI as a whole, referred in particular to the difficulty of assessing and measuring the effect of subsidies. This Panel noted that statistical measures are insufficient to define the concept "equitable share in world markets", although shortly after in 1960 a Panel suggested that statistics "may assist in determining the effects of a subsidy and make one element in determining the 'equitable share'".⁶⁴ The 1958 Panel considered an Australian complaint against French subsidised wheat and wheat flour sales under Art. XVI:3 of GATT, according to which France had displaced Australia from its traditional markets in South East Asia and impaired its benefits under the terms of the G.A. The crucial question was whether the French assistance on exports involved a subsidy within the meaning of Art. XVI:3. France drew attention to an interpretative note incorporated in Art. XVI:3 which recognises that in certain circumstances a system for stabilisation of domestic prices would not be considered as a subsidy on exports and went on to argue that the assistance to its exports fell within this meaning. The Panel concluded that although the French system had contributed to a large extent to the increase in France's exports and the present share was more than equitable, and that it had caused injury to Australia's interest, yet it could not define that system as representing export subsidies within the meaning of Art. XVI:3 of the G.A. At the same time, however, the Panel pointed out the need for intergovernmental consultation and the necessity for some arrangements so as to take into account the interests of traditional suppliers.⁶⁵

Other Panels on Australian and Brazilian complaints against the European Community Sugar Refunds under Art. XVI:3, found that they were "not in a position to reach a definite conclusion" about the criterion of "more than equitable share in world export markets", although the European Community's Sugar Export Share had considerably increased, particularly in 1978 and 1979 compared with the previous representative period Australia's share, and even more that of Brazil, had decreased.⁶⁶

From the above discussion on the definition of subsidies and the consideration of the concept "more than equitable share in world markets /

markets" it is clear that there have not been developed so far uniform acceptable solutions and interpretative problems exist in almost every case. The Panels considering the particular cases have not reached any definite conclusions. Although Art. XVI:3 explicitly allows the use of subsidies on primary products, the following paragraph 4 of this Article absolutely prohibits export subsidies on other than primary products from 1st January, 1958. It is explicitly provided that "contracting parties shall cease to grant any form of subsidy on the export of any product other than a primary product which subsidy results for export at a price lower than the comparable price charged in the domestic market".

Therefore, according to Art. XVI:4 relating to non-primary products barriers to trade should be eliminated. It was agreed by the contracting parties not to introduce new export subsidies in parallel with an effort to eliminate eventually all existing export subsidies. Until 31st December 1957 a standstill was agreed on the 'introduction of new or the extension of existing subsidies'. This effort was not successful, however, but no further action was necessary as the O.E.E.C. succeeded in abolishing export subsidies among its members under its liberalisation programme.⁶⁷

Under this programme and after the European currencies had improved their position, export subsidies on non-primary products were gradually eliminated. As the O.E.E.C. became O.E.C.D. and the development function was added to its tasks in addition to co-operation, the GATT took on new importance. A Review of the use of subsidies was held in 1960 and a form of declaration was drawn up by the contracting parties.⁶⁸ Thereafter only DCs accepted the declaration, which had binding effects on their future conduct. The LDCs were not signatories to the declaration and therefore were free to use export subsidies on industrial products. It was the first time that LDCs were treated differently. The LDCs are free to subsidise their exports and they are unlikely voluntarily to change their practices, unless there are special provisions for their economic and development needs.⁶⁹ With respect to primary products LDCs should comply with the obligation expressed in paragraph 3 of GATT Art. XVI.⁷⁰

Where, /

Where, however, an export subsidy on industrial products causes serious prejudice to the trade of another signatory, the matter shall be referred to the Committee. This procedure can be avoided if an LDC enters into commitment to reduce or eliminate export subsidies when they are inconsistent with its competitive or development needs.⁷¹ (Special reference to LDCs' problems is later made in this chapter, p. 54.).

(b) Subsidies as provided in the Subsidies Code.

Two important questions can be put under the Subsidies Code.

1) Does it represent an improvement of Art. XVI of the GA, and 2) Does it provide an adequate mechanism to deal with subsidies to relieve real economic consequences of unfair export subsidies?

Art. 10:1 of the Subsidies Code reproduces Art. XVI:3 of the G.A. retaining the concept of 'more than equitable share in world export markets' as a measure of obligation, but this concept is given greater precision. According to the Code Art. 10:1 "(equitable share) includes any case in which the effect of an export subsidy is to displace the exports of another signatory bearing in mind the developments in world markets", (Art. 10:2a) (Reference to Australian/Brazilian case is made later in Chapter 6, p.188). Art. 10:3 continues with the addition that signatories to a particular code shall not grant any form of subsidy which operates to increase the export of any primary product in a manner which results in prices 'materially' below those of other suppliers in the same market. This is an innovation and an attempt to improve Art. XVI:3. Subsidies on primary products under these circumstances are therefore prohibited. Production subsidies for promoting social and economic policies are permissible and export subsidies are generally prohibited according to the above-mentioned provisions for primary products.⁷²

The Code represents a slight improvement on earlier GATT definitions. It clarifies general subsidies and there is, in addition, a list of governmental actions which are deemed to be export subsidies, but it has not removed the difficulties in the interpretation of "equitable share". It recognises the need for special and differential treatment to LDCs and the possibility for LDCs to use export subsidies for both industrial and primary products. Despite this, LDCs have criticised /

criticised the Code as falling short on many of the important issues, especially because it fails to impose an obligation on DCs to refrain from subsidising exports when directed to LDCs' markets. Moreover, LDCs argue that the Code fails to discipline DCs by allowing subsidies to those agricultural products which are also produced in LDCs, and which products provide LDCs with substantial export earnings. From the LDCs' point of view, therefore, the Code provides no substantial improvement.⁷³

As a consequence of intense negotiations between the EEC and the USA, the latter has now accepted for the first time an internationally agreed discipline on subsidies, that is the concept of injury. The USA has to comply with the requirement of injury before imposing countervailing duties, whereas before, under the USA law, the criterion of injury was not a prerequisite.⁷⁴

How effective the Code could be is an open question. It is not as detailed as necessary to deal with domestic aids which are directed to increasing exports. Subsidies are now used in the same way as tariffs and other restrictive practices which the GATT was established to reduce. If the Subsidies Code does not prove able to reduce the use of public subsidies, other means will be needed to achieve that objective.⁷⁵

As far as the EEC is concerned, intra-community barriers should have been eliminated according to EEC Arts. 30-36.⁷⁶ In the external sphere the provisions of the G.A. in relation to the EEC Common Commercial Policy are applied. (The direct effects of the latter provisions are discussed in detail in the next chapter, p.86.). The Code on Subsidies and Countervailing Duties and the Anti-Dumping Code are implemented in the EEC by Council Regulation 3017/79, as amended by Regulation 1580/82 and in the ECSC by Commission Recommendation 3018/79 as amended by Recommendation 1955/82.⁷⁷ Both these legal instruments, concerning protection against dumped or subsidised imports from countries not members of the EEC, came into force on 1st January 1980. They contain similar provisions and are directly applicable in the member states which shall inform the Commission about dumped or subsidised imports. The Commission in turn shall communicate such information to the other member states. The Commission of the European Communities is responsible for the application /

application of the anti-dumping and countervailing duty law. It receives all subsidy and anti-dumping duty complaints, and investigates them in assistance with an anti-dumping unit whenever necessary. Under the Rome Treaty, the Commission undertakes all countervailing and anti-dumping duty negotiation, but it has no legislative power. It is the Council of Ministers which has such authority. Under the Paris Treaty establishing the ECSC, the Commission receives complaints, proceeds with investigation and has the decision-making power. Assisted by an Advisory Committee, the Commission makes recommendations for action to be taken.⁷⁸

Apart from export subsidies which are largely treated, production subsidies are not correspondingly discussed, for it is believed that they are not distortive of trade. Most discussions in the international fora are devoted to export subsidies, with reference to their effects in causing distortion in world trade relations. As regards production subsidies, there is no general prohibition, provided either in Art. XVI of the G.A. or in the Subsidies and Countervailing Duties Code. The Rome Treaty as well does not explicitly treat this issue with regard to its external relations. Nevertheless, production subsidies should be given greater attention to the extent that, although granted for social and economic policy objectives, they usually result in over-production and, consequently, can lead to distortive effects on trade. Production subsidies amount to the same results as export subsidies. They can have, indirectly, equivalent effects to export subsidies and therefore the issue of the former appears to be very sensitive and some kind of control over production subsidies should be carefully considered. As far as the countervailing duties are concerned, they are a counterpart to the anti-dumping duties which are levied in respect to low-priced goods. Countervailing duties can be levied when subsidies result in material injury in the importing country. That country can only impose countervailing duties when the material injury has occurred in a particular sector of the economy

THE CONSULTATION PROCEDURE

The Consultation procedure provided for in Arts. XXII and XXIII:1 is an important element of the GATT Agreement and the first step for the resolution of disputes. Arts. XXII and XXIII:1 constitute basic GATT procedures and should therefore be analysed with the ultimate objective of the evaluation and better understanding of problems concerning the settlement of disputes in international trade relations.

Despite the fact that in the Geneva draft of the ITO, four Articles were incorporated, one concerning the consultation procedure and the remaining three the nullification and dispute resolution, only the first Article was incorporated into the G.A.⁷⁹ Then over the years the Western nations felt a growing need to co-operate and consult each other in international economic problems. The habit of international consultation was indeed very well established by the early 1960s, especially in emergency situations. Consultation over a large number of economic problems became necessary. In fact, consultations should take place as frequently as possible and as a necessary prerequisite for the settlement of disputes.

Within the GATT framework and during the MTNs, where customs duties have been eliminated in world trade, the principal accomplishment has been the establishment of a forum for continuing consultation. Even hard disputes have been resolved after consultations have taken place.⁸⁰

Art. XXII:1 states that "each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation with respect to any matter affecting the operation of this agreement" and, in paragraph 2, "...the CONTRACTING PARTIES may ... consult with any contracting party or contracting parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation ...". This procedure is of particular importance to the small countries because they can ask to consult and they can be consulted as well.⁸¹

Therefore, when a dispute between two contracting parties to GATT arises, the first thing the disputants are obliged to do is to conduct bilateral consultations.⁸² If the matter is not settled after the bilateral consultations have been exhausted, the matter is brought before /

before the CONTRACTING PARTIES acting jointly to settle the case by multilateral consultations.⁸³ The procedure adopted by the CONTRACTING PARTIES on 10th November 1958⁸⁴ for the resolution of disputes by consultations is described in the GATT Basic Instruments and Selected Documents. (7 Supplement p. 24)

However, apart from Arts. XXII and XXIII:1 (Consultations under the latter - see hereinafter in the Disputes Procedure Section), there are several other clauses in the GATT relating to this procedure.⁸⁵

In the case of the EEC, consultations are conducted by the EEC Commission, which has in fact replaced the member states and represents them in international trade negotiations in particular within the GATT framework. Although the member states are also present in the negotiations, exercising voting power, the EEC Commission has been tacitly accepted since the Dillon Round as the legitimate representative of the member states in GATT. (Further details about the EEC's power to enter into international agreements are discussed hereinafter in chapter 3).

THE DISPUTES PROCEDURE

Nowhere in the G.A. has there been laid down explicit and detailed rules concerning the settlement of disputes ⁸⁶ except for Arts. XXII and XXIII copied from the ITO Charter. A proposal for submission of disputes to the jurisdiction of the International Court of Justice (ICJ) was not accepted. Likewise there is no mention of any equivalent provision establishing a GATT Court for resolving disputes or interpreting relevant questions. The CONTRACTING PARTIES acting jointly is the main GATT Institution from a juridical point of view.

Arts. XXII and XXIII, therefore, comprise the main dispute clauses in the G.A. These two Articles are the principal ones for the settlement of disputes and they provide the procedure which is to be followed whenever a dispute arises. ⁸⁷ Inter-related provisions concerning retaliation are found in Arts. XII:4(c) and XVIII:2(c).

The procedure of the dispute settlement is as follows :

The first step is bilateral private consultations between the parties concerned. If they have been unsuccessful then multilateral consultation procedure within the GATT framework is used, under Art. XXII, or under Art. XXIII:1, when there is nullification or impairment of benefits. Subsequently, if the multilateral consultation has failed to bring a dispute to an end, a Panel or a Working Party is set up to consider the matter. ⁸⁸ Throughout the Panel or the Working Party procedure, an attempt is made to resolve the dispute by conciliation and where there is a clear violation of the GATT rules to obtain a withdrawal of the disputed actions; then the Panel or the Working Party Reports are submitted to the CONTRACTING PARTIES acting jointly. Before the case is referred to the CONTRACTING PARTIES, the Director General of the GATT is often asked to act as a mediator or conciliator in the disputes after consultations have not been successful. The CONTRACTING PARTIES have jurisdiction 'over the final disposition of the dispute procedure'. ⁸⁹ The CONTRACTING PARTIES acting jointly in the first instance may make recommendations or give a ruling. If these measures are not followed they "may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this agreement as they determine to be appropriate in the circumstances". (Art. XXIII:2)

It is evident, however, that the suspension is ineffective when it is applied by a small nation against a large nation whose volume of exports to the small country are negligible. ⁹⁰ The suspension as a threat /

threat is often ignored by a large nation and as a sanction does not really work. Finally, Art. XXIII:2 authorises official retaliation and withdrawal from the G.A. as the ultimate sanctions. Under this clause if the application of any concession or other obligation is, in fact, suspended the contracting party shall be free to withdraw exclusively from the G.A. after written notice to the Executive Secretary.⁹¹ Art. XXIII does not move, however, towards a more powerful sanction. The measure which the CONTRACTING PARTIES should take is to authorise a large number of contracting parties to suspend concession towards an offending party, but this sanction is very weak. As Dam says "The CONTRACTING PARTIES have manifested a great reluctance to authorise the retaliation that constitutes the heart of the GATT enforcement".⁹²

However, no other sanction is imposed on a contracting party violating the GATT rules or acting inconsistently with those rules. In order to invoke Art. XXIII there is no need for any breach of the G.A. It is enough if the benefits of any contracting party are being nullified or impaired as a result of the application of any contracting party's measure when certain conditions are met, even though no other party is responsible for this injury. Moreover, if a contracting party violates its obligations under the GATT rules, and this results in the nullification or impairment of benefits of another contracting party, this is called "prima facie nullification or impairment" of benefits requiring counter-evidence.⁹³

Presently there is no direct appeal according to Art. XXIII by individuals. A private person can usually only make a complaint to GATT through his government.

Nevertheless, the waiver exception provided for in Art. XXV:5 constitutes a very important mechanism in GATT for the settlement of disputes.⁹⁴ Waivers are measures which constitute exceptions to the GATT obligations granted by two-thirds of the contracting parties. They legalise particular restrictions which otherwise would be illegal. Waivers are mechanisms which not only help avoid disputes, but also help settle existing ones and prevent them from being raised in the future.⁹⁵ Moreover, it is worth mentioning here some of the most important disputes which have been raised in GATT throughout its existence. In the first two decades (1948-1968) about sixty (60) cases were brought against contracting parties to GATT with reference to Arts. XXII and /

and XXIII. The majority of them are complaints alleging some violations of the GATT obligations⁹⁶ and on various matters. Clearly the 1952-58 period provided the highest number of disputes. After that there was a decline in the volume of disputes, partly due to an improvement in world trading conditions. During the interim period between the Dillon and Kennedy Rounds four cases were brought by the USA and one by Uruguay which actually constituted fifteen (15) separate complaints against fifteen developed countries.⁹⁷ Half of the complaints brought before the GATT during this period, resulted in the settlement of disputes by agreement. Only one, the Netherlands' complaint against the USA resulted in retaliation by suspending concessions.⁹⁸

The decline of disputes between the contracting parties to GATT in the 1960s gave the hope that the disputes would be resolved between the disputants through conciliation.⁹⁹ But this was not proved true. The 1970-1975 period was characterised by a revival of disputes. Thirteen (13) complaints were initiated. Eleven of them were brought by the USA which seems to have at that time lost some of its power.¹⁰⁰ The USA threatened to withdraw from the GATT entirely and declared to some extent a 'trade war' against the other GATT parties, particularly against the EEC member states. It became evident meanwhile that the GATT's legal system was unable to cope with major world trade problems.

During the 1975-1980 period not many disputes were brought to GATT. The characteristic feature of this period is that most complaints have been raised against the EEC's agricultural policies. Most of them (six out of ten) after consultation between the disputants arrived at a bilateral solution and terminated any procedure being raised under Art. XXIII of the G.A. Nevertheless, four out of the six can be defined as complaints brought against the EEC's policies.¹⁰¹

Finally, during the 1980-present period there is a revival of complaints brought to GATT. The EEC's CAP is again the centre of the complaints, mainly brought by the USA against the EEC Agricultural Policy.

An examination of these last two periods of the evolution of the GATT dispute settlement procedure, and generally of the GATT system overall make it quite obvious that the EEC and the USA are the principal nations dominating GATT affairs. Their movements greatly influence the world trading system. (The particular disputes are examined in depth later in Chapter 6, pp. 183, 187).

The EEC's existence, however, has had an impact on the GATT legal system, and especially on that of the settlement of disputes. Even its establishment as a customs union had raised legal problems and its compatibility with the GATT System is not yet definitely settled. Subsequently the EEC and the USA have become the central partners in disputes. It is not absolutely clear if the individual EEC member states would have been involved in so many disputes within the GATT system, but it is rather easier to conclude that the EEC as a bloc has had an impact on the increased number of disputes within the GATT. In particular its protectionist measures for the controversial CAP has led to a largely increased number of disputes involving the EEC and third countries, mainly the industrialised countries.

CRITIQUE AND EVALUATION OF THE GATT DISPUTES PROCEDURE:
PROPOSALS FOR REFORM.

It is increasingly evident that the GATT does not work satisfactorily. In the current economic climate constraints in trade relations have developed and disputes have arisen between DCs on the one hand and DCs and LDCs on the other. Above all between the USA and the EEC serious frictions are now more frequent than ever. They concern in particular trade in agricultural products which are not treated in the G.A. in the same way as industrial products.

The GATT has not proved successful in accommodating the interests of the DCs and especially the interests of the developing world. Its rules, obsolescent and increasingly ineffective, need some kind of reform. An overall reform would be greatly desirable: however, this is not feasible at the present. Therefore improvements to the GATT system should be done on a small scale. Several areas in the GATT legal system need attention - e.g. institutional weaknesses, QRs, but above all special attention should be paid to the GATT dispute settlement procedure. There is no doubt that there has been widespread consideration for the need for the reform of the latter.

Historically, the dispute settlement procedure was based on the idea that the GATT might discuss trade problems in their early stages and thereafter, these problems would be dealt under the procedure which was envisaged in the ITO charter. Due to these reasons Arts. XXII and XXIII appear to be weak and unable to deal with the current world trade problems. Over the first two decades of the GATT's existence, economic problems were not so pressing and enabled governments to co-operate at a satisfactory level. However, under the current economic circumstances, and the tendency towards protectionist measures, the institutional weakness of the GATT System, and especially the dispute settlement machinery, has become evident. The parties to the GATT seem reluctant to co-operate and they devise techniques in order to protect their domestic markets from foreign competition. Departures from the rules then is not an exception.

Therefore, there has been growing criticism of the ineffectiveness of the GATT System and the inadequacy of its dispute settlement machinery, in particular that of the Panels or Working Parties. Severe criticism /

criticism has come from the USA, especially during the adoption of legislation and, in particular, of the Trade Act of 1974, when criticism was expressed in Congress over the GATT law and its procedures. It proposed revision of the overall System of GATT with particular reference to the dispute settlement mechanism. The criticism sought revision of the GATT System in order to bring it into line with present economic circumstances.

However, there are many obstacles in the reform of the dispute settlement system. The world-wide membership of GATT is one of them, thereby the required unanimity is impossible to achieve. Furthermore, the USA believes, as Professor Jackson says, that the EEC has been among the more difficult obstacles to the potentiality of reform of the GATT Institutional System.¹⁰² In fact, the EEC combined with the Associated Countries is a strong force against USA interests in trade negotiations.

A great difficulty in resolving disputes rests also with the Panels which have not sufficiently developed. That is, the machinery for resolving disputes is rather ineffective. The Panel members are in principle independent of their governments and are supposed to be impartial, but in practice, they cannot act independently from their government's policy. They are persons residing in Geneva and therefore known to each other. Diplomatic pressure and influence is always present. As Jackson says, when considering the DISC case "the political forces (involved) are inappropriate as an adjudicatory procedure that needs to develop confidence and trust".¹⁰³ Panels have been proved inadequate to bring a dispute to an end. They mostly play the role of conciliators and frequently refer the case to the CONTRACTING PARTIES for further consideration. Lack of confidence in the Panels and the inadequacy of enforcement of their recommendations or findings is customary. There is no doubt that the GATT System needs improvement which can be achieved by reference to the rules of law rather than to political or economic factors. Professor Jackson supports the view that the most important of all is trust and confidence in the System. He believes that sanctions are inappropriate at this stage and not welcome by the contracting parties. He acknowledges the inadequacy of the Panels and further argues that the establishment of a permanent "cadre of international civil servants" would help the System improve as a system of conciliation or adjudication. He proposes settlement of disputes by negotiation and agreement. He makes a concrete proposal for resolution of trade and economic disputes, and suggests that if /

if consultations have been unsuccessful, any member feeling unsatisfied may address a request for mediation assistance to the Director General of GATT who may offer mediation services if he deems it appropriate. He would make concrete proposals for improvement of the system even before a Panel or a Working Party is initiated.¹⁰⁴ Professor Dam, too, expresses a more or less similar point of view as regards the role which the Director General can play. He argues that information should be provided to Panels or Working Parties either by certain contracting parties or by the Director General himself, who may be in charge of preparing a Report and who can require the contracting parties to provide him with relevant information. The role which the Director General is called on to play is very important indeed in the improvement of the dispute settlement system. Therefore, advantage of this opportunity should be taken, given that he is in a more privileged position than Panels or Working Parties. He has trained personnel, staff and so on, at his disposal and can properly investigate the matter and reach a quick and concrete conclusion.¹⁰⁵

The role of the Director General as a mediator or conciliator is favoured by many contracting parties and has been put forward on several occasions.¹⁰⁶

In this context proposals for improvement and amendment have been made during the Tokyo Round. A Canadian proposal stresses the importance of Panels as being the most appropriate and major dispute settlement body. The EEC proposed that disputes should be settled by diplomatic arrangement rather than quasi-judicial determination. The GATT Secretariat proposed that customary practice and an understanding on dispute settlement elaborated upon the customary practice should not be negligible in the dispute settlement procedure. Within the 'Framework Group' proposals have also been made, stressing compulsory consultations.¹⁰⁷

A Brazilian proposal pointed out the inadequacy of the GATT system to accommodate the interests of the LDCs and the ineffectiveness of Part IV of the G.A. In the context of differential and non-reciprocal treatment of the LDCs' trade, discussed during the Tokyo Round, the Brazilian Government considered that certain very specific exceptions should be added to those already existing, in favour of the LDCs, e.g., a provision of a standing legal basis with greater security for the /

the GSP while it could maintain its present non-discriminatory and non-reciprocal nature and a provision in the GATT to enable a DC to negotiate a "preferential" concession with the LDCs in the same way as they are negotiated under MFN rules. It generally points out that the power-orientated GATT system might be changed to a more rule-orientated system for the benefit of the weak.¹⁰⁸ The need for an effective dispute settlement and enforcement (binding) mechanism is everywhere recognised, but none of these proposals have been accepted. There should be no illusions whatsoever, that a unanimous acceptance is possible. In this respect it has been proposed that a separate protocol of the dispute procedure should be established and applied to the signatories, with the hope that a great number of countries would subscribe. Radical changes are unacceptable. Small-scale reform, as most authors suggest,¹⁰⁹ in the improvement of the system, is the most appropriate.

There is no doubt that considerable improvement of the GATT legal system has been achieved by the negotiation and adoption of codes in the course of MTNs. As far as the dispute settlement procedure itself is concerned, no corresponding code has been established, but several norms and techniques for resolving disputes have been developing over the major tariff and trade liberalisation rounds. Nevertheless, there has been growing support for the establishment of a dispute settlement code. A panel of the American Society of International Law, contemplating the adoption of several codes, suggests that a uniform procedure be established in resolving disputes. Also, it has been suggested that there be established a separate and independent dispute settlement mechanism for each of the various agreements (Codes). Already in the Subsidies Code, and in the Code on Government Procurement, separate dispute settlement machinery has been established. This has been a decisive step towards the improvement of the settlement of disputes.

Therefore, a permanent body, constituted of independent experts known for their abilities and experience in international trade relations assisted by Panels or Working Parties, should be established for resolving disputes. That is, a decision-making body should be established, whose decision should have legally binding effects as well as an adequate machinery for enforcement of the findings or recommendations, or preferably decisions, of the appropriate bodies. It is believed that sanctions /

sanctions at international level are not appropriate, but nevertheless, at international economic level some strong kind of enforcement should be established so as to strengthen and improve the system and so as not to leave it to the discretion of the contracting parties. The practice so far has demonstrated that retaliation is absolutely ineffective and therefore another stronger form of sanctions is required. Retaliation is useless if taken by small contracting parties. In that respect LDCs should be given special attention. They should subscribe to the codes and participate fully and effectively in the dispute settlement and surveillance procedures.

In the GATT Ministerial Declaration of November 1982, a little progress was made in the improvement of the system. Although in principle, willingness of the contracting parties for amendment is apparent, in practice no effective measures have been taken for resolution of disputes. It is encouraging, however, that the good offices of the Director General are recognised although no formal agreement for consultation has been reached.

DEVELOPING COUNTRIES AND THE GATT

The GATT system in principle accommodates both developed and developing countries' trade, primarily that relating to industrial products. Agricultural products are included in this system, but they are not actually regulated the same way as industrial products. The liberalisation process, however, is, in practice, almost exclusively limited to DCs' trade which export the bulk of the industrial products.

The legal position of LDCs in the GATT is very important, and many legal issues are raised.¹¹⁰ Does the MFN clause of equal treatment apply or are different levels of economic development to be taken into account? Does the GATT sufficiently accommodate the interests and needs of the LDCs? Is the GATT able to offer a greater number of benefits to LDCs?

The existing legal and economic order based on the principles of equality, non-discriminatory treatment and reciprocity, has become insufficient to accommodate the interests of the LDCs. As a result of the original system the gap in economic development between DCs and LDCs has widened. LDCs felt that they are exposed to discrimination within the existing economic system and the rules governing international trade. The legal framework centred around GATT has not been on the whole beneficial to LDCs. The liberalisation process was especially directed to industrial products of interest to DCs. Products on which the LDCs had a comparative advantage have not been liberalised or have been later subjected to several restrictions, i.e. textiles subject to quotas. Also, the existing protectionism in agricultural products is harmful to LDCs' export opportunities.

In fact, since the establishment of the GATT, efforts have been made so that more favourable treatment be accorded to LDCs. Art. XVIII relating to trade problems in LDCs provides them with rights and privileges. The Heberler Report in 1958 entitled "Trends in International Trade" pointed out the need for export growth in LDCs and that tariffs and other barriers raised by DCs were detrimental to trade in which LDCs had a special interest.¹¹¹

The culmination of these efforts was the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1964,¹¹² because LDCs felt that GATT was not the appropriate forum for them to get the desired modifications in the international trade system. In some /

some ways departure from the MFN principle was the only answer to the development needs of the LDCs. With the addition of part IV in 1964, the MFN principle and the principle of reciprocity gave way to the differential treatment in favour of the LDCs. Part IV provides for an exceptional and more favourable treatment for LDCs, but this seems rather temporary and there is no provision for establishing the legal basis for permanent preferential treatment in favour of LDCs.

The LDCs therefore have demanded further changes in the existing international legal order. Efforts concentrated in UNCTAD led to the adoption of the Charter of Economic Rights and Duties of States, the so-called New International Economic Order (NIEO) on 12th December, 1974, concerning, among other aspects of international trade, promotion of development of LDCs, preferential treatment of LDCs and non-reciprocal concessions. Meanwhile the North-South Dialogue was begun in Paris in 1975 covering raw materials, development and financing.¹¹³ Within this framework two reports, the Brandt Reports, have been published relating to the development needs of the LDCs urging the transfer of capital and technology to the third world and the elimination of disparity among the nations. The Brandt Report I or 'Programme for Survival' met with an unwillingness on the part of the DCs to implement its proposals.¹¹⁴ The Brandt Report II or 'Common Crisis' published in February 1983, is more concrete in its proposals, but its implementation is still uncertain because the DCs are very much concerned with their economic problems at home.¹¹⁵

Nevertheless, the need for a New International Economic Order is universally recognised. Proposals for modification of GATT have on several occasions been made. The modification of the existing legal system depends on a more active participation of LDCs. In the course of MTNs only a limited number of LDCs take part, although formally a great number of them participate in the GATT. Their bargaining power, therefore, so essential to this end, is rather limited. Consequently, products of particular interest to LDCs are excluded.¹¹⁶

Nevertheless, there is a change in the Old International Economic Order today as far as the advanced LDCs, the so-called NICs, are concerned, and a great deal of economic power has passed to them.¹¹⁷ Subsequently /

Subsequently the rules governing economic and trade relations should be changed to accommodate the new pattern of economic development. The U.N. Commission of International Trade Law (UNCITRAL) has already taken the first steps and in 1978 a Working Group on the NIEO was established to deal with questions of law.¹¹⁸ In fact, the existing legal rules and principles governing international trade have largely become ineffective and obsolete and are in need of review, revision or extension. The GATT agreement is now required to take into more serious consideration the development needs of the Third World. The only solution to the modification of the existing system which should be to the benefit of the LDCs, is that they must participate more effectively in the international decision-making process.

Deviation from the MFN principle and that of reciprocity has frequently taken place in favour of the LDCs. Arts. XVIII and XXIV and the Generalised System of Preferences are the most important application of the principle of differential treatment in international trade relations. Nevertheless, this treatment in favour of the LDCs is on an exceptional and temporary basis. It was only at the conclusion of the Tokyo Round MTNs that the CONTRACTING PARTIES decided to initiate a differential and more favourable treatment to LDCs on a permanent basis, although the developed countries insisted on some kind of reciprocal concessions by the most advanced LDCs. The LDCs had strongly urged the permanent establishment of this principle during the Tokyo Round, since their initial objective of modification of the MFN principle was impossible, given that this would require unanimity. The differential and more favourable treatment, or the so-called 'Enabling Clause' negotiated within the 'Framework Group' in the course of the Tokyo Round MTNs, is the result of tremendous efforts made by LDCs to establish a permanent deviation from the MFN in favour of their trade, but it falls short of their demands to modify the GATT legal structure, which remains their long-term objective. Of course this treatment designed to liberalise LDCs' trade must not create obstacles to other countries' trade, nor prevent further liberalisation at MFN rates.¹¹⁹ The Enabling Clause, nevertheless, is a step forward. It provides the legal basis which sets up a permanent legal framework for differential and more favourable treatment of LDCs in international trade relations notwithstanding the provisions of Art. I of the G.A., despite the criticism that its provisions remain rather vague.

Moreover /

Moreover, the establishment of the Agreements or Codes at the conclusion of the Tokyo Round emphasises the need for special treatment to third world countries, particularly for improving their position in the international framework of the conduct of world trade.¹²⁰

The Tokyo Round was called to eliminate not only tariffs but more importantly NTBs. The charter of the NIEO explicitly demands their elimination, but the perplexity of the NTBs' issue gives no hope for greater trade liberalisation. In particular, products of special importance to LDCs are not sufficiently liberalised. Agricultural products with the only exception of tropical products, which are of great significance to developing countries, are not sufficiently treated within the framework of MTNs. LDCs demanded that special consideration should be accorded to their exports and, in particular, to least developed countries' (LLDCs) exports, in the application of NTBs. All the Codes contain, however, some important elements of LDCs' trade liberalisation but a lot of criticism has been directed against them as they are designed to protect North-North trade from new barriers. Under the Subsidies Code, which is of particular importance to LDCs, LDCs are permitted to use subsidies on both industrial and primary products. Art. 14 of this Code, specifically recognises that subsidies are an integral part of the economic development of LDCs, provided that they shall not prejudice the trade interests of another signatory. The Customs Valuation Code provides for technical assistance to LDCs. The Code on Technical Barriers to Trade, provides that LDCs "should not be expected to use international standards including test methods which are inappropriate to their development, financial and trade needs". The Code on Government Procurement includes the LLDCs among its beneficiaries, even if they do not subscribe to the Code. The Code of Conduct promises a change in the rules of the behaviour of the DCs as well.¹²¹

After the Tokyo Round a very important question to be considered is the implementation of the Codes concerned. DCs seem reluctant to recognise the need for permanent differential treatment of LDCs and are constantly demanding concessions from the NICs. The LDCs on the other hand, are not satisfied with the results of the Tokyo Round. They point out that benefits to LDCs are limited, because products of great importance to them are excluded from the liberalisation process, such as textiles, footwear, etc.; VETs and OMAs (Orderly Marketing Arrangements) have dangerously proliferated; existing QRs are not negotiable and /

and Safeguard Measures have not been agreed. The Codes could have been more favourable to third world countries if the LDCs had more effectively participated in the negotiations. Few LDCs, however, have subscribed to the Codes. Needless to say that it is in their interest to subscribe to them and more actively press towards their implementation, in particular, to the implementation of the provisions which are of interest to them.¹²²

The same treatment towards the LDCs is re-emphasised also in the GATT Ministerial Declaration of November 1982. The contracting parties are urged, i.a. to implement more effectively part IV of the GATT and the decision of 28th November 1979 regarding "differential and more favourable treatment, reciprocity and fuller participation of LDCs", to improve the GSP, to reduce or eliminate NTBs, to strengthen the technical co-operation programme of GATT and to examine the prospects for increasing trade between DCs and LDCs and the possibilities under GATT for facilitating this objective.¹²³

In conclusion, the LDCs have not greatly benefited from their participation in the GATT and in the MTNs, conducted under its auspices. This is particularly true for the LLDCs, for which no special reference is made in the GATT, even in part IV. The LDCs could have benefited further if they had been better organised within the Committee on "Trade and Development" in the GATT and more active in the UNCTAD. Subsequently, they could have made any necessary efforts to improve their position under the GATT system. Through UNCTAD they could successfully press for greater trade liberalisation in products of special importance to them. UNCTAD is indeed an important forum for international negotiations concerning changes in the world trading system. As an example, the GSP negotiated in UNCTAD in 1968 was later incorporated into GATT.¹²⁴

Likewise some concessions from the NICs may be beneficial as long as they are able to improve their situation and participate more fully in the G.A. In fact, during the Tokyo Round, the LDCs have affirmed that as their development proceeds they are willing to assume more obligations.¹²⁵ Their attention, therefore, should be directed not only towards exceptions or preferences but also towards increasing their voice and also their responsibilities in international organisations. It is important for LDCs to be united and it is encouraging that they /

they do so on a large number of questions. It is of great significance that the pattern of world trade law has already changed from the MFN principle and that of reciprocity to the principle of non-reciprocity and differential treatment for LDCs, but there remains of even more fundamental importance the implementation of this achievement towards which increased efforts are required.

CHAPTER 2.

NOTES

1. Peter Gray, A Generalised Theory of International Trade, (1976), pp. 12-56; I. Pearse, International Trade, (1970); B. Hazani, P. Sgro, D. Sub, Non-traded and Intermediate Goods and the Pure Theory of International Trade, (1981); J. Bhagwati, Trade Tariffs and Growth, (1960), pp. 311-325 and 339-361; B. S. M. Beresdsen, Regional Models of Trade and Development, (1978), pp. 9-23.
2. Quoted in Miltiades Chacholiades, The Pure Theory of International Trade, (1973), p.13 ff.
3. G. Haberler, The Theory of International Trade, (1956), pp.125-175 and 221-226.
4. I. Pearse, International Trade, (1970), pp. 270-273, 319-360, 598-601 and 157-161.
5. J. M. Letiche, R. G. Chambers and A. Schmitz, The Development of gains from trade theory: Classical to modern literature, in J. M. Letiche (ed.) International Economic Policies and their Theoretical Foundations, (1982), p. 91-149 (at p.96).
6. Bertil Ohlin, Inter-Regional and International Trade, (1933), Appendix I.
7. Paul Ellsworth, The International Economy, (1969), pp. 19-189, 224-241 and 558-581.
8. Ibid, pp. 19-189.
9. Ralph Haughwot Folsom, Corporate Competition Law in the European Communities, (1978), Chap.2.
10. Gerard Curzon and Victoria Curzon, The Management of Trade Relations in GATT, in A. Shonfield, (ed.) International Economic Relations of the Western World, 1959-1971, (1976), pp. 142-143; Fortune, July 1949 and September 1949.
11. Robert Hudec, The GATT Legal System: A diplomat's Jurisprudence, 4 Journal of World Trade Law, (1970), pp. 615-665; GATT and G.A. are interchangeably used throughout this thesis and both refer to the General Agreement on Tariffs and Trade.
12. John Jackson, Legal Problems of International Economic Relations, (1977), p. 396.
13. /

13. Ibid.
14. George Bronz, An International Trade Organisation: The Second Attempt, 69 Harvard Law Review, (1956), pp. 440-476.
15. The USA has never ratified the G.A. Canada has been the only country which consistently supported the GATT.
16. The Communist countries had not participated in GATT and refused to sign the Final Act. Recently most of the Eastern European countries have joined. Czechoslovakia was the first Communist country which signed and has retained its membership in GATT since 1955. The USSR delegate to the regular Session of the U.N. ECOSOC in 1955 raised the question of reviving the ITO charter, despite a thorough denunciation of the document made by the USSR in 1948.
17. Malcolm Shaw, International Law, (1977); Max Sørensen, Manual of Public International Law, (1968), pp. 128 ff.; Robert Hudec, The GATT Legal System. A Diplomat's Jurisprudence, 4 Journal of World Trade Law, (1970), pp. 615-665.
18. Gerard Curzon, Multilateral Commercial Diplomacy: The GATT and its impact on National Commercial Policies and Techniques, (1966), p. 34; Robert Hudec, The GATT Legal System. A Diplomat's Jurisprudence, 4 Journal of World Trade Law, (1970), pp. 615-665.
19. When performing any official decision-making function, the parties shall be referred to as the "CONTRACTING PARTIES" in capitals in accordance with the usage in the literature. When they are referred to as contracting parties in small letters, they imply the participating countries which constitute the GATT.
20. John Jackson, op. cit., in Note 12, p.418; International Trade Centre - Basic Instruments and Selected Documents/GATT, 21 S/44-70.
21. BISD/GATT, 25 S/37, L/4715.
22. Kenneth Dam, The GATT Law and International Economic Organisation, (1970), p. 2b Notes.
23. BISD/GATT, 13 S/67 (1965).
24. Customs Regime between Germany and Austria, Protocol of March 19, 1931, Public Law International Cases, (1931), pp. 26-31.
25. John Jackson, op. cit., in Note 12, p. 515.
26. John Jackson, World Trade and the Law of GATT, (1960), p.249. Australia was the only State which objected to the MFN clause in the ITO Charter.
27. /

27. Document UN A/CN, 4/257 and ADD 1 (MFN).
28. Article 2 allowing existing preferences to continue was finally adopted into the GATT legal system, despite USA objections, when it became apparent that USA efforts would not succeed.
29. Document (MFN) op. cit., in Note 27 in the Treaty of Cyprus signed in 1960, there is a promise to grant MFN treatment. The Republic of Cyprus shall by agreement on appropriate terms accord MFN treatment to the UK, Greece and Turkey, in connection with all agreements whatever their nature.
30. Document (MFN) op. cit., in Note 27.
31. Ibid.
32. Gerard and Victoria Curzon, op. cit., in Note 10, p.156.
33. BISD/GATT, 4S/81 (1956).
34. BISD/GATT, 13S/111 (1965).
35. BISD/GATT, 12S/47 (1964).
36. Tigani I. Ibrahim, Developing Countries and the Tokyo Round 12 Journal of World Trade Law, (1978), p. 1-26.
37. GATT/CONTRACTING PARTIES 38 Session, Doc. W.38/4/29 November, 1982, p.6.
38. John Jackson, op. cit., in Note 12, p.310.
39. Andreas Lowenfeld, Public Controls on International Trade, in International Economic Law, Vol.6 (1979), para.5.11, p.197.
40. Robert Hudec, The GATT Legal System and World Trade Diplomacy, (1975), Chap.21; Japan still imposes restrictions on industrial products except for those imposed on public policy grounds; e.g. drugs, pornography et al.
41. John Jackson, World Trade and the Law of GATT, (1969), p.311.
42. Ibid. p.310; also, BISD/GATT, 25S/68, Report of a Panel adopted on 18 October 1978, L.4687 (EEC Programme of Minimum Import Price Licence), and BISD/GATT, 11S/94 and 55 (French import restrictions).
43. Gerard and Victoria Curzon, in Shonfield, op. cit., in Note 10, p.215.
44. /

44. The Provisions of Arts. XI-XV and the IMF rules relating to exchange restrictions have the same effects: the restrictions in the importation of goods.
45. GATT: A Legal Guide to the Tokyo Round, 13 Journal of World Trade Law, (1979), p.529.
46. GATT CONTRACTING PARTIES, 38 Session Doc. W 38/4/29 of November, 1982.
47. As a result of the Kennedy Round, the Anti-Dumping Code was established in 1967 with the object of reducing and further eliminating distortions in international trade. The Anti-Dumping Code in connection with Art. VI of the GATT (ref. to Anti-Dumping and Countervailing Duties) provides for the imposition of anti-dumping duties in case of dumping. Art. VI lays down the definition of 'dumping' as "the importation of a product at less than its normal value". In such a case heavy anti-dumping duties can be imposed by the affected party provided that dumped sales cause or threaten to cause material injury. During the Tokyo Round a revision of the Anti-Dumping Code was agreed in order to bring some provisions (concerning inter alia determination of injury, price undertakings, imposition and collection of anti-dumping duties) into line with the relevant provisions of the Subsidies and Countervailing Duties Code. LDCs demanded revision of the Code concerning mainly provisions relating to goods exported by them into DCs' markets. The EEC had incorporated the Anti-Dumping Code by its Council Regulation, 459/69.; For more information see also, Ivo van Bael, Ten years of EEC Anti-Dumping Enforcement, 13 Journal of World Trade Law (1979), pp.395-408; European Court: Dumping of Japanese Bearings, 13 Journal of World Trade Law (1979), pp. 361-366.
48. The purpose of the Code or Agreement on Customs Valuation is to interpret Art. VII of the GATT, to the effect that "a fair, uniform, and neutral system (is established) for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values".

Ad valorem duties used in the past in effect constituted NTBs and thus five alternative methods were set, the most important of which takes into account the invoice price. The application of the new standards will have beneficial effects by ensuring uniformity and simplicity in the valuation of imports. Specifically the Code can benefit the LDCs. They, in fact, had put forward an alternative text proposing a ten year extension instead. Disputes could be settled not by recourse to Art. XXIII but by reference to a Committee on Customs Valuation, assisted by a technical sub-committee, with the possibility of the establishment of a Panel; For further details see also, GATT: A Legal Guide to the Tokyo Round, 13 Journal of World Trade Law, (1979); Bela Balassa, The Tokyo Round and the Developing Countries, 14 Journal of World Trade Law, (1980), pp. 93-118.

49. The objective of the Code on Import Licensing was to ensure that that import licensing requirements did not erect any barriers to free movement of goods. Accordingly, this agreement attempts "to simplify and bring transparency to the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices". Automatic and non-automatic licensing - the latter laid down by this code and including procedures relating to the administration of quotas or other forms of import restrictions - should not have restrictive effects on imports; See also, Bela Balassa, The Tokyo Round and the Developing Countries, 14 Journal of World Trade Law, (1980), pp. 93-118.
50. Distortions on trade are sometimes due to differences between national standards and technical regulations. Examples of such can be new technical regulations, quality standards, testing and certification methods, and for reasons of safety, health, consumer or environmental protection and other purposes. The GATT Code on Technical Barriers or Standards Code covers industrial and agricultural products and aims (as explicitly referred to in Art.2:3.) to make world-wide inter-governmental co-operation possible and to establish uniform international standards and regulations. This can be achieved by abolishing only those differences which constitute barriers. The principal benefits expected, however, are the encouragement of governments to review their policies towards international harmonisation of standards and regulations, and stimulate more effective implementation of international standards. Not only national governments, but also local governments and other various bodies are requested to base their import standards on international standards. Moreover, within this framework the LDCs should be given special and differential treatment. The EEC and the USA were the principal parties which wanted this code to be established, and had long claimed that Japan uses technical barriers and other equivalent practices as ways to keep out their exports. For further details see also, R. W. Middleton, The GATT Standards Code, 14 Journal of World Trade Law, (1980), p.201; Financial Times, 21st March 1980; J. J. Bourgeois, The Tokyo Round Agreements on Technical Barriers and Government Procurement in International and EEC perspective, 19 Common Market Law Review, (1982), pp. 5-23.
51. The Code on Government Procurement is excluded from the application of the GATT rules. Under it, national and foreign suppliers should receive identical treatment as regards tenders for purchases of products and for services. The aim of the agreement was to liberalise formal and informal methods of government procurement and eventually to establish an international framework for government procurement: that is, to make laws, regulations, procedures and practices more transparent and to ensure that they did not protect domestic products or suppliers, or discriminate among foreign products or suppliers. Detailed rules are provided in respect of tenders and full details must be published to enable all suppliers to submit tenders, which must be opened publicly. LDCs in relation to their development should be given the opportunity with technical assistance of submitting tenders.

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53. Colin Phegan, GATT Article XVI:3; Export Subsidies and "Equitable Shares". 16 Journal of World Trade Law, (1982), pp. 251-264.
54. J. Cunnane and C. Stanbrook - Dumping and Subsidies, (1983).
55. Patrick Low, The Definition of Export Subsidies in GATT. 16 Journal of World Trade Law, (1982), pp. 375-390.
56. Tokyo Round, Report by the Director General (1979), Vol.I; BISD/GATT 27S/31 (1979-1980).
57. Re-Dumping proceedings concerning certain kinds of women's shoes originating in Brazil, Common Market Law Reports, (1982), p.416 . Re: Slaughter of Hill Cattle in Scotland, Common Market Law Reports, (1979) p.505. Re: Refunds on Exports of Sugar - Australia V. European Communities, Report of the GATT Panel, L.4833 Common Market Law Reports, (1980), p.238. Re: Anti-Subsidy proceedings concerning certain stainless steel bars originating in Brazil - Common Market Law Reports, (1981), p.131.
58. BISD/GATT 23S/98 (1976), Panel Report 4422.
59. John Jackson, The Jurisprudence of International Trade: The DISC case in GATT, 72 American Journal of International Law, (1978), pp. 747-781.
60. BISD/GATT 23S/114 (1976); 23S/127 (1976) and 23S/137 (1976) ; Financial Times, 5th November 1982.
61. Tokyo Round Report op. cit., in Note 56.
62. Edmond McGovern, International Trade Regulation, (1982), p.258.
63. Colin Phegan, op. cit., in Note 53, pp. 251-264.
64. BISD/GATT 9S/185-187 (1961).
65. BISD/GATT 7S/46-55 (1959), Report of 21st November 1958, L/924.
66. BISD/GATT 26S/290 L/4833 and GATT Doc. L/5051/1980.
67. K. Dam, op. cit., in Note 22, Chap.8, pp. 132 ff.
68. BISD/GATT 9S/185-194 and 32 (1961).
69. /

69. Lorenzo L. Porcz, Export Subsidies in Developing Countries and the GATT, 10 Journal of World Trade Law, (1976), pp. 529-545.
70. GATT: A Legal Guide to the Tokyo Round, 13 Journal of World Trade Law, (1979), pp. 436-446.
71. Ibid: also see Abdulqawi A. Yusuf, "Differential and more favourable treatment" The GATT Enabling Clause, 14 Journal of World Trade Law, (1980), pp. 488-507; Tokyo Round Report op. cit., in Note 56.
72. Vijay Laxman Kelkar, GATT: Export Subsidies and Developing Countries, 14 Journal of World Trade Law, (1980), pp. 368-372.
73. Subsidies Code, 18(1) International Legal Materials, (1979), pp. 579-620.
74. Injury exists when the subsidised exports cause or threaten to cause material injury to an established industry or materially retarding its establishment. The volume of imports, their price and the consequent impact assessed in terms of production are the principal factors concerned.
75. Robert Baldwin, Beyond the Tokyo Round Negotiations, Thames Essay, p.21 ff.
76. Peter Oliver, Free Movement of Goods in the EEC, (1982).
77. O.J. L/339/1979; BISD/GATT 26S/171 (1980); 18 International Legal Materials, p. 261; EEC Council Regulation 3017/79; (O.J. - L.339/21 December 1979), as amended by Reg. 1580/82; (O.J. - L.178/22 June 1982) and ECSC Commission Recommendation 3018/79 (O.J. - L.339/21 December 1979) as amended by Commission Recommendation 1955/82 (O.J. - L.215/22 July 1982). For more detailed and recent information see J. Cunneane and Clive Stanbrook, Dumping and Subsidies, (1983).
78. Ibid.
79. John Jackson, op. cit., in Note 41, p.165.
80. P. Ellsworth, op. cit., in Note 7.
81. Working Party Report adopted on 28th March 1966, BISD/GATT, 14S/59 (1966); L/2165 Consultation under Art. XXII:2.
82. In the GATT we can find several clauses which obligate the parties to GATT to consult in specific instances (Arts. II:5, VI:7, VII:1, VIII:2, XII:4, XIII:4, XVIII:7, XVIII:12,16,21,22, XIX:2, XXII, XXIII:1, XXIV:7, XXV:1; John Jackson, The GATT as an instrument for the settlement of trade disputes, 61 American Society of International Law Proceedings, (1967), p. 144 ff.
83. /

83. The contracting parties are not obliged to bring the matter to GATT or to submit it to arbitration.
84. BISD/GATT 7S/24, (1959).
85. Some examples are referred to here: Art. VII relating to the Laws and Regulations concerning valuation for customs purposes; Art. XIX concerning emergency action on imports of particular products; Arts. XII and XIV relating to consultation procedures for BOP reasons which are in particular quite elaborate and complex. Over the first years of the GATT's existence on several occasions the CONTRACTING PARTIES had adopted rules concerning the initiation of BOP consultations and many times BOP consultations have been held: Jack Jackson, op. cit., in Note 41 pp. 682 and 696-706; Working Party Report with reference to the U.K. import deposits; BISD/GATT 185S/210 (1972), L/3526, BISD/GATT 14S/160 (1966). Consultations for BOP restrictions in 1966; BISD/GATT 9S/19. During Poland's accession to GATT consultations were held with particular reference to QRs maintained by Poland on BOP grounds, BISD/GATT 9S/18 (1961), 7S/95 (1959), 18S/212 (1972), 3S/173 (1955), 2S/89 (1954) and VII/93.
86. Robert Hudec, The GATT Legal System and World Trade Diplomacy, (1975); K. Dam, The GATT Law (1970); John Jackson op. cit., in Note 41.
87. BISD/GATT 9S/18-20 (1961) and L/1642 at 2 (1961).
88. A Panel is composed of individuals chosen for their personal capacities and they are free to deal with the matter not acting as representatives of their governments, nor being influenced by them (although this is not always the case). A Working Party is composed of representatives of contracting parties including even parties to the dispute. Panels or Working Parties, considering disputes, play to some extent, the role of an internal tribunal.
89. John Jackson, op. cit., in Note 82. Gilbert R. Winham, The Mediation of Multilateral Negotiations, 13 Journal of World Trade Law, (1979), pp. 193-208.
90. Michael Handel, Weak States in the International System, (1981). The weak states often export a high percentage of their GNP, but very frequently they export to relatively few states.
91. For more details see John Jackson, op. cit., in Note 82; BISD/GATT 14S/18 (1966).
92. K. Dam, op. cit., in Note 22.
93. John Jackson, op. cit., in Note 41, p.180.
94. G. and V. Curzon, op. cit., in Note 10, pp. 215 and 232.
95. /

95. K. Dam, op. cit., in Note 22; Canada-USA Automobile import restrictions, see John Jackson op. cit., in Note 12; BISD/GATT 13S/112 (1965); New Zealand waiver proposal, see R. Hudec, op. cit., in Note 40.
96. Chicken War, see in R. Hudec, op. cit., in Note 49; John Jackson, op. cit., in Note 50, and H. Walker, Dispute Settlement and the chicken war, 58 American Journal of International Law, (1964), pp. 671-685. Chile's complaint V. Australia, BISD/GATT V2/193 (1952); Italy V. Sweden Doc. L/215 (1954), L/328(1955), BISD/GATT 3S/8 (1955); French import restrictions BISD/GATT, 11S/55 (1963).
97. Uruguay V. 15 Developed Countries, BISD/GATT 11S/56, 95 (1963).
98. The Netherlands case, R. Hudec, op. cit., in Note 40, and BISD/GATT 1S/32, 1S/23 and 14S/214.
99. Conciliation under Art. XXIII, Decision of 5th April 1966. BISD/GATT 14S/18 (1967).
100. R. Hudec, op. cit., in Note 40, Ch. 20.
101. USA complaint V. EEC minimum import prices for processed fruits and vegetables, BISD/GATT 25S/68 (1978); Australian complaint V. EEC refund on exports of sugar, BISD/GATT 26S/290 (1978), L.4637. Brazilian complaint V. EEC's refunds on exports of sugar, BISD/GATT 27S/69 (1979), L/5011. Chilean complaint V. EEC's restrictions on imports of apples, BISD/GATT 27S/98 (1979) L/5047.
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103. John Jackson, op. cit., in Note 59, pp. 747-781.
104. John Jackson, Governmental Disputes in International Trade Relations: A proposal in the context of GATT, 14 Journal of World Trade Law, (1980), pp. 1-21; Robert Hudec, GATT or GABB? The future design of the GATT, 80 The Yale Law Journal, (1971), pp. 1299-1386.
105. Kenneth Dam, op. cit., in Note 22.
106. Gilbert R. Winham, op. cit., in Note 89, pp. 193-208.
107. C. F. Teese, A view from the dress circle in the theatre of trade disputes, 5 The World Economy, (March 1982), pp. 43-60.
108. /

108. George Alvares Maciel, The International Framework for World Trade, Brazilian proposals for GATT Reform, GATT Lectures in Commercial Diplomacy, No.3.
109. Robert Hudec, in his book "The GATT Legal System and World Trade Diplomacy", suggests 'bit by bit' improvements to the system.
110. T. N. Stinivasan, Why Developing Countries should participate in the GATT System, 4 The World Economy, (1982), p.85 ff.
111. Dupuy René-Jean (Ed.) The Right to Development at International Level, Hague Academy of International Law; U.N. University (1980); I. Tigani, Developing Countries and the Tokyo Round 12 Journal of World Trade Law, (1978), pp. 1-26.
112. United Nations, Yearbook, (1964), pp. 195-205.
113. Lars Anell and Birgitta Nygren, The Developing Countries and the World Economic Order, (1980).
114. NORTH-SOUTH: A programme for survival, Brandt Report No.1 (1980); North-South Dialogue: The Community should take the lead, Commission of the European Communities' Background Report, 11th June, 1981.
115. Financial Times, 10th February 1983, and Scotsman, 12th February 1983.
116. Tigani Ibrahim, op. cit., in Note 111, pp. 1-26.
117. Michael Handel, op. cit., in Note 90, Chap.5.
118. Kamal Hossain, (ed.) Legal Aspects of the NIEO, (1980) W. Arthur Lewis, The Evolution of the International Economic Order, (1978), pp. 67 ff., See also, Jamison M. Selby UNCITRAL considers Work Programme for NIEO, 74 American Journal of International Law, (1980); pp. 958-961.
119. Abdulqawi, A. Yusuf, op. cit., in Note 71.
120. Dupuy René-Jean, op. cit., in Note 111; GATT, A Legal Guide to the Tokyo Round, 13 Journal of World Trade Law, (1979).
121. Bela Balassa, op. cit., in Note 48; European Commission Background Report; The Community and the Tokyo Round, 13th December, 1979.
122. /

122. Robert M. Stern, The Accommodation of Interests between Developed and Developing Countries, 10 Journal of World Trade Law, (1976), pp. 405-420; Bela Balassa, op. cit., in Note 48.
123. GATT Ministerial Declaration of 23-29 November 1982.
124. Brandt Report I, op. cit., in Note 128; Closer collaboration between UNCTAD and GATT could be beneficial for LDCs. A very significant step was taken in 1964 when the International Trade Centre was created under the joint control of GATT and UNCTAD. (BISD/GATT 21S/44-70).
125. Robert Stern, op. cit., in Note 122.

CHAPTER 3.

THE EXTERNAL TRADE LAW AND POLICY OF THE EUROPEAN COMMUNITY

This chapter aims to deal with the legal aspects of the external trade of the European Community, with particular reference to commercial agreements, to association agreements, to the contribution of the European Court of Justice (ECJ) in the evolution of external trade law, and to the position of the Community within the international legal system. Explicit rules governing these aspects are provided for in the Rome Treaty, e.g. Arts. 110-116, 131-136, 228, 238 and furthermore, Acts of the Community Institutions have been enacted so as to regulate their development. These aspects will be discussed and analysed, however, as an important and fundamental pre-requisite for the present study.

International Legal Personality of the European Community.

The legal personality of the EEC is provided for in Art. 210 which states: "The Community shall have legal personality".¹ This implies that the Community, within the limits of its law, has the power to represent its member states in international fora, accept international responsibility and conclude international agreements with third countries. The Treaty, as the 'Constitution' of the European Community provides, therefore, the Community with the legal basis for its external relations.

The Community's power to enter into agreements in the external sphere and to replace its member states at international level is not only an external phenomenon, or otherwise a phenomenon of legal recognition by third states, but also has its internal implications. It assumes the existence of a common agreement in the internal sphere which would entitle the Community institutions to represent the Community and the relevant interests of the member states externally. The member states have transferred to the Community all the necessary power to conclude commercial, (tariff and trade) agreements under EEC Arts. 110-116, but they have been reluctant to do so when agreements include more than commercial aspects, e.g. the association agreements incorporate not only commercial but also other aspects for which the member states /

states still retain negotiating power and therefore, they are not included in the common Community policies such as aid, transfer of technology. In this case the Community institutions act together with the member states in the so-called 'mixed procedure'. Over this issue, however, controversies between the Community and its member states involving political issues, in particular that of the surrender of sovereignty, have often arisen.²

The Community's legal personality, however, in entering into international agreements has been largely recognised by third states. Most of these states have entered into agreements with the Community and have accredited diplomatic representation to it. Therefore, by doing so they have recognised the Community as an entity of international law. Some COMECON countries and, in particular the USSR, have not yet recognised the Community, although in the early 1970s the Soviet leaders had expressed an interest to negotiate with the Community as such. But the Community had turned down the proposal obviously because it did not want to facilitate integration among the COMECON countries. Romania is the only CMEA country today which has negotiated an agreement with the Community.³ The USSR has entered into negotiations with the Community over fishing rights, but no agreement has been reached.⁴ No other country has at least directly denied the existence of the EEC under international law. With particular reference to the GATT, where the EEC represents its member states in multilateral trade talks, no participating country has ever raised this question.

The capacity of the Community to enter into international agreements, either explicitly provided for by the Treaty or conferred on it by Community Acts, is in fact a demonstration of its legal personality. The Community, in order to support its legal personality, may rely on the case law of the International Court of Justice which in an advisory opinion of 11 April 1949, acknowledged that "the U.N. had the legal capacity to make all international claims for the reparation of injuries even against a defendant state which was not a member of the U.N."⁵ The Community can invoke this provision especially when a claim against her is made. However, the ECJ has lately extended its jurisdiction over the external powers of the Community and has strengthened and confirmed the Community's legal personality in its external relations. The EEC, in its concrete practice, has largely extended its external powers and has concluded a great number of Treaties with third countries, concerning mainly commercial issues.⁶

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The Role of the European Court of Justice in the External Relations of the European Community.

The ECJ has since 1970 increasingly expanded the international legal capacity of the European Community. In the historic case of the European Road Transport Agreement (ERTA), the EEC member states themselves entered, in 1962, into an agreement with certain other European states over a common transport policy of the Community. However, as this first ERTA never came into existence, a second ERTA was negotiated in 1967 and concluded, also by the EEC member states, in 1970. The ERTA case is extremely important for defining the external legal capacity of the Community, because it deals with the question of the Community's competence over external relations, especially where there is no express Treaty provision. The negotiation and conclusion of the ERTA by the member states provoked objections by the Commission of the European Community. A controversy between the Commission and the Council of the European Community had arisen over the extent of the Community's treaty-making power deduced from explicit treaty provisions or from Acts of the Community Institutions. The Commission filed a complaint against the Council arguing that it, the Commission, should have carried out the relevant negotiations and asked for nullification of a Council Communiqué (of 20-21 March 1970 Session) approving a "mandate to allow the member states to continue negotiations for the conclusion of the ERTA".⁷

The ECJ had to decide whether the member states were capable of entering into international agreements concerning Community competences. This depended on whether the Community has the capacity to enter into international agreements beyond the powers conferred on it by the Treaty, or deduced from Acts of Community Institutions. Meanwhile, Council Regulation 543/1969 providing for common rules had been enacted on transport policy. The Commission contended that it, and not the member states, had the power to represent the Community in the external field.

The ECJ in its judgement⁸ held that when the Community enacts common rules in order to implement common policies "the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules" and when "such common rules come into being the Community alone is in a position to assume and carry out contractual obligations towards third /

third countries affecting the whole sphere of application of the Community legal system", and it reaffirmed the doctrine of parallelism by stating that "with regard to the implementation of the provision of the Treaty the system of internal measures may not therefore be separated from that of external relations".

The Court relied on Council Regulation 543/69 and recognised the Commission's competence to negotiate international agreements, not only when such a power is derived from explicit treaty provision, but also from Acts of Community Institutions. Nevertheless, the ECJ did not go thus far to declare the ERTA as violating Treaty rules because pragmatic considerations had to be taken into account. The position of the non-European Community states was considered. Re-negotiation of the ERTA by the Commission would have harmed Community interests in the outside world, in particular because negotiation for the ERTA had started by the member states before Regulation 543/69 had come into force. Another policy reason why the European Court of Justice did not find the case as inconsistent with the EEC provisions and did not order re-negotiation, was that the Eastern European countries would have questioned the acceptance of the EEC as negotiator in the Agreement.

In the next case, the Local Cost Standard Case⁹ the European Court of Justice was requested by the Commission to give an opinion in accordance with the provisions of Art. 228(1), (EEC), as to whether the Community had the power to conclude an agreement (an understanding on a Local Cost Standard which would be established for export transaction within the OECD), or whether the member states had concurrent power in the field. The European Court of Justice at first considered that the understanding constituted an agreement within the meaning of Community agreements concluded with third states, and then went on to examine whether or not the Community had the power to enter into this particular agreement; it also examined the nature of the understanding, and concluded that this understanding falls within the CCP provision of the Rome Treaty - i.e. Art. 113. Accordingly, when a common policy is established, it is intended to serve the interest of the member states, and, therefore, it would be inconsistent if the member states had concurrent power in this field.

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The European Court of Justice in this case went further than in the ERTA case and confirmed the exclusive competence of the Community in the external trade field. This case, therefore, has particular importance for the discussion of our topic.¹⁰

Another important case concerning the Community's capacity in the external field is opinion 1/76 of the European Court of Justice,¹¹ on the Draft Agreement on a European Laying-up Fund for Inland Waterway Vessels. The aim of this Agreement was to set up a fund in order to alleviate the economic problems resulting from over-capacity and fierce competition between inland waterway vessels on the Rhine and related waterways. Parties to the agreement would be the European Community (with the express participation of six member states - i.e. the Benelux Countries, Germany, France and the UK.) and Switzerland (because the Rhine-Moselle waterway has been largely utilised by the Swiss). There was in the European Community agreement as to the representation of the Community by the Commission and the participation of the above six member states in their own capacity. This was justified for historic grounds. This agreement was linked with the Mannheim Convention of 1868 and the Convention of 1956 on navigation of the Moselle, to which the six EEC member states were parties.

The Commission asked the European Court of Justice whether the Community and Switzerland were entitled to delegate decision-making and judicial powers to the Fund.¹² This case, however, has to be seen from the point of the Community's competence to enter into international agreements. Arts. 74 and 75 of the Rome Treaty lay down provisions for the establishment of a common transport policy; but, no measures of implementation of this policy had been taken. In view of this and in accordance with earlier judgements of the ECJ, the question was whether the member states had the competence to represent the Community externally, or whether the internal powers of the Community would be extended to the external field. In its opinion, the European Court of Justice held that it did not matter that the common transport policy had not yet been implemented, and repeated the doctrine of parallelism according to which internal powers of the Community can be extended to external relations, and furthermore said that the Treaty making power of the Community flows from provisions of the Treaty creating the internal powers. This constituted a development of the principles /

principles laid down in earlier cases. In this opinion the European Court of Justice recognised the Community's competence to enter into international agreements, even though no common rules for a common transport policy had been laid down. On the other hand, it did not reject the member states' participation in the agreement, reasoning that their involvement was necessary for the attainment of the proposed amendments to the earlier conventions. The ECJ thus reaffirmed its willingness to strengthen the Community's treaty-making power in the area of external relations. As Hardy¹³ puts it, commenting on the opinion: "This is one illustration of the Court's pre-occupation with the need that the unitary nature of the Community should be reflected in its external relations - that is, it is the Community as such which should take its place on the international scene"

Another important case concerning the representation of the Community to the outside world is the international agreement on Natural Rubber,¹⁴ conducted within the UNCTAD framework. At the beginning negotiations were conducted by the Community and its member states, but shortly after, the Commission felt that it should exclusively participate in the negotiation of this agreement and brought a case before the European Court of Justice under the procedure of Art. 228 (EEC) and asked if the member states are capable of participating as well. The ECJ had to consider if the agreement fell within the context of the CCP and, if so, whether the member states could effectively participate. On the first question the Court held that the matter fell within the CCP and the Commission therefore had exclusive competence to participate in the Draft Agreement. But in this specific case it went on to say that since the member states were to bear, together with the Community, the financing of the scheme (commodity), they too should participate in such negotiations. However, the Court held that until the matter of financing was definitively resolved internally within the Community, both the member states and the Community should participate in the relevant negotiations.

From the above surveyed cases, we can conclude that the international legal capacity of the Community has been gradually enhanced. The European Court of Justice has greatly contributed to this development with the result that the Commission's views in all the cases since ERTA have prevailed before the Court (ECJ).¹⁵

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The powers of the EEC in the external sphere, although limited at the time of its establishment, have, in the course of the time, been extended, with the consequence of a relative reduction of the member states' powers. The doctrine of parallelism as Hartley¹⁶ says "has triumphed", and we can, moreover, observe that the ECJ has even gone further than parallelism to state that the EEC can exercise in its external relations more competences than that of the internal sphere, supporting thus the Commission's views.

Commercial Agreements

The commercial provisions of the EEC Treaty are the most important and detailed aspect of the external relations of the Community. They are mainly contained in EEC Art. 110-116 relating to CCP, but they can also be found in other provisions, such as EEC Arts. 18, 19, 27, 28, and 29 relating to CET. Under Arts. 110-116 the Rome Treaty empowers the Community to enter into agreements involving tariffs and trade with a great number of countries or group of countries. These are, in the following chapters below, distinguished as associated countries, industrialised countries, non-associated countries and state-trading countries, according to their geographical position or stage of economic development. These agreements cover a wide field including amongst other things, movement of goods and transfer of payments.

Arts. 110-116 lay down a common approach to trade in the external field, which may involve, to a great extent, both economic and political aspects. Judge Pescatore has defined "the commercial policy (as meaning) all measures intended to regulate economic relations with the outside world."¹⁷ The extent, however, to which a common commercial approach to the outside world has been achieved is discussed below. The establishment of the CCP is indeed of fundamental importance for the Community to the extent that it strengthens its unity and its future existence.¹⁸

Art. 110, EEC, together with Arts. 18, 19 define the CCP objectives. This Article, also read together with the preamble to the EEC Treaty, emphasises that the object of the Community is to contribute to the harmonious development of world trade, the progressive abolition /

abolition of restrictions on international trade, and the lowering of customs barriers. This commitment is further emphasised in EEC Art. 29 as far as tariff liberalisation is concerned.

During the transitional period (Arts. 111 and 113 (EEC)) and according to Council Decision 1273/61 (9th October 1961)¹⁹, the member states were to co-ordinate their policies and progressively standardise commercial agreements concluded with third countries. These agreements were not extended beyond 1st January 1970. The Community would then undertake the application of a common policy and conclude trade agreements with third countries. Nevertheless, individual member states were left free to derogate from the Council Decision 1273/61, and to take some measures of commercial policy until the end of the transitional period, provided that these measures did not constitute an obstacle to the establishment of the CCP. However, according to Council Decision of 16th December 1969²⁰ some national measures which did not present great difficulties in the establishment of the Common Commercial Policy could be prolonged for one year and in no case later than 31st December 1972. That would happen when particular difficulties - economic, political and technical - were involved, which would make the Community's involvement impossible. An example concerns the COMECON countries, apart from Romania, with which still no Community agreement has been achieved, for obvious political reasons.²¹

With respect to tariff agreements, Art. 111 EEC gave the Community the task of negotiating on the basis of common customs duties, whereas the other aspects of CCP were to come under full Community competence when the CCP would be implemented.²²

Art. 113 is the principal provision of the CCP, for it aims to regulate commercial policy measures after the transitional period. It provides that "The CCP shall be based on uniform principles particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies". Therefore, common principles were to have been adopted by the end of the transitional period and it is the Council which would proceed with the implementation of those principles. It is not absolutely clear under this provision whether after the transitional period the Community would be responsible for the conduct of negotiations and the conclusion of commercial agreements. As regards the procedure, negotiations are conducted in accordance with Art. 113:3 by the Commission in consultation with a special Committee /

Committee (The Article 113 Committee) appointed by the Council and composed of representatives of member states. The power to conclude such agreements is vested with the Council (Art.114). A necessary pre-requisite for the negotiations is that internal agreement should be reached within the Community. In that respect, however, some controversy had arisen as to the method of implementing a common policy and the range and manner of exercise of the Community's external responsibilities. The Commission's view is that a related survey should be carried out. When for legal and other reasons, the Community's negotiating capacity is limited, member states can conclude agreements with third states, as in the case of agreements with COMECON countries. Art. 113 (EEC) refers to the measures that can be taken in the context of the implementation of the CCP. Besides tariffs, QRs are also included as regards unification of liberalisation measures. The EEC Treaty provides for abolition of QRs in the internal sphere but measures of export policy are left to be regulated by the CCP. Furthermore, Art.113 is restricted to trade issues and it does not embrace measures such as transportation, exchange restrictions, et al.²⁴. Of course, tariffs and to some extent QRs are measures that have been subjected to treatment under the GATT rules. In this context liberalisation in tariffs has been remarkable, but the use of QRs as protective measures of internal markets has been dangerously increasing to the detriment of world trade.

Art. 113 along with 116 is the most important in practice today. Accordingly, it is the Community that conducts negotiations based on uniform principles with third countries and organisations of an economic character. The European Court of Justice has recently examined its jurisdiction and the Community's competence over commercial policy in the external field. Examples of such cases are the opinions 1/75 and 1/78. In these cases the Court has confirmed the Community's competence and has decided that Art. 113 should be widely interpreted for the attainment of the objectives set out in the CCP provisions.²⁵ The Court held that the Community is empowered to enter into negotiations in respect of CCP provisions without excluding altogether the member states. However, in every case particular circumstances have to be taken into account. In view of the Court's decisions, the Community's capacity has been improved and strengthened. The member states'/'

states' involvement has had to be limited to matters belonging to their jurisdiction. The ECJ has tried to exercise a kind of control over external trade and has contributed to some extent to the development of the CCP, although the member states still have a role to play. It is clear that, where no common Community measures have been taken, member states are left free to take any measure of commercial policy provided, of course, that they do not infringe Treaty provisions.

Art.115 EEC, provides for a procedure which enables member states after authorisation from the Commission to take protective measures. This is, in fact, a derogation from Arts. 9 and 30-36 (EEC) which provide for free-movement of goods in any member state. It would be greatly desirable if member states would not apply Art.115 but the fact is that it is being increasingly used, although the member states require the authorisation of the Commission for any such measures, usually in the form of import licenses. The fear has been expressed that non-application of Art.115 "would frustrate rather than enhance intro-Community trade".²⁶ In practice the Commission, following the lead given by the Court, has been exercising close supervision of all actions of member states.

Having examined the legal aspects of the CCP as provided for in the Treaty, and considered the development of the commercial policy of the Community, we can finally ponder whether the Community has succeeded in establishing a CCP in accordance with the Treaty provisions and, if not, how far it has gone. Art.113 EEC provides that in the adoption of a CCP uniform principles should be applied. It does not expressly provide for the establishment of a common policy as such; only in the transitional rules (Art.111) is mention made of a common policy. There is no doubt, however, that common policy should be based on uniform principles but the provisions of Art.113 are not absolutely clear, and no details are given for the adoption of these principles. Different opinions have been expressed. One of them supports the view that the CCP is not intended to be really a common one in the sense of being carried out by the Community in the way the CAP is, but rather a co-ordination by member states of a policy based on uniform principles.²⁷ The concept of co-ordination, certainly, is less than common policy. The procedure for the establishment of a CCP whether carried out by co-ordinated /

co-ordinated action of member states based on uniform principles or by concerted action of member states is ambiguous. Furthermore, a comparison of Arts.110-116 with Arts.38-47 relating to CAP or with Arts.74, 75 with reference to the common transport policy, leave the reader with the impression that the founders of the Treaty were not exactly agreed as to the concept and application of the CCP or that they had realised the difficulties arising from the implementation of a CCP. However, if one analyses the concept of the CCP in the context of Community objectives and the technical necessities of international commerce and commercial policy in our times, he can come to a comprehensive definition of this concept.

The Commission, although supported by the European Court of Justice, is not able by itself to formulate a CCP. Of course, we must not underestimate its efforts towards the creation of a CCP. Nevertheless, the real power rests with the Council, which is composed of representatives of the member states, and it depends on them to proceed to the implementation of a common policy. The approach taken by the Council is similar to that taken by the member states. As P. Leopold says "The Council keeps balance between the development of the Community and the desires of the member states".²⁸ The Council seems to have no real intention to interpret these provisions and widely clarify them. Indefinite and unclear interpretations prevent the CCP from being fully implemented. Therefore, it is evident that there is no political willingness on the part of the Council to determine the application of the CCP. In fact, it is a matter of surrender of sovereignty which the member states have so jealously safeguarded.²⁹ However, apart from this, implementation of a CCP is not only a Community matter. The CCP is addressed to the outside world and therefore external influences and different economic, legal, political and social developments need to be taken into account.

There is no doubt that many commercial agreements have been concluded by the Community,³⁰ but not all areas of commercial activities have been covered under CCP. As an example tariffs have been regulated by common measures, but although highly relevant to commercial policy, they do not constitute the main part of commercial agreements. Whether all trade agreements should be concluded by the Community is open to doubt. This, of course, requires reciprocal effort on the part of third /

third countries, parties to the agreements. For example, in the case of Eastern European countries, it has for purely political purposes been accepted that member states can still have individual co-operation agreements, but an obligation to consult the Commission fully on the terms has been introduced in 1975.³¹

Numerous efforts, political activities, programmes and proposals from the Commission, have been made towards a CCP. As a result many trade agreements have been concluded, but despite this we are not in a position to conclude that CCP has been fully implemented. The increasingly depressing economic circumstances, the uncertainty over the legal issues and the involvement of political issues have made and will make the full implementation of a CCP very difficult.

Association Agreements

Although the concept of association is nowhere defined in the Rome Treaty, Arts. 238 and 228 lay down the rules for its consideration; particularly, Art. 238 provides that "the Community may conclude with third countries a union of states or an international organisation, agreements establishing an association involving reciprocal rights and obligations, common action and special procedures". Association agreements do not only include provisions concerning tariff and trade matters, but also development assistance, transfer of technology, capital flows, etc. The concept of association is much wider than that of commercial agreements and, therefore, the procedure of an association agreement is more complex and stricter than for a merely commercial agreement. Normally they constitute preferential agreements and, as such, they raise the question whether they conflict with the GATT law. The association agreements with the overseas countries and territories aiming at their economic and social development (131-133 EEC) had been sought to be included in the EEC Treaty as a condition of its establishment (Haberler Report). Later, in 1973, when the UK joined the Community she wanted her dependencies to have special links with the Community and she became partly responsible for the negotiation of the Lomé I Convention.³²

An association arrangement consists of two or more countries or groups of countries which grant each other, unilaterally or reciprocally, duty-free access to their markets of their domestic products or groups of /

of products, or access at lower than normal rates of duties. It is doubtful, however, if they constitute a free-trade area within the GATT framework, although the EEC wants to define them as FTAs or at least one-way FTAs aiming at liberalising trade.³³

Three types of association have been defined:

(1) Association as a preliminary to membership of the European Community; (2) Association as a special form of development assistance, and (3) Association as a substitute for EEC membership. (Further details in Chap.5, p.140). For the conclusion of an association agreement, the Commission of the European Communities negotiates and the Council concludes the agreement (Art.228, EEC) on behalf of the EEC, acting unanimously after consulting the European Parliament.³⁴ The ECJ may be consulted, especially as regards the compatibility of the proposed agreement with the EEC and particularly if an amendment is required (Art. 236 EEC). Representatives of the member states, too, participate in the negotiations as observers to follow the Commission's work. The principal organ of negotiations is the Council of Association, composed of members of the Council and the Commission of the EEC on the one hand, and the representatives of the Associated States on the other.³⁵ When association agreements include development aid provisions, e.g. association agreements with the overseas countries, the 'mixed procedure' is used.³⁶ In those cases, the Community and the member states can act together in order to negotiate international agreements. These agreements are called "mixed agreements". Such agreements are ratified by the individual member states and also approved by the Council on behalf of the Community. A mixed agreement with particular importance to the Community is the Lomé II Convention, negotiated by both the member states and the Council. (Further details are discussed later in Chap.5, p.147). In the negotiation of association agreements with Turkey and Greece, member states were also involved. If an association agreement is a preferential agreement, and usually it is, in order to work legally within the GATT framework and in accordance with its rules, it must provide for the establishment of a customs union or a free trade area. The association agreements, especially those including development assistance, do not appear to be free trade areas, although the EEC argues in favour of this designation. (Further details are discussed in Chap.5, p.144).

International Agreements and Community Law

As has been discussed above, the Community has the legal capacity to enter into commercial agreements with third countries (Art. 113 EEC) or with international organisations of an economic character (Art. 116 EEC). As far as commercial - tariff and trade - agreements are concerned, the Community has replaced the member states, since the date of commencement of the application of the CCP, i.e. 1st January 1970, and has assumed jurisdiction in this area in the sense that all rights and obligations of member states have been transferred to the Community. However, when special circumstances are involved (see e.g. Opinion 1/78) or for political purposes (see e.g. Co-operation agreements with COMECON countries), member states can act together with the Community.³⁷ The Community, therefore, has exclusive jurisdiction in commercial policy matters and as such represents the member states in GATT and conducts all negotiations, participating as a contracting party, although voting power is still exercised by the member states. The other contracting parties to GATT have accepted this situation and thus far no contracting party has raised the question of the legality of the participation of the Community in the negotiations.³⁸

The commercial agreements bind both the Community and its member states, according to Art. 228 EEC, which provides that Community agreements "are binding on the Community and on member states". Within the GATT legal system, therefore, which deals with tariff and trade matters, both the Community and its member states are bound by its rules.

In the Polydor case³⁹ the ECJ held that "by virtue of Art. 228 of the Treaty, the effect of the agreement is to bind equally the Community and its member states".

Concerning association agreements, which are wider than mere commercial agreements, member states can be parties to the agreements together with the Community in the so-called "mixed agreements". In fact, there is controversy as to what extent the mixed agreements bind the Community. They are certainly binding on the member states, but it is not clear if the Community is bound by the whole agreement or only by the parts which fall within its jurisdiction. The International Fruit Company case is rather favourable to the second solution, although disadvantages /

disadvantages are recognised.⁴⁰

It is believed that agreements concluded by the member states prior to the establishment of the Community bind not only the member states but the Community too. It is Art. 234 EEC, which provides that "the rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more member states on the one hand and one or more third states on the other shall not be affected by the provisions of this Treaty". This has proved to be particularly true in the International Fruit Company case. When the GATT was established in 1947, the individual (later EEC) member states became parties to it and subsequently the Community succeeded the member states to their rights and obligations, and since the Dillon Round it has participated in GATT negotiations. The Community has become if not de jure certainly a de facto contracting party to GATT and it is bound in the same way as agreements concluded under Art. 228 EEC. The European Court of Justice has, in a number of cases, ruled that the Community is bound by GATT in accordance with international legal principles.⁴¹

In the above context, the question of a relationship between Community law and international law is apparent. The question of primacy or non-primacy of international law over Community law has been discussed and that of direct effect has been upheld by the ECJ in several judgements. According to the constitutional provisions of a number of countries, rules of general international law have been in principle accepted (Italy, USA) as having binding effects, although a distinction between general international law and international agreements should be drawn.⁴² In the (Commission v. the UK) Fisheries case⁴³ the ECJ held that the Community should respect all rules of general international law. Of course, the formation of the EEC is a new phenomenon in the international trade scene, and the relationship between international law and Community law assumes a peculiar and rather difficult character. One could say that the Community, in respect of GATT, has succeeded the member states according to the rules of international law. According to this interpretation, the Community has become subject to the rights and obligations previously possessed by its member states and even by one of them as explicitly referred in Art. 234 EEC. Based on this reasoning, the ECJ held in the International Fruit Company case that the Community is bound by the GATT. In that case, the Community /

the Community had, in the context of the implementation of its CAP, imposed QRs on imports of apples from third countries to the Community. The International Fruit Company, as the importer of apples into the Netherlands, argued that QRs imposed by the Community were illegal and brought the case before the Dutch Courts. The Dutch Court held that QRs were contrary to Art. XI of the G.A. and, therefore, according to Art. 177 EEC referred the case to the ECJ for a preliminary ruling. QRs are aspects covered by the Community CCP, and in that respect the Community has explicit treaty-making power.

The ECJ examined in the first place whether or not it had jurisdiction in the case, and upheld its own jurisdiction on the grounds that its function is to ensure the uniform interpretation and application of community agreements and that these agreements to which the Community is a party constitute Community law. Therefore, the ECJ has jurisdiction in commercial agreements (in respect of which the Community has exclusive treaty-making power) and the power to interpret them.⁴⁴

In the International Fruit Company Case⁴⁵ the ECJ accepted the binding effects of the GATT agreement on the Community. In the ERTA⁴⁶ case there was no explicit reference to the binding effects of the ERTA agreement on the Community, although it could be implied that the Community was bound by the agreement even though it was not a party to it. In the North-East Atlantic Fisheries Convention case,⁴⁷ it is probable that the Community would be bound by the Agreement as soon as it was concluded. However, this particular issue, i.e. the direct effects of the GATT has no longer raised difficulties as it is widely recognised that international agreements have binding effects on the Community.

On the other hand, the issue of direct effect of international agreements within the Community legal system, that is, the right of individuals to invoke them before their national courts, has not yet been absolutely settled.⁴⁸ Within the Community legal system, the issue has been well settled. In the historic case of Van Gend en Loos, the ECJ recognised the direct effects of Community rules in the national legal systems.⁴⁹ This issue was further developed by the subsequent case-law of the ECJ. The concept of direct effects of international agreements involves, however, three legal systems - International, Community and National legal systems -. In several countries international agreements have been recognised as having binding /

binding effects; e.g. Italy has declared certain international agreements directly applicable. The ECJ has dealt with this concept of direct effects of international agreements concluded by the Community exclusively or the Community and its member states in a number of cases, but its case-law is not conclusive.

In the International Fruit Company and in Schlütter⁵⁰ cases, concerning the compatibility of certain Community Acts with Arts. XI and II of the GATT respectively, the ECJ in these early judgements was much concerned with the direct effect of GATT provisions in the Community legal system. Likewise, in Haegemann⁵¹ and Schroeder⁵² concerning infringement of a provision of the association agreement with Greece by a Community Regulation, the issue of direct effects was raised. Bresciani⁵³ dealt with a provision of a Yaoundé Convention of 1963 and it is examined from the point of view of its direct effects into the Community legal system.

In the International Fruit Company and Schlütter cases, the issue in question was whether individuals could invoke Arts. XI and II of the GATT before national courts. The International Fruit Company could only succeed if Art. XI had direct effects in the Netherlands legal system. The Court recognised that the GATT provisions were very flexible and also that the G.A. provided (Arts. XXII and XXIII) for consultations and settlement of disputes. It has traditionally been accepted that if the Treaty provides for settlement of disputes, it is unlikely that the Treaty is directly applicable, since its applicability before national courts would provide for another more effective system of enforcement.⁵⁴ The ECJ stated that GATT resembled other international agreements usually characterised by flexibility; it therefore concluded that "GATT was not capable of conferring rights on citizens which could be invoked before the Courts".⁵⁵ The view has been expressed that since GATT is an international agreement, concluded under the rules of international law, it is consequent that international rules and principles should apply to determine its applicability, not only at Community but also at national level.⁵⁶ The ECJ appears to favour the view that international law could determine the direct applicability of international agreements.

In the International Fruit Company and Schlüter cases, the ECJ was very concerned about the direct applicability of GATT rules, and in both cases it denied the possibility of direct effects of the GATT provisions /

provisions in the Community legal system. In both cases the reasoning of the Court was quite broad and might apply to other GATT provisions as well. Commenting on these particular cases M.Waelbroeck⁵⁷ expressed the view that the ECJ should abandon its strict criteria as to determine the direct applicability of international agreements, and also stressed that the ECJ should reconsider its stance in the International Fruit Company and Schlüter cases with the ultimate objective of accepting the direct applicability concept, and not of distinguishing between the internationally binding character of GATT and its lack of direct effects. The Court denied the direct applicability of the relevant GATT provisions, taking into consideration the flexibility of the GATT Agreement and its dispute settlement mechanism.

In later cases the ECJ was not so much concerned about direct effects. In the Schroeder case,⁵⁸ concerning the compatibility of certain provisions of the association agreement with Greece with the Community law, the Court did not examine the direct effects of the agreement. In The Nederlandse Spoorwegen case,⁵⁹ the ECJ proceeded to its judgement without examining the question of direct effects of Provision II of the G.A. In this case, the applicant had imported, into the Netherlands from a third country, a zerographic duplicator for the reproduction of documents. The Dutch custom authorities had classified the apparatus under the heading 'photographic cameras' instead of 'other office machines' as the applicant contended, and had charged higher customs duties. According to the applicant, the Dutch authorities had contravened Act II of GATT. In turn, the Dutch court (The Tariefcommissie) asked the ECJ whether the Dutch court is bound to consider and apply Community Acts which contravene GATT provisions.

In the Bresciani case⁶⁰ the issue concerned the direct effect of a provision of the Yaoundé Convention of 1963 concluded by the Community and its member states with 19 African and Madagascar states. The question was whether Art. 2:1 of the Convention, prohibiting member states from imposing custom duties and charges having equivalent effect on imports from associated countries, had direct effect and could be invoked in national courts - in this case in Italy -. The ECJ recognised that this specific provision had direct effects. It based its findings on the special nature of the objectives of the Convention /

Convention and paid particular attention to the special economic and political links of the Community with the associated countries. This was the first case in which the Community recognised direct effects of a provision of a Community agreement, and as such this case stands as one of particular importance.

In the Polydor case ⁶¹ the Community had concluded an agreement with Portugal. It concerned the production and distribution of records in Portugal. In Britain the owner of an English copyright of the records wanted to prevent the records in question from coming into Britain and insisted that his copyright had been infringed. The defendant, who had legally produced and marketed the products in Portugal, argued that such a measure was equivalent to QRs. He invoked before the Portuguese Court Arts.1 and 23 of the Agreement with Portugal, which prohibited Quantitative Restrictions, arguing furthermore that this agreement produced direct effects and therefore it was applicable in the national legal system.

The ECJ, considering these questions, held that the objectives of the agreement were to eliminate customs duties and charges having equivalent effect, including quantitative restrictions, and that the provisions of Arts.14 and 23 of the agreement were similar to Articles 30-36 EEC, relating to the free movement of goods. The ECJ considered the nature, the objectives of the agreement, and moreover, compared the differences between the EEC Treaty and Arts.14 and 23 of the agreement concerned. As far as the direct effect of the agreement is concerned, the Court stated that Art.23 did not constitute a measure having equivalent effect to QRs and there was, therefore, no need to consider its direct effect. As regards Art.14, the Court did not examine its direct effect at all. Finally, the ECJ concluded that the agreement had binding effects on the Community and on the member states, but did not go further to examine the issue of direct effects, although one of the parties expressed the view that the agreement should be interpreted according to the rules of international treaties and agreements.

In the Pabst case ⁶² an individual brought an action against the German state monopoly in spirits for infringing a provision of the association agreement with Greece, concerning fiscal discrimination. A temporary tax relief was granted to producers and importers of spirits in Germany in the course of adjustment to the new tax situation; the tax /

tax relief measure favoured domestic spirits. The referring German Court (The Finanzgericht) asked inter alia whether Art.53 of the association agreement with Greece, which was similar to Art.95 EEC, could confer rights on individuals to claim the same treatment as that granted to domestic spirits. The ECJ concluded that Art.53 of the relevant agreement had exactly the same effect as Art.95 and therefore declared it directly applicable. The ECJ took this decision relying on the nature and the objectives of the agreement, mainly on the fact that this agreement was of temporary nature being preparatory for Greece's accession into the European Community.⁶³

On the other hand in Haegemann,⁶⁴ which also concerns the association agreement with Greece, but from a different perspective (countervailing duties imposed on Greek wines, involving interpretation of Protocol No.14, annexed to the association agreement), the concept of direct effect was not even raised.

In Kupferberg⁶⁵ which more or less concerns similar questions as in the Pabst case, i.e. the rate of monopoly equalisation duty imposed on imports of port wine from Portugal, the ECJ inquired whether this provision, which prohibits discrimination of imported products, had direct effect and if so whether it had the same meaning as Art.95:1 of the EEC Treaty. In this case a free-trade agreement between the Community and Portugal had been concluded. The Court, putting particular emphasis on the fact that a free-trade agreement was involved, considered the principle of reciprocity, but it rejected the view put forward that an agreement may have direct effect in the legal order of any contracting party only when the other party recognises such an effect. Although the Court stated that a single free-trade agreement does not in itself justify direct effects, and furthermore, that neither the nature nor the objectives of the agreement justify direct effects, nor special links with the Community are established as in Bresciani, nor future membership is envisaged as in Pabst, it nevertheless went on to favour the direct effects of the agreement. In the last cases and, in particular, in Kupferberg, the tendency of the Court now has been to uphold the direct effect of international agreements.

In the *Société Italiana v. Ministero delle Finanze and delle Marina Mercantile* case⁶⁶ concerning fiscal arrangements of goods in transit between Italy and Austria, the referring Italian Court inquired of the ECJ inter alia what was the effect within the Community, of the GATT /

GATT and the interpretation of Art.V of GATT relating to freedom on transit. The ECJ, as regards the direct effects of Art.V of GATT within the Community legal system, based its findings on previous cases relating to similar questions (e.g. joined cases 21-24/1972, International Fruit Company cases) and concluded that "(Art.V) cannot have direct effect under Community Law" and therefore "individuals may not rely upon it"

Having in this section considered the relationship between international agreements and Community law, we may distinguish between the effect of international agreements on the Community legal system and their direct effect on the national legal systems. Concerning the first question, i.e. the primacy of international law, it has widely been accepted that international agreements have binding effect on the Community legal system. In particular, as far as the GATT is concerned, the International Fruit Company case has clearly established this principle. In the ERTA case, and in respect of the North-East Atlantic Fisheries Convention, the same principle is indirectly recognised. In the Schlüter and in the Nederlandse Spoorwegen cases referred above, as well as in some other recent cases ⁶⁷ the binding effect of the GATT law over the Community law has also been accepted as a rule.

As regards the second question, i.e. the direct effect of international agreements on national legal systems, we may say that the Court's decisions lead to no definite conclusions. Firm rules have not been established through the case-law. In Bresciani, Pabst, Kupferberg cases, although the nature and the objectives of the agreements are different, they have all been declared directly applicable. It seems that the overall objectives of the agreements play a decisive role. As Bebr ⁶⁸ rightly observes "(the ECJ's) case law hardly reveals whether the Court applies the same standards for direct effect to agreements as it does to the Treaty provisions, or whether it differentiates between them for which there would be good grounds". It is remarkable, however, that although the Court has denied direct effects to international agreements in the first cases, e.g. International Fruit Company case, Schlüter case, in the later cases it seems to have upheld the tendency to favour the direct effect of international agreements. Such a tendency, which is favoured by most writers, would be in line with national treatment, which through constitutional changes, has /

has accepted the supremacy of international agreements on national legal orders. This demonstrates the fact that international trade law with due regard to the GATT law is increasingly directly effective on the Community legal order. When the notion of direct effects is well established it will give the individual the right to invoke certain rules of international trade law before its national courts. For example, as we have seen in the International Fruit Company case, it, the company, would only have succeeded if Art. XI of the GATT had direct effects. ^{The question of direct effects of} international agreements concerning trade relations of the EEC is an important legal issue with which the ECJ has dealt. The ECJ in order to justify its concerns has had to take into account specific situations in different circumstances and this explains why, for the time being, no firm rules have been established in this developing area of international law. The tendency of the Court, however, to uphold the direct effects of international agreements is certain to increase confidence in the international trading system by giving the right to individuals to invoke the rules of international trade law before their national courts. Furthermore, it (tendency) would facilitate uniform interpretation and application of the GATT rules within the Community legal order, it would safeguard the application of the CCP, with the consequence of avoiding distortions of international trade. When the notion of direct effects is well established by the ECJ, (which seems to be only a matter of time), the individual will generally be given this right. However, there is no doubt that this is a new area of law where a constructive relationship between domestic, Community and international law is progressively developing.

NOTES

1. Art. 6 of the European Coal and Steel Community Treaty provides that the Community has legal personality, but it does not contain directly provisions relating to a Common Commercial Policy. Also, Art. 101, para. 1 in Chapter X of the Euratom (EAEC) Treaty provides that the Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third state, an international organisation or a national of a third state. The powers of the Euratom Treaty are much wider than those of the ECSC. It also contains the most systematic set of provisions in the field of foreign relations of all three European Treaties; see also European Documentation (1979) 25 Years of European Community External Relations, 4/1979.
2. T. C. Hartley, The Foundations of the European Community Law (1981), pp.145 ff.; Georges Le Tallec, The Common Commercial Policy of the EEC, 20 International and Comparative Law Quarterly, (1971) pp.732-745.
3. Romania, has entered into a trade agreement with the European Community. (For further details see Chapter 8.)
4. R. Churchill, Revision of the EEC's Common Fisheries Policy - Part II, 5 European Law Review (1980) pp. 95-111; E.P. Working Documents, Report on the state of relations between the EEC and East European state-trading countries, and COMECON, 89/78 (11 May 1978) p.8.
5. Georges Le Tallec, op. cit. in Note 2.
6. Patricia Leopold, External Relations power of the EEC in theory and practice, 26 International and Comparative Law Quarterly (1977), pp. 54-80; For full list of agreements entered into by the European Community see Parry and Hardy EEC Law, 2nd ed. (1981) Appendix 3, pp. 494-519.
7. Ibid.
Also see Clive M. Schmitthoff and Kenneth Simmonds (ed.), International Economic and Trade Law (1977) Chaps. 1, 6, 7, 8, 9, 18.
8. Case 22/70 (1971). Commission V. Council European Court Reports 263, paragraphs 17-19.
9. Opinion 1/75 (1975), ECR 1355; H.H. Mass, Opinion 1/75, Opinion of the Court of Justice pursuant to Art. 228 of the EEC Treaty of Nov.11, 1975, pp. 375-387. ECR. 1355.
10. Furthermore see Cases 3/76, 4/76, 6/76 (1976), 2 Common Market Law Reports, p.440. The question of member states' competence to enter into international treaty obligations in order to restrict fishing on certain marine species is considered.
- 11./

11. Opinion 1/76 (1977), European Court Reports 741.
12. K. S. Simmonds, The Evolution of the External Relations Law of the European Economic Community, 28 International and Comparative Law Quarterly, (1979), pp. 644-668.
13. Michael Hardy, Opinion 1/76 of the Court of Justice, 14 Common Market Law Review, (1977), pp. 561-600.
14. Opinion 1/78 (1979), 3 Common Market Law Reports, p. 639.
15. K. S. Simmonds, External Relations of the EEC. A recent ruling of the European Court, 26 International and Comparative Law Quarterly, (1977), pp. 208-210.
16. T. C. Hartley, op. cit., in Note 2, p.164.
17. Georges Le Tallec, op. cit., in Note 2, p. 738.
18. P. Taylor, When Europe Speaks with one Voice, (1980).
19. O.J. L/1273/1961.
20. O.J. L/326/29.12.1969 Council Decision 69/494.
21. Further information on this matter is provided in Chapter 8, relating to state-trading countries.
22. Cae One Kim, Developments in the Commercial policy of the EEC, 8 Common Market Law Review, (1971), pp. 148-167.
23. K. S. Simmonds, op. cit., in Note 12.
24. Ulrich Everling, Legal problems of the Common Commercial Policy in the European Economic Community, 4 Common Market Law Review (1966-1967), pp. 141-165.
25. Jacques Steenberg, The Common Commercial Policy, 17 Common Market Law Review (1980), pp. 229-249.
26. Pierre Vogelenzang, Two aspects of Art. 115 of the EEC Treaty: its use to buttress Community set sub-quotas and the Commission's monitoring system, 18 Common Market Law Review, (1981), pp. 169-196.
27. U. Everling, op. cit., in Note 24.
28. P. Leopold, op. cit., in Note 6, p. 54.
29. John Costonis, The Treaty-making power of the European Economic Community, 5 Common Market Law Review (1967-1968) pp. 421-457.
30. P. Kapteyn and P. VerLoren van Themaat, Introduction to the Law of the European Communities, (1973), Chap. XI, p.359.
31. European Documentation, 25 Years of European Community External Relations (1979), 4/79, p. 15 ff.
32. /

32. T. C. Hartley, op. cit., in Note 2;
Bernard R. Bot, Negotiating Community Agreements: Procedure and Practice, 7 Common Market Law Review (1970), pp. 286-310;
Carol Cosgrove Twitchett, Europe and Africa, From Association to Partnership (1979) pp. 74, 124.
33. Karin Kock, International Trade Policy and the GATT 1947-1967 (1969); In a similar way the OEEC countries in 1949 started to liberalise trade and in 1950 they accepted a code of liberalisation, the aim of which was the gradual freeing of up to 75% (later 90%) in their mutual trade. The liberalisation was not automatically extended to GATT members outside the OEEC; The liberalisation Code was tacitly accepted without the question of compatibility being raised nor a waiver being asked for; Information obtained by interviews with members of the legal service of the European Community Commission (Dec. 1981).
34. The European Parliament, under Art. 228 EEC, must be consulted after the signing but before the conclusion of agreements; see also Juliet Lodge, The European Parliament in Juliet Lodge (ed.) Institutions and Policies of the European Community, (1983) pp. 27-42 at 35-36.
35. The Commission and the Council of the EEC sometimes however, disagree. During Turkey's association agreement negotiations, the two bodies disagreed and, also, shortly after the second Yaoundé Convention. The ERTA case is one of the most remarkable cases and indeed the first one brought by the Commission V. Council of the European Community.
36. T. C. Hartley, op. cit., in Note 2;
K. Lipstein, The Legal structure of Association Agreements, XLVII British Yearbook of International Law (1974-1975) pp. 201-226.
37. Stefan Riesenfeld, The Doctrine of Self-Executing Treaties and Community law. A pioneer decision of the Court of Justice of the European Community, 67 American Journal of International Law (1973), pp. 504-508; It is the Commission EEC which represents the member states and conducts the negotiations; also see J. Steenbergen, The Status of GATT in Community Law, 15 Journal of World Trade Law (1981), pp. 337 ff.
38. Ibid.
39. Case 270/80, Polydor Ltd. V. Harlequin Records (1982), ECR.329.
40. Joined cases 21-24/72, International Fruit Company V. Produktschap Voor Groenten en Fruit (1972), ECR.1219; See also T. C. Hartley, op. cit., in Note 2.
41. The ECJ has in a number of cases applied principles of international law, e.g. 10/1961 Commission V. Italy (radio valves case), Common Market Law Reports, (1962), 187.
42. K. M. Meessen, The application of Rules of Public International law within Community law, 13 Common Market Law Review (1976), pp. 485-501.
43. /

43. Case 32/79 Commission supported by Denmark, France, Ireland and the Netherlands V. U.K. (1980), ECR, 2403.
44. In Haegemann, the Court has explicitly recognised its jurisdiction. (1974), ECR, 449.
45. Joined cases 21-24/74 op. cit., in Note 40.
46. Case 22/70 ERTA (1971), ECR, 263.
47. Case 32/79 op. cit., in Note 43.
48. Gerhard Bebr, Agreements concluded by the European Community and their possible Direct Effect: From International Fruit Company to Kupferberg, 20 Common Market Law Review (1983), pp. 35-73.
49. Case 26/62 Van Gend and Loos (1963), ECR, 1. For a general discussion on direct applicability of Community law see A. G. Toth, Legal Protection of Individuals in the European Communities, Vol. I, para. 104, p. 11 ff.
50. Case 9/73, Schlüter (1973), ECR, 1135.
51. Case 181/73, Haegemann (1974), ECR, 449.
52. Case 40/72, Schroeder (1973), ECR, 125.
53. Case 87/75, Bresciani (1976), ECR, 129.
54. K. Messen, op. cit., in Note 42.
55. Ibid. p. 485.
56. Ibid.; also see T. C. Hartley, op. cit., in Note 2.
57. M. Waelbroeck, Effect of GATT within the legal order of the EEC, 8 Journal of World Trade Law (1974), pp. 614-623.
58. Case 40/72, Schroeder, (1973), ECR, 125.
59. Case 38/75, Nederlandse Spoorwegen, (1978), ECR, 1439.
60. Case 87/75, Bresciani, (1976), ECR, 129.
61. Case 270/80, Polydor, (1982), ECR, 329.
62. Case 17/81, Pabst, (1982), ECR, 1331.
63. Henry G. Schermers, Direct application of treaties with third states: Note concerning the Polydor and Pabst cases, 19 Common Market Law Review (1982), pp. 563-569.
64. Case 181/73, Haegemann, (1974), ECR, 449.
65. /

- 65. Case 104/82, Kupferberg, Judgement of 26 Oct., 1982, not yet reported.
- 66. Case 266/81, Societe Italiana V. Ministero della Finanze, not yet reported.
- 67. Joined cases 267-269/1981, Amministrazione delle Finanze, not yet reported and joined cases 290 and 291/80 Compagnia Singer, not yet reported.
- 68. Gerhard Bebr, op. cit., in Note 48.

PART II

CHAPTER 4.

REGIONAL ARRANGEMENTS WITHIN THE GATT: THE EXAMPLE OF THE EEC.

Regional Arrangements and GATT Article XXIV.

The MFN principle provided for in Art.I of the G.A. is the most important non-discrimination clause of the agreement. (For further information see above chapt. 2, p.22). Although uniform application of this principle is urged, a number of exceptions to MFN obligations to GATT are provided for, the most significant of which are laid down in Art. I par.2 and Art.XXIV of the G.A.; both relate to preferential trade agreements. Art. 1:2 of the GATT agreement provides for the continued operation of preferences established prior to the coming into force of the G.A.¹ Art. XXIV, which is arguably the most controversial, disputed and abused provision of the G.A. permits regional economic arrangements, such as customs unions, free-trade areas and interim agreements leading to either of them, to operate lawfully under the agreement.

↓ The spirit and basic tenets of the MFN principle, is also found in the Community legal system as a pillar underlying it.² The most significant application of this spirit in the EEC is incorporated in Art.7 which prohibits any discrimination between Community nationals. Art. 40:3 EEC, prohibits discrimination between producers and consumers in relation to agriculture. Art.86 EEC, relating to the competition policy of the Community, prohibits discrimination between consumers, where a supplier in a dominant position may discriminate against consumers in terms of different prices, different conditions of delivery, payments, etc. Art. 119 EEC, establishes the principle of equality of payment for equal work regardless of sex.³ Likewise, Art. 95 EEC, relating to internal taxation, provides that "No member state shall impose directly or indirectly on the products of other member states any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products". This article aims to eliminate internal discrimination on taxation and facilitate the free flow of goods within the Community. A series of cases /

cases have been brought before the ECJ against certain member states because of the way they taxed alcoholic beverages.⁴

The ECJ has on several judgements based its decisions on the principle of equality when considering various matters. In the Frilli V. Belgium case, it held that there is a general principle of non-discrimination in Community law.⁵ In the skimmed-milk powder case, the question of discriminatory treatment in regard to Art. 40:3 was considered.⁶ The question of discrimination on the grounds of sex, nationality, religious faith, has, on several cases, been considered by the ECJ.⁷

Therefore, the EEC Treaty incorporates the general principle of non-discrimination as a fundamental foundation of its legal system. This principle has, subsequently, been implemented and strengthened by the ECJ in the course of its case law with the ultimate objective of developing it even further and providing the necessary framework for the full protection of individuals.

Regional arrangements are not a new phenomenon. International and regional integration as is referred earlier in Chapter 2 (p.9 and following, and in particular at p.13) has its foundations in international trade theories, in particular in the classical theory of comparative advantage and specialisation. Specifically, in the commercial treaties of the last centuries there had been provisions relating to regional arrangements that had long been considered as an exception to the idea of the MFN principle. In the ITO/GATT preparatory negotiations the issue of regional arrangements was long discussed. The first ITO draft contained only provisions relating to customs unions, but the Havana charter included provisions relating to free-trade areas as well.⁸ After the Havana Conference, the ITO Article on regional integration was carried into GATT.⁹ The USA favoured the formation of customs unions and free-trade areas for political reasons and it saw them as a means of exercising political influence on other states, even though regional arrangements might not be advantageous to its own economy.¹⁰ The LDCs pressed also for the exception of regional arrangements, to which they were parties from MFN obligations, so that they would benefit by entering into regional arrangements, broaden their markets and expand their development programs.

Since /

Since the establishment of GATT and, most particularly, since the formation of the EEC in 1958, numerous regional arrangements, such as customs unions, free-trade areas and interim agreements have proliferated, and several preferential agreements have been negotiated between them (regional arrangements) and third countries. The EEC has negotiated a chain of preferential agreements with almost all Mediterranean and most of the African countries. (See next chapter for further details). At present most countries form part of regional arrangements and thereby or through other means most countries belong to one or another regional economic group. Today more than two-thirds of the GATT parties belong to some regional economic arrangements.¹¹

The creation of regional arrangements is not ruled out by the GATT rules as Art. XXIV states: "The provisions of this agreement shall not prevent the formation of a customs union or a free-trade area." From one respect such a formation shall be rather encouraged so that regional arrangements encompass the whole world and facilitate trade between them, with due observance to the GATT norms. It is worth defining regional arrangements in order to evaluate the development and significance towards the establishment of free-world trade.

1. Customs Unions

A customs union is an arrangement "whereby tariffs and quotas on trade between members are removed, but members agree to apply a common level of tariff on goods entering the union from without."¹² According to GATT Article XXIV:8(a) "duties and other restrictive regulations of commerce (except where necessary, those permitted under GATT Arts. XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories" and "the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union".

Therefore, a) all internal trade barriers shall be eliminated on substantially all the trade, b) a uniform CET shall be applied to non-union members, and c) a third requirement is found in Art. XXIV:5 /

Art. XXIV:5 (a) with respect to customs unions and interim agreements leading to customs unions. Accordingly "duties and other regulations of commerce (imposed) on contracting parties not parties to such a union shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce ... prior to the formation of such a union".

As regards the first of the above criteria, "the substantially all the trade" aspect is very important and it should be considered with respect to customs union arrangements. It can be interpreted in the sense that the bulk of trade, i.e. 80% of the trade should be liberalised. The EEC before the GATT Committees at the time of its establishment claimed that 98.6% of intra-Community trade would be liberalised, although this percentage was considered to be very high. The question of substantially all issue was also raised in the EFTA arrangement which excluded agricultural trade from the provisions of the free-trade areas. Within the GATT framework, the CONTRACTING PARTIES with regard to the question of whether the regional arrangements liberalised substantially all the trade "never made any serious attempt to define this term nor to indicate any agreement as not meeting this standard".¹³ With respect to the common external tariff of the customs unions when relating to the third requirement of Art. XXIV:5(a) mentioned above, problems arise.

In this context it is worth mentioning that so far the only complete customs union which has reached the level of the application of a CET is the EEC. All the other customs union arrangements are interim agreements which are supposed to lead to the formation of customs unions.¹⁴ It is also with reference to the EEC that the GATT agreement has had the only opportunity to scrutinise the CET. In considering the CET in its application to both high tariff and low tariff countries, several interpretative problems have arisen. The quantitative concretization of the CET is quite difficult. With respect to par.5 of Art.XXIV which states that "duties and other regulations of commerce ... shall not on the whole be higher or more restrictive than the general incidence of the duties ...", the question which had to be determined was whether the concepts "on the whole" and "general incidence" refer /

refer to each item in the CET or to the CET as a whole.

This question is highly problematic. The GATT agreement does not include any official interpretation of this concept. The Havana Reports indicate that the intention was that the article on regional arrangements "should not require a mathematical average of customs duties, but should permit greater flexibility, so that the volume of trade may be taken into account",¹⁵ In 1957 during the negotiations leading to the establishment of the EEC, the term "general incidence of the duties" had been used with the intention that it should not require mathematical calculation of duties.¹⁶ It is submitted that the intention at the beginning of negotiations for the establishment of the EEC was that the method of calculation of the CET should not relate to each item, but look in general at the CET schedule as a whole. The schedule as a whole should not be higher and more restrictive than the general incidence of the duties existing prior to the formation of such a union. Long discussions took place to determine the CET. It was decided that the arithmetical average method should be applied as provided for in Art.19 of the Rome Treaty which reads "that CCT shall be at the level of the arithmetical average of the duties applied in the four customs territories comprised in the Community (at the time of its establishment)".

The common sense interpretation of Art.XXIV is to the effect that as long as the CET is not higher or more restrictive than the members' tariffs collectively, one may conclude that the creation of the CET has not been restrictive.¹⁷

The interpretation and application of the CET of customs unions is very significant, given that it plays a major role in the liberalisation of trade as applied towards the non-union states. The most important aspect of the CET, however, is its uniform application to all foreign suppliers. In customs unions once goods are imported into one member state and submitted to the CET, they cannot be subjected to additional duties, but they circulate freely within the union. When a customs union adopts its CET it may raise a member's tariffs (XXIV:6) as in the case of the EEC which raised the Benelux tariffs; these were much lower than those of the other members. The creation of a customs union may entail, however, (1) an increase in all duties, (2) an increase in some and decrease in other duties, (3) a decrease in all duties. Under the GATT rules only category (3) qualifies for an exception.¹⁸

Art. /

Art. XXIV:8(a) refers to the elimination within the customs unions' territory of all internal barriers, that is, duties and other regulations of commerce which mainly include QRs (except for those provided as necessary and permitted under Art. XI-XV and XX). This paragraph (XXIV:8(a)) treats QRs as equivalent to tariffs. Both are to be eliminated with respect to substantially all trade. Therefore QRs as well as tariffs are eliminated in the internal sphere, but may still be imposed as against third parties. In particular QRs are very problematic. In the case of the EEC they would have to be applied jointly or with the approval of the Commission. (For further details see earlier, Chapter 2 p.29. , and later in this Chapter, p.118).

2. Free-Trade Areas

Free-trade areas are much simpler regional economic arrangements than customs unions. In free-trade areas all internal barriers are substantially eliminated, but the members retain their own individual external barriers against third countries. For the creation of a free-trade area, two requirements must be met.

(a) According to Art. XXIV:8(b) between constituent territories duties and other restrictive regulations of commerce are required to be eliminated on substantially all the trade in products originating in such territories. Towards third countries the free-trade area members retain their own duties, that is, no CET is applied, and (b) according to Art. XXIV:5(b) for the establishment of a free-trade area "each member's duties and regulations of commerce shall not be higher or more restrictive than the corresponding ones prior to the formation of the free-trade area or the interim agreement leading to a free-trade area".

In a free-trade area no common external tariff is required, but each member can adopt its own system of duties, et al, which should not be higher or more restrictive than those existing prior to the formation of the free-trade area. Goods originating from outside the area are submitted to the importing country's duties, but, contrary to what happens in customs unions, when re-exported to another higher tariff member of the area, may be subsequently, submitted to some additional higher duties, which the second country may apply.

Thus /

Thus, the origin of goods is the most essential and complicated question in a free-trade area. How to determine the origin of goods and how to cope with the practical difficulties raised in trade with third countries are very difficult questions.^{19.}

3. Interim Agreements

Interim agreements are regional economic arrangements which are assumed to lead to customs unions or free-trade areas within a reasonable length of time contemplated by the parties. Art. XXIV:5(c) states that "Any interim agreement shall include a plan and schedule for the formation of such a customs union or free-trade area within a reasonable length of time".

Interim agreements are the first step towards the establishment of customs unions or free-trade areas. They are subject to the same procedures and are required to comply with the same obligations under the GATT rules as customs unions or free-trade areas in accordance with par.5(a) and (b) of Art. XXIV. This Article applies in the same way and has the same effects with respect to interim agreements. All regional arrangements, with the possible exception of the EEC, brought to GATT for approval have been interim agreements needing a transitional period on the way to becoming customs unions or free-trade areas.

4. Preferential Agreements

Preferential agreements are arrangements negotiated between two or more countries or groups of countries, in this case between the EEC and third world countries. They involve preferential treatment granted by the EEC to the latter, in order to promote, through financial and technical aid, their economic development and expand their trade. They can be a step towards the establishment of a free-trade area between the Community and third countries.

Preferential agreements are absolutely forbidden by the G.A., except those previously in existence, in accordance with Art. I:2 MFN principle and according to par.9 of Art. XXIV, which states that "preferences referred to in Art. I:2 shall not be affected by the formation of a customs union or a free-trade area, but may be eliminated /

eliminated or adjusted by means of negotiations with contracting parties affected".

Preferential agreements are, as such, inconsistent with the MFN principle of GATT, and several questions have been raised as regards their application and their subjection to the concept of regional economic arrangements. In fact, tariffs applied between the constituent territories are reduced, whereas in customs unions or free-trade areas they are eliminated on substantially all the trade.²⁰ But despite this, several preferential agreements have been negotiated. In particular, the EEC which is the most important of the regional economic arrangements, has negotiated several preferential agreements. Its preferential network encompasses almost all Mediterranean and most of the African countries. (Further details are discussed in next chapter, in particular as regards the impact of preferential agreements on the GATT system.)

The GATT agreement, as has been pointed out earlier, does not allow preferential agreements to operate under its provisions. It nevertheless, provides for the system of waivers applicable instead of preferential agreements. A waiver can be granted to any country and, having obtained it, such a country can act lawfully under the G.A. For example, Australia obtained a waiver from GATT in 1966 to allow it to grant preferences to LDCs.²¹ Also, the GSPs granted in 1971 by several DCs to LDCs can be defined as a waiver of the GATT obligations.²²

EVALUATION OF REGIONAL ARRANGEMENTS

Regional arrangements, such as customs unions or free-trade areas, establish a preferential and privileged regime among the countries involved. They may tend more towards free trade in the internal sphere, at least to the extent that tariffs are lowered and to the extent that the shift from high-cost producers to low-cost member supplier may be beneficial leading to trade creation.²³ They involve a departure from the MFN obligations and may discriminate against the rest of the world by moving away from the global free-trade approach.

Within the multilateral trading framework, in particular in GATT, regional arrangements are permitted in order to increase freedom of trade, facilitate integration between the economies, accelerate their development process without formal action or retaliation from GATT members, and promote rational allocation of world resources. Although at the time of the establishment of GATT, regional economic arrangements were not as advanced as in the 1970s (as has been discussed above in Chapt.2 p. 14); they had been seen as gradual steps for freer, non-discriminatory world trade and therefore Art. XXIV. was included in the GATT.²⁴ The USA had been sympathetic to the idea of incorporating the regulation of regional arrangements within the GATT. The first ITO draft included clauses exempting such arrangements from MFN obligations. During the ITO negotiations the USA representative pointed out that customs unions "are desirable provided that they do not cause any disadvantage to outside countries in comparison with their trade before the establishment of a customs union".²⁵

GATT Article XXIV regulates regional arrangements and sets out the conditions under which contracting parties may become members of customs unions or free-trade areas. It is, however, considered to be the most troublesome provision of the G.A. and, as such, it has been discussed in the legal literature more extensively than any other GATT provision.²⁶ Certainly, regional arrangements promote internal trade but they may be discriminatory and conflict with free world trade. For the assessment and impact of regional arrangements on the world trading system we should look at the Article as a whole. Paragraphs 4 and 5 of this Article point out in particular its major significance. Paragraph 4 states that regional arrangements "can increase /

increase freedom of trade" through "closer integration between economies", but the danger of moving away from free trade as regards external trade has also been recognised. Para.5 requires, with reference to customs unions that external tariff and trade barriers "shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the territories prior to the formation of such union".

Art. XXIV of the G.A. puts the system of regional arrangements under the control of a multilateral mechanism and therefore plays a very significant role in trying to keep a balance between the world trading system and regional economic groupings, permitting regional arrangements to function without causing any disturbance in the multilateral system and therefore political conflicts.

In the case of regional economic arrangements the most important questions which can be asked in respect of their effects on world trade are: What is the impact of the creation of regional arrangements? Are they beneficial to world trade or not? Is the GATT's role positive towards the establishment of regional arrangements? It has been recognised that there can be favourable effects on trade creation; i.e. when there is a shift from high-cost local suppliers to low-cost union suppliers, or there can be unfavourable effects on trade diversion; i.e. when there is a shift from low-cost suppliers from outside the regional arrangements to high-cost suppliers within the regional arrangements.²⁷ The latter case can, moreover, lead to disturbances in international economic flows and, furthermore, to political tension, and also it may cut ties with third countries. On the other hand as U. Everling²⁸ suggests this may stimulate economic activities and thus help to develop relations with other countries. Which of the two conflicting effects is the stronger is an extremely difficult question, even for economists. It rather depends on the policies of the regional economic arrangements. If they pursue liberal economic policies, the creation of the regional arrangement can be beneficial on world trade, but if on the contrary they pursue protectionist policies the effects on trade can hardly be beneficial.

Whatever the circumstances are, regional arrangements are submitted to a multilateral surveillance mechanism in order to examine whether /

whether they are in conformity with the GATT rules and procedures, and especially with Art. XXIV requirements.

When two or more constituent territories decide to enter into a customs union or free-trade area arrangement they have to present the CONTRACTING PARTIES with the proposed Treaty and provide information to facilitate GATT review. The proposed union or area is examined for its conformity with the GATT rules. So far the GATT has approved all regional arrangements submitted to it, although none of them notified to GATT fully complied with its requirements.²⁹ For example, the EEC, which is considered to be the only complete customs union, has been subjected to a great deal of criticism, particularly as regards its association agreements with third countries which, however, have been approved and have been legally functioning under the G.A. despite their apparent discriminatory nature.³⁰

In fact, to date, regional arrangements have proliferated to such an extent that most countries have been parties to one or other regional arrangement, according to their geographical position or stage of economic development. Regional arrangements have been the rule and their establishment no longer raises particular problems when submitted to GATT for approval. The pattern of world trade has shifted from the MFN principle and principle of reciprocity to differential treatment and to the acceptance of the principle of non-reciprocity. Art. XXIV, of course, allows the latter treatment for customs unions and free-trade areas, but preferential agreements are not allowed to operate within the GATT framework. In practice Art. XXIV is very flexible and, therefore, it cannot be expected to be strictly applied. Its broad interpretation aims to facilitate trade among GATT contracting parties and not to raise trade barriers. Preferential agreements, although in law inconsistent, have tacitly been accepted as equivalent to customs unions and free-trade areas, and therefore in practice no particular problems have arisen.

Most countries are parties to preferential agreements; e.g. the EEC in particular has negotiated a large number of preferential agreements.³¹ Although preferential agreements are contrary to MFN obligations and to the free world trade approach of the GATT, in practice they have become the rule. In other words, the practice is contrary to the legal /

legal rules. DAM ³² has expressed the view that preferential agreements should be included in the GATT system and submitted to the same treatment as customs unions or free-trade areas. In that way some kind of reconciliation of preferential agreements with GATT Art. XXIV and Art.I could possibly be achieved. As GATT Art. XXIV stands now, however, it has not proved sufficiently capable of coping with existing economic and legal issues and, therefore, it is submitted that it should be revised and updated so as to have more control than is presently possible.

At the present point of the discussion, having regard to the proliferation of regional arrangements, it is also submitted that regional arrangements should be strengthened in such a way so as to constitute individual entities within the GATT legal system. Such entities could be parties to the G.A. Thus having a certain number of regional arrangements functioning within a superior multilateral trade organisation, we would have a limited number of contracting parties and consequently we would be in a position to strengthen the world trading system. This could be best achieved if all regional arrangements apply common rules and set out the conditions for improvements of world trade rules and in order to provide for a better allocation of world resources. Nevertheless, such a submission of the regional arrangements to a multilateral trade system could cause some conflicts. At this stage, the multilateral trading system should be called on to solve existing problems and try to reconcile conflicts. Such a development which would establish uniform principles, would facilitate and strengthen inter-bloc relations, promote efficiency and ultimately improve the standards of living of the international community of states. In this framework, however, particular attention should be given to LDCs' regional arrangements as a means towards development and industrialisation. The question as Huber ³³ puts it, is whether the GATT should give these regional arrangements between LDCs more lenient treatment than to arrangements among DCs.

EEC and GATT: The external trade relations provisions of the EEC and their compatibility with the General Agreement.

The history of the EEC is well known.³⁴ The treaty establishing the EEC was signed in Rome on 25th March 1957 by the six ECSC countries (France, Fed. Republic of Germany, Italy, Belgium, the Netherlands and Luxembourg.) The new organisation took the form of a customs union and it is considered to be the only complete customs union so far. Accordingly, Arts. 9-29 EEC, provide the details for its foundation.

Art. 9 of the EEC provides that the Community "is based upon a customs unions which covers all trade in goods". The EEC is, moreover, much more than a mere customs union. It is a Common Market in which the factors of production, labour, capital and enterprise are to move freely. It is also governed by Community law, by harmonised national policies and common Community policies. Eventually, the establishment of an Economic and Monetary Union is envisaged, although not explicitly provided for in the EEC Treaty.

As was pointed out earlier in this chapter (p.100) customs unions can contribute indeed to the expansion and promotion of trade within the bloc, but it involves possible discrimination against the rest of the world (GATT Art. XXIV 4-9). Some economists believe that the benefits of the Western European Customs Union are not very great.³⁵ Although some of them believe that the gains of the creation of a customs union are not great, much support is given to the creation of customs unions.³⁶ However, it is believed that the impetus for the creation of a customs union are more political than economic. That is, because political integration is difficult to be directly achieved, integration of the economies is considered to be the necessary prerequisite and the first step to this end.³⁷ The failure to establish the European Political Community not founded on an economic background is an explanatory justification of this argument.

The EEC Treaty provides in Arts. 9-29 for the creation of a customs union. It provides for the harmonisation of customs legislation, leading eventually to the establishment of common customs legislation, which would constitute the basis for the progressive economic integration of the EEC.

A /

A schedule for the elimination of internal barriers and other relevant restrictions between the original six member states is contained in the Treaty and was to be accomplished by 31st December 1969. The Community complied with the obligations contained therein eighteen months ahead of schedule, on 1st July 1968.³⁸ The three new member states later, on 1st July 1977, brought their customs legislation into line with the Community. Greece, being the tenth full member state of the EEC will apply the customs union's provisions by the end of the transitional period, that is on 31st December 1985 in accordance with the Treaty of Accession and the rules laid down in the association agreement, applicable since November, 1962. Furthermore, quotas were abolished. This was achieved relatively easier by virtue of measures of liberalisation taken within the framework of IMF, GATT, UNCTAD and OECD.

In addition, customs unions' provisions of the EEC Treaty together with the preamble to the Treaty and Arts. 110-116, relating to the CCP, aim at the harmonious development of international trade, the abolition of restrictions and the lowering of customs barriers.

Arts. 110-116 of the EEC provide for a CCP as well as for negotiations with third countries on the common external tariff and on the CCP. Beside the CCP provisions of the EEC Treaty, there are some other scattered provisions relating to external relations; notably Arts. 18, 19, 27, 28 and 29 relating to the CET. Already in the Preamble to the EEC Treaty the establishment of common policies is emphasised. The Community shall apply liberal principles of commercial policy to third countries. It shall apply liberal measures towards third countries and at the same time take measures to protect its internal market from imports coming from third countries. Art. 110 EEC Treaty, in connection with the general principles set out in the Preamble, states that the object of the Community is to contribute to the harmonious development of world trade and the lowering of customs barriers. Art. 111 refers to the task of the EEC of negotiating on the basis of common customs duties, whereas the other aspects of the CCP were (Art. 113) to come under full Community competence only in 1970. Individual member states were left free to take some measures of commercial policy until the end of the transitional period; common measures in the field of the CCP may be taken on certain points after that. /

that.³⁹ Art. 113 provides that "member states shall co-ordinate their trade relations with third countries so as to bring about by the end of the transitional period the conditions needed for implementing a common policy in the field of external trade". Art. 116 of the EEC provides that the member states must act in common after the transitional period has expired when matters of particular interest for the common market arise in international economic organisations.⁴⁰

The best example of negotiations concluded in common by the member states represents the participation of the EEC in multilateral trade talks conducted within the GATT framework. Before the EEC Treaty was ratified, the member states individually had to conduct negotiations within the framework of the GATT. Currently the Commission represents the member states in such negotiations while representatives of the member states still formally take part and, in fact, they have the voting power. The latter are represented by the Commission, which is responsible for conducting tariff negotiations with third countries.⁴¹ (For a full discussion on this matter see Chapter 3).

Thus the European Community has, in practice, replaced the member states in international trade talks and facilitated the dismantling of barriers. In the Kennedy Round trade talks, which coincided with the merger treaty in 1967, the EEC has also had the opportunity to participate successfully in multilateral trade negotiations within the GATT framework and thus strengthen its position in international fora.

Concerning the relationship of the EEC with the G.A., the status of the EEC as a customs union needs to be analysed with regard to Art. XXIV. The EEC's establishment in 1957 had an impact on the GATT agreement and it established a precedent for the formation of other customs unions or free-trade areas within the GATT framework. However, the question of compatibility of the EEC, founded on a customs union, with the GATT, occupied a central place in deliberations within the GATT for a long time. Even before the EEC Treaty was signed, deliberations and extensive discussions took place. Most of the time the legal issue in question concerned the validity of the EEC Treaty itself under the GATT rules relating to customs unions.⁴²

As far as tariffs and other restrictive regulations of commerce between the EEC member states are concerned, they had been removed partially /

partially within the GATT framework, even before the EEC's establishment. This partial reduction of duties and other restrictive measures such as QRs, facilitated the further elimination of all barriers in the internal sphere and the establishment of a CET in the external sphere.

On the other side of the Atlantic the USA, even before the EEC Treaty was drawn up, indicated its willingness to support and even it helped with the Marshall Plan, the establishment of the new powerful Community in the form of a customs union. The Americans, mostly for political reasons wanted to help Europe to re-establish its balance of payments position. After the EEC Treaty was signed, the Americans supported the EEC, although they recognised that there was some inconsistency between the new treaty and the GATT rules, especially Art. XXIV.⁴³ In the light of the USA support, other countries felt that "it was meaningless to insist on pursuing the legal technicality of possible EEC violation of GATT obligations any further".⁴⁴ What the Europeans wanted most was to facilitate and restore intra-European trade. In fact, the EEC Treaty was drawn up so that its provisions would be flexible and would not conflict with the GATT rules.⁴⁵

However, in accordance with Art. XXIV para. 7 the EEC Treaty had to be notified, as all regional arrangements, to the GATT for approval. For this reason all the information concerning the proposed customs union had to be made available to the CONTRACTING PARTIES. Subsequently, when the new treaty was notified to GATT, laborious negotiations and consultations took place. A working party was appointed to examine the compatibility of this new customs union with the GATT agreement and particularly Art. XXIV.

During the negotiations, "in several instances, reconciliation of interests was brought about by adopting measures that were in violation of the GATT rules or at least were close to the line. Consequently, the Rome Treaty and its commercial understanding had to be accepted as they were or not at all".⁴⁶ However, with the formation of the EEC, the GATT agreement for the first time had the opportunity to test its legal character. As Jackson says "the approval of the EEC by the GATT in fact has changed the GATT law concerning regional arrangements".⁴⁷ Meanwhile the GATT agreement had to proceed forward and adapt /

adapt to the new requirements of the times, especially the requirements brought up by the formation of regional arrangements.

However, in accordance with Art. XXIV:7, the EEC Treaty was submitted to the GATT CONTRACTING PARTIES at the eleventh session late in 1956, when the creation of the EEC was the subject of negotiations. Between the eleventh and twelfth sessions an inter-sessional Committee was appointed with the express purpose of studying the new treaty and of examining its compliance with the G.A. The Committee had to examine particularly "the commercial aspects of the Rome Treaty following from the rules on customs unions in the Agreement".⁴⁸

During the twelfth session, extensive discussions took place relating in detail to the EEC Treaty. "Most of the members of the GATT felt that as regards the internal trade barriers the Rome Treaty was fairly detailed and complete. On the other hand, the CONTRACTING PARTIES were not in a position to judge the consistency of the EEC external tariff with the G.A. because the common level of duties had not yet been published".⁴⁹

The basic problems which occupied the discussions throughout the twelfth session concerned four main legal issues: (1) the process of calculating the CET of the European Community. The method of calculating it, that is, the mathematical averaging of some sort, was extensively discussed. (2) the imposition of QRs for balance of payments difficulties by the member states against the rest of the world, whereas no restrictions of any kind would have to be imposed against member countries. (3) As regards agriculture, the Community representatives pointed out that the Community's price support system in agriculture needed some protection as the system itself was in its infancy. (4) The "loudest guns" were directed against the EEC's association agreements. The GATT agreement holds the existence of preferential agreements to be illegal under its rules. (Detailed reference to preferential agreements is later made in Chapt.5) A very detailed study was made relating to trade impact of the association agreements on twelve commodities.⁵⁰

The EEC member states responded to severe criticism made by the other GATT parties and offered to work out whatever actual problems might arise.

After the twelfth GATT session completed its work, an inter-sessional Committee was appointed for further study of the legal issue of /

of compatibility of the Rome Treaty with the G.A. It is worth noting that the relevant committee reported to the thirteenth GATT session and explicitly stated : "It would be more fruitful if attention could be directed to specific and practical problems leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Art. XXIV of the G.A."⁵¹ It was felt that the legalistic examination of compatibility was fruitless. It was more important for the Committee to study the Rome Treaty in general and to examine its application to the practical problems. Therefore, the CONTRACTING PARTIES agreed that more attention should be directed to the practical issues and leave aside the theoretical approach of the EEC's consistency with the GATT rules.

Therefore, the EEC has been tacitly accepted by the Working Party as legally operating, under Art. XXIV of the G.A. despite the controversies and the various views expressed, particularly as regards its preferential network. The acceptance of the EEC and the following proliferation of preferential agreements, has led to the weakening of the GATT Articles I and XXIV and, in general of the GATT system as a whole. Thus an amendment of Art. XXIV, so as to embrace all kinds of regional arrangements including preferential agreements, recommends itself. This particular legal issue of compatibility of the EEC itself and hereinafter of the EEC agreements with the G.A. is further analysed in the conclusions, because this issue is taken up time after time and in the following chapters, when a preferential agreement is negotiated by the EEC with third countries.

THE FOUR MAIN LEGAL ISSUES RAISED BY THE GATT WORKING PARTY.

(a) The common external tariff

The Working Party appointed four sub-groups to deal with four main legal issues raised on the compatibility of the EEC Treaty with the General Agreement. Sub-group A was appointed to examine the EEC common external tariff (CET) and to consider if it was in conformity with the provisions of the GATT agreement and especially of Art. XXIV Par.5(a) and par.8(a). The issue raised many questions during the negotiations, the most important of which was the method of its calculation.

According to Art.19 of the EEC Treaty ⁵² the member states decided to use the method of the "arithmetical average of the duties applied in the four customs territories comprised in the Community"⁵³ which in their view was in conformity with the GATT agreement and especially Art. XXIV:5(a). The method of calculation of the CET had occupied a very great part of the EEC's deliberations. The EEC representatives argued that the arithmetical method was in conformity or at least was not in contradiction with the GATT rules. They further argued that they could use any method of calculation since "Art. XXIV does not exclude any method of calculation provided that the duty rates are not on the whole higher than the general incidence of the duties which they replace". ⁵⁴

The Working Party requested, however, the EEC to supply not later than 1st July 1959, the sub-group with all data concerning the CET. The data finally presented by the EEC member states in mid-1960, regardless of the controversy over the date of its submission, was inadequate according to the sub-group's opinion. The sub-group said that "the EEC refused to supply data by which to compare the general incidence of the common tariff duties actually applied by exporters to the EEC from third countries on 1st January 1957". ⁵⁵ Subsequently, the sub-group asked the other GATT contracting parties to supply any available information concerning this matter. On the data supplied, however, the sub-group felt that the common customs tariff seemed to be higher than that actually applied before and on 1st January 1957.

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On the other hand, the EEC representatives noted that "they had gone further than the requirements of Art. XXIV:5(a) which derived the common external tariff (CET) by arithmetical average of the tariff rates actually being applied by the member states on 1st January 1957". They argued that they had observed the rules and exceptions laid down in Art. 19 EEC.⁵⁶

In general the arithmetical average method envisaged in Art.19 of the EEC Treaty and adopted by the EEC member states was not welcomed by the other contracting parties. The latter argued that "an automatic application of the formula whether arithmetic average or otherwise could not be accepted ... The matter should be approached by examining individual commodities on a country by country basis".⁵⁷

Meanwhile, when the EEC member states were negotiating the CET, the Dillon Round Multilateral Trade Negotiations were being conducted.⁵⁸ The item to item approach, which was adopted during these negotiations, was abandoned during the next round of MTNs. The Kennedy Round concluded in favour of the "linear approach" of tariff schedule negotiations.⁵⁹ Some writers, including J.Allen, thought that a product by product approach was the proper one in evaluating the impact of the new common customs tariff.(CCT).⁶⁰ He concluded that the common rates of duty on each product must be examined to see if there is overall compatibility with the GATT Art. XXIV:5(a).⁶¹ In general, the contracting parties considered that the arithmetical average method did not comply with the G.A. especially as far as the increase of the Benelux external duty rates were concerned. These were less than 3% at the time of the EEC establishment and they had to raise it to 12% in order to reach the level of the common customs tariff. Furthermore, some of the common customs duties had to be gradually increased.⁶²

Meanwhile, as the question of the compatibility of the method of calculation of the CET with Art. XXIV of the G.A. had not reached any definite conclusion, the controversy turned upon the word "applicable" provided for in Art.XXIV:5(a) and in relation to par.4 and par.8(a). That is a comparison of the duties applied in the constituent territories prior to the formation of the /

the customs union with the common duties applied thereafter, which had to be made. The question was whether the calculation was made on those duties actually applied or those authorised by GATT law.⁶³

Finally, the members of the sub-group felt that they were not in a position to consider whether the EEC CET was in conformity with the General Agreement, because "the common level of duties had not yet been published".⁶⁴ They further noted that they should be given more time and be supplied with additional data in order to be able to make a thorough and detailed analysis of the proposed customs tariff.

(b) Quantitative Restrictions

As far as the Rome Treaty provisions on QRs are concerned, Arts. 30-37 provide for the elimination of QRs between member states and lay down the rules for this purpose.⁶⁵

Accordingly, QRs and other equivalent measures were to be eliminated between the six original EEC member states by 31st December 1969, but, in fact, they were eliminated even earlier. As far as the new Acceding states are concerned, the 1972 Accession Act concerning the accession of the U.K, Ireland⁶⁶ and Denmark into the Community, provides for the abolition of QRs on imports and exports of industrial products between the six original and the new member states from the accession date.⁶⁷ As regards agricultural products they were subject to a Common Agricultural Market Organisation at the date of accession.⁶⁸ Likewise as regards Greece, under the Accession Act of May, 1979⁶⁹ by which she was admitted into the Community, it is provided (Arts. 25 and 35) that the abolition of QRs on imports and exports between the Nine and Greece should take place as from the date of accession, i.e. 1st January 1981 (save some exceptions provided for⁷⁰) concerning both industrial and agricultural products. The latter are covered by a common organisation of the market.

There is no doubt whatsoever that the problem of QRs applied by EEC member states is complex. What measures, taken by a member state, constitute quotas or which measures can be defined as QRs is a source of continuous argument between member states. In the Rome Treaty no corresponding definition is provided. Various rules enacted /

enacted by member states may directly or indirectly amount to QRs. The ECJ in its endeavour to cope with the difficulty concerned, has in several cases defined which actions taken by member states can constitute QRs or other measures having equivalent effect. Thus a list of such measures has been developed by the ECJ.⁷¹ The Commission of the European Community has also taken steps to speed the elimination of QRs. In particular, it has issued a communication according to which any product produced and marketed in any member state must, in principle, circulate freely within the member states.⁷² In general, the EEC in the context of harmonisation of national legislation, under Arts. 100-102 has adopted several measures in the form of directives which have binding effects on member states. In particular, emphasis is concentrated on the approximation of national laws concerning trade and industry. The European Community has attempted to eliminate technical barriers to trade, taking also into account international standards - e.g. within GATT the development of international standards. In fact, the EEC has actively participated in the establishment of the Code of Technical Barriers to Trade, or Standards Code.⁷³ Furthermore, in this context the EEC has still to proceed with a programme of harmonisation of all measures which can constitute obstacles to the free movement of goods.⁷⁴ The harmonisation process should particularly cover laws concerning national health and safety standards and generally all concept provided for in Art. 36 (EEC) under which derogation from the rules becomes easier.

The elimination of QRs while it is equivalent to the elimination of tariffs in the internal sphere, does not tackle the question on the external sphere; the treatment of QRs against non-members is different from the treatment of external tariffs. Despite the establishment of a CET, there has as yet been no equivalent common policy concerning the abolition of QRs against third countries. In the CCP chapter of the Rome Treaty, Art. 110 EEC provides for "... the harmonious development of world trade, the progressive abolition of restrictions on international trade, and the lowering of customs barriers". Also the subsequent Article 111:5 provides for "trade liberalisation lists regarding third countries, or groups of third countries". As regards this obligation the Commission makes appropriate recommendations to the member states. Then if member /

member states abolish or reduce QRs in relation to third countries, "they shall accord the same treatment to other member states".

The EEC Treaty provisions must be examined in relation to the GATT provisions concerning QRs and with the customs unions provisions of the GATT. As QRs between the EEC member states have been abolished, like tariffs, under the GATT rules and particularly Art. I:1 of the MFN clause, the same treatment should be expected to be applied to all parties to this Agreement; but the EEC as a customs union can deviate from this provision. Art. XXIV authorises customs unions to qualify for exceptions to these rules.

On the other hand, the G.A. treats QRs as equivalent to tariffs. In Art. XXIV:8(a) it is provided that both are to be eliminated with respect to "substantially all the trade". It explicitly provides that "Duties and other restrictive regulations of commerce (except those permitted under Arts. XI-XV and XX), are eliminated between the constituent territories of the union .. and ... substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union". Therefore this different treatment of the EEC approach on QRs on the external sphere and of the GATT Art. XXIV para.8(a) on QRs, should be examined. The EEC applies the CET applicable to tariffs but as regards QRs there is no common external approach. The EEC member states can apply their own quantitative measures, while the G.A. provides that all members of the customs union should apply the same tariffs as well as QRs to the non-union members.

Sub-Group B was appointed in GATT to examine this second legal issue, concerning the QRs provisions of the Rome Treaty and their compatibility with the G.A. The six member states of the EEC argued that they were entitled to deviate from some provisions of the G.A. including Arts. XI and XIV (concerning QRs)⁷⁵ provided that according to Art. XXIV para.5(a), "other regulations of commerce ... shall not on the whole be higher or more restrictive than the general incidence of ... those regulations applicable to the constituent territories prior to the formation of the union". They further argued that under the OEEC liberalisation code, they had liberalised in the external sphere at least 85% of their QRs. Indeed the EEC countries /

countries have eliminated most of the quotas concerning products coming from third countries, but they do not seem willing to eliminate the rest against other contracting parties to GATT, nor do they resort to the waiver procedure under Art. XXV:5.⁷⁶ Certainly, if member states do not use the waiver procedure and their restrictions cannot be justified under balance of payments provisions or other legitimate provisions, they act in violation of the G.A.

Therefore, the original six member countries of the EEC, as any other contracting party to GATT, are under the rules of this agreement, not allowed to use QRs for protective purposes, apart from those permitted in exceptional circumstances provided for in Arts. XI-XV and XX.⁷⁷

In its external phase the EEC has not established, however, a common level of QRs for BOP difficulties or for any other reason. Most members of the sub-group believed that "the imposition of common quotas by the six apart from being contrary to Art. XII of GATT, would be contrary to fundamental economic reasoning unless they held reserves in common".⁷⁸

The USA position towards QRs was not favourable. They still preferred tariffs to QRs in order to protect domestic producers, although they used quotas for a number of products. In particular, for BOP reasons, they were in a difficult economic position in 1971 when they felt obliged to use import surcharges which are equivalent to quotas. In the past the USA commercial policy has always been opposed to the use of import quotas. In fact, Americans suffered from quotas imposed by other countries, especially during the period of economic depression in the 1930s.⁷⁹

During discussion on this matter, different opinions were expressed. The EEC representatives argued that Art. XXIV:5 provides exceptions to the MFN obligations, but also entitles them to deviate from other provisions of the G.A. including Arts. XI and XIV. In their opinion "Art. XXIV imposed an obligation on the member states of the customs union to eliminate between themselves QRs without extending this measure to non-members".⁸⁰ On the other hand, the members of the sub-group pointed out that under the Rome Treaty a member state may impose QRs against third countries even if not justified for BOP reasons. The group did not share the EEC members /

members' view and could not accept the EEC interpretation. The group finally expressed the hope that the EEC would not take action that was inconsistent with GATT.⁸¹

In the end, what was considered important for the harmonious attainment of the objectives of the EEC and the G.A. was that a co-operation and consultation machinery should be established between the European Community and the contracting parties; and that, in relation to QRs for BOP reasons, further close collaboration with the IMF (Art.XV:1) was considered to be necessary.⁸²

In conclusion, the sub-group considered that there was no need for further examination of this issue, nor for the CONTRACTING PARTIES to take a formal decision to set up a special machinery to deal with the use of QRs by the six. It seems the CONTRACTING PARTIES were not willing to examine this issue further, despite the fact that quotas should have been treated more seriously than tariffs with respect to most crucial areas of products. Quantitative restrictions in juxtaposition to tariffs have been very complex measures in their application, since each contracting party to GATT and in particular each EEC member state applied its own quotas and as such has been considered by sub-group B. (More details about the GATT approach to QRs are provided earlier in Chapt.2 p.29).

(c) The Agricultural Provisions

Both the GATT agreement and the EEC Treaty provisions apply to all products, industrial and agricultural. The GATT agreement, however, makes no distinction at all between industrial and agricultural products, whereas the EEC Treaty includes special provisions with reference to agriculture and trade in agricultural products, envisaged in Arts. 38-47 with the objective of establishing a CAP.

In the agricultural sector over-production and protectionism are the problems that have made trade one of the most controversial issues of recent times. In the European Community the member states have agreed that trade in agricultural products should be restricted even within the Common Market. They thought that trade in agricultural products should be governed by a CAP that has been developed gradually /

gradually and implemented through a common organisation for agricultural products.⁸³

Sub-group C was to examine a possible conflict between the GATT and the EEC with particular respect to agricultural provisions and in particular, the system of minimum import prices, the development of long-term agreements of the EEC Treaty and the problems that might arise in the wake of their implementation. EEC Art. 44 provides for a system of minimum import prices below which imports may be suspended or reduced. This system was to be applied during the transitional period. It was to promote the formation of such a customs union by facilitating the internal reduction of trade barriers (XXIV:8(a)(1)).⁸⁴

The minimum import price system, however, operating during the transitional period does not seem to be incompatible with the G.A. Unquestionably, it restricts imports into the Community by imposing a minimum import price level below which products cannot be imported into the Community; it thus protects domestic producers from foreign competition; but continued beyond the transitional period, it might be incompatible with the G.A.⁸⁵

Secondly, EEC Art. 45 refers to the development of long-term agreements or contracts, between importing and exporting countries during the process of replacing national organisation with a common organisation for agricultural products. This objective was designed to guarantee national producers a market for their products. These long-term agreements or contracts would be applied for a limited period and to a limited number of products and only until such time as the common organisation for agricultural products would be established.

The purpose of the long term contracts is to facilitate the abolition of QRs and import duties when EEC Treaty provisions conflict with national regulations. According to Art. 45 (1) EEC and GATT Art. XXIV:8(a)(1), it appears doubtful whether such contracts are incompatible with the G.A.⁸⁶ It was perhaps unfortunate that the Community imposed other restrictions after the establishment of a common agricultural organisation, thus consequently raising new barriers against imports into the Community.

Within /

Within the GATT framework and outside the Community, countries exporting agricultural products were concerned that the minimum import prices system and the long-term agreements or contracts might affect their exports to the Community and that those two measures may be inconsistent with Art. XXIV:4. This Article states that the purpose of a customs union is to facilitate trade between the constituent territories and not to raise barriers to trade to other contracting parties with such territories.⁸⁷

The USA with its agricultural support system, similar to the EEC's CAP support mechanism, after having obtained a waiver for agricultural products in 1955, was not in a strong position to negotiate for free agricultural trade.⁸⁸

However, trade in the agricultural sector has continued to be the most sensitive area. Trade in agricultural products always poses problems - e.g. in the Benelux customs union, although customs duties and QRs were eliminated in the industrial sector, in the area of agriculture no significant achievement could be claimed; the respective national organisations for agricultural trade remained in existence.⁸⁹

The GATT sub-group C, which was set up to examine the consistency of the EEC agricultural provisions with the GATT, considered that "neither the EEC provisions as such, nor the Community institutions had acted contrary to their international commitments".⁹⁰ Especially as regards the second of the above points, i.e. concerning long-term contracts, the six EEC member states gave before the sub-group the assurance that they would be applied to a limited number of products and for a limited period until the national agricultural organizations were replaced by a common one.

The members of the sub-group pointed out that "the G.A. does not forbid long-term contracts but they felt they could hardly be reconciled with the provisions of Art. XXIV".⁹¹ They expressed fears that these contracts may lead to more import barriers and restraints on international trade, particularly with reference to the export trade needs of the LDCs, where the national economies depended on the export of certain agricultural commodities. The six EEC member states said that "the main aim of the long-term contracts /

contracts was to make possible a development towards freeing trade in certain products for which the provisions of the Rome Treaty relating to the abolition of QRs and import duties were 'not adequate', and they pointed out that no inconsistency of the European Community provisions with Art. XXIV of the G.A. existed; should any problem later arise, the institutions of the Community may apply for a waiver.⁹²

Some members of the sub-group were of the opinion that "the agricultural provisions carried a strong presumption of increased external barriers in place of existing tariffs and other measures".⁹³ Moreover, the majority of the members of the sub-group considered that it was impossible to determine the compatibility of the agricultural provisions with the G.A.⁹⁴

Thus, during the first stage of the implementation of the measures concerned, relating to a minimum import price system and long-term contracts, there were no indications that an inconsistency between the G.A. and the emerging Community system existed. After the transitional period, problems might arise, but they would be solved by means of consultations under GATT Art. XXII.

(d) Association with Overseas Countries and Territories

The Association Agreements (AAs) of the EEC with the overseas countries and territories are one of the most debated issues and have received much criticism as being incompatible with the GATT provisions. Even before the EEC Treaty was signed, the GATT contracting parties were concerned with this issue and objected to the conclusion of Association Agreements by the EEC, but France, with overseas dependencies, wanted special arrangements to be made so as to establish links between these territories and the EEC. The French particularly threatened not to participate in the Community if its overseas territories were excluded.

Articles 131-136 of the EEC Treaty entitle the member states to conclude association agreements with overseas countries and /

and territories and even to extend existing ones for the purpose of economic and social development of such countries and territories. In particular EEC Art. 133:3 provides that "these countries and territories may levy duties (new ones) in order to meet their development and industrialisation ... and that the duties shall be progressively reduced to the level of those imposed on imports of products from member states with which each country or territory has special relations".

Obviously these Association Agreements establish a preferential regime and as such are contrary to the MFN treatment of GATT Article I which, in para. 2 permits existing preferences to continue but precludes their extension, unless there has been established between the countries involved a customs union or a free-trade area arrangement, falling within the scope of Article XXIV.

The crucial question has been whether such arrangements between the Community and overseas countries and territories constitute a free-trade area. The members of Sub-Group D were of the opinion that these association agreements did not constitute a free-trade area since they did not meet the requirements of Art. XXIV:8(b) of elimination of duties and other regulations of commerce on substantially all the trade. They went on to argue that not only was there no reduction of barriers in the trade, but also that the countries and territories concerned could levy new duties, (133:3 EEC) and that the association agreements were an extension of the preferential system already in existence between the EEC member states and the overseas countries and territories.

On their side, the EEC representatives argued that the ultimate objective of these agreements, was the establishment of a free-trade area, and they held that they were interim agreements envisaging /

envisaging the formation of a free-trade area; they insisted that the conditions laid down in Art. XXIV:8(b) were fulfilled, that is, that substantially all the trade was liberalised and duties and other restrictive regulations of commerce maintained, were not on the whole higher or more restrictive than those before the formation of the free-trade area; and even if this were not so, they argued further that the provisions of Art. 133:3 (EEC) together with Art. XVIII of the G.A, providing that duties could be justified for economic development and industrialisation of the associated countries, should be taken into account. The volume of trade between the six EEC member states and the associated countries was negligible and the protective duties and measures taken were at about 1.4%. Such a small percentage, it was said, did not violate the "substantially all" criterion.⁹⁵

The members of the sub-group insisted, however, on their view that association agreements did not create a free-trade area and they pointed out that the Rome Treaty did not provide that association agreements create a free-trade area and that, additionally, the G.A. does not provide for a simultaneous existence of customs unions and free-trade areas, nor can a customs union operate within a wider free-trade area framework and vice-versa. The association agreements were attacked not only by the contracting parties to GATT but also by the other LDCs who were not linked with the European Community by any kind of agreement. The latter (LDCs) particularly emphasised that the preferential treatment extended to the dependent countries and territories would do damage to their trade and development, and that the growth and economic expansion of the associated countries was to be achieved at their expense. A number of delegations wanted special consideration to be given to practical problems rather than to a legalistic analysis of association of the overseas territories with the EEC.

Undoubtedly, association agreements are preferential agreements and to many members of the sub-group they were a simple extension of the existing preferential arrangements and, as such, violated the MFN clause of GATT Art. I.⁹⁶

Despite /

Despite this general consideration, no ultimate decision was taken by the sub-group, although a majority within the sub-group strongly criticised the association agreements as being contrary to the G.A.

The CONTRACTING PARTIES to GATT might find some aspects of the Rome Treaty or sources of action inconsistent but as Allen says "if the GATT was too juridical in its appraisal and too demanding in its requirements, the Community could find it more profitable to withdraw from the Agreement altogether".⁹⁷ The EEC actually could apply for a waiver from its GATT obligations, but it felt there was no need to do so, since the sub-group decision was inconclusive; it preferred to wait until another contracting party would force the issue. The association agreements were finally tacitly accepted due to American support.⁹⁸ In fact, the contracting parties to GATT could make recommendations to the EEC relating to incompatibility of the measures, but they never did.

At the thirteenth GATT session, the CONTRACTING PARTIES did not examine the legal issues, but it was suggested they should direct their attention to practical problems. They concluded, however, that negotiations and consultations should take place and at the end a compromise might be attempted if necessary, as had been the case with the EEC and the association agreements within the Fifth Multilateral Tariff Negotiations Round.⁹⁹ Consultations and compromise were stressed by Steinberger.¹⁰⁰ He did not argue for recourse to any juridical process, nor considered recourse to the International Court of Justice to be effective. He argued that if a whole region is affected, it is doubtful that a judicial or legal instrument can solve the problem.¹⁰¹

As far as this question is currently concerned, some EC officials in Brussels argue that the association agreements between the EEC and the associated countries and territories constitute a one way free-trade area with regard to the fact that the associated countries (e.g. the Lomé countries) can levy duties on imports of products from the member states on a non-reciprocal basis. Some others believe that there is no establishment of a free-trade area but the agreements concerned are "something special".¹⁰²

The /

The compatibility issue has never been discussed again since the first years of the EEC's existence, and although in law we may say that there is some element of incompatibility, in practical terms there is no need to discuss this issue again. The EEC has been accepted if not as a de jure, certainly as a de facto entity for the purpose of the GATT and, as such, enjoys legal personality.¹⁰³ The practice, as it has been developing thus far, is that only trade agreements with preferential character concluded by the EEC should be submitted to GATT for approval and not mere commercial agreements. As is discussed in the next chapter preferential agreements, concluded by the Community and third countries or groups of countries, are submitted to GATT for consideration of the compatibility issue, but in no case have definite conclusions been reached. Discussions and consultations normally take place, but as regards this specific issue, no problem of at least legal nature has arisen. (This issue is taken up again in the conclusions for further consideration).

CHAPTER 4.

NOTES

1. At the time GATT was established some regional arrangements existed which under Art. I:2 were excepted from MFN obligations, e.g. the Benelux customs union.
2. T. C. Hartley, The Foundations of European Community Law, (1981) p.140; A. G. Toth, Legal Protection of Individuals in the European Communities, Vol. I, par.304, pp. 111-114.
3. As far as the free movement of workers within the Community is concerned, i.e. with particular reference to employment, remuneration and other conditions of work, discrimination on the grounds of nationality is prohibited as envisaged in Art. 48(2), implemented by the Community Regulation 1612/68, (O.J. L 257/2, 1962 p.455 as amended O.J. C/138 19-6-1980, p.65) Art. 1 of this Regulation entitles any national of a member state to the right to work in any other member state, under the same conditions as the other member state's nationals. Art. 7 of this Regulation explicitly provides that "a national of one member state should not be treated differently from national workers by virtue of his own nationality". Accordingly, workers and their families are entitled to the same benefits as regards training, voting, representation, social and economic advantages, housing, etc. as national workers and their families.
4. Scott Davidson, Legal Aspects of the Common Market in Goods, Ch.11 in Lodge Juliet (ed.) (1983); See also A. Parry and J. Dinnage, Parry and Hardy, EEC Law, Second Edition (1981) p.366 (ext. relations); Case 168/78 Commission v. France (1980) ECR.347; Case 169/78 Commission v. Italy (1980) ECR.385; Case 170/78 Commission v. U.K. (1980) ECR.417; Case 171/78 Commission v. Denmark (1980) ECR.447; Case 55/79 Commission v. Ireland (1980) ECR.481;
5. Case 1/72 Frilli v. Belgium (1972) ECR.45F; also see Case 152/73 Sotgiu v. Deutsche Bundespost (1974) ECR.153.
6. Case 114/76 (1977) ECR.1211. In this case the EEC Council had sought to reduce the surplus of skimmed-milk powder in the Community. To this effect it asked the animal breeders to use, instead of protein element soya, skimmed-milk powder which was three times more expensive than soya. This method would benefit the dairy farmers, but on the other hand it would harm the animal feed producers. The ECJ in this case, held that this scheme was discriminatory against a certain category of producers.

7. /

7. Case 20/71 Sabbotini V. European Parliament (1972) ECR.345, in respect of allowance granted to Community officials when employed outside their home countries; Case 21/74 Airola V. Commission, (1975), ECR.221; specifically, in this case the ECJ held that the concept of nationality should be interpreted in such a way as to eliminate any difference of treatment between males and females; Case 130/75, Prais V. Commission in respect of religious faith, (1976), ECR.1589.
8. John Jackson, World trade and the law of GATT, (1969).
9. Ibid.
10. The USA, however, urged so that certain preferential trade agreements to be abolished, i.e. commonwealth preferences; J. Jackson, op. cit., in Note 8, ch. 24.10
11. However, not all regional arrangements intend to be customs unions or free-trade areas, i.e. in the co-operation agreement between India, United Arab Republic and Yugoslavia, the participants said they formed this agreement in the interest of trade expansion. The question is whether those regional arrangements fall under the jurisdiction of Art. XXIV. The three contracting parties said that it was not inconsistent with the GATT rules because they complied with part IV and the spirit of the G.A., although the Working Party did not agree. From the legal point of view it appears to be a preferential agreement and not a customs union or a free-trade area. Therefore, in order that this agreement fully complies with GATT rules, the appropriate legal action was a waiver to Art.I:1. under XXV:5 and not under XXIV:10. This decision, extended twice until 1978, shows that the contracting parties wanted to allow the agreement although it was clearly outside the scope of Art. XXIV; J. Huber, The practice of GATT in examining regional arrangements under Art. XXIV, XXIX Journal of Common Market Studies, (1981), pp. 281-298 at p.292.
12. Dennis Swann, The Economics of the Common Market, 4th ed. (1978) chap.3, p.74 ff.; P. Kapteyn and P. VerLoren Van Themaat, Introduction to the Law of the European Communities, (1973), pp. 194-202.
13. Gerard and Victoria Curzon, The Management of Trade Relations in GATT in A. Shonfield (ed.) International Economic Relations of the Western World 1959-1971, (1976).
14. J. A. Usher, Uniform External protection - EEC Customs Legislation before the Court of Justice, 19 CML Rev. (1982), pp. 389-412; The Customs Union, E. Commission, European Documentation 4/1980.
15. Kenneth Dam, Regional Economic Arrangements and the GATT; The legacy of a misconception 30, The University of Chicago Law Review, (1963).
16. /

16. Karin Kock, International trade policy and the GATT 1947-1967 (1969) p. 120 ff.
17. DAM in his book The GATT Law raises some important questions as the method of determining the CET. How should an average EEC tariff be determined? If one country has a duty of 50% and a second country imposes no duty at all, would the average be 25%? How can tariffs on items with greatly different volumes on imports be determined? How is an average tariff among countries calculated? How can a protective tariff and a revenue tariff be determined?
18. K. Dam, The GATT Law and International Economic Organisation, (1970) ch.16, p. 274 ff.
19. For further information see Dennis Swann, op. cit. in Note 12.
20. K. Dam, op. cit., in Note 15.
21. John Jackson, World trade and the law of GATT, (1969) para.24.10.
22. Abdulqawi A. Yusuf, "Differential and more favourable treatment". The GATT enabling clause 14 JWTL (1980) pp. 488-507.
23. J. Viner, in his famous work on Customs Union Issue in 1950, argues that any customs union being a step in the direction of free-trade could increase the welfare in the world;
R. Robson, International Economic Integration, (1980) ch. 4.
24. Ralph Haughwout Folsom, Corporate Competition Law in the European Communities, (1978) ch. 2, p.23 ff; John Jackson, Equality and discrimination in International Economic Law (XI); The GATT, 37 The Yearbook of World Affairs, (1973)
25. John Jackson, op. cit., in Note 21, p.575.
26. J. Jackson, op. cit., in Note 8, K. Dam, op. cit., in Note 18, R. Hudec, The GATT legal system and the world trade diplomacy, (1975).
27. J. Viner, theorist and economist, (in his book on Customs Union Issue of 1950) says that advantages of the regional arrangements will be gained only if the customs union or free-trade area creates new trade. If the agreement merely deflects trade then one state may profit at the expense of others, i.e. the strong efficient state will profit at the expense of the weaker less efficient states, unless some compensatory mechanism is introduced - i.e. a regional or social policy. Other theorists believe that regional integration is not so beneficial as world-wide trade agreements as regional arrangements tend to increase trade among members, but discriminate against non-members; John Jackson, op. cit., in Note 21, p.621.
28. /

28. Ulrich Everling, Legal problems of the Common Commercial Policy in the EEC, 4 CML Rev., (1966-1967) pp. 141-165.
29. However, there is a possibility for a waiver in case of disapproval for non-compliance with the requirements of Art. XXIV, but it has never been used.
30. In the EEC-ACP (Lomé I) Convention, it was stressed by the non-participants that this Convention was of apparent discriminatory character and, therefore, inconsistent with the G.A. But, despite this, it was finally approved as meeting the GATT requirements. See also J. Huber, op. cit. in Note 11.
31. For a list of EEC agreements see A. Parry and J. Dinnage, Parry and Hardy, EEC Law, second edition (1981), Appendix 3, pp. 494 ff.
32. K. Dam, op. cit., in Note 15.
33. J. Huber, op. cit., in Note 11.
34. William C. Cromwell, The Marshall Plan, Britain and the Cold War, 8 Review of International Studies (1982) pp. 233-249; P.S.R.F. Mathijssen, A guide to European Community Law, 3rd edition, (1980) chaps. 1 and 2, pp. 1-13; R.C. Mowat, Creating the European Community, (1973); D. Lasok and J. W. Bridge; Introduction to the Law and Institutions of the European Communities, 3rd edition (1982) chaps. 1 and 2, pp. 3-47; Edward Wall, Europe: Unification and Law, (1969); Stuart de la Mahotière, Towards One Europe, (1970); Walter Hallstein, United Europe, challenge and opportunity, (1962); Roy Pryce, The Politics of the European Community, (1973); A. N. Duff, The Report of the Three Wise Men, XIX J.C.M. Studies pp. 237-254; P. Taylor, When Europe speaks with one Voice, (1980); Altiero Spinelli, The growth of the European Movement since the Second World War, (1957), pp. 43-68 in Michael Hodges, (ed.) European Integration, (1972); John Pinder, Positive Integration and Negative Integration: Some problems of Economic Union in the EEC, (1968) in Michael Hodges (ed.) European Integration, (1972), pp. 124-150.
35. P. Robson, International Economic Integration, (1980), Chap.1.
36. G. Curzon, in his book Multilateral Commercial Diplomacy, (1966), says that "The EEC's customs tariffs had been cut partially in the context of GATT membership. Without GATT the six countries of the EEC would have not achieved their end so quickly nor in the final form of a customs union". p.95.
37. H. W. de Jong, Reflections of the Economic Crisis: Markets Competition and Welfare, chap.2 in Essays in European Law and Integration, D. O'Keefe and H. Schermers (1982), pp. 79-93.
38. European Commission. Declaration on the occasion of the customs union on 1st July, 1968, (1968) in Michael Hodges (ed.) European Integration, (1972).
39. /

39. Commission EC, 25 years of the EEC external relations, EEC Documentation, 4/1979.
40. As far as international organisations are concerned the Community often shares observer status, but in practice it is placed on the same footing as those organisations at least for the present. In theory, however, it should be given higher status than that of observer.
41. For a full and very recent discussion on this matter see E.U. Petersmann, Participation of the European Communities in the GATT: International Law and Community Law Aspects, in David O'Keefe and Henry Schermers (ed.) Mixed Agreements, (1983) pp.167-198; The Commission of the EEC opens negotiations on multilateral and bilateral trade agreements and submits recommendations to the Council which, in turn, decides on the co-ordination and uniformity of the commercial measures during the transitional period and the implementation of a CCP after the end of this period. The Commission conducts negotiations in consultation with a special committee, which assists it in this task, uses its powers for the adoption of the uniform principles during and at the end of the transitional period and for the establishment of a CCP after the transitional period has expired.
42. Robert Hudec, The GATT legal system and the World Trade Diplomacy, (1975), chap.18, pp.195 ff.
43. John Jackson, op. cit., in Note 8, chap.24
44. J. J. Allen, The European Common Market and the GATT, (1960).
45. G. Curzon, Multilateral Commercial Diplomacy, (1966), p.273 ff.
46. Robert Hudec, op. cit., in Note 42, chap.18.
47. John Jackson, op. cit., in Note 8, chap.24.
48. Karin Kock, op. cit., in Note 16.
49. J. J. Allen, The European Common Market and the GATT: A Study on Compatibility, Law and Contemporary Problems, (1961) pp.559-571.
50. Robert Hudec, op. cit., in Note 42.
51. BISD/GATT. 6 S/68-112, (1958).
52. Other provisions with reference to the Common External Tariff, (CET) can be found in the EEC Treaty: e.g. Art.28 EEC provides that "any autonomous alteration or suspension of duties in the common customs tariff (CCT) shall be decided unanimously by the Council", Art. 22 EEC "... duties shall be taken into account for calculating the arithmetical average within a period of two years", Art.95 EEC forbids "the imposition of internal charges of any kind in excess of those applied directly or indirectly to like domestic products".
Also /

Also, several EEC Regulations have come into force regarding the common tariff system applicable to imports from third countries inside or outside the GATT system; John Jackson, Legal Problems of International Economic Relations, (1977), p.542.

53. The Benelux countries, since the establishment of the Benelux customs union in 1949, applied a common external tariff (CET).
54. BISD/GATT, 6 S/68/(1958).
55. John Jackson, op. cit., in Note 8, p. 612 ff.
56. Ibid.
57. J. J. Allen, op. cit., in Note 44.
58. The EEC during the common external tariff (CET) negotiations between the member states decided to make a 10% unilateral reduction to third countries as a demonstration of good will.
59. Stein, Hay, Waelbroeck, European Community Law and the Institutions in Perspective, (1976); At that time new tariff concessions in individual products were applied at an average of 35%, p.405 ff.
60. J. J. Allen, op. cit., in Note 44.
61. Ibid.
62. J. J. Allen, op. cit., in Note 49.
e.g. The Benelux duty on plate glass was 16% and the Italian was 31%. The average should be about 24%. Would the foreign exporters from Benelux countries suffer from such tariff increase?
63. John Jackson, op. cit., in Note 8, p.612 ff.; Eventually, the external duties were gradually aligned in a number of stages and the common external tariff (CET) was completed on 1st July, 1968, ahead of the scheduled time - i.e. by 31st December, 1969.
64. J. J. Allen, op. cit., in Note 44.
65. The Rome Treaty, in Arts. 30-37, provides for the elimination of QRs and other measures having equivalent effect on imports, exports or goods in transit between the member states. Art. 30 contains the general prohibition of QRs on imports; Art. 31 prohibits the introduction of new restrictions and other equivalent measures; Art. 32 is a standstill provision; Art. 33 sets out a system for the progressive abolition of such restrictions by the end of the transitional period - i.e. 31st December, 1969. These restrictions, however, might be abolished earlier as Art. 35 envisages.. Art. 34 states that existing QRs on exports must be abolished after the end of the first /

first stage of the transitional period - i.e. 31st December, 1961. Art. 36 contains exceptions to the rule (as provided in Arts. 30-35) "on grounds of public morality, public policy, or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property". Finally, Art. 37 relates to state monopolies of a commercial character and requires member states "to ensure that no discrimination regarding the conditions under which goods are produced and marketed exists between nationals of member states" and to refrain from taking such (discriminatory) actions in the future.

66. With particular reference to the Republic of Ireland, the Accession Act introduced exceptions according to which Ireland could maintain QRs until 1st January, 1985, especially for motor vehicles.
67. Peter Oliver, Free Movement of goods in the EEC, (1982), p.47.
68. In the agricultural sector, liberalisation of quotas was to be made within a common agricultural market organisation, although not all products were included in this process. In fact, in the EEC the problem of elimination of QRs was much simpler than within the framework of the GATT because of the relative economic strength and currency convertibility of member states and the limited number of countries involved. Yet the initial success in this field has not been maintained over the years, and the EEC member states through licenses or other import formalities impose quotas in order to protect their domestic products, and they have recently done so on many occasions; During the Tokyo Round MTNs, the EEC was asked to eliminate restrictions imposed by individual member states according to a timetable, Commission European Communities Background Report: The Community and the Tokyo Round, December 13, 1979; S.A.B. Page, the Revival of Protectionism and its consequences for Europe. XX Journal of Common Market Studies, (1981), pp. 17-39.
69. Official Journal L/291, (1979).
70. Certain exceptions have been made possible under this Act, with regard to the especially difficult circumstances of the Greek economy; particularly under Annex.III of the Act., Greece is given the right to maintain QRs on some sensitive products (Art. 36 of the Act) which in any case must be abolished by the end of the transitional period - i.e. 31st December 1985.
71. A. Parry and J. Dinnage, Parry and Hardy: EEC Law, Second edition, (1981) par. 13-22, pp.179-180; See also Case 120/78 Cassis de Dijon ECR.649. In this case the German Federal administration refused to allow a firm, the firm Rewe, to import liqueur Cassis de Dijon as the minimum amount of alcohol required did not conform with German legislation. The F.R.G. put forward the argument that its legislation was for the protection of public health and safety and it did not constitute a measure equivalent to quotas as it applied without discrimination to national and foreign products. The ECJ held that if national measures favoured domestic products, then the measures would be in breach of the Treaty.

72. O.J.C. 256/1980 ; L. Gormley, Cassis de Dijon and the Communication from the Commission, 6 European Law Review, (1981), pp. 454-459.
73. H. L. Select Committee on the EEC (Session 1977-78, 22nd Report), H. L. Paper, 131.
74. Noreen Burrows, Labelling Policy in the EEC. Food Policy Journal, (1978), pp. 209-215.
75. BISD/GATT, 6 S/68-112 (1958).
76. J. J. Allen, op. cit., in Note 49.
77. J. J. Allen, op. cit., in Note 44.
78. BISD/GATT, 6 S/68-112, (1958).
79. J. J. Allen, op. cit., in Note 44.
80. BISD/GATT, 6 S/68-112, (1958).
81. Ibid.
82. Ibid.
83. K. Dam, op. cit., in Note 15.
84. J. J. Allen, op. cit., in Note 49.
85. Ibid.
86. Ibid.
87. Helmut Steinberger, GATT und Regionale Wirtschaftszusammenschlüsse, (1963).
88. Stein, Hay, Waelbroeck, European Community Law and the Institutions in perspective, (1976), p. 450.
The relevant question was whether the USA agricultural policy was consistent with the GATT provisions. The USA Congress in 1951 amended the Agricultural Adjustment Act so as to ensure consistency between the USA internal law and the GATT, although no violation of the GATT existed at that time.
89. J. J. Allen, op. cit., in Note 44.
90. BISD/GATT, 6 S/68-112, (1958).
91. /

91. Ibid.
92. Ibid.
93. K. Dam, op. cit., in Note 15.
94. Ibid.
95. Ibid.
96. The Ceylon Delegation, studying the case, reported that the association agreements constitute a preferential area and not a free-trade area.
97. J. J. Allen, op. cit., Note 49.
98. The USA in principle opposed the association agreements of the European Community (e.g. the citrus case), but for purely political reasons supported their conclusion, and pressed the U.K., Latin American and the Commonwealth countries, who constituted a majority in GATT, to desist from any action against the association agreements.
99. 13th GATT Session, BISD/GATT, 7 S/71, (1959).
100. H. Steinberger, op. cit., in Note 87.
101. Ibid.
102. Information obtained by interview with a member of the legal service of the European Community Commission (December 1981).
103. G. Curzon, op. cit., in Note 45.

PART III

EEC AGREEMENTS WITH THIRD COUNTRIES IN THE CONTEXT OF THE GATT LEGAL SYSTEM.

The Community has the power to enter into bilateral or multi-lateral agreements with third countries or organisations of an economic character. In this context it has, since its establishment, replaced its member states in entering into a great number of agreements involving trade. These agreements can be distinguished as :

1. Association agreements under Art. 238 EEC, and
2. Commercial - tariff and trade - agreements under Art. 113 EEC.

However, when elements of a non-commercial character are also involved as in the case of association agreements, member states may also participate. In the case of the GATT, the Community has succeeded to the rights and obligations of the member states and has become if not de jure certainly a de facto contracting party to GATT. The Community is also bound by agreements concluded by its member states, prior to its establishment.

ASSOCIATION AGREEMENTS

(a) Association Agreements leading to membership of the European Community.

All European countries in accordance with Art. 237 EEC are eligible to become members of the European Community, provided that they apply to the EEC Council which must unanimously accept their application, after having obtained the opinion of the Commission. To this effect, Denmark, Ireland, Norway and the United Kingdom applied in 1970 to enter into the Community. On 22nd January 1972, the Act of Accession was signed by the ten (10) governments and the Council of Ministers of the European Communities, subject to notification by the four applicant countries, applicable from 1st January 1973. Norway failed to accede into the European Communities due to negative results of a referendum, undertaken in the country, before the Norwegian Parliament was to ratify the Accession Act.

Greece is the tenth member state which acceded to the Community on 1.1.1981. For Greece, however, the first step to this movement was the conclusion of an Association Agreement which led eventually to membership of the European Communities. Turkey has also concluded an Association Agreement with the European Communities, which agreement may finally result in EEC membership. These two countries, while belonging from an economic point of view to the least developed regions of Europe, are, from a political point of view, worth special consideration. This consideration gains in weight with reference to their membership of the NATO Alliance and their geographical and strategic importance.

The association agreement with Greece was an early major activity in the external relations of the European Community. Much faith was invested in the successful conclusion of the agreement. As such, it was considered to be quite favourable for the Greeks /

Greeks, but it involved considerable difficulties for the Community, when the Community was unable to grant similar treatment to other countries, especially to the Mediterranean and near Eastern areas. The Athens Association Agreement¹ signed in 1961, was submitted to the GATT CONTRACTING PARTIES at the nineteenth GATT session in the same year. In November 1962 Greece became associated with the Community with the prospect of becoming a full member, after a transitional period. This agreement was based on a customs union, but in view of the weak economic position of the country, Greece was granted a very long transitional period. Greek products would enter duty free into the Community within a twelve-year period, that is in 1974, while Community products would enter Greece duty free after twenty-two years - i.e. in 1984, when Greek tariffs were to be brought in line with the Community's CET. In this way it was hoped that Greece would be helped in its economic and social development.² Subsequently, owing to the political situation in Greece, the agreement was frozen between 1967 and 1974 and re-activated in 1974 when Parliamentary democracy was restored to the country. Later, in June 1975, application for accession was submitted to the Community and finally the Treaty of Accession was signed in Athens on 29th May 1979, providing for full membership from 1st January 1981.³ It includes a five year transitional period within which all duties and other restrictive measures were to be gradually abolished for almost all products, and a seven-year transitional period for some agricultural products, notably tomatoes and tobacco, and for the free movement of labour. When in October 1981 the new Greek government came into power, it maintained that membership of the EEC would have negative effects on the Greek economy, with special reference to the more advanced level of economic development in the EEC member states and the critical international economic situation.⁴

Nevertheless, the Greek Government has been taking an active part in Community activities (from July to December 1983 it held the presidency of the Council of Ministers) in spite of its different stance on various aspects of the external political relations of the Community, e.g. the situation in Poland, the Middle East crisis, /

crisis, the destruction of the Korean airliner by the Soviets.

On 19th March 1982, Greece submitted a memorandum to the Community Institutions, pointing out that the special problems of her economy had not been taken into account by the Accession Treaty and furthermore the Greek Government stressed the sensitive nature of the Greek economy, its structural weaknesses, the relatively important role of agriculture, the extremely difficult competitive position of small and medium scale industries the negative GNP growth rate, and the balance of payments deficit. They asked for more help from Community funds so as to improve agricultural infrastructure, develop tourism and protect small industries and, also, exemption from the strict application of Community rules on competition. In the first round of discussions, Greece's special economic situation was recognised by the EEC, but its overall response to the Memorandum does not seem favourable for Greece, although it is too early as yet to reach definite conclusions.⁵ Within the GATT framework the association agreement (of 1961) with Greece was pointed out by the GATT contracting parties to be a preferential agreement and, as such, in conflict with GATT law. The Community again pledged within the GATT that the association agreement in question granted no more than MFN treatment to Greece. During the formal review by GATT CONTRACTING PARTIES in 1962 at the nineteenth GATT session, the GATT failed to examine the legality of the association agreement and no consideration was given to whether or not it was a movement towards or away from free trade. This Association Agreement was contemplated in the form of a customs union arrangement, because the EEC wanted it to be in line with the GATT requirements and as such was permissible under the GATT Art. XXIV. It was the first association agreement concluded by the EEC and its conformity with the GATT rules had a special importance. Its legality or not came under consideration in accordance with the GATT rules and procedures. And in this case, as happened in the examination of the EEC's compatibility with GATT, (discussed in detail in the previous Chapter 4), the same pragmatic approach was followed by the CONTRACTING PARTIES to GATT, while the legal question was left open. (This legal /

legal question has occupied the GATT deliberations as many times as association or preferential agreements have been concluded by the EEC. The questions is, in detail, analysed in the conclusions and it is not exaggeration to say that it is still left open.

Turkey is the second country which has signed an association agreement with the Community with the prospect of becoming a full EEC member sometime in the future. The Ankara Association Agreement was signed in September 1963, and became operative in December 1964. This agreement aims at the progressive establishment of a customs union. It is different from the Athens Association Agreement in that its final objective was "the accession of Turkey to the Community when the operation of the agreement makes it possible to foresee the acceptance in full by Turkey of the obligations arising from the EEC Treaty"⁶

A preparatory period of five to ten or more years was needed for Turkey to strengthen its economy with assistance from the EEC and for increasing the EEC tariff quotas for Turkish products. After that period a plan would be worked out within a twelve-year transitional period, within which a customs union would be gradually established. The Working Party of GATT, examining the Ankara Association Agreement, was very concerned with the time limits set for the completion of the customs union and the unilateral preferences granted to Turkey. Once again, no decision was at the end taken as regards the compatibility of this agreement with the GATT.⁷ The same legal considerations were taken into account in the GATT appropriate committees, as in the case of Greece's Association Agreement.

The Turkish authorities have continuously complained that the operation of the agreement has not really helped the country in its development as was foreseen, because the tariff preferences have been diluted through the granting of similar concessions to other Mediterranean countries. Turkey has argued that the aid given has been inadequate and the contemplated introduction of the free movement of labour between the two sides has not been fulfilled. Particularly, Turkey has argued that the Greek accession to the EEC was to the detriment of the Turkish economy.⁸

Nevertheless /

Nevertheless, after political instability and the establishment of a military government in Turkey in 1980, it has been argued by the EEC that the association agreement should be frozen until parliamentary democracy was restored.⁹ The European Trade Union Confederation has asked for the suspension of the agreement, as was done with the agreement with Greece during the seven years of Greek military dictatorship (1967-1974). Also, the Community has taken into account political developments in the country, every time it has come to consider Community aid to Turkey.¹⁰ These two association agreements are on the one hand preliminary for an EEC membership according to Art. 237 EEC and, on the other hand, they both incorporate a preferential trade agreement which provides for free movement of goods, persons and services, dismantling of customs duties and QRs, harmonisation of laws in trade policy and co-ordination on economic policy matters. In particular, the Athens Association Agreement which was deemed to be very favourable for the Greek side, especially for agricultural products, has left narrow margins for further concessions made by the EEC to the other Mediterranean countries, which had sought to link themselves with the EEC.

(b) Association as a special form of development assistance.

(i) Association Agreements with African, Caribbean and Pacific (ACP) countries and territories.

The EEC Treaty envisaged two sets of provisions relating to the concept of association. The first envisaged in Part IV of the Treaty (Arts. 131-136), establishes an association with the member states' overseas dependencies and territories and the second, provided for in Art. 238, authorises the Community to "conclude with a third country, a union of states or an international organisation, agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".

The first form of association has its origins in the existing links between the EEC member states and their overseas countries and /

and territories. Both groups of countries wanted their relationship to be maintained and strengthened after the EECs establishment. In particular, the overseas dependencies of France, Belgium, the Netherlands and Italy, wanted their preferences with the Community member states to be extended over a much wider market. The result was an association agreement signed in Cameroon in 1963, between the Community and eighteen African states - former colonies - and Madagascar.¹¹ This is the Yaoundé I Convention, subsequently followed by a second one which entered into force in 1969 and expired on 31st January 1975. These conventions, however, did not cover commercial relations between the African States and Madagascar. Provision was made only for the progressive elimination of all duties and QRs. The principle of reciprocity was included in the Yaoundé Convention, but certain duties were retained by the associated countries in order to protect their infant industries against imports from EEC countries, especially for certain agricultural products. EEC development policy was an important element of the association. Financial and technical aid was provided in the form of grants through the EDF and, since 1964, in the form of loans from the EIB. Financial aid was provided not only by the Community but by the member states as well.

However, some other African countries (not former dependencies of the original six member states), felt that they might experience discrimination against their exports to the EEC and therefore sought a similar kind of relationship with the Community. Nigeria was the first country outside of this framework which signed an association agreement with the EEC, in 1966, while still a member of the Commonwealth preference system. This agreement which was based on reciprocal treatment, and included no development aid, never came into force. The example of Nigeria was followed in 1969 by three Commonwealth countries of Eastern Africa, i.e. Uganda, Kenya and Tanzania. This association agreement, known as the "Arusha Agreement", involved free trade, but not financial and technical co-operation.¹² This association agreement never came into force either.

However, /

However, with specific reference to the Yaoundé Convention, the issue of compatibility of the convention with the GATT was considered. The EEC and the associated countries' representatives pointed out to the GATT that the convention constituted nineteen separate free-trade areas fully consistent with Art. XXIV:8(b) and that, therefore, they were under Art. XXIV:5, entitled to deviate from the provisions of the G.A. in order to establish the free-trade areas. Nevertheless, the argument put forward by the EEC was not accepted by the other contracting parties to GATT and therefore uncertainty about the existence of such free-trade areas existed in the light of great differences of views between member countries in the consideration of the convention within GATT. In this case also, no decision was reached, and the matter was referred to the twenty-fourth GATT session.¹³

Attacks on the Convention were made by the other LDCs, and by the UK on behalf of her colonies. The LDCs outside the Convention did not really want the agreement to be declared illegal under the GATT rules, but wanted to be granted similar treatment by the EEC. Germany also strongly opposed the Convention during the GATT deliberations throughout the 1960s because it feared that its trade with Latin America and Asia might suffer as a result of the Yaoundé preferential system. In the end, the Working Party of GATT adopted a Report on 9th November, 1971, concerning the compatibility of the association agreements with the G.A. but no definite conclusion was reached and the question was left again open for future consideration.¹⁴ Pragmatic considerations had again been taken into account, while any legal factors had been left aside.

After the U.K. entered the Community in 1973 (Accession Treaty of 22nd January 1972), and specifically in October 1973 the nine EEC member states and forty-six African, Caribbean and Pacific (ACP) states¹⁵ began negotiations leading to the renewal and enlargement of the second Yaoundé Convention. Thus, the first Lomé Convention (Lomé I) was signed on 28th February 1975 by /

by the negotiating parties for a period of five years, and expired on 1st March 1980. The Lomé I Convention entered into force on 1st April 1976, but some trade arrangements included in the Lomé I Convention were put into effect unilaterally by the Community earlier on 1st July 1975.¹⁶ When it expired it was followed by the second Lomé Convention (Lomé II) signed by the Community and over sixty ACP countries (sixty-one with Zimbabwe) at Lomé on 1st October 1979; it became fully operational on 1st January 1981.¹⁷ Negotiations for Lomé III started in 1983.

Both Lomé Conventions contain most of the provisions of the Yaoundé Conventions in an improved form and they include in addition, the new policy of the Community concerning raw materials and commercial and industrial co-operation.¹⁸ They involve some important innovations, particularly the principle of non-reciprocity under which virtually all products originating in the ACP countries can enter the Community duty-free, save some agricultural products, whereas the Community products receive in the associated countries MFN treatment.¹⁹ Apart from that, the ACP countries are free to determine their trade policy. It is a great achievement, however, that 99.5% of the total ACP exports to the Community are duty-free.²⁰

The second and greatest innovation of the Lomé Convention has been the introduction of the STABEX system for the stabilisation of export earnings of the ACP countries; it guarantees the earnings from certain exported commodities. Initially, the system covered twelve products (groundnut products, cocoa products, coffee products, cotton products, coconut products, palm and palm nut and kernel products, bananas, raw hides, skins and leather, wood products, tea, raw sisal and iron ore.) Under the second Lomé Convention, the system has been expanded and covers forty-four products compared with thirty-four of Lomé I.

When, under the STABEX system, export earnings from certain products fall below an agreed reference level, a compensation fund contributes the difference. The agreed aid under this scheme was set at 375 million European Units of Account (EUA) for the first five years (Lomé I) and 550 million EUA under the second /

second Lomé Convention. It provides for protection not only on the grounds of bad economic conditions, but also on the grounds of fall in demand and of drop in production attributable to natural disasters. Its purpose is to stabilise market price fluctuations and to secure the regularity of supplies. It assures the EEC of a reasonable stability of prices of certain raw materials and foodstuffs and also secures access to suppliers in times of shortage.²¹

The STABEX system under the first Lomé Convention, succeeded in meeting the demands of the ACP countries and, in fact, left an undemanded balance of 6 million EUA when the Convention expired. But as soon as the second Lomé Convention came into existence, STABEX ran into difficulties. In 1980 and 1981 it ran out of funds.²² The reasons are various and complex. The Commission acknowledged the need to reform the system and carried out an investigation.²³ This investigation revealed that many factors were involved; increased demands of the ACP countries, world recession, increased competition in world markets, protectionist measures undertaken by DCs, improvement in the operation of the system, sharp fall in world prices of a number of key products covered by STABEX, natural disasters, lower demand in the Community. It seems, however, that the most important factors which led to the ineffectiveness of STABEX are found in the point that the ACP countries started to effectively use the system and also to the worsening competitive position of ACP exports covered by STABEX on international markets.

In the face of such competition the ACP countries are unable to develop their industries, increase production, expand their exports and diversify their economies. The consequences of the ineffectiveness of STABEX are very serious. The recoil of the system illustrates the negative effects of protectionism on the ACP countries and on the EEC as well. The situation has reached alarming dimensions, especially because funds from the IMF may be short.²⁴ The system is also criticised by the non-ACP LDCs which point out that it discriminates against their exports; but the EEC cannot, for the time being, extend the system to all LDCs.²⁵

Nevertheless, /

Nevertheless, whatever the shortcomings of the system, the ACP countries want the maintenance and improvement of STABEX, which remains one of the most important instruments of co-operation. In general, Community funds should be reimbursed when export earnings return to a satisfactory level, but this obligation does not apply to the thirty-five least developed countries.²⁶

Moreover, another system similar to STABEX, the SYSMIN or MINEX (a new innovation included in Lomé II, concerning mineral exploitation) has been introduced to protect ACP exports of minerals apart from iron-ore, against price fluctuations and other disturbances. For the operation of the schemes funds can be channelled through the European Development Fund (EDF) and also loans can be secured by the European Investment Bank (EIB). Not all countries, however, have equally benefited under these schemes.²⁷

Financial and technical co-operation: Financial and technical co-operation is provided for the ACP states through the EDF and EIB, in favourable and long-term loans for financing in particular small scale basic development schemes in rural areas, and most particularly those in the least developed countries. The beneficiary countries are responsible for administering and managing the aid, although the Community member states still play a role. The second Lomé Convention has contributed to a more equitable distribution of funds to all ACP states and particularly to those needing most help. Part of the aid is given for industrialisation, economic infra-structure and social development. The total financial aid given by the Community according to the terms agreed in the Lomé II Convention is 5,692 million EUA, compared with 3,457 million EUA of the Lomé I Convention. For the ACP countries this kind of co-operation is vital given that they want co-operation and open European markets for their primary commodities.²⁸

Industrial Co-operation: For the development and diversification of this crucial sector of the economy, numerous decisions have been made /

made involving aid administered by the EIB and by the Commission of the EEC. The proposed areas of action are development of research and technology, information exchanges, studies, establishment of conduct between firms, co-operation in the field of energy especially since 1973. Community firms have an important role to play in the industrialisation of the ACP countries who are calling for the transfer of technology to the third world. To this end the Centre for Industrial Development (CID) assisted by a Committee on Industrial Co-operation (CIC) was created to provide information opportunities for industrial co-operation and to facilitate the transfer of technology. Unfortunately, this centre has been a disappointment despite the efforts on both sides to correct the disadvantages.²⁹ Since the application of the first Lomé Convention, over 140 million EUA have been transferred to the ACP states for fifty-seven projects in studies in this field, with special consideration given to the least developed countries (LLDCs).³⁰ Lomé does not meet the aspirations of the LDCs as evidenced by their demands made at the second UNIDO Conference held at Lima, Peru, in March 1975, which adopted the Declaration of Lima.³¹ This Declaration constitutes a series of demands in the field of development co-operation; it is much broader and ambitious than the Lomé industrial co-operation provisions, especially as regards the operation of multinational companies and the supervision of foreign businessmen. The Lima Declaration urges the LDCs to co-operate and speed up their industrial development. The USA voted against the Declaration but the EEC adopted a more conciliatory attitude during the conference.³² In principle, the EEC supports the development and industrialisation of the LDCs, but it has no global programme for the industrialisation of the third world. Moreover, it has a global aid target of 0.7% of the GNP. So far only the Netherlands have reached the 0.7% aid target and has written off some debts of the poorest countries.

The Community is the principal development aid donor to third world countries and its contribution amounts to 35.5% of total aid given to LDCs.³³ At first glance these figures are impressive but, in fact, the real aid is much lower. During the Lomé I Convention only 6% of the EEC aid reached the ACP countries, due to the disbursement procedures which are very slow.³⁴ Therefore, complaints /

complaints raised by the ACP countries are justifiable. In fact, the LDCs call the Community for better understanding of their problems and seek more aid through the EDF or the EIB. However, under the present economic circumstances of reduced export opportunities and mounting debts for the developing countries, it is very depressing that some developed countries have spoken up for decrease of development aid; e.g. the USA has currently considered reducing its foreign aid commitments, even though the IMF may be dangerously short of funds, and also to reducing the share of funds it is supplying to the World Bank's development programmes in the poorest countries.³⁵

What, however, remains as an important aspect in this study is the impact of the EEC-ACP associations agreements on world trade. Is this beneficial or not? To what extent are the non-associated LDCs affected?

At first, and as regards the legality of the Lomé I Convention with the GATT rules, the text of the Convention was submitted to the GATT in July 1975 and a Working Party was appointed.. Sympathy was expressed in the Working Party with the view that the objectives of the Convention were in line with the spirit of GATT and especially Part IV, given that the Convention aims at the improvement of the standards of living and economic development of a significant number of LDCs, including a number of LLDCs as well. The parties to the Convention and some members of the Working Party stated that "the trade commitments in the Convention were compatible with the relevant provisions of the G.A. taken as a whole and with its objectives".³⁶ However, contrary opinions were expressed and finally no decision was taken, but the parties to the Convention agreed to supply information and notify any changes in the Convention. The second Lomé Convention signed in 1979, is fundamentally an extension of the first one for five more years. It does not include new provisions requiring its submission to the GATT CONTRACTING PARTIES for approval. Only when it is deemed necessary, the parties can supply any additional information, concerning the operation of the Convention. The Lomé Conventions as such do not include any separate provisions concerning preferential /

preferential treatment, but it is generally accepted that the EEC has, through the Lomé Conventions, granted preferences to the ACP countries in comparison with what it has granted to other LDCs. Whether and to what extent the Lomé Conventions infringe the GATT law is left an open question. As it happened with the EEC association agreements with Greece and Turkey and in this case, no definite decisions have been taken in GATT as regards this sensitive legal issue.

However, the aim of the EEC-ACP association agreements, relating primarily to the economic and social development of the overseas countries and territories, and the raising of their standards of living, through the expansion of their trade, appears to coincide with the aims and the objectives of the G.A. set out in the preamble and Part IV relating to the developing countries. In broader terms, these agreements do not appear incompatible therefore with the spirit of GATT in respect to preferences not accorded to other contracting parties.

This consideration is justified on the grounds that the GATT and the EEC have both the same objectives as far as LDCs are concerned, that is the industrialisation and development of the LDCs. A favourable treatment granted by the EEC to the associated countries consequently could not be incompatible with the spirit of the GATT, although the position of the LLDCs raises several questions.

Due to political and historical reasons, the EEC and ACP countries have developed mutually close relations. The ACP countries have chosen closer relations with Europe, aiming at their social and economic development and expansion of their trade. In fact, the EEC association agreements with the ACP countries are considered to be more privileged than others concluded by the Community. These arrangements are beyond any doubt favourable to the countries involved. Even the hardest critics cannot deny their favourable effects at least for a short time. Nevertheless, the ACP countries complain that their exports to the Community stagnate, while European exports to their markets have continued to grow under the Lomé Conventions.³⁷ In absolute terms there has been an increase of ACP exports to the Community, but considering inflation rates /

rates the actual increase is much reduced.³⁸ They also complain of the EEC sugar policy and of the limited effects of the STABEX system which in their opinion covers too small a range of products.³⁹

However, in this context the case of non-associated LDCs raises certain questions. The non-ACP developing countries are those who are particularly unhappy about the EEC-ACP association arrangements, arguing that they have worked to their detriment. These countries have repeatedly demanded a halt to the proliferation of EEC preferential agreements. Even the LDCs who are associated with the Community but outside the Lomé Convention complain about the EEC association network.

Whether or not the EEC-ACP agreements are favourable or not to world trade as a whole is a very difficult question. Developing an EEC global approach towards the third world should be one of the major tasks ahead. Unfortunately, to date the Community has not developed a common policy towards the LDCs within the framework of the North-South dialogue.

In general, the LDCs' demand for global negotiations must be taken into account; the LDCs should be recognised as equal partners and particularly the position of the LLDCs, the LDCs and the Newly Industrialised Countries (NIC) should be carefully distinguished. Some ACP countries have supported the view that they should work within the group of 77 within the UN instead of being limited by association with EEC.⁴⁰ They maintained that association with Europe does not provide them with long-term advantages and discriminates against countries outside the Lomé framework. A united LDCs' front could better achieve its expectations, when participating in international fora and strengthen its bargaining position when negotiating with the EEC or other DCs. A united group of 77 within the UN framework will also enable LDCs to improve their relations, develop common programmes, such as common transport projects, exchange information and goods, and further develop trade among themselves on a larger scale than with developed countries.

(ii) Agreements with the Mediterranean Countries.

The European Community has concluded both association and co-operation agreements /

agreements with all the Mediterranean countries with the exception of Libya and Albania. All the agreements were negotiated separately with each one of the Mediterranean countries and include tariff reductions, co-operation in capital flows, technology transfer and development aid. With Israel the first trade agreement was signed in 1964, which was replaced by two co-operation agreements in 1970 and 1975 respectively.⁴¹ Partial association agreements were signed in 1969 between the Community and Morocco and Tunisia without providing financial and technical co-operation. They were replaced with co-operation agreements in 1976 in the context of an overall Mediterranean policy. With Yugoslavia, initially in March 1970, a three-year non-preferential agreement was signed which was renewed for another five years, and finally was replaced by a preferential (co-operation) agreement concluded in April 1980 after two years of negotiations.⁴² Association agreements have been signed between the Community and Malta and Cyprus (1971-1976 and 1972 respectively). These agreements provided for the progressive establishment of a customs union. Except for association agreements the Community has signed co-operation agreements⁴³ with the rest of the Mediterranean basin states.

However, after the Paris Summit Meeting of the European Council of 7th November 1972, a document concerning a 'global Mediterranean policy' was adopted providing for the establishment of a free trade area in industrial goods, certain concessions on agricultural products, industrial and technical collaboration and development aid to poorer Mediterranean countries.⁴⁴

In the context of the overall Mediterranean policy, preferential agreements were signed in 1975 with Spain and Portugal. Also, co-operation agreements were signed with the Maghreb countries (Algeria, Morocco and Tunisia) in 1976 for an unlimited period⁴⁵ and with the Mashrek countries (Egypt, Jordan, Lebanon and Syria) in 1977 for an unlimited period as well. The co-operation agreements, as well as the association agreements, include financial and technical assistance.⁴⁶ They include the fields of energy, science and technology, industry, trade and the environment. The association agreements with Malta and Cyprus contain in addition a free-trade area element with the ultimate objective of establishing a customs union.⁴⁷

Israel /

Israel was the first country to negotiate with the EEC an agreement which needs special consideration because of prolonged and conflicting interests of the countries involved. From the first years of the EEC's existence Israel sought to negotiate an agreement with the Community. The only way that an agreement would be compatible with the GATT rules, would be in the form of a customs union or a free-trade area, or under any other form provided that a waiver under Art. XXV:5 of GATT has been secured. Israel proposed the establishment of a free-trade area under Art. XXIV:5 but the Commission of the European Community was more in favour of a commercial agreement under Art. 111 which would cover all measures of trade liberalisation and provisions of financial and technical co-operation. But the conclusion of an agreement was extremely difficult, because of divergence of opinions on both sides. The EEC was concerned that the proposed agreement would not be in breach of the GATT rules. Meanwhile, during the Kennedy Round multilateral trade negotiations, liberalisation measures were taking place. Israel pointed out her specific problems, for example BOP problems, which might justify special treatment, but the EEC maintained that these special problems could be raised in the GATT for special treatment (e.g. under Arts. XI-XV of the GATT). Delegations from both sides met repeatedly in 1963, but they failed to reach an agreement.⁴⁸

However, the first agreement between EEC-Israel was signed on 4th June, 1964. This agreement was purely a bilateral trade agreement, and it was very important from the legal point of view of the evolution of the commercial policy of the Community. Subsequently Israel, on 4th October 1966, submitted a new application and requested the replacement of the old agreement by one of association. The Commission was rather of the opinion that the agreement should only cover industrial products and exclude the agricultural products which would be regulated in the framework of a Mediterranean policy. Italy and France expressed the view that the existing trade agreement should be extended and that the Community should accelerate tariff reductions agreed during the Kennedy Round, in particular for products of special interest to Israel. Germany and the Netherlands, backed by Belgium and Luxembourg argued for a preferential agreement. Long and arduous discussion took place over /

over the form the new agreement was to take. The Commission was still careful not to contravene the GATT rules. Italy, Belgium and Luxembourg put forward a new proposal for tariff reduction for products of special interest to Israel. Nevertheless, the fear was expressed that this proposal might be in contradiction with the GATT rules.⁴⁹ The issue in question was very complicated indeed. The matter was debated between Council, Commission and Coreper. Meanwhile the overall Mediterranean policy was in the course of its implementation. The EEC, within this framework, granted preferential treatment to Israel and Spain for their citrus fruit (this case is discussed below), and at the same time, it requested a waiver in GATT, so as to overcome any probable violation of the GATT rules. During 1969 progress was made towards a compromise solution. Italy was opposed to a preferential agreement for Israel, while the Netherlands was the country which supported it the most. Finally a 45% tariff preference was achieved and in September 1969 another round of negotiations for an agreement took place. The Commission proposed a five-year agreement. Official negotiations with Israel started in November 1969, and ended in February 1970, when a co-operation agreement was reached. This agreement gave Israel a 45%-50% tariff reduction of her industrial products.⁵⁰ It did not constitute a free-trade area and it was not even proposed as such by the parties to the agreement. Consequently, it was criticised by the other contracting parties to GATT as being preferential and therefore infringing the GATT law.

However, this agreement was submitted to GATT for the usual examination of its compatibility with the G.A. This case was a very difficult one indeed, where the CONTRACTING PARTIES to GATT had difficulty in reaching even the customary conclusions. Some members of the Working Party expressed the view that no eliminations of tariffs or other restrictions on 'substantially all the trade' took place; that it was a pure preferential agreement contrary to GATT rules.⁵¹ Nevertheless, the prolonged conflict of opinions in this case was responsible for making the GATT rules more flexible in the 1960s. As Henig rightly observes⁵² the Community's attitude during the 1960s had changed towards GATT. In the early stages /

stages of the first trade agreement with Israel, the Community was very concerned about the GATT rules, pointing out that no preferential agreement could be contemplated outside the context of a customs union or a free-trade area arrangement: but during the negotiations of the second agreement with Israel, the Community feeling its own strength and confidence in its external policy, started to deviate from the provisions of the G.A. by concluding this agreement, outside the framework of a customs union or free-trade area arrangement. Also, the other preferential trade agreements concluded between the Community and the Mediterranean basin countries (e.g. Mashrek, Maghreb countries,, Malta, Cyprus) have been submitted to the CONTRACTING PARTIES to GATT to be examined as to whether or not they comply with the GATT requirements of Art. XXIV. In particular the legal issue of free-trade area element was considered. No definite conclusions were reached at the end. The CONTRACTING PARTIES neither prohibited the arrangements nor issued recommendations to alter them, nor approved them as they stood. That is, the application of Art. XXIV was not determined and the non-preferred countries were left with the option to claim nullification or impairment under Art. XXIII or to ask for consultations under Art. XXII, or to accept the system as a whole. The most common procedure for the settlement of disputes arising was that of holding consultations. 53

All the same, the parties to the agreements have argued that the agreements were consistent with the GATT requirements and, furthermore, that their aims were the same as the objectives set out in the General Agreement, that is the liberalisation of trade. The Community always supported the notion that it had established interim agreements leading to FTAs with each one of the Mediterranean countries, and that the requirements of Art. XXIV par. 5-9 had been fulfilled. It pointed out that Art. XXIV should be read in the context of the economic position of the poor Mediterranean countries. On several occasions the Community pointed out that previously concluded agreements between the EEC and African states with more or less the same provisions, were not defined as incompatible with the GATT provisions and that they constituted a good precedent. The Community made it clear that it would never accept invalidation of this preferential framework, despite the fact /

fact that outside countries, and particularly the USA, maintained that the preferential system was illegal.⁵⁴ The latter argued that the Community's agreements did not comply with Art. XXIV of the G.A. and therefore that they were contrary to MFN principle of non-discrimination.

Some members of the Working Parties set up to investigate these agreements, expressed the view that the agreements concerned were inconsistent with the provisions of the G.A. in that no plan or schedule for the establishment of a free-trade area was provided for, nor was there provision for the elimination of the obstacles to "substantially all the trade".⁵⁵ In particular, in the examination of the Mashrek countries' (Lebanon⁵⁶, Syria⁵⁷, Jordan⁵⁸, and Egypt⁵⁹) agreements, the parties to the agreements argued that "the agreements were entirely consistent with the objectives of the relevant provisions of the G.A. taken as a whole", and that they constituted "a positive contribution to solving the economic development problems of the Mediterranean countries". The representatives of the Mediterranean countries pointed out that special favourable treatment should be given to them as LDCs.

In the agreements with Morocco and Tunisia⁶⁰, the parties argued that the requirements of Art. XXIV:5-9 of a free-trade area had been fulfilled. They pointed out that they were interim agreements, leading to free-trade areas and that the elimination of obstacles to "substantially all the trade" was not an essential condition as to the initial stages of the interim agreement. Consequently, they argued that anyway trade was not disrupted but further developed and that they would depart from the provisions of Art. XXIV:5 only to the extent necessary for the formation of these two free-trade areas.

The association agreements between the EEC and Malta⁶¹ and Cyprus⁶² was concluded with the objective of establishing a customs union within a reasonable length of time. The Working Party, likewise, could not reach any definite conclusion as to the issue involved.

In the EEC-Spain preferential agreement, the parties expressed their determination to form a free-trade area or a customs union so as to comply with the GATT requirements, and this appeared as a firm undertaking expressed by the parties.⁶³

However,

However, the Community has had and still has a great interest in maintaining the agreements with the Mediterranean countries for economic, political and strategic reasons.⁶⁴ The countries concerned are good customers for EEC industrial products and its exports to them represent 12% of total Community exports at MFN rates. What is most important is that these agreements make the Community secure in the supplies of energy and raw materials, (especially because of the particularly good relations of the South Mediterranean states with the oil producing Arab countries). The Community, in the context of its overall Mediterranean policy, gives to all Mediterranean countries' exports, duty-free access to their industrial products and preferential treatment for most of their Mediterranean-type agricultural products, while some other agricultural products produced in Southern France and Italy are protected under the CAP variable levies. The Community is the biggest single trade partner for most Mediterranean countries and it receives an estimated 50% of their total exports, thereby becoming an exceptionally important market for them.⁶⁵ The number of products covered under these agreements is much larger than those under the GSPs.

All the above mentioned agreements have as an ultimate objective the liberalisation of trade. In the context of the overall Mediterranean policy this aspect needs to be given particular attention as, with the entry of Spain into the Community, the EEC is likely to become self-sufficient and therefore protectionist in several Mediterranean-type agricultural products. These products are the very ones which constitute a large percentage of the trade of the other Mediterranean countries. It is, however, in the interest of these Mediterranean countries to maintain and strengthen their trade relationship with the EEC in order to secure markets for their agricultural products. Liberal trade policies pursued by the EEC would be to the benefit of both groups of countries. Tunisia, the main exporter of olive oil to the EEC will be most affected by the Spanish accession. There is growing concern, however, within the Community for a revision of the CAP and possible arrangements in favour of Mediterranean-type products. The Mediterranean states, likewise, are increasingly concerned about the second EEC enlargement and are proposing the setting up of a system /

system, along the lines of STABEX, for securing their export earnings.⁶⁶ The liberalisation of trade at least within this region should be given special attention after the second EEC enlargement. It is in the Community's interest that this enlargement should not have negative effects on trade with the South Mediterranean countries. On the other hand, it is hard for the Community not to try to safeguard some sectors of its economy; e.g. by negotiating the so-called 'self-limitation agreements' in textiles and clothing.⁶⁷

In fact, the Community, as the biggest single trade unit in the world, is more responsible than any other country or grouping for maintaining an open system of international trade as far as it is possible, not only with the Mediterranean countries, but with those countries which are outside this framework. The citrus fruit waiver case⁶⁸ is of particular importance to this study from the legal point of view when considering its consequences for the GATT legal system and observing its implications for those countries outside the preferential area.. In 1969, the Community gave preferences for citrus fruit to Morocco and Tunisia. Israel and Spain renewed their repeated requests for equal treatment. Therefore the Community gave to Spain and Israel a 40% tariff reduction for their citrus products; a measure which was contrary to GATT. Meanwhile a waiver was requested by the Community, but shortly after the Community withdrew its request.

The Community suppliers, particularly the USA, who had been seriously affected, at least during certain months, by the introduction of a preferential system, filed a series of complaints. Many members of the Working Party to GATT felt that the preferential system violated GATT and that the waiver was requested after the operation of the preferential system. The main objective of the waiver was not to grant a trade advantage to Spain and Israel, but rather to permit the conservation of the trade advantage that Morocco and Tunisia had traditionally enjoyed and which was of vital importance for their economies. Nevertheless, although the waiver request was withdrawn, it provided an indication of the goodwill, on the part of the Community, in observing the GATT rules especially Art. I of the MFN principle. The citrus fruit waiver case /

case is particularly important for considering the application of the MFN principle and its effect on third countries outside the EEC preferential framework. As L. Boselli ⁶⁹ says "the citrus fruit case cannot be considered as an isolated event in the history of GATT. On the contrary it is an episode in a long and uneasy evolution towards the necessary adaptation of the old rules to new forms of world trade organisation. This evolution concerns the MFN clause. There is no doubt that this principle has rendered inestimable services to international trade permitting it to evolve from a bilateral to a multilateral pattern. Nevertheless, its rigid application might be in some cases a hindrance to trade development". and he continued further that "in the USA-Canada automobile agreement many CONTRACTING PARTIES thought that Art.I should be more flexible to permit preferential agreements for neighbouring countries". In this context the USA, opposing the EEC preferences on citrus fruit, maintained the view that the EEC preferential system was illegal, under GATT Art. XXIV. After long consultations between the parties concerned, they reached a compromise solution, that is - the EEC undertook to reduce the margin on citrus fruit coming from Mediterranean countries during the peak USA export season. The USA achieved its goal of increasing its trade in citrus fruits with the EEC, despite the fact that agreements between EEC-Israel and EEC-Spain had been negotiated concerning tariff reductions. Apparently, the preferred Mediterranean countries were not affected by this compromise between the EEC and the USA because they had not yet increased their production. The country which was most affected was Brazil, whose citrus fruit exports to the Community rapidly decreased. ⁷⁰

The case, therefore, illustrates the disadvantageous trade position of a third and weak country not linked with the EEC with any sort of preferential trade agreement, and the extent to which the MFN principle can apply. Preferential agreements have caused, and are still continuing to cause significant distortions of trade in favour of the preferred countries, especially in favour of the most advanced of them as against the LLDCs' and LDCs' interests. ⁷¹ Another important aspect is that problems raised as a consequence of the establishment of preferential agreements are now being resolved through bilateral negotiations outside the legal /

legal machinery of GATT. It is a fact, however, that preferential agreements are negotiated outside the GATT system and they are inconsistent with its rules but, on the other hand, they are a 'fait accompli' and have proliferated to such an extent that their consideration cannot be left out of the GATT framework. To this end, as is earlier discussed in Chapter 4, preferential agreements should be submitted to the GATT procedures and rules especially to GATT Art. XXIV.⁷²

To sum up, it would seem that the Community was very concerned about the GATT rules during the conclusion of the first preferential agreements, that is, the association agreements with Greece and Turkey, which were contemplated in the context of a customs union arrangement. After the first two decades the Community felt its own strength and it rather based its preferential agreements in Art. 113 (EEC), which agreements do not seem to accord with the letter or even the spirit of the G.A. As Henig observed in examining the EEC-Israel and EEC-Spain agreements of 1970, "the agreements of Israel and Spain of 1970 show the Community's intention to build up its external policy on its own rationale. The first 1964 EEC-Israel agreement shows the difficulties the Community faced as a result inherent in the GATT rules: the second (1970) agreement shows the Community's present confidence in its external relations ...". The EEC wanted to present the preferential agreements as free-trade areas and used Art. XXIV as a loophole for those agreements, although it is hard to say that they really met the requirements set out in Art. XXIV. Because of the proliferation of the preferential arrangements the GATT has increasingly become ineffective to deal with this issue and the legal machinery of Art. XXIV has proved inadequate to deal with preferential agreements, since a great number of the GATT parties are involved in a preferential arrangement of one sort or another. Therefore, the GATT system has been weakened as a result of the conclusion of the EEC preferential arrangements; in particular the MFN clause has lost its significance because it has proved impossible to apply to a so different level of economic development of states.⁷³

(c) Association as a substitute for an EEC membership
Agreements between the EEC and EFTA countries.

In the late 1940s the OEEC countries, along with Marshall aid took some measures (e.g. removal of QRs on imports, the establishment of the European Payments Union, and the code for liberalisation of trade) and were thinking of the creation of a European free trade area encompassing non-Communist Europe, according to GATT rules. The six countries later to become the EEC member states were not satisfied, however, with the proposed solution. After the Messina conference was held in 1955 they were determined to adopt not only commercial measures, but their ultimate objective was an integration of their national economies. They thought a free-trade area based only on commercial considerations would disturb and weaken their interests.⁷⁴

On a British initiative in 1956 the OEEC Council of Ministers decided to study the feasibility of multilateral co-operation on trade policy between the six EEC member states and the other OEEC states, and particularly to find a solution through a general free-trade zone as defined in the GATT. The negotiations, under the chairmanship of Reginald Maudling, for the establishment of a large free-trade area met with serious difficulties, especially after the French refusal to accept any kind of free-trade area between the six and the other OEEC countries. Finally, the negotiations failed to reach a successful conclusion.⁷⁵

Under these circumstances seven European countries⁷⁶ outside the EEC decided to take any necessary steps to eliminate any discrimination in trade as a result of the creation of the EEC, and to create a partial version of the proposed Pan-European free-trade area. Therefore, on British proposals and on Swedish invitation, seven European countries started negotiations, and in July 1959 a draft treaty was ready and a final agreement, the European Free Trade Association (EFTA), the so-called Stockholm Convention, was ready to be signed on 20th November 1960. Ratification followed the next year and subsequently the Convention was submitted to the sixteenth session of the CONTRACTING PARTIES to /

to GATT (May-June 1960) for the conventional examination of the compatibility issue.⁷⁷

The special problem raised in the EFTA was that the Convention covered the free movement of all industrial products, but excluded trade in agricultural products, such trade was to be carried out through bilateral agreements between the member states. The critics of the Convention, however, were not ready to accept the Convention, since it excluded a whole sector of the economy and therefore was not consistent with the spirit of GATT. The negotiation of the bilateral agreements between the EFTA countries for agricultural products was also severely criticised, as tending to create preferential agreements and discriminating against the other members of the association. On the other hand, the parties to the Convention strongly argued that they strictly followed the GATT rules and particularly Art. XXIV:8(b). As regards the agricultural sector, the case in point, they argued that bilateral agreements did facilitate the expansion of trade in agricultural products and that this sector was not excluded altogether. In any case, they supported the view that the 'substantially all the trade' criterion had been fulfilled, given that the trade in industrial products covered 85% of the total trade. The Working Party, however, was unable to reach any unanimous conclusion, nor did it make any recommendations to the CONTRACTING PARTIES. The issue was postponed to the seventeenth session of the CONTRACTING PARTIES in autumn 1960. At this stage the EFTA partners were ready to furnish additional information and to hold further consultations.⁷⁸

However, the main interest in this study has been the legal issue of compatibility of the bilateral agreements between the EEC and EFTA countries with the GATT rules. The Community has negotiated trade agreements separately with each one of the EFTA countries, but general principles have been applicable to all. Agreements between the EEC and the seven (i.e. Austria, Sweden, Switzerland, Iceland, Norway, Portugal and (Finland associated)) EFTA countries, were signed setting up free-trade areas. Agreements between the Community on the one hand and Austria, Sweden and Switzerland on the other hand were signed on 22nd July, 1972. An interim agreement with Austria had already entered into force on /

on 1st October, 1972.⁷⁹ The agreements with Iceland, Norway and Finland entered into force on 1st January 1974 respectively. The U.K. and Denmark former EFTA countries joined the EEC on 1st January 1973.

Between the EEC and the EFTA countries the establishment of free-trade areas was agreed (not customs unions nor harmonisation of legislation), with the object of removing tariff barriers, QRs and non-tariff barriers on all industrial products, except for paper and steel and for certain processed agricultural products. In the agreements with Austria, Finland, Norway, Sweden and Switzerland duties on industrial products would generally be eliminated in five equal steps by 1st July 1977. In the case of a few sensitive products and of the agreements with Iceland and Portugal longer periods have been negotiated. In fact, this happened ahead of the scheduled time.⁸⁰

All these agreements aim "at promoting, by the expansion of mutual trade, the harmonious development of conditions of life and employment, the growth of productivity and financial stability and to contribute to the liberalisation and expansion of world trade".⁸¹

The EFTA countries, taken as a whole, constitute the largest trading partner for the EEC. About a quarter of the EEC's external trade goes to EFTA countries and about a fifth of EFTA's external trade goes to the Community. These figures show the significance of the inter-dependence in the region and the economic and political implications of this inter-dependence.⁸² There is a common interest, therefore, on the part of both parties to do anything possible to maintain and develop even further these relations, for a high level of economic growth and liberalisation of trade. It is their common interest, however, that their relations should be expanded beyond trade to include other fields as well, such as transport, technical and scientific research, protection of the environment, the exchange of information, views on economic and monetary policies, development aid, energy and industrial policy with the ultimate objective of further economic growth and the rising of the living standards of their people. Inter-dependence is very vital for both groups of countries. For the Community is very significant /

significant as its comfortable trade surplus with the EFTA countries enables it to offset its trade deficit with Japan and the USA. For the EFTA, it is even more important, since a great percentage of its external trade is conducted with the Community.⁸³

However, all the free-trade agreements have functioned quite well. They have contributed to the removal of trade barriers and to the expansion and liberalisation of trade, which have shown considerable progress since the establishment of these agreements. To the countries involved, therefore, the effects of the trade agreements are beneficial and trade creating.

A Working Party to GATT was appointed meanwhile, to examine whether or not these agreements were in conformity with the GATT rules and especially Art. XXIV. The critics of the agreements argued that they were not trade agreements, but preferential ones and, as such, inconsistent with Art. XXIV. In particular, they pointed out that the criteria set out in paras. 5 and 8(b) have not been fulfilled. The 'substantially all the trade' requirement could not be justified since most agricultural products have been excluded from the agreements. They said the plan and schedule set up in these agreements was to indicate an interim agreement and in no way a complete free trade area. Moreover, they went on to argue that the rules of origin (an eminent characteristic of the EFTA association) not only became an obstacle to inter-area trade, but also raised new barriers to trade. They were especially of the opinion that the rules of origin increased restrictions against third parties and in general they worked against the LDCs' interests.⁸⁴

However, it is submitted, and this opinion is supported by the parties to the agreements, that the EEC-EFTA trade agreements created a free-trade area consistent with the requirements of Art. XXIV. It included a plan and schedule for elimination of customs duties and other restrictive regulations to trade (already completed ahead of schedule) and in no way were preferential agreements. The sensitive issues of the rules of origin and the exclusion of trade of most agricultural products, raised a question but /

but it does not indicate that world trade has been diverted because of those rules. It is quite clear, nevertheless, that there have been established free-trade areas between the EEC and EFTA countries, despite the exclusion of the agricultural sector. This exclusion seems not to have caused any significant trade diversion in world trade⁸⁵; e.g. the USA trade with EFTA countries has not been much affected in absolute terms, at least after these agreements came into force.⁸⁶ But even so, traditionally there has been accepted an exception to MFN clause obligations for bordering countries and limited regional arrangements. Especially, in this case, political, historical and geographical links between the Community and EFTA countries have been remarkable. At the end of the day the Working Party was unable to reach any unanimous conclusions as to the compatibility issue of the agreements with the GATT, nor did it make any recommendations to the parties concerned, nor condemn any particular aspect of the agreements as causing problems in the diversion of world trade.

Finally, the most important question raised earlier, i.e. the impact of the EEC agreements on the GATT system, should be given attention here. It has been pointed out that the EEC was concerned with the compatibility of the first agreements with the GATT, i.e. the association agreements with Greece and Turkey, which were contemplated in the form of a customs union arrangement. But shortly after, when the EEC started to feel its own strength, it rather based its preferential agreements in Art.113, EEC, (CCP), which does not seem in accordance with the letter and even the spirit of GATT. Subsequently, when association agreements with the Mediterranean and African countries were submitted to GATT for approval, the EEC maintained that they constituted free-trade areas and as such were consistent with the letter and spirit of GATT. It particularly maintained that these agreements were in line with Part IV of the GATT regarding 'Trade and Development' of the LDCs and pointed out the importance of the agreements in question for the development and expansion of trade of the LDCs. Certainly one cannot deny the benefits of the association agreements for the associates, but there has been clearly established a discrimination for the non-associates. This latter group argued /

argued that their position in the group of 77 in the U.N. framework had weakened as a result of the EEC preferential agreements with some LDCs. These association agreements involve preferential treatment for the associates and they are agreements recognised as preferential agreements by the international Community, despite the EEC's insistence and constant efforts to present them as free-trade areas. The EEC's argument is not convincing and it has not, accordingly, been accepted by the other contracting parties to GATT.

From the legal point of view these agreements, as preferential agreements, are contrary to GATT Art. XXIV, which does not allow for regional arrangements other than customs unions or free-trade areas to operate legally within its framework. As preferential agreements therefore, contrary to Art. XXIV, they are inevitably contrary to Art. I of the MFN clause, which establishes the principle of equality among all contracting parties. However, as the EEC's preferential agreements have proliferated to such an extent that the weakness of the GATT system is obvious. The MFN principle, on which free, fair and equitable world trade is based, has lost its importance, and it is applied as an exception instead of being the rule. On the other hand, one may ask what the GATT system did to protect itself from further deterioration. Since consideration of the issue of compatibility of the EEC with the G.A., the GATT gave way to the EEC. In that case, GATT did not consider the legal issue, but it stated that it was 'more fruitful' to direct its attention to the practical problems.

Later, when other regional arrangements came into being, GATT was called on again and again to examine their relationship and compatibility with its provisions. In all cases, despite the apparent controversy of the preferential arrangements, the GATT was silent. The contracting parties neither prohibited the arrangements nor issued recommendations, nor approved them as they stood. They tacitly accepted them and left them to operate within the system. Therefore, although the EEC's agreements have weakened the GATT system, the blame cannot go altogether to the EEC, but also to the GATT system which, from the beginning, allowed preferential agreements to operate within its framework despite their inconsistency with its letter and its spirit and to develop and further proliferate.

CHAPTER 5.

NOTES

1. J.O. 1963, 293; A. N. Yanniotis, Association of Greece with the European Economic Community (in Greek), (1965).
2. Stanley Henig, The External Relations of the European Community, (1971); BISD/GATT 1 S/56-57 and 149-158 (1963).
3. For further information see, Loukas Tsoukalis (ed.), Greece and the European Community, (1979).
4. Greece, Accession Protocol O.J. 1978, L.161/1, Financial Protocol 1978, O.J. 1978, L.225/25; Accession Act of May 1979, O.J. L.291/1979; Keesing's Contemporary Archives, January 26, (1979) p. 29423 ff.
5. Europe, November 1982, p. 16.
6. BISD/GATT, 13 S/59 (1965).
7. Ibid.; This point is also evaluated in the conclusions, (Chap.10, p.).
8. Ibid.; Karin Kock, International trade policy and the GATT 1947-1967, (1969), p. 136-137.
9. Europe, December 1981.
10. Europe, January/February 1982.
11. Burundi, Cameroon, Central African Republic, Chad, Benin, Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Samalia, Togo, Upper Volta; Zaire and Mauritius joined in 1971.
12. BISD/GATT 19 S/149 (1972); Karin Kock, op. cit., in Note 8 pp. 128-129 and 252.
13. BISD/GATT 14 S/22 and 100-115 (1966); This point is further analysed and evaluated in the conclusions so as to avoid repetition of the same legal issue. (Chap.10, p.).
14. BISD/GATT 18 S/143 (1971).
15. /

15. The ACP countries included the nineteen associated African states and Madagascar, and twenty-one Commonwealth countries mainly in Africa, the Arusha agreement countries (Kenya, Uganda and Tanzania), Botswana, Gambia, Ghana, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland and Zambia. In the Caribbean - Barbados, Guyana, Jamaica, the Bahamas, Grenada, Trinidad and Tobago; in the Pacific Fiji, Western Samoa and six other African states, Ethiopia, Guinea, Guinea Bissau, Equatorial Guinea, Liberia and Sudan.
16. Bulletin of the European Communities No.2. 1980, pp. 22-58.
17. O.J. L.347/22.12.1980, European Communities Background Report, Zimbabwe signs the Lomé Convention, November 20 1980; Katharina Foche, From Lomé 1 towards Lomé 2, European Community publications, (1980).
18. Particularly under the Lomé II the areas of co-operation have been expanded to fisheries, maritime and labour; Europe, May 1982; Commission of the European Communities, Background Report, Preparations for Lomé III, April 28, 1983; Financial Times 5.4.83 (Lomé: The need to persevere); Negotiations for the Lomé III have already started under the chairmanship of Commissioner Pisani.
19. Ellen Frey Wouters, The European Community and the Third World: The Lomé Convention and its impact, (1980).
20. Ibid.
21. Christopher Stevens, (ed.), EEC and the Third World: A Survey 1. (1981), Chap. 3.
22. The Guardian 14 May 1982, p. 8.
23. The Courier, ACP-EC, (May-June 1983), pp. 68-84.
24. Ibid.
25. European File: Community aid to the Third World: The Lomé Convention, E.6/81 March 1981.
26. Ibid.
27. Also another similar agreement is to be adopted within the UNCTAD framework for an establishment of a common fund to stabilise the world's trade in commodities. The Community and the member states are to become signatories to this agreement.
28. Commission of the European Communities, The European Community and the Developing Countries, E. Doc 1977/1.; Ellen Frey Wouters, op. cit., in Note 19; Europe Information Development, Relations between EEC and Africa, EC Commission (1980); Bulletin of the European Communities, Supplement 5/82, Memorandum of the Community's development policy, (1982).
29. /

29. Commission of the European Communities, The European Community and the Developing Countries, E. Doc 1977/1.
30. 14th General Report of the European Community, para. 675.
31. Ellen Frey Wouters, op. cit., in Note 19.
32. Ibid.
33. In the second place come the OPEC countries with a contribution of 21.8%. followed by the USA with 16.1%. Russia falls behind with only 4.6%.
34. The Guardian, 14 May 1982, p. 8.
35. The Times, September 24, 1983, p. 11.
36. BISD/GATT 23 S/46 (1976); And in this case the question of compatibility of the Lomé Convention with the GATT is further discussed in the conclusions.
37. Kessing's Contemporary Archives (1980), p.30697 ff.

	1975	1976	1977	1978	1979
EEC exports to ACP	8.1	9.8	12.5	12.7	11.8
ACP exports to EEC	8.4	10.5	12.5	11.9	14.8

Percentage

Growth of EEC exports to ACP	+33.0	+22.0	+27.0	+ 2.0	- 7.0
Growth of ACP exports to EEC	-17.0	+20.0	+19.0	- 5.0	+25.0
ACP share of EEC exports	6.7	7.0	7.6	7.3	6.1
ACP share of EEC imports	6.7	6.6	7.3	6.7	6.8

According to Community sources the downfall of ACP exports, especially in 1978 as compared with 1977, was partly due to sharp fluctuations in world prices for certain commodities exported by the ACP states.

38. In 1977 sales to the EEC represented 43% of total ACP exports and 48% of the total imports.
39. The Times, May 9, 1980, p.10.
40. For further information see, Ellen Frey Wouters, op. cit., in Note 19.

41. /

41. For a very good and detailed analysis of the EEC-Israel agreements, although not up to date, see S. Henig (1971), op. cit., in Note 2; Europe Information, Development, The EEC-Israel Co-operation Agreements, May 1980.
42. P. Artisien and S. Holt, Yugoslavia and the EEC in the 1970s, 18 Journal of Common Market Studies, (June 1980), p. 355-369; The Times, 26.2.1980, p.5; Financial Times, 26.2.1980, p.3; European Community, (in Greek) (April 1980), pp. 19-23.
43. Both association and other agreements, in the context of an overall examination of the global Mediterranean policy, are included in this section.
44. Al El Agraa, The Economics of the European Community, (1980).
45. Europe Information, Development, EEC-Algeria Co-operation Agreement, (June 1980); Europe Information, Development, Robert Taylor, Implications for the Southern Mediterranean countries of the second enlargement of the European Community, June 1980.
46. Financial protocols to the co-operation agreements have been implemented throughout 1980, Bulletin of the European Communities, 4, 6, 7, 8, 10 and 12 (1980).
47. European Commission, 25 years of external relations of the European Community, Doc 4/1979.
48. S. Henig, op. cit., in Note 2.
49. Ibid.
50. Ibid.
51. BISD/GATT 18 S/158, L/3581 (1971); 23 S/55 (1976).
52. S. Henig, op. cit., in Note 2.
53. BISD/GATT, 18 S/149, 21 S/102 ff, 24 S/97 and 25 S/114, 123, 133 and 142.
54. Ibid.
55. Ibid.
56. Europe Information, Development, EEC-Lebanon Co-operation Agreement, May 1980; BISD/GATT 25 S/142, 1/4663 (1978).
57. /

57. Europe Information, Development, EEC-Syria Co-operation Agreement, 1978; BISD/GATT 25 S/123, L.4461 (1978).
58. BISD, 25 S/133, L/4462 (1978).
59. Europe Information, Development, EEC-Egypt Co-operation Agreement, May 1978; BISD/GATT, 21 S/102, (1974) and 25 S/144 (1978).
60. Europe Information, Development, EEC-Morocco Co-operation Agreement, Feb. 1980; BISD/18 S/149 (1971), EEC agreement with Morocco and Tunisia; BISD/GATT 14 S/94 (1967), EEC agreement with Tunisia.
61. BISD/GATT 19 S/90, L/3665 (1972).
62. BISD/GATT 18 S/166, L/3579 (1971).
63. BISD/GATT 21 S/94, L/4009 (1974).
64. Bulletin of the European Community Memorandum of the Community's Development Policy, Supplement 5/1982, part V.
65. Al El Agraa, op. cit., in Note 43; Commission of the European Community, Background Report, An integrated plan for the Mediterranean regions, (April 21, 1983).
66. Europe Information, Development, Robert Taylor, Implication for the Southern Mediterranean countries of the second enlargement of the European Community, June 1980.
As an example see :
67. Alfred Tovias, Egypt's trade policies (A bilateral agreement between the EEC and Egypt entered into force in 1976 within the framework of the MFA), 15 Journal of World Trade Law (1981), p. 471-489.
68. L. Boselli, the Citrus Fruit Waiver case, 7 Common Market Law Review, (1970), pp. 466-476; Loukas Tsoukalis, The European Community and its Mediterranean Enlargement, (1981).
69. L. Boselli, Ibid.
70. Robert Hudec, The GATT legal system and world trade diplomacy, (1975).
71. Gerrit Faber, European Community and Development Co-operation, (1982).
72. /

72. D. Gaines, W. Sawyer and R. Sprinkle, EEC-Mediterranean policy and the USA trade in citrus, 15 Journal of World Trade Law, (1981) p. 431-439. G. N. Yannopoulos, The Mediterranean policy of the EEC. Its impact on the associated developing countries, 11 Journal of World Trade Law, (1977), p.489; The problem of preferential agreements is also discussed in Chap. 4 and further in the conclusions.
73. For further discussion see also, John Jackson, Equality and discrimination in international economic law (XI); the GATT, 37 The Yearbook of World Affairs, (1983).
74. EFTA Bulletin, Vol. XXI June 1980, p. 4 ff.
75. Ibid, and E. P. Wellenstein, The free-trade agreements between the enlarged European Communities and the EFTA countries, 10 Common Market Law Review, (1973), pp. 137-149.
76. Norway, Sweden, Switzerland, Austria, the U.K., Portugal and Denmark.
77. EFTA Bulletin, Vol. XXI, (June 1980), p. 4 ff; K. Kock, op. cit., in Note 8, p. 133 ff; Dennis Swann, The Economics of the Common Market, 4th edition, (1978), pp. 25-30, 41, 75 ff.
78. BISD/GATT 9 S/20, Report adopted on 18.11.1960; BISD/GATT 9 S/70, Report adopted on 4.6.1960, L/1235.
79. A discussion was going on about EEC-Austria customs union, but the Netherlands were strongly against any other derogations from the spirit of GATT.
80. John Jackson, Legal problems of international economic relations, (1977), p. 571 ff.
81. Europe Information, External Relations, EEC and EFTA, 35/80, June 1980.
82. Switzerland is a most important market for the Community's exports followed by Sweden, which accounts for approximately half of its external trade with the EEC.
83. Europe Information, op. cit., in Note 81.
84. BISD/GATT 9 S/20 and 70, (1961).
85. No case has been brought to the CONTRACTING PARTIES to GATT against the EEC-EFTA agreements by industrialised countries, nor by LDCs.
86. John Jackson, op. cit., in Note 80.

COMMERCIAL - TARIFF AND TRADE - AGREEMENTS with INDUSTRIALISED COUNTRIES.

1. The European Community and the United States of America.

While, during the 1960s, relations between EEC and USA were inspired by the concept of interdependence and close economic, military and political relationships, in the 1970s this intimate relationship has been eroded. Economic recovery in Europe and the emergence of Japan as one of the major industrial powers has caused a relative shift of economic strength. Western Europe has gained an economic strength almost equivalent to that of the USA, but for the latter this has meant a relative decline in an almost exclusive economic dominance. Relative equality has resulted in conflicts over trade, investment and monetary policies. Therefore, over the course of the 1970s and the first years of the 1980s EEC-USA relations instead of moving closer, drifted apart, mainly as a result of different economic perspectives. Differences are even more evident now in a period of economic recession. Over this period, the EEC started to develop its own independent trade policy based on its self-interest rather than on American designs. Increasingly and inevitably the EEC has grown into the role of a competitor.¹ In this context of trade relations, counter-attacks between the EEC and the USA are concentrated on criticism that trade policies from both sides have been protectionist. The USA has, in particular, criticised Europe for its CAP's, variable import levies and especially export subsidies. In turn, the Europeans have argued that the USA has been even more protectionist and that its continuing trade balance surplus with them has demonstrated quite the opposite of the American arguments.² The USA has, in fact, gained from the creation of the European Community. It, the Community, is still the most important trading partner for the USA in both industrial and agricultural imports and exports. There have obviously been some sectors in point which have suffered as a result of the EEC's trade expansion, but the overall effect has been beneficial. From 1958 to 1971, the USA /

USA has had large balance of trade surpluses with the Community; only in 1972 did the USA have a small deficit (\$500m.), but this was far smaller than the USA trade deficit with Canada or Japan. From 1973 and onwards the USA has had a growing trade surplus with the Community.³ Much of this surplus is created by USA exports of agricultural products.⁴

Nevertheless, trade policies pursued by the Nixon and later Administrations, have damaged relations between the two partners. Trade wars have been threatened and have almost emerged over particular sectors of the economy, such as agriculture and steel. The EEC's trade agreements with third countries have similarly caused great concern in the USA, which maintains that these special trade agreements have an adverse effect on its economy. The EEC's preferential agreements with various countries, such as the Mediterranean or ACP countries, are unfavourable to USA interests. Moreover, the enlargement of the EEC in 1973 to include particularly Britain, a major agricultural importer from the USA, was not beneficial to the USA economy either. It is quite noteworthy that despite such important economic and commercial links between the USA and the EEC, there have not been concluded preferential bilateral agreements, or even relevant negotiations between the EEC and the USA, similar to those with other third countries; e.g. Mediterranean or ACP countries. Trade relations between the member states of the EEC and the USA are generally conducted at a bilateral level. Economic deals are also taking place directly between EEC industries and the USA government and industries. However, these trade relations and, in particular, relations between the governments of the Community member states and the USA are assumed to be conducted within the framework of international trade agreements, primarily within the GATT and under the auspices of other international economic organisations such as OECD, and IMF. Frictions in their relations have inevitably generated problems. Disputes over agricultural export subsidies and steel export subsidies have caused, and are still causing, concern to both sides.

(i) Agriculture

The /

The EEC's Common Agricultural Policy

Agriculture, with its peculiar nature has proved to be the most difficult area, within which liberalisation in international trade has been attempted. Difficulties arise from an economic upturn in the developed countries and faster economic growth in LDCs. A large increase of exports of tropical products and to some extent increase in non-tropical products like beef, tobacco, etc. have added to existing difficulties. The sensitive nature of agriculture, the national policies, fluctuations due to weather, disease, etc. are also important factors, which tend to make the market quite unstable.⁵

The EEC Treaty in Arts. 38-43 provides for the establishment of a CAP founded on three main principles: the single market for all EEC member states, Community preference and financial solidarity. Its main objectives concern increase of farm productivity, stabilisation of markets, assurance of fair standards of living for farmers, guarantee of regularity of supplies and reasonable prices for consumers. These objectives aim further at the interest of both producers and consumers. They are to be accomplished by protecting internal prices; by the guarantee of minimum import prices by means of variable import levies; by the support of domestic purchases, which provide that only minimum products will be imported, and by export subsidies in case of over-production.⁶

Variable import levies apply when Community prices are above world markets. They have the effect of limiting imports to the Community more than would be the case if no such restrictions existed.⁷ Export subsidies are used when Community prices are higher than the corresponding world ones. Thus the Community market is to be protected from foreign competition. The system of high market prices was adopted at the Stresa Conference in July 1958. Quantitative restrictions and tariffs were rejected as a means of protecting the internal market price in a manner contrary to GATT and as being too uncertain. The use of export subsidies is the result of the failure to control production and the need to remove surpluses from the European market. Export subsidies are frequently used because prices in the Community are generally higher /

higher than those of world market.⁸

The agricultural policy in economic terms⁹ has been highly protectionist since its conception, especially for those products in which the Community has a comparative advantage, e.g. grains. This protectionist policy has encouraged over-production, particularly in some sectors such as grains, sugar, dairy products, eggs, poultry, pig-meat, fat, oils and wine. In many agricultural products self-sufficiency has been achieved, especially since the first EEC enlargement. X

Over-production and self-sufficiency have led to conflicts with other major exporting countries, notably the USA. Confrontation, however, became inevitable after the 1960s, when agricultural production in the developed countries was substantially increased. The Eastern European countries for their part developed the production of agricultural goods, which could be exported to developed countries in West Europe. The NICs too emerged as large exporters of tropical and non-tropical products. The agricultural policies of the major trading nations encouraged 'home self-sufficiency and export orientated programs'.¹⁰

However, it is of very particular importance to note that Arts. 38-47 (EEC) regulate intra-Community trade in agricultural products, without extending their jurisdiction to external relations. Therefore, trade in agriculture between the EEC and third countries is regulated by the same provisions as those applicable on industrial products. This means that the CCP provisions of the EEC Treaty envisaged in Arts. 110-116, regulate the EEC external trade for both industrial and agricultural products. In particular, Art. 110 (EEC) aims to contribute to the development of international trade in both industrial and agricultural products, to the progressive elimination of international trade restrictions and to the lowering of tariff barriers. With particular reference to agriculture, the Community in order to achieve this aim has participated in GATT talks, although in practice its commitments over agricultural issues are very limited. It was first suggested, during the Kennedy Round that participating countries should put their agricultural policies as such on the negotiating table. Differences between the EEC and the USA were at that time more than evident. The USA maintained serious objections /

objections to the EEC CAP's price support mechanism and it also demanded the Community the reduction of the variable import levies against future increases, something which was rejected by the Community.¹¹ Finally, no agreement was reached mainly due to persisting USA-EEC differences, and the only positive result which emerged from the Kennedy Round MTNs was an agreement to establish an Agricultural Committee within which trade liberalisation in this sector was to proceed.¹²

However, as the world trade problems have aggravated since the monetary crisis of 1971, and the oil embargo of 1973, and as the Kennedy Round left a big vacuum in the regulation of international trade, failing in particular to regulate trade in agricultural products, the GATT parties agreed to proceed to further Multilateral Trade Negotiations known then as the Tokyo Round MTNs (1973-1979). During this period some progress was made and a group was established with responsibility for agriculture.. Also, recently in the GATT Ministerial Conference of November 24-29, 1982, efforts have resulted in the establishment of a relevant committee to study this sensitive issue. The EEC's approach during the Tokyo Round was that agriculture with its unique characteristics should be dealt with separately.¹³ At the Ministerial Meeting, the Community's position was disappointing. It, the Community, was not willing to discuss agricultural problems, despite the overwhelming pressure from the other contracting parties, and especially the USA. Nevertheless, what was finally considered fundamentally necessary in the GATT Multilateral Agricultural framework was the establishment of a mechanism which would provide for exchange of information, active co-operation and consultation.

The EEC in practice has done very little to liberalise trade in agricultural products. The CAP is indeed very protectionist operating in an autarchic manner and attaching little importance to its implications for third countries. There is a considerable gap between the law as set out in the CCP provisions of the EEC Treaty and the EEC practice. EEC largely subsidises its agricultural exports and (as discussed in detail below) it is deemed responsible for disturbance of world agricultural markets. The EEC's /

EEC's movement away from its basic principles and aims contradicts also with the GATT objectives and principles.

However, some reforms are needed, so that, the objectives set out in the EEC Treaty are accomplished (Arts. 39 and 110 EEC), with particular regard to the interests of the agriculture producing countries, especially the LDCs.¹⁵

The main provisions of the USA Agricultural Policy

The USA agricultural policy is as protectionist as the EEC's CAP. The USA support for agriculture dates back to the years following the First World War. During the inter-war years, the USA encouraged a high-price support system for agricultural products and applied rather ineffective production restraints. This as a result led to over-production and accumulation of surpluses in government hands, heavy government expenditure and direct export subsidies. In the late 1950s the agricultural policy was directed to domestic problems rather than to exports. However, as time progressed in the 1960s, USA policy, supported by the labour organisations, was export oriented. Commercial export sales and expansion of agricultural trade were the main objectives. Subsequently, with the extended farm legislation of 1965-70 the USA government, having realised how uneconomic the policy was, started to lower the support price system towards world market levels. An important goal for the USA government became "getting the government out of agriculture".¹⁶ Instead "farm incomes were supplemented by direct payments to those farmers who participated in (progressively stringent) supply management programmes".¹⁷

Simultaneously, as the USA was trying to expand its trade in agricultural products, it was concerned for the protection of agricultural markets and enacted legislation to this end. How those laws affected the drafting of several GATT clauses, especially Arts. XI and XIV remains a difficult question. It is certain, however, that in 1947-1948 the USA negotiators tried to tailor GATT to their needs, so that no USA provisions would be incompatible with GATT and, later, when the Agricultural Adjustment Act was amended /

amended in 1948, they added a special provision making it compatible with GATT. But in 1951 when the Congress amended the Defence Production Act of 1950, it added a section that allowed import quotas for oils and fats and certain dairy products. This movement was not consistent with GATT and it led to the Netherlands retaliation over dairy products; the only case so far to have arisen under Art. XXIII of GATT.¹⁸ (See chap.2, the disputes procedure, p.45.). Therefore, as the USA realised that a potential breach of the GATT agreement was imminent, it requested in the GATT review session of 1954-1955 a waiver for some agricultural products under Art.XXV:5. This was to waive the USA obligations under Arts. II, XI and XVI to the extent "necessary to prevent a conflict". However, no time limits were included, nor any provision made for reconsideration after a certain time. The spirit of the waiver thus implied, that it would last as long as was necessary to prevent a conflict.¹⁹

Agricultural policies in the EEC and the USA face the same problems. The Americans have also tried to stabilise prices and protect their farmers from imports. The USA too has a support system similar to the support mechanism of the EEC's CAP with its target price, intervention price and export subsidies through refunds. Special mention should be made of indirect subsidies to the farmers. In this context it is worth noting the statement of Mr Brock, the USA Trade Representative, before the Senate²⁰ "if you look at the American agricultural scene we too have surpluses that are engineered and supported by the USA government: we too have engaged in selling that surplus below market price in the world and we too are subject to some criticism in that respect". In particular after the 1960s when new competitors, mainly EEC and LDCs, came on the international scene, the USA problems over agriculture have multiplied. USA agricultural protection is expressed by various import restrictions notably imposed (1) by voluntary export restraints on her trading partners as well as by direct import quota restrictions on foreign products by different means; e.g. restriction of meat imports from Latin America on the justification that they do not meet the USA health standards: (2) through a Congressional Bill of 1970, which imposed automatic trade restrictions on those foreign products which were likely to enter the /

the USA market and (3) through the 1955 waiver which restricts agricultural imports into the USA market.

Despite such protectionist measures, and particularly the indirect support for agriculture, the Americans constantly complain about the EEC's variable levies and in general the EEC's support system for agriculture which in their opinion results in unfair international competition. The USA contention has been that the CAP is highly protectionist and thereby restricts USA exports to the Community, which would be of greater volume if the CAP did not exist.. The fact, however, remains that USA agricultural exports to the EEC have, since the establishment of the CAP, actually increased faster than those to the rest of the world.²¹ The USA has had a very comfortable surplus in its agricultural trade with the Community and in general with the rest of the world.²² Its agricultural exports contribute to reverse the steadily worsening balance of payments in the industrial sector. Today most of its agricultural production (more than two-thirds) goes for exports.²³

However, the USA still advocates the liberalisation of trade in agricultural products in world markets. In the GATT Ministerial Meeting in November, 1982, the USA pressed that agriculture be included in the talks, and it demanded that the EEC adopt some liberal measures of agricultural trade policy. But unfortunately this support only extends to supporting the liberalisation of trade in farm products, in which it, the USA, has a competitive advantage, notably wheat, feedgrains, tobacco, citrus fruit, oils and poultry. Warley, in his analysis,²⁴ says that "For commodities in which it (the USA) has no advantage or is clearly uncompetitive, its agricultural policies have been restrictive and conditions of access to the USA market as restrictive as have been those of Western Europe or Japan. These commodities include dairy products, rice, sugar, cotton, manufacturing grades of beef, mutton, lamb and wool".

Despite the proclaimed desire for a free-trade approach in agricultural products few GATT parties can be persuaded of the genuineness of the USA arguments as long as the USA retains the 1955 /

1955 waiver granted for protection of its agricultural production, which was to have been adopted only for a limited period of time. If the USA truly believes in trade liberalisation and it really wants some progress towards this goal, it must give up its agricultural waiver. The GATT failure to liberalise trade in the agricultural sector is partly attributable to this waiver.

Friction between the EEC and the USA over agriculture.

The issue of agricultural trade is the most disputed in recent years. Most of the cases brought to GATT concern trade in agriculture with constant rivals the major trading countries, in particular the EEC and the USA.²⁵

The Community is the principal trading partner for the USA and, in the case of the agricultural sector, the EEC remains the most important market for American agricultural products. But, since the establishment of the CAP, the EEC became a strong competitor to USA farming. It has become a competitor not only in penetrating the USA market, but also in exporting to traditional USA export markets.²⁶ However, both the EEC and the USA face similar difficulties. The USA is in a very strong position in many respects to meet foreign competition. On the other hand, the Community is more open and penetrable by foreign products and meets hard competition in its endeavour to find secure export markets. The situation is getting even more difficult due to the fact that the volume and the value of the world exports in the agricultural sector has been substantially increasing, while industrial exports stagnate.

A serious reason for these uneasy trade relations in agriculture between the EEC and the USA has been over-production on both sides. Over-production has inevitably led to uncertainties and confrontations at international level. Disputes over agriculture between the EEC and the USA have brought several cases to GATT for further consideration. Such disputes date back to the first years of the CAP's implementation and have multiplied since the monetary crisis of 1971. (For further information see Chap.2, p.45.).

GATT /

GATT, the body which regulates trade for both industrial and agricultural products, has been called on to solve all these differences. In many instances panels were established. Major confrontations have led to the citrus fruit case which led to a compromise solution, and which demonstrates the role which GATT plays in solving international trade disputes,²⁷ to the cheese war sometime earlier, which provoked the Netherlands into retaliating against the USA exports of grains (the only case of retaliation so far) et al.²⁸

From 1980 to present, five out of seven cases brought to GATT between the two partners concern agriculture. The USA in bringing the cases to GATT believes that it has strong cause for bringing certain European Community practices to GATT. All those cases are presently in the early consultation procedures of the dispute settlement under Art. XXII and Art. XXIII:1 of the G.A.²⁹ It is worth noting also that USA producers of poultry, sugar, wheat flour, canned fruit and pasta have formally complained recently (January 1982) to the USA office of Special Trade Representative, that Community exports were undercutting USA produce on the world markets as a result of subsidies provided under the CAP and thereby breaching the GATT Subsidies Code.

The problem, however, is not only the restriction of imports into the Community market, but that the Community has in the course of time expanded its exports to markets which traditionally belonged to the USA, e.g. in the Middle East the USA used to be the major supplier of poultry, but now the Europeans have taken over the market; an action which has made the USA complain that the EEC has failed to assume its international trade commitments.

Therefore, as the Community takes over a larger part of foreign exports, it is being blamed in the USA not only for causing market difficulties in the USA market, but also in the LDCs and the world in general. The USA particularly blames the EEC's CAP for its export subsidies and the system of variable import levies, maintaining that this policy is inconsistent with GATT trading rules. The EEC's point of view, however, in respect of variable import levies is that these measures have been negotiated in GATT by the Community, which (GATT) gave appropriate compensation /

compensation to the other contracting parties whose interests were affected. According to this view the GATT partners have long accepted the basic principles and mechanisms of the CAP, including the system of import levies and export refunds, and that the Americans formally accepted the CAP at the end of the Tokyo Round. Therefore, the EEC has pointed out that export subsidies for primary agricultural products are explicitly allowed under GATT provided that the export refunds (if they are considered export subsidies) are not used to obtain a 'more than an equitable share of world markets'.³⁰

In fact, (as we have already seen in chap. 2) the Subsidies Code in relation to Art. XVI of the G.A. permits subsidies on agricultural products. It forbids their use only when they have certain effects; e.g. where the subsidies result in the exporting country having more than "an equitable share": a very complicated question, which needs further interpretation and is not yet precisely defined.

Finally, there is growing concern that there is lack of common understanding and co-operation between the two parties. The USA in the first place should abandon its unilateral interpretation of the GATT law and be more willing to exchange information and consult and co-operate with the Community, having regard to its advantageous position in regulating international trade in agriculture. Its policy has often been unjust to third countries. The USA has the power to impose voluntary restraint agreements and frequently presses the EEC to buy more and more agricultural products; (e.g. wheat products for animal feeding); promotes grain sales to the USSR while accusing the Community of being in the wrong for her desire to import Soviet natural gas. USA policy over agricultural problems may be qualified as arrogant and aggressive. Despite proclamations for free-world trade, in fact it, the USA, is moving towards protectionist measures. This attitude embraces the USA administration one of whose members stated recently - "if the GATT Panel was to rule against the Americans (something which is likely to happen) in a current case, this could result in the USA pulling out of the GATT Subsidies Code altogether". After that, one can pose /

pose the question whether this is the kind of enforcement of the law and pursuance of the liberal trade principles which the Americans emphasise. Meanwhile, the USA Department of Agriculture (USDA) threatens to retaliate against the EEC export subsidies with subsidies of its own, or with direct payments on individual products. The USDA has at its disposition a recently approved \$170-190m. of Congressional authorisation for export promotion and it might decide to spend it on agricultural trade export promotion.³¹

Agriculture is the most sensitive sector in international trade and it will remain so until an international framework dealing with those issues has been established. Periodic consultations and co-operation in this field, particularly between the EEC and the USA should be established on a regular basis. Consultative committees should be established concerning economic competition involving legal questions under GATT. The most difficult question of what constitutes "equitable shares in world markets" needs further interpretation and consideration. Also, the legality of subsidies on agricultural products within the GATT framework needs further consideration (see Subsidies). There are growing fears that agriculture, if not regulated, may tear GATT apart. Current trade disputes over agriculture justify this concern. In fact, some agricultural trade has been regulated through International Commodity Agreements. (International Sugar Agreements (ISA), International agreements on cocoa, meat, dairy products, and so on), but many products are left out of international arrangements and fall to be regulated by the G.A.

Now as the world recession and weak demand has exacerbated trade problems over agriculture, it has become necessary that positive steps be taken by both the EEC and the USA. The USA with its constant threats to retaliate against the EEC's agricultural practices, if it takes action in that direction, may demolish the GATT edifice. It is imperative therefore now more than at any time that the Agricultural Committee work out systematically any acceptable solution to all GATT parties, especially the LDCs whose economy is very vulnerable and their export earnings usually depend on a specified agricultural commodity. Protectionist measures taken by the major trading partners, in particular the EEC and the USA, in /

in order to protect domestic outputs and producers, should be reduced and eventually eliminated.

The particular problem of subsidies in agricultural products.

Most of the complaints which have been brought to GATT have been raised by the USA against the EEC's CAP and, in particular, against its subsidised agricultural exports. Likewise, other countries such as Australia and Brazil have raised complaints against the EEC's sugar policy. However, in the context of this study it has been considered important that all these complaints be discussed together, since they illustrate the same type of complaint as those made by the USA. Their analysis will help us to understand the particular case of the EEC's subsidised agricultural exports, and evaluate the impact which the EEC's CAP has on the world trading system. Therefore, this issue presents a special legal interest, as to the effect which the CAP has on the GATT legal system. The question of subsidies in agricultural products is one of the most important questions in the evolution of the external trade policy of the EEC in the context of GATT. Whether or not the EEC's subsidies on agricultural exports are legal in respect of the GATT provisions, is a fundamentally important issue.

Are the EEC's subsidies on agricultural exports consistent or not with Art. XVI:3 of the G.A. and with the Subsidies Code, which was established during the Tokyo Round? Subsidies are very common in agriculture, mainly because the cost of agricultural products in world markets are generally lower than those prevailing in the producing countries. In the USA subsidies have been in use for a long time. Since the term of office of President Roosevelt (1943-1945) legislation has provided for payments to be made to farmers to discourage over-production in grain and other commodities.³² Currently, other measures, such as payments in kind (pik)³³ direct and indirect payments, government purchasing surpluses and support price system often take place. In the EEC also subsidies and export refunds are common under the CAP.

In accordance with GATT Art. XVI and Art. 10 of the Subsidies Code /

Code, export subsidies for primary products (farm, forest and fisheries) are permitted but there is a limitation to their use. They can be applied to the extent that the country concerned cannot obtain "more than an equitable share in world export trade" in the particular product. (For full discussion see chap. 2 Subsidies Code, p.34). On several occasions Panels in GATT were established to consider this sensitive issue of subsidies on the export of primary products. In 1958 a Panel was established to consider this sensitive issue of subsidies on the export of primary products. This Panel was established following an Australian complaint about French subsidised exports of wheat flour to South East Asia. The Panel issued a mild recommendation to France that she should limit her exports because she had obtained "more than an equitable share" in the South East Asia markets.³⁴ (This case is earlier discussed in chap. 2, p.38).

However, as has been discussed in detail earlier in chap.2 p. 34, since the early 1960s an improved framework has been established to consider the case of subsidies; i.e. the establishment of the Subsidies Code and the Multilateral Agricultural Committee. An analysis of the Subsidies Code and the work of the Multilateral Committee helps us to evaluate and understand the effect of EEC export subsidies in agricultural products on world trade.

Australia and Brazil have both attacked the EEC's sugar policy in terms of Art. XVI:3 of GATT and Art. 10:3 of the Subsidies Code. Both complaints are directed against the EEC that it had obtained "more than an equitable share of world trade" in sugar, contrary to the above provisions. Neither of the established Panels 35 resulted in a definite conclusion as regards the compatibility of the EEC practices with Art. XVI:3 of the G.A. but both concluded that the EEC sugar policy had contributed to a depression of prices in world markets and that serious prejudice (within the meaning of Art.XVI:1) had been indirectly caused to the complaining countries. The Panels also pointed out that the EEC had accelerated production growth and through the export refunds contributed to a permanent source of uncertainty in world markets, in terms of Art. XVI:1.

In the Brazilian case, the Panel specifically found that
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"on the basis of the evidence available to it, it was not able to conclude that the increased share had resulted in the European Communities 'having more than an equitable share of world export trade in the product' in terms of Art. XVI:3"³⁶ Subsequently when in 1981 and 1982 two Working Parties were established they also repeated the Panel's criticisms.³⁷ On the Australian complaint³⁸ the Panel noted that the European Community's exports, despite its increased share, had displaced Australia's exports only to a limited extent and in a few markets, because Australia's exports were bi-laterally regulated under long-term arrangements and the Panel concluded that "it was not in a position to reach a definite conclusion that the increased share had resulted in the European Communities in 'having more than an equitable share of world export trade' in that product" in terms of Art. XVI:3 of the GATT. It was acknowledged that the EEC's sugar policy had depressed world prices and thereby serious prejudice had been indirectly caused to Australia, but no violation in terms of Art. XVI had been indicated. Likewise, the CONTRACTING PARTIES to GATT before which the matter was raised, adopted a similar decision asserting that the EEC policy had not been found inconsistent with the legal rules especially with Art. XVI. This is one of the most detailed cases thus far, relating to the compatibility of the EEC's CAP with the GATT provisions.

Therefore, although one could argue that the EEC practices would be incompatible with the legal rules, due to the depression which these practices caused to world markets, yet no inconsistency of the EEC's CAP with the international trade rules had been found in this case. However, the effect on the effectiveness of the GATT's dispute settlement procedures and on the GATT legal system as a whole, had been questioned. The decision of the GATT bodies was received with much relief in the EEC, but the other exporting countries were unhappy because the Community's measures had depressed the world sugar market.³⁹

Agricultural subsidies too have been a major bone of contention between EEC and USA and they will be such until a mutually acceptable solution can be found. As regards the sugar policy, the USA has also lodged in 1982, another complaint under the Subsidies Code.⁴⁰ The USA complains that the Community's regime of subsidisation violates /

violates Arts. 8 and 10 of the Subsidies Code and Art. XVI of the GATT. In defending its position the EEC maintained that agreements were reached at the Tokyo Round, according to which the EEC undertook not to take more than an equitable share in foreign markets and, therefore, such questions should not be re-opened.⁴¹

A number of other complaints were also raised in 1982 by the USA against the EEC's CAP. Some examples are referred to herein. (1) A complaint against EEC production subsidies on Greek raisins pointed out that the USA producers of raisins are deprived of world markets because of the Community's practices. (2) In the poultry case, the USA poultry industry maintained that as a result of the Community subsidies, it has been denied an equitable share in world markets, particularly the Middle East, which was one of its traditional markets. (3) In the pasta case, the USA argued that the EEC subsidy on pasta exports is per se illegal because it constitutes a subsidy on any "other than primary product" which is prohibited under Art.9 of the Subsidies Code.⁴² In all these and other complaints the USA maintained that the spirit of the GATT provisions and the Subsidies Code had been violated, and requested the EEC to reduce its level of subsidies and to refrain from expanding its share of markets with the help of subsidies. The USA is unhappy with the EEC's subsidisation programme, especially now in view of the Spanish entry into the Community. A reform of the CAP, so desirable for the USA, is, however, the most difficult question for the EEC for various reasons. The CAP is vital for the Community and to date it is the most complete common policy, the operation of which is, to a large degree, important for the continued existence of the European Community.⁴³ In fact, the EEC maintains on every occasion, and it did so during the GATT Ministerial Meeting of November 1982⁴⁴, that subsidies on agricultural products are permissible under GATT Art. XVI and the Subsidies Code and, therefore, there is no need to re-open this issue, given that the Subsidies Code has only recently been put into operation (1.1.1980). The Australian proposal for a standstill for all protectionist measures was not welcomed by the Community, which is not prepared to make any substantial changes in its CAP. The Community pointed out that it would be unrealistic to enforce tougher rules for regulating international trade at a time of world recession.⁴⁵

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In the light of these circumstances the USA has reacted by retaliating and selling 1,000,000 tonnes of subsidised wheat flour to Egypt and similar potential deals are under way with another ten countries, and also by threatening to put into the international market other products in surplus such as cheese and dairy products. This in turn made the EEC react by lodging an official complaint to GATT. The Egyptian wheat flour case is likely to determine future actions in world trade policy. The case has not been definitely considered by the GATT, but it is likely that the EEC will win the case. A Panel has already rejected the USA argument that the EEC subsidies are unfairly undercutting USA exports of wheat flour on world markets.⁴⁶

In this confused situation over export subsidies in agriculture and given this aggressive trade diplomacy followed by both the EEC and the USA, it is important to consider the impact of the EEC agricultural policy on the GATT legal system. At first sight, export subsidies strictu sensu in primary products are permitted under Art. XVI:3 of the GATT and the Subsidies Code. There is no indication whatsoever that the EEC, in subsidising its agricultural exports, acts illegally under the GATT framework. In practice, however, things are quite the opposite. There is no doubt that uncertainty in world markets has been caused and to some extent distortion of free world trade has resulted owing to these EEC practices. Such practices have not contributed to freeing international trade and therefore are contrary to the spirit of the GATT.

It may be submitted that the EEC should exercise some kind of restraint in its export subsidies in agricultural trade with a view to negotiating agricultural trade issues within the GATT framework in a satisfactory and acceptable way to all parties. It would be encouraging if a recent proposal by the Commission for a reform of the CAP, takes into consideration the problems raised at international level and in particular within GATT.

Also the weak competitive position of the LDCs should be taken into account. Whereas the USA is able to retaliate against the EEC's concerted practices, for example, by selling subsidised products to third countries, weak states are not in a position to take such measures /

measures. It is interesting to note that all the complaints which have been brought to date, have been brought by industrialised countries or by NICs and not by LDCs.

The fact that no cases have been brought to GATT by LDCs might indicate that they do not want to upset their relations with the EEC or that their agricultural trade has not been affected by the EEC's practices, or that they have no confidence in the dispute settlement procedure. Certainly, all these arguments play a role, but the second one seems to be the most significant. LDCs are not agricultural competitors of the EEC. Their agricultural output is not even enough to feed their population and their agricultural products are not similar to those produced by the EEC. Apart from tropical products for which separate arrangements have been made (i.e. International Commodities Agreements), LDCs do not produce competitive agricultural commodities. Therefore, regulation of agricultural trade between the industrialised countries and the LDCs does not in practice take place within the GATT legal system. This strengthens an earlier argument that the legal basis of the GATT agreement is designed to deal with North-North trade problems, while leaving aside trade problems between North and South.

(ii) EEC-USA dispute over steel

From 1960 to 1973, that is, in the years of great economic expansion, production of steel multiplied in Europe and in the world over. However, since 1974 demand in steel has been dropping at around 9% p.a. and therefore the steel industry has been seriously hit by the economic crisis and the world recession.⁴⁷

In the USA until 1974 steel output was not enough to satisfy the internal needs and foreign supplies supplemented it; but in 1974, with the gradual recession, industrial production fell by 7.7% and GNP fell by 1.2%; subsequently demand for steel declined sharply. Since then the situation in the industry has been critical.

Over-capacity in Europe and Japan resulted in the increase of exports on to the USA market. USA steel companies had to reduce their production in face of cheaper imports from Europe and Japan. The device of voluntary export restraint agreements was put into action. The /

The USA government tried to impose voluntary export restraint agreements on Europe and Japan.⁴⁸ However, government representatives did not have Congressional authorisation to negotiate an agreement with third countries, and therefore it was decided to approach the steel industries directly.⁴⁹ The EEC governments (in contrast to the Japanese who voluntarily offered to curb their exports by 5% - 7%) 'were reported to be upset' by the voluntary limitation of steel exports, agreed to by their steel industries, because it constituted a bad precedent.⁵⁰

The European Community tried to monitor the situation by cutting production in 1976 rather than by fixing import quotas, which were not justified under Arts. XIX and XI of GATT. A Committee was established to study the situation and then the Simonet-Davignon plan, effective from 1st January 1977, was adopted. In the short-term the Davignon plan aims at the promotion of the steel industry. In the long-term the Community, though a net exporter of steel, proposed to curb imports through a technique similar to that introduced by the USA (The American trigger price mechanism). Minimum or basic prices for some products were introduced and bilateral restraint agreements were negotiated with third countries exporting steel to the Community. The USA, however, was not directly affected by the Davignon plan because American steel producers were not typically exporting in volume to the Community.⁵¹

In 1978, as part of the crisis plan for steel, the Commission of the European Community introduced a series of commercial measures. They aimed to reach agreements with the Community's major suppliers and to establish price discipline sufficiently strong to prevent disruption of the Community market and prevent destabilisation by external influences.⁵²

However, since the beginning of 1982, and most particularly since June 1982, disputes have arisen between EEC and USA over steel. Conflict was inevitable because of the continuing serious economic recession and of the struggle to preserve markets for home industries. After the Versailles Summit Meeting of June 1982, the USA took preliminary measures by imposing countervailing duties against EEC steel exports on the grounds that the Community subsidised steel exports and /

and sold at dumped prices on the USA market, in breach of the subsidies and anti-dumping Codes of GATT.⁵³

In 1982, the USA steel industries themselves brought forty cases against eleven foreign countries, inter alia seven EEC member states, (The Benelux countries, W. Germany, France, Italy, and the U.K.), before the International Trade Commission (ITC) in Washington, but not in GATT.

The Community contested that the USA action was contrary (1) to the consensus reached by the OECD countries in 1977 in which they agreed that a period of transition was necessary in order to restructure the entire steel industry in the OECD member countries; (2) to the general balance of advantage reached in the Tokyo Round; (3) to the maintenance of the open trading system by resisting protectionist pressures, and by respecting GATT rules, reiterated at the Ottawa Summit Meeting, and (4) to the principles adopted during the Versailles Summit Meeting of June 1982.⁵⁴ The Community furthermore contested that in any case, the problems that USA steel producers face today are not attributable at all to its exports, but that they are the result of the general economic situation in the USA. Given that the EEC exports to the USA market had declined in 1981 by 16% and that, in any case, its steel exports were very small at around 5% p.m., such a disturbance of the magnitude which the USA producers claim could not have been occasioned by Community actions.⁵⁵ Finally, the Community announced that it would resort to GATT and would take all appropriate steps to defend its producers' rights, pointing to the fact that international agreements are correctly applied and in particular that it followed the GATT Code on Subsidies and Countervailing Duties.

Important legal questions remain as to whether these EEC subsidies on steel are unfair and, if so, how are they to be defined and to what extent they violate international trade rules.⁵⁶

There is no doubt that the GATT Subsidies and Countervailing Duties Code is loosely applied (for further details see earlier, chap. 2, p. 34): that is because multilateral negotiations in the 1970s did not reach any precise solution, neither did the bilateral talks between /

between the EEC and the USA reach such a solution.

The Subsidies Code recognises that governments sometimes use subsidies to promote their social and economic objectives. What really matters is if subsidies are unfair in both economic and legal terms.⁵⁷ If they are unfair the country concerned must refrain from using them, and respect internationally agreed rules and principles.⁵⁸ As regards this particular issue, the EEC's view was that the GATT Subsidies Code permits governmental assistance to industries undergoing restructuring and that at the very least subsidies should be eliminated when the circumstances which made their application permissible, have passed. In particular, in the EEC-USA dispute, the former argued that it had already reduced its exports by the imposition of "voluntary export restraints" by the USA, and that in any case it complied with the GATT and with the EEC rules relating to state aids to the steel industry. The Community, furthermore, argued that the USA action to impose preliminary countervailing duties on its steel exports was totally illegal, pointing to the fact that the USA legislators tend to interpret unilaterally the Subsidies Code and, therefore, to conclude that EEC steel exports are unfairly subsidised. This case, if brought to GATT, would be of great legal interest from the perspective of international trade rules.

In response to the USA action, the EEC filed complaints in GATT against DISC (Domestic International Sales Corporation), and sought compensation for injury caused by DISC. What the Europeans tried to do was not to take retaliatory measures (although they threatened to do so); but to bring pressure to make USA suspend its decision about countervailing duties. The EEC could possibly retaliate against agricultural synthetic fabrics and against the effective subsidies which the USA government granted to the exporters who set up DISC, ruled last year by the GATT as being illegal. The EEC obviously does not prefer retaliation or trade conflicts, but it wants the legal issue of subsidies to be definitively considered.⁵⁹

On the actual facts of the EEC-USA steel dispute, the USA threatened to impose heavy tariffs unless the EEC agreed to limit its steel exports to the USA markets.⁶⁰ In view of this situation the EEC offered to cut its exports to the USA market by 5.8% compared with last year's 6.4% until the end of 1985. However, this offer was not accepted /

accepted by the USA administration and more precisely by the USA steel producers, who were not willing to drop their complaints brought before the International Trade Commission (ITC).⁶¹ The situation became more complicated for the EEC, which had not meanwhile secured an internal agreement. Germany did not agree to limit her exports, maintaining that she has not promoted her steel exports with the help of subsidies.⁶² However, seconds before the set time (18.10.82) the EEC governments proceeded with a common plan, including Germany, to limit their carbon and alloy steel exports to 5.75% and their pipe and tubes for oil and gas to 5.9%.⁶³

Subsequently a voluntary restraint pact was concluded between the USA and the EEC, and thus a nine-month old dispute ended with the USA steel producers as winners. The pact was received with much relief on both sides of the Atlantic.⁶⁴ The agreement will run from 1st November 1982 to the end of 1985. Meanwhile the Reagan Administration announced that USA producers had dropped their countervailing duties and anti-dumping cuts, against approximately forty EEC steel industries. The pact requires EEC sales to be reduced through an export licensing system to around 10% below the 1981 level when Community sales took 6.4% of the USA market. The EEC was pressed to adopt all these concessions in favour of the USA steel industry, but, as the EEC Industry Commissioner, Mr V. Davignon said - "the EEC will be much better off than if the duty threat had been carried through".⁶⁵ What, however, remains to be seen is whether the Europeans honour their undertaking to restructure their steel industry so as to eliminate subsidies and whether the Americans will use this deal as a precedent for permanent protection of their high cost industry. This seems highly unlikely, however, since a few days later the USA appeared to want to include stainless steel in the pact.

The issues from a legal and economic point of view are so complex and so many conflicting interests are involved, that no one can be in a position to prevent any future confrontations. A transatlantic trade war is to nobody's interest and it would further deteriorate the already ill-served western alliance.

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In the interest of an orderly trade system, it would be desirable to adopt more precise internationally agreed trade rules. Concrete interpretation and definition of some disputed rules and procedures is needed, notably in this case, of what exactly constitutes an unfair subsidy. Consultation and co-operation between all countries should become a necessity. The GATT conciliation procedure should be used to solve any dispute arising. All parties should recognise that subsidies, quotas, dumping and other restrictive measures are the wrong remedies.

Agricultural products and steel are specific examples of the threat to free world trade. It is a natural reaction of governments to try to protect the interest of their own industries and jobs at the expense of imports, but if the practice proliferates it can seriously damage the free world trading system. Steel, as well as agriculture, is another example, which demonstrates that disputes mainly arise between industrialised countries and not between developed and less-developing countries. This, furthermore, justifies the concern that the GATT is designed to deal with North-North problems. It illustrates again the fact that competition is lacking between DCs and LDCs. However, the GATT is called to test its legal character and ability to react to the problems when difficult economic circumstances arise. In that case we are called on to consider either that the theoretical assumptions on which GATT is based are inherently wrong, or that they are unworkable at times of crises, or that in fact, they are the correct rules which are to be applied confidently by the governments and subsequently the problem of trade disputes should not arise.

However, it seems likely that the GATT system is not endowed with sufficient power to react at times of crises. The successful operation of the system during the first two decades of its existence might be attributable to the fact that this period of great economic expansion did not raise serious economic problems or that the system was capable of tackling the problems of the late 1940s and the subsequent years. To now, in the light of changing circumstances the GATT system stands unable to cope with the difficulties and to solve the disputes arising.

2. EEC trade relations with Japan

Trade relations with Japan, partly because of geographical distance and lack of common historical background, have no long history. They have developed over the last fifty years. Yet, even the first years of this period trade relations were limited to commercial exchanges, not involving bilateral agreements, nor large scale trade relations.

It was only in 1972 at the Paris Summit Meeting that the nine launched a plan to open a dialogue with the industrialised countries, including Japan. That was the first serious attempt ever made to develop close relations with Japan. Then, during the Tokyo Round MTNs (1973-1977) the Community tackled the opportunity in establishing a permanent body of representatives in Tokyo, and made a series of attempts to negotiate very closely with Japan. High level annual consultations were inaugurated then and both bilateral and multilateral economic problems have been discussed.⁶⁶

However, in the 1960s and 1970s, the development of the Japanese economy has been remarkable. Japan rapidly expanded its manufactured exports, notably cars, motorcycles, television and sound equipment, to world markets and established itself as the third industrial economic power after the USA and the EEC. The Japanese expansion, nevertheless, was not an economic miracle, but it came as the result of its social and economic system. The Japanese penetration in world markets and especially in the western markets was attributable to its constant and effective efforts; hard work, discipline, the peculiar structure of the Japanese economy, the close co-operation between industry and government, the concentration of industry in few hands and few sectors (especially in heavy industry) and its well-organised and export-orientated economic programmes, all these are factors which have contributed to its dramatic development and success. Japan's unique economic system has been developed on the basis of bilateral national export agreements and international level agreements between industries from various branches of the economy.⁶⁷

Nevertheless, this tremendous success of the Japanese economy has caused a number of problems and tension in the exporting countries, particularly the European countries. The European Community, the most important /

important trading bloc in the world, with its high-level of production in manufactured goods, was the first to feel the consequences of the Japanese expansion especially after 1970. Cheap imports of Japanese cars, television sets and other manufactured goods caused a series of economic problems in the recession-hit European market.

What actually causes major concern in the European Community is the NTBs applied by Japan on imports. Of course, NTBs are difficult to define, identify and be systematically integrated into a Code. Conventional NTBs are not the obstacle to free world trade but those NTBs associated with voluntary export restraints and other restrictions negotiated by non-governmental bodies and not officially recorded. An additional difficulty lies in the fact that the GATT Secretariat does not maintain a comprehensive inventory of NTBs. GATT has available whatever information is provided in official national documents relating to NTBs. Therefore, non-governmental voluntary export restraints negotiated privately between firms are not included and since there is no available information relating to such NTBs in official national documents, GATT provides no systematic list of such NTBs.⁶⁸

Already in 1960, Japan in its endeavour to promote its external trade and control liberalisation, established a Ministerial Council which in collaboration with MITI (Ministry of International Trade and Industry) simplified inspection of imported products and contributed to the liberalisation of trade. Subsequently, Japan participated in the Multilateral Trade Negotiations within the GATT framework and, in the context of these negotiations, it maintained that it imposed currently NTBs on only twenty-seven products, most of which are agricultural. As a result of the Tokyo Round Japan, according to official documents, imposes NTBs on about 5% of imported manufactured items, compared with 22% in the EEC and 21% in the USA. Those which are particularly concentrated on footwear and textiles are of interest to Community exporters.⁶⁹

During the Tokyo Round MTNs, consultations were held between EEC and Japan, concerning the current economic problems. The Community was very concerned about Japanese exports which are concentrated /

concentrated in a limited number of sectors, about the restriction of Japanese imports in products in which Europe has an export interest, such as shoes, pharmaceutical and beauty products, chemical and agro-chemical products and about Japan's small share of imports of manufactured goods. The Japanese, however, pledged to improve accessibility of Community products to the Japanese market, and committed themselves to the reduction of most NTBs which really are a main concern of the European exporters. But, despite that declaration, the Community alleges that no substantial improvement has been made.⁷⁰

Apart from negotiations at the multilateral level, no trade agreement has been negotiated between Japan and the European Community, such as those with EEC and Mediterranean countries, or ACP countries. In the 1960s, the Community attempted to negotiate an agreement with Japan but without success. Therefore, trade between the countries concerned is conducted through bilateral negotiations within the context of Multilateral Trade Agreements such as GATT, and through bilateral negotiations at national level between the EEC governments and Japan, or even between industries. This latter action causes, however, a number of problems in the Community and sometimes differences in national treatment of foreign imports may lead to the distortion of competition within the Community and may damage large sectors of Community industry in the future.⁷¹

The implementation of the Common Commercial Policy and the development of a Common Industrial Policy towards Japan, should be the first and major task ahead for the Community. Without it the Community's position will remain weak and vulnerable to foreign imports. In order that the Community face the situation and be able to compete effectively with Japanese exports the Council of the European Community and the European Council made, during 1978, declarations defining the broad lines for a common Community strategy and a CCP whose purpose would be to defend Community interests in view of the influx of foreign imports, particularly in some sensitive sectors. The Community called on Japan to review its economic policy by increasing internal consumption of imported goods to open up /

up its markets by removing all NTBs and by moderating its exports in the sensitive sectors which have seriously been hit by the economic crisis and current recession.⁷²

The EC Commission too sees that trade with Japan should be conducted through the implementation of the CCP and the establishment of a Common Industrial Policy. It argues for an overall Community trade policy towards Japan.⁷³ Consequently, the EC Council was called on to discuss the proposal and finally adopted the stance to move towards a common strategy with Japan.⁷⁴ However, despite the Community's determination that there is absolute need to face Japan with a common stance, the Community national governments are still negotiating with Japan at national or even at industry level; e.g. UK and France have negotiated with Japan over car exports.

However, appreciation of the Community's situation was expressed by Japan. High-level consultations and negotiations have frequently taken place. The Japanese government acknowledges the problems caused to the Community by its huge deficit with the former and the danger which threatens to break down the world free-trade system following on the adoption of protectionist measures by the Community. Japan has shown signs of goodwill and understanding by declaring its willingness to promote closer collaboration and consultations, and to maintain the open and multilateral trading system by moderating its exports which will be to the benefit of all.⁷⁵ Japan also, in parallel with the Commission in its endeavour to improve trade relations with Europe, and to reduce the trade imbalance, offered to help European businessmen who may have difficulty in penetrating the Japanese market.

The Community has persistently pursued quite a vigorous policy and has made a lot of efforts to improve its imbalance with Japan, but they have been considered insufficient. Therefore, the EC Council has adopted three statements, (25th November 1980, 17th February 1981 and 18th and 19th May 1981), expressing its main concern about the concentration of Japanese exports in certain sensitive sectors calling on Japan to moderate its exports in view of this situation and proposing that the Community should undertake an analysis of all the main issues involved. It, the Council, expressed its dissatisfaction, that the Japanese had not responded sufficiently to remove /

remove the Community's uneasiness. It urged European businessmen to take measures to penetrate the Japanese market and to persuade the Japanese authorities to open up their market.⁷⁶ At the same time national EEC governments urged Japan to curb her exports in the European market, e.g. Germany.⁷⁷

Within the European Community framework many studies have been undertaken to consider the Japanese case and to view how the situation could be remedied. Therefore, the EEC Economic and Social Committee (ECOSOC) adopted an opinion in July 1981,⁷⁸ underlining that two main courses of action should be pursued: defense of the Community market and at the same time an offensive strategy towards Japan. It proposed, likewise, that the Community should adopt an overall policy, but if the member states persist in dealing bilaterally at national level with Japan, then they should consult with the Commission prior to such negotiations.

In practical terms, however, the Community should restructure her industry, make her exports more competitive and pursue constant efforts to achieve an effective penetration of the Japanese market. In order to bring the trade deficit down, the Community should make any effort to penetrate the Japanese agricultural market and the importing market of the Japanese economy; e.g. food and clothing are important sectors which offer an excellent export opportunity for the Community to offset her trade imbalance. A common and coherent Community policy, by harmonising national policies and setting common goals for industry, it is maintained should be the task ahead.

High-level consultations between the European Community and Japan also continued throughout 1981. The Community's trade deficit with Japan showed for the first time in recent years a moderate improvement, particularly the third quarter of that year,⁷⁹ a small but encouraging phenomenon. Critics, however, say that the moderate reduction in the Japanese surplus is not attributable to Japanese export restraints, but to fall in demand not only in Europe and the USA, but also in other countries like China and the Middle East.⁸⁰ While this may be partly true, the Japanese have on the other hand shown signs of goodwill and understanding in their relations with the Community. They seem to realise the dangers which might be caused to the free-trade system due to tense relations with the Community, and are willing to restrain their exports in preference to facing /

facing import controls. Certain steps have been taken by Japan meanwhile. The Ministry of International Trade and Industry (MITI) announced tariff cuts in some sectors of special interest to European exports, and the then Prime Minister, Suzuki, called on his Ministers to forward a plan. Also, at the Ottawa Summit Meeting Japan reviewed its commitment to safeguard the "smooth functioning of international trade".⁸¹

At the same time the EC Commission and the member states individually were exerting constant pressure on Japan to improve even further the adopted measures. The Ten acknowledged that the Japanese responded to their demands and that the Japanese move was a 'step in the right direction', but they insisted that it was not enough to improve the imbalance and to bring their trade balance to the level they desired.⁸² On the Japanese side more tariff cuts and reduction of NTBs were announced in 1982. Although things seemed to be moving in the right direction, yet the Commission considered that 'no fundamental shift of policy was made', because the cuts announced were of minor significance to the Community's exports. Pressure on Japan to open up its markets should be an everyday matter for the Community through the appropriate procedures.⁸³

Nevertheless although Japan, after years of laborious consultations and negotiations, has moved towards freeing trade by undertaking certain tariff and NTB cuts, yet the Commission found these measures unsatisfactory, and proposed to bring the case to GATT on the basis of Article XXIII:1, for further discussion, particularly concerning the Japanese NTEs. The Community's contention, however, is that NTBs of interest to her have not been sufficiently removed.⁸⁴ On this proposal from the Commission the appropriate procedure was followed and the EC Council responded with the adoption of a relevant decision in March 1982 that the case could be brought to GATT since the benefits expected by the Community as a result of successive GATT negotiations with Japan have not been realised and since the results of bilateral discussion have been unsatisfactory. The Council in justification of the move issued a text stating that 'the measures announced by the Japanese government aimed at further opening the Japanese market ... but that their practical effects on the evolution of trade would be very limited and could not, therefore, constitute the response expected by the Community'.⁸⁵

Therefore /

Therefore the Community, feeling that it has not achieved what had been expected through bilateral negotiations and consultations, decided to bring the matter under the multilateral procedure of Art. XXIII:1, before the GATT, in order to persuade Japan to open up its markets and moderate its export policy in those sensitive sectors in which the Community had a great interest.⁸⁶ Art. XXIII:1 provides that the two parties should take part in further bilateral talks in GATT, mediated by a third country. If no agreement can be reached, a GATT panel can hear the case. The EEC requested Japan, through written representations presented to the Japanese ambassador in Geneva in April, 1982, to take measures to improve rapidly the situation. As a result of this movement and of subsequent talks held in Geneva on 18th and 19th May, 1982, under Art. XXIII:1 the Japanese government announced new measures to improve the situation, and promised that new concessions will be made aiming at trade liberalisation.⁸⁷ The two countries met again outwith the GATT framework to discuss further and to exchange views. Japan, as an advocate of the free-trade approach in international trade, realises the dangers and the adverse effects of protectionism, and has moved a step towards a solution of the trade problems with the Community. Japan seems to be aware that her external relations, in the light of the trade issue, have become increasingly difficult. She gives it to understand that she depends on export markets, and must maintain good relations with her partners, in particular because she is more vulnerable than any other country, e.g. the USA or even NICs. This vulnerability is mainly due to the structure of the Japanese economy and her great dependency on developed countries' markets. Japan tries actually to correct her vulnerability and dependency on foreign supplies of oil and raw materials by operating joint ventures abroad and selling high-technology; e.g. construction works in Iran or Argentina.⁸⁸ To this effect, Japan agreed to moderate its exports to the Community, particularly in the electronics field.⁸⁹

The case brought by the EEC against Japan illustrates the GATT's role in the development and promotion of international trade relations, and the need for conducting those relations in the context of the G.A. Nevertheless, GATT has contributed to the lowering of customs /

customs duties of imported products to a remarkable extent which, in the case of Japan, is 3%, compared with 4% for the USA and 5% for the EEC.⁹⁰ It has also contributed to the regulation and reduction of NTBs through the MTNs codes. Certainly, NTBs remain currently the most difficult issue, especially as regards those which regulate trade and exist outside governmental channels. The decision of the EEC Council to bring the case of the Japanese NTBs before the GATT under the procedures set out in Art. XXIII:1 and the following deliberations, illustrates the fact that the GATT system gives the weaker party the opportunity to claim its rights at a multilateral level. While outcome of this procedure is still under consideration, it seems most likely that the parties will reach a mutually acceptable solution.

To sum up, the Community should direct greater attention to its relations with Japan, than with any other industrialised country, not because of the latter's huge trade surplus (\$14.billion in 1981), but mainly because of the complicated Japanese import and export trading pattern. Japanese exports are concentrated in a few sectors involving high technology and hit the EEC's heavy industries. Close government and industrial co-operation, hard work and discipline, high level of productivity and competitiveness, close domestic markets, are the principal factors which have made Japan develop as an economic superpower. On the other hand, it is extremely difficult for the Community exporters to penetrate the Japanese market, partly because of the imposition of a large range of NTBs which minimise imports of manufactured goods and partly because of the inability of the Community to reach a common approach in this field. In the past, the Community had found it easier to export to the other European countries and also to the neighbouring countries of the Mediterranean basin and the ACP countries. Therefore, it had attached very little importance to the Japanese market while leaving Japanese goods to penetrate its markets. Also other differences, such as the way of life of the Japanese people make exports of luxurious European products into a quite complicated matter.

One may say, however, that conflicts in the trade field were inevitable in the wake of such a tremendous expansion as that of the Japanese /

Japanese export potential. The Japanese, of course, claim that their tariffs are already lower than in any other industrialised country and, furthermore, that they have undertaken to reduce NTBs, which have been liberalised during the MTNs in GATT. It is moreover a fact that the Japanese success was further helped by the lack of unity on the part of the European Community, in the commercial and industrial fields. The Commission has not proved able to negotiate a common Community approach, in particular because it has never been given a clear mandate from the Council to this end. Some member states argue that "the Commission should not handle the issue but leave it to the industrialists who could then work out a solution, whereas others opt for direct bilateral negotiations with Japan, arguing that the Commission is not strong enough."⁹¹

However, whatever the circumstances might be, the Community has lost out owing to its lack of unity in the commercial and industrial fields towards Japan. In particular, the complete absence of a Common Community Industrial Policy is very detrimental to its interests, and, therefore, the Community must proceed to the implementation of such a policy in order to counterbalance its huge trade deficit with Japan. The Japanese, of course, have benefited from this lack of unity on the part of the EEC, although it is not certain whether and to what extent Japan can, in the long term, benefit from this fact. To ease the situation the Commission was called upon by the Council to try to facilitate contacts with the Japanese, to establish periodic consultations and to pursue studies on the concentration of the Japanese exports to the EEC, such as Japanese exports of automobiles and high technology equipment. Furthermore, it, the Commission, has pressed Japan to open up its markets and liberalise NTBs.⁹²

Nevertheless, despite these efforts, the situation is for the Community far from satisfactory, and it will continue to be so if no common stance on both industrial and commercial fields is not taken and, moreover, if Community industries do not use the time to restructure themselves. In the absence of such measures the Community may have to restrict Japanese exports to its markets, but it is more likely that it may increasingly lose other world markets to the Japanese as the latter direct their attentions to other /

other markets in order to export their industrial products. European exports would have to strengthen their position and increase their competitiveness in order to conquer Japanese markets, provided, of course, that the Commission and the Council of the European Community support them in their endeavours and, in particular, to implement a CCP and to lay down the foundations of a Common Industrial Policy.

Further consultations and contacts between the two sides should be encouraged and, in particular, more understanding should be shown by the Japanese, who apply a very large range of NTBs, not consistent in a wider perspective with internationally agreed trade principles and rules.

3. EEC - Australia

In this section relating to EEC-Australia, as well as in the next one relating to EEC-Canada trade relations, a brief mention is made only for the purpose of giving the reader a complete picture of the EEC's trade relations with the industrialised world. This discussion intends to point out the legal issues of particular interest to our topic.

Despite historical and cultural links between the Community (particularly Britain) and Australia, trade relations have not been easy, and open controversies in international fora often take place. Restrictive trade and protectionist practices have also been mutually ascribed. The main areas of friction nevertheless are the EEC's CAP and some sensitive manufactures such as textiles, footwear, and cars. Efforts to improve trade relations have been made between the two partners, and periodic consultations and mutual visits to Canberra and Brussels have often taken place. To this end, the Community's opening of an official mission to Australia in April 1981, has been seen as a positive step.⁹³

Major issues of trade between the two partners are being negotiated within the MTNs framework. The Community and Australia are seeking a satisfactory agreement on agricultural issues within this framework. On this matter the European Parliament on 16th February 1979 adopted a Resolution on economic and trade relations between the EEC and Australia calling for appropriate solutions to be sought in the framework of the MTNs, and at the same time that trade relations be improved on a bilateral basis.⁹⁴ Under the umbrella of GATT the two parties succeeded in negotiating in September 1980 an agreement over Australia's exports of sheepmeat, under which Australia is to limit its exports to the Community. The sugar issue too has been examined by a GATT Panel in 1980.

Within the multilateral framework, however, trade relations have been improved and mutual concessions have led to mutual advantages. Concessions by the Community on Australian beef and cheese, enable Australia to resume its traditional trade with the Community /

Community. For its part Australia granted the Community concessions on a number of industrial and agricultural products. Australia's concern, however, is not only the Community's exports to Australian markets, but the indirect damage caused to her exports, when the EEC's farm surpluses flooded Australia's natural markets in South-East Asia.⁹⁵

Therefore, differences and competition between the two parties have frequently caused tension. The Australian accusation of protectionism in the EEC's CAP has been refuted by the Community with countercharges of industrial protectionism. High Australian import duties on certain manufactured products that are in the Community's interest, and Australia's reluctance to accept traditional Community exports such as footwear, textiles, clothing, are major issues of contention.⁹⁶ On this particular matter bilateral and multilateral negotiations under GATT Art. XIX are still being held (in 1983) in the hope of reaching a mutually satisfactory solution.

While Australia's political links with the Community are no longer as strong as they were in the past, in particular because Britain has loosened her ties with the Commonwealth and has increased her interests in the Community, economic ties remain important for both. Australia and the Community compete in some products, notably wheat, flour and dairy products and they are involved in mutual and frequent counter-accusations of protectionism. Australia specifically complains about the EEC's CAP and sugar policy, and also about the EEC's, and especially French expansion into traditional Australian markets in South-East Asia. However, Australia's trade links are now orientated towards Japan, China and South-East Asia rather than towards the Community, without of course underestimating the significance of co-operation with the EEC and its member states. On the political and diplomatic field, Australia, although an OECD country, backs the LDCs and advocates a New International Economic Order (NIEO). Nevertheless, trade for both sides is a substantial factor for further development and the one's markets remains very important for the other.

To sum up, EEC-Australia's trade relations have not caused serious tensions for either side, and apart from the sugar case, no other complaints have been considered by the GATT Panels or Working Parties. The sugar case (discussed earlier in this chapter, p.188) is /

is of particular importance for the evolution of trade relations between the EEC and Australia. The consistency of the EEC's CAP with the international trading rules is analysed, while the effectiveness of the GATT legal system in solving disputes to this extent has been left open to doubt.

4. EEC - Canada

EEC and Canada have developed good trade relations which account for a considerable share of their external trade. They have mutually negotiated beneficial agreements which promote trade through bilateral contacts; also negotiations have been conducted in certain international fora such as the annual 'Western Economic Summits', the OECD and the GATT. The Community has shown great interest in extending the present system and in developing further trade relations with Canada so as to rely on it for security of supplies of raw materials and oil.⁹⁷ The most important agreement is the European Community-Canada Co-operation Agreement signed on 6th July 1976, which enables both parties to develop and extend their economic and commercial co-operation. In a wide context of issues it includes trade, industrial co-operation and even environment and fisheries questions. Under this Agreement the two parties have agreed to grant each other MFN treatment in accordance with the GATT principle of Art.I, and to develop and diversify their trade through co-operation at the highest level, to promote industrial co-operation and to set up a joint Co-operation Committee.⁹⁸ High level consultations (every six months) take place between the two parties as a result of the 1976 Co-operation Agreement. They cover a series of bilateral trade problems involving industrial and agricultural trade.

As a result of this Agreement the volume of trade between the two parties has considerably increased and Canada, partly because of this agreement, now is the fifth extra-European trading partner of the Community.⁹⁹ In their trade balance, the Community, except for the year 1981, has had a small deficit with Canada, but no major dispute or trade war has arisen between them.

Despite the free-trade approach which both areas have applied in the field of international trade, they both have used protectionist measures and have imposed discriminatory restrictions. The Community has complained that Canada uses protectionist measures for protection of Canadian domestic produce, imposing import quotas and restrictions against some products of interest to the Community, notably leather footwear. The Community has in turn complained that /

that the Canadian imposition of trade barriers on alcoholic beverages are discriminatory. Canada claims to have met its obligations undertaken during the Tokyo Round MTNs to the effect that it would reduce discriminatory measures within eight years. In particular the Canadians direct complaints concerning the EEC's CAP arguing that it is highly protectionist and creates problems for certain exports of their farm products.

However, the Canadian import restrictions applied on footwear imports were the subject of separate consultations held on the footwear sector, under Art. XIX of the GATT, in April 1980. The European Community contested that Canadian production in 1979 does not justify the extension of quota systems beyond the three years for which it had originally been introduced. Moreover the Canadians on 9th July 1982, extended the imposition of quota restrictions on this matter until 30th November 1984. Consultations have again taken place under Art. XIX of GATT in Brussels on 27th July 1982; the Community complained and asked the Canadian authorities to withdraw the quota. Both parties accepted that in the absence of an agreement consultations within the GATT framework would take place under Art. XXII or XXIII:1, or a GATT Panel might be appointed to resolve the dispute according to the GATT rules.¹⁰⁰

Again as for a long time, the CAP has been the focal point of contention on the part of Canada. The Canadians argue that the system has generated great surpluses, which are dumped on the international market with the help of subsidies. Likewise, the Canadians are unhappy with the Framework Agreement, which was set in motion in 1976, pointing out that concessions given by the EEC to the USA are not, similarly, given to Canada. Moreover, the Framework Agreement has not worked in practice, as it was envisaged and, on some issues - such as uranium and fisheries - protracted negotiations have taken place.

CHAPTER 6.

NOTES

1. Roy Howard Ginsbery, The European Community and the United States of America, in Juliet Lodge, (ed.) Institutions and Policies of the European Community (1983), pp. 168-189.
2. A. Olechowski and G. Sampson, Current Trade Restrictions in the EEC, the United States and Japan, 14 Journal of World Trade Law (1980), p.230-241. The EEC points to the fact that it applies lower tariffs than the USA or other industrialised countries at an average of 6% to 7%.
3. Keesing's Contemporary Archives, (1982), p.31556 ff; European Community (in Greek), (April 1981), p.7 ff.
4. Commission EC Agricultural Policy of the European Community Documentation 2/79; Europe Information, External Relations, EEC and USA, 39/80 (1980); Hearing before the USA Senate, (February 11, 1982); European Community (in Greek), Sept. 1982.
5. European Parliament, Working Documents 1977-78, No.510, p.52 and Financial Times, 28.7.82.
6. T. K. Warley, Western Trade in Agricultural Products, in A. Shonfield, (ed.) International Economic Relations of the Western World 1959-1971, (1976), p.308.
7. Alting von Gesau, (ed.), The External Relations of the European Community, (1974).
8. T. K. Warley, op. cit., in Note 6; Commission E.C., The Agricultural Policy, Documentation 2/79, p.12.
9. In legal terms, protectionism is difficult to define. That is because there is no definite framework of reference governing international commercial rules applicable to agriculture, affecting protectionism in the legal sense. The question of subsidies is (later in this chapter) examined with respect to legal implications on international trade; however, these subsidies in question concern exports to third countries.
10. J. Marsh and P. Swanney, Agriculture and the European Community, (1980), p.30 ff.
11. /

11. Stein, Hay, Waelbroeck, European Community Law and Institutions in Perspective, (1976), p.450.
12. J. Marsh and Ch. Ritson, Agricultural Policy and the Common Market, (1971), p.51 ff.
13. Commission of the European Communities, The Agricultural Policy of the European Community, Documentation 6/1982.
14. GATT CONTRACTING PARTIES, 38 Session, Doc. W 38/4/29 Nov. 1982; Financial Times, 26.11.82. Tokyo Round, Report by the Director General of GATT, (1977), Vol.I.
15. J. Marsh, Ritson, op. cit., in Note 12, p.51.
16. T. K. Warley, op. cit., in Note 6.
17. Ibid. (Agriculture and Consumer Protection Act of 1973).
18. John Jackson, World Trade and the Law of GATT, (1969), p.733 ff.
19. Stein, Hay, Waelbroeck, op. cit., in Note 11.
20. Hearing before the Sub-Committee on International Trade of the Committee on Finance, U.S. Senate (February 11, 1982).
21. Alting von Gesau, op. cit., in Note 7.
22. Commission of the European Communities, The EEC's External Trade 1958-1974, Documentation 1/1976.
23. Hearing before the U.S. Senate op. cit., in Note 20.
24. T. K. Warley, op. cit., in Note 6, p.308 ff.
25. The overall USA difficulties lie with Japan in the industrial sector, rather than with the EEC in respect of agricultural trade, Financial Times, 13.10.82.
26. Roy Howard Ginsbery, op. cit., in Note 1, at 178.
27. L. Bosselli, The Citrus Fruit Waiver Case, 7 Common Market Law Review, (1970), pp.466-476; D. Gaines, W. Sawyer and R. Sprinkle, EEC Mediterranean Policy and the USA Trade in Citrus, 15 Journal of World Trade Law, (1981), pp. 431-439.
28. /

28. Robert Hudec, The GATT Legal System and the World Trade Diplomacy, see The Netherlands case, (1975).
29. Hearing before the USA Senate, op. cit., in Note 20.
30. Europe, July-August, 1982.
31. Financial Times 10.9.82 and 14.10.82; Glasgow Herald 12.10.82.
32. Financial Times 25.3.83.
33. Financial Times 10.2.83 and 4.3.83.
34. BISD/GATT 10 S/201-203 (1962), 7 S/46-55 (1959), Reports adopted on 21st November 1958, L/924; Kenneth Dam, The GATT Law and International Economic Organisation, (1970), Chap.8, pp. 132 ff.
35. BISD/GATT 26 S/290 (1980) and 27 S/69 (1981).
36. Ibid.
37. Report of a Working Party on EC Refunds on Exports of Sugar L/5113 (1981) and Report of a Working Party on EC Refunds of Sugar L/5294 (1982).
38. Re: Refunds on Exports of Sugar, Australia v. European Communities, 12 Common Market Law Reports (1980), p.238; 19 International Legal Materials, (1980), p.429 and Vol.20 (1981) p.843.
39. The EEC, the largest world exporter of sugar has not yet entered the new International Sugar Agreement (ISA). It is encouraging, however, that it has started negotiations in order to enter the ISA; Financial Times 11.11.81 and 9.5.83
40. Hearings before the US Senate, United States Department of Trade, (USTR), Report to Congress on Section 301 of the Trade Act of 1974, July 1982, p.3.
41. Financial Times 12.2.82.
42. Hearing before the US Senate, op. cit., in Note 20.
43. The Commission EC has proposed a reform for the CAP; European Community (in Greek), Sept. 1983.
44. GATT CONTRACTING PARTIES, 38 Session, Doc.W 38/4/29, Nov.1982; Financial Times 26.11.82.
45. /

45. Ibid.
46. Financial Times. 8.2.82, 12.2.82, 17.2.82, 12.8.82, 17.2.83, 26.2.83, 14 and 17.3.83 and 18.4.83. It has been argued by certain contracting parties (e.g. the USA) that the EEC has succeeded so far in winning almost all cases brought to GATT against her, because of its powerful diplomatic representation and excellent preparation of its documents.
47. European File, E.Doc. 6/1979; European Community (in Greek) June 1982, pp. 10-14.
48. Andreas Lowenfeld, International Economic Law Vol.VI (Public Controls on International Trade), (1979).
49. Voluntary restraint agreements are introduced outside the context of international rules and even sometimes within industries outside the responsibility of governments.
50. Gerard and Victoria Curzon, The Management of Trade Relations in GATT in A. Shonfield (ed.) International Economic Relations of the Western World, 1959-1971, (1976), p.270-273.
51. Andreas Lowenfeld, op. cit., in Note 48.
52. 12th General Report of the EC (1978) p. 251,
13th " " " " (1979) p. 226,
14th " " " " (1980) p. 241, and
15th " " " " (1981) p. 233.
53. The Scotsman, 29.7.82.
54. Bulletin EC. No. 1-6 (1982).
55. Ibid: also Keesing's Contemporary Archives, (Jan.25, 1982) p. 31557.
56. Patrick Low, The Definition of Export Subsidies in GATT, 16 Journal of World Trade Law (Sept. 1982) pp. 375-390; BISD/GATT 26 S/56 (1980), Agreement on interpretation and application of Articles VI, XVI and XXIII of GATT and 27 S/31 (1981) Reports on Subsidies.
57. The term "unfair" with reference to subsidies cannot be interpreted in a legal meaning independently from an economic context; in the concrete case with reference to international trade. It is submitted that economic criteria can lead to a definition of "unfair" in a legal sense as adopted by the legislators or by the contracting parties. Since this involves economic analysis beyond the scope and purpose of the present thesis the term unfair /

unfair is left undefined as currently is the case in the practice of the states .

58. Financial Times, 14.6.82.
59. Financial Times, 18.6.82.
60. Dundee Courier, 26.7.82.
61. Financial Times, 3.8.82; Newsweek, Oct. 25, 1982.
62. Financial Times, 16.10.82 and 18.10.82.
63. Glasgow Herald, 19.10.82.
64. Glasgow Herald, 22.10.82; Commission of the EC Background Report The Giants Lower arms, Nov. 8, 1982.
65. Glasgow Herald, 30.10.82.
66. Europe Information, External Relations, EEC-Japan, (1980).
67. Loukas Tsoukalis, Maureen White (eds.), Japan and Western Europe (1982); ECOSOC EC, EEC's External Relations. Stocktaking and Consistency of Action, (1982).
68. Andrzej Olechowski and Gary Sampson, op. cit., in Note 2.
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CHAPTER 7.

TRADE RELATIONS WITH NON-ASSOCIATED COUNTRIES

The Generalised System of Preferences (GSP).

In the context of EEC trade relations with non-associated countries and before we examine the individual EEC agreements with certain Asian or Latin American countries, it has been considered important to discuss and analyse the basic aims and objectives of the Generalised System of Preferences (GSP). The GSP was introduced in order to establish preferential treatment for all LDCs, but its practical importance has been limited to those countries not-associated with the Community because the associated countries enjoy greater benefits under their preferential schemes, e.g. Lomé countries. In fact, preferential treatment for LDCs has been a major concern in UNCTAD since 1963, long before the establishment of the GSP. The first positive steps for the establishment of the GSP and on UNCTAD initiative were taken during the UNCTAD conference in 1964, when the participants agreed to the principle that LDCs' exports needed preferential access to the industrialised countries' markets.¹ Subsequently, it was the second UNCTAD in 1968 which adopted Resolution 21 (II) initiating a generalised non-discriminatory, non-reciprocal and autonomous system of preferences for the developing countries in relatively vague terms, not including the concrete range of products, nor the amount of the preferences.² This implies that UNCTAD was very concerned, from the very beginning, for the development and trade expansion of all LDCs. UNCTAD saw preferential treatment for LDCs' exports as an essential step for their growth and industrialisation. This treatment could be expressed through deeper tariff cuts and increased quotas in particular for products of special interest to LDCs as against products exported by developed countries. Meanwhile, as the EEC developed its preferential network with certain LDCs with whom it had special historical, political and economic links, notably with the Mediterranean basic countries and with the former dependencies of its member states in Africa, Pacific and Caribbean, UNCTAD was left with no other option but to press even harder for the extension /

extension of preferential treatment to all LDCs. To this end the GSP was introduced by UNCTAD, which has pursued this policy with the ultimate objective of the achievement of a uniform preferential treatment for all LDCs.

The EMC responded to UNCTAD's call for extending preferential treatment to all LDCs. It invoked the procedure of Art. XXV of GATT, in order to secure a waiver from the MFN clause of Art. I. Therefore, the CONTRACTING PARTIES to GATT decided on 25 June 1971 to "waive the provisions of Art. I of the GATT for a period of ten years to the extent necessary to permit developed contracting parties to accord preferential tariff treatment to products originating in the LDCs, with the view not to grant any such treatment to like products to other contracting parties provided that any such preferential tariff arrangements shall be designed to facilitate trade from LDCs and not to raise barriers to the trade to other contracting parties."³

The GSP has been seen as an instrument of development rather than a commercial policy instrument, but it nevertheless involves trade, and aims to promote industrialisation of the LDCs to expand their trade, to increase their export earnings, to achieve better access to world markets for their primary products, to accelerate the pace of their economic growth and to collaborate with international organisations, concerned with economic development. It is based mainly on the need for economic and political interdependence between the developed countries and the developing world. The system is addressed to all LDCs but applies it in practice to the non-associated LDCs in Asia and Latin America. This is because certain LDCs, e.g. ACP countries enjoy greater benefits under other preferential schemes. Its primary objectives are to counter-balance the preferences granted to associated countries in Africa and the Mediterranean basin and to contribute to a better balance in international trade. This can be achieved according to the objectives set out by the GSP by tariff cuts for products, industrial and processed, originating in the LDCs.⁴

The European Community's GSP came into effect on 1st July, 1971, for a period of ten years and it has been renewed for another decade, due to expire at the end of 1990. It is subject to yearly reviews and will be in force until 2000. During the first ten years, improvements to the system were made, despite the difficult economic situation /

situation with which the Community member states had to cope. In particular, in 1975 and 1977 modifications to the system were made which included both simplification of its procedure and diversification. In this context the European Parliament's Development and Co-operation Committee recognised the complexity and uncertainty of the system, due to which a very small utilisation of the system has been made. Also, the UNCTAD, as the international forum responsible for the promotion of trade with the developing world, has set up a special Committee on preferences.⁵ In 1977, during the Tokyo Round MTNs, it appealed "for deeper tariff cuts and improvements of the GSP by raising or eliminating ceilings binding or otherwise, ensuring the security of the preferential margins and liberalising the rules of origin". It stressed the need for special consideration for the LDCs' products of special interest to them and not covered by the GSP, and called for an increase of the products covered by it.⁶ Individual developing countries requested, during the Tokyo Round MTNs, the developed countries to provide them with more benefits, expansion of trade and economic growth. They specifically wanted the DCs to ensure an obligation or grant permanent preferential treatment under the GSP. The DCs have, therefore, responded by expressing their willingness to further improve and liberalise the GSP schemes. Following these requests, the Ministers of the contracting parties agreed that differential and more favourable treatment to the LDCs was necessary and desirable. They also pointed out that the GSP must be maintained and further improved. To this end the CONTRACTING PARTIES decided on 17th December 1979 on the introduction of a 'qualification clause' introducing a legal basis for preferences under GATT law.⁷ Therefore differential and more favourable treatment to LDCs was introduced in GATT, but this treatment falls short of the demand of the LDCs for the amendment of the legal structure of GATT, for establishing permanent preferential treatment for LDCs.

(1) The first GSP (1971)

According to the first (1971) GSP, products are divided into four categories: non-sensitive could enter the Community duty-free, unless their exports prove to be detrimental to the economy of the Community and therefore duties can be introduced on a product by product basis. The sensitive were exempted from custom duties up to certain /

certain amounts (ceilings or quotas). Beyond this level the change of customs duties set out in the CCT of the EC could be re-applied. The semi-sensitive were subject to a surveillance system or monthly controls. Finally, preferential margins were set for agricultural products, particularly for some processed agricultural products. The EEC could in this latter case apply the safeguard clause for 'market disruption' or threat thereof under Art. XIX of the G.A. and possibly suspend the application of the GSP.⁸

However, each beneficiary country was entitled to export to the Community up to a maximum amount or 'buffer'. This measure was designed to help the economically backward developing countries, but in practice restricted imports from the advanced LDCs. That is because only a small number of the beneficiaries were in the position to understand the system and make full use of the opportunities provided. Specifically the administrative procedures and the origin requirements were too complex for most of the LDCs. This was partly due to the insufficient information given by the Community and partly due to the fact that organisations in LDCs were not capable of helping their exporters.⁹ Specifically, the rules of origin constituted a quite serious barrier for the LDCs' exports. The fact that the industrialised countries do not apply identical criteria and rules of origin, makes the situation even more complex. On the other hand, the LDCs viewed the rules of origin from a different perspective, pointing to the special needs of the LLDCs.¹⁰

An analysis of the Community's ten years' experience of the GSP has shown that despite the relative progress and the improvements to the scheme year after year, it has not yet fundamentally changed. The Community's objective, of extending the GSP to include a larger range of products, especially to the extent that the more backward developing countries would be given the opportunity to benefit most, in practice has not largely been achieved. The advanced LDCs, that is the NICs, were those which have mainly reaped the benefits offered by the GSP. Their exports to the Community were those which have amounted to the increase of value of imports from LDCs.¹¹ It can be said that the system could have yielded better results if the administrative procedures involved were simpler and more information was provided to both sides. Due to these complexities traders in both /

both the Community and the developing countries have not been able to take advantage of the opportunities offered.

Therefore, neither the Community which acknowledged that there is 'room for improvement', nor the LDCs seem to have been satisfied with the operation of the system. A Community Review at the end of the 1971-1980 scheme, revealed that the GSP needed some improvement, while maintaining its main characteristics.¹²

(ii) The New GSP. (1981)

The EC Council adopted on 16th December 1980, a decision to continue the GSP for a further period of ten years, until the end of 1990, coinciding thus with the development objectives of the UN adopted for the next ten years, i.e. 1981-1990.¹³

The New GSP is based on the same guidelines as the original one. It provides further simplification of the system and differentiation of the LDCs' products. It aims at a better balance of preferential benefits. It is "part of the efforts for better redistribution of the economic relationship between the industrialised countries and the LDCs, making them more equitable and closer to the needs of the modern world".¹⁴ It comes in line with the opinion expressed by UNCTAD for the simplification of the scheme and the abolition of overall quotas and ceilings.

Under the new GSP, the categories of products involved are reduced to two; sensitive and non-sensitive. Agricultural products form a distinct category, however. The non-sensitive products are subject only to statistical supervision and can enter the Community duty-free up to a certain point. Relevant imports can be restricted if they cause 'material injury' in the Community.¹⁵ The sensitive products are subject to import quotas or ceilings. For all beneficiaries shares are allocated in the Community; for the less competitive, the ceilings are rather theoretical. The usual rule of reintroduction of customs duties will apply when the Community's market is disturbed by the GSP exports.¹⁶ Industrial products, non-sensitive and sensitive including even textiles can enter the Community duty-free when they are importing from LDCs. Both tariff ceilings /

ceilings and tariff quotas allow duty-free imports up to a point. Tariff quotas are the same or a little lower than corresponding ceilings, but the main purpose of tariff quotas is to ensure a fair distribution of duty-free goods between the EEC member states. They both have the same aim but only differ in technical and administrative procedures.. As regards agricultural products, tariff reductions apply in place of duty-free treatment. For the economically most backward LDCs full exemption of all agricultural products covered by the GSP is provided. Even products like tobacco, tin and pineapple are included.¹⁷

Therefore, the LLDCs can export to the Community duty-free regardless of the category of the products, non-sensitive and sensitive, industrial or agricultural, save some limited exceptions. The rest of the LDCs can export to the Community their industrial non-sensitive products duty-free, but if imports cause economic difficulties tariff ceilings can be set up. For the sensitive industrial products tariff quotas can be set up. When tariff ceilings or tariff quotas are reached normal customs duties may be reintroduced. Certain exemptions to the rules are provided when certain requirements are fulfilled - i.e. rules of origin of goods.

Quotas are shared among the Community member states. The beneficiary countries can export to the Community (duty-free) up to a maximum amount known as 'butoirs' or 'buffers'. This measure is taken in order to ensure that the advanced LDCs do not use all the preferential benefits to the detriment of the weaker.

(iii) Evaluation of the GSP.

An assessment of the 1971 and the new GSP reveals that the New System has not been improved, both in terms of the number of products included and in terms of a more liberal and broader preferential access for LLDCs, which need it most. In 1971 the more advanced LDCs were those who made the wider use of the GSP. The New GSP, however, aims "to be adapted to the new economic conditions in international relations and the needs of the Community's industrial and commercial policies and must at the same time ensure that the preferences offered are utilised more equitably".¹⁸ As regards some sensitive products such as textiles and footwear, they are not covered even by the new GSP, for which VERs have been arranged between the /

the Community and the LDCs. In particular, there has been no real change for textiles even for the LLDCs, mainly because trade in textile products is linked with agreements concluded within the MFA.

As the GSP provides for tariff reductions only, it does not include financial transfers or measures for industrial and technological co-operation, nor the reduction of other NTBs. This may particularly explain the relatively limited achievements of the system. Tariff cuts only are not sufficient to enable the LDCs to promote their exports. Tariffs today do not constitute a serious barrier to international trade, particularly for manufactured goods. In the framework of MTNs tariffs have been reduced to a very considerable extent, and therefore the GSP has lost its significance because of generally low MFN tariff levels. "In fact (it has been acknowledged) that preferences for developing countries were designed to remedy some of the problems that arose from MFN provisions. Preferences for LDCs under specified conditions are complementary and not contradictory to the principle of non-discrimination in trade. In fact, MFN for the rich and preferences for the poor countries - two instruments designed to deal with two different problems - would appear to be an optimal combination of policies".¹⁹

In considering the tariff-cuts question and its implications for the liberalisation of trade of the LDCs with the DCs, data available from UNCTAD should be examined. An UNCTAD report in 1973²⁰ covering the year 1970, evaluating the significance of the EC GSP for LDCs, concluded that in 1970 (before the GSP came into existence), 7% of the EEC imports from beneficiary countries would have been covered by GSP. In 1972 only 4.3% to 3.9% of EEC imports have been accorded preferential treatment under the GSP. Thus, during this period, the actual contribution of the EEC to the export growth of products covered by the GSP, was very small. The Commission has recognised that the GSP is a complex system and needs simplification in order to work properly. In fact, the Commission has made, and it is still making, efforts to maintain and improve the system.²¹ To this end in October 1976 it, the Commission, proposed the establishment of a 'European Agency' capable of dealing with the GSP's problems, to co-operate and give information to the countries concerned, in order to make "its use easier for the LDCs". Nevertheless, as a result of the GSPs' establishment little international trade has been created.²²

A later assessment, also made by the UNCTAD Secretariat for the years 1975 and 1976, revealed that only 13.4% of products at MFN rates, exported by LDCs to DCs' markets, received GSP treatment. The relative increase in comparison with the 1972 year is partly attributable to the replacement in 1973 of Commonwealth preferences with the GSP. Specific studies made by UNCTAD on individual schemes show that trade under preferential rates has not grown by any significant amount.²³ The UNCTAD's Special Committee on preferences estimated that the results of the tariff cuts are not large and that, in any event, definite conclusions are a rather difficult matter, because "complete information on the value of imports actually receiving preferential treatment is lacking."²⁴ The UNCTAD's studies²⁵ therefore, indicate that the developing world had not gained much from the schemes. Nevertheless, whatever the gains are, the GAP is beneficial for LDCs at least for some medium or short term needs which otherwise would have not been fulfilled.

In view of this situation, we may come to a conclusion that the practical importance of the European Community scheme for the LDCs is rather small, and this small importance is further decreased by the fact that tariffs are at very low level. The GSP appears to be more theoretical than practical and its most positive contribution is the encouragement and impetus which it gives to the developing countries to move away from inward-looking economies to outward-looking economies,²⁶ to the development of further communications and contacts with developed economies. Such relationships help in promoting trade schemes and in developing and utilising any opportunities offered. Despite the relatively small effect which the GSP has had on the LDCs exports, the UNCTAD Special Committee on preferences pointed out that preferences are an important step in providing better access to the markets of the developed countries. The benefits, moreover, cannot be isolated from other factors such as efficient and competitive production of industrial goods, foreign investment, proper commercial policies, dynamic export promotion and marketing and, in addition, collaboration with other international organisations.²⁷

For the European Community studies concerning the GSP do not indicate that it brings any economic benefit to the Community, but it is obvious that there are political, social and diplomatic gains from the /

the operation of the scheme. The EEC as has been pointed out throughout the thesis, wanted continuation of the already existing links with certain countries in the Mediterranean basin or in Africa, but on the other hand, it did not want the other LDCs, e.g. in Asia or Latin America, which had no special ties with the Community, be left out of the preferential framework and be subjected to MFN treatment. The EEC, furthermore, wanted to promote interdependence with all third world countries, which could be achieved through a more lenient treatment of LDCs. This treatment would come into line with the UNCTAD's call for special and differential treatment to all LDCs and with the GATT's Part IV, which also provides for differentiation of LDCs as against the developed countries. Application of the GSP would bring benefits to all countries involved and it would eventually enable the Community to establish uniform principles for all third world countries, in particular, if greater preferences are to be granted through this scheme.

As has already been noted above, the Community GSP, although it is addressed to all LDCs, it practically applies to the non-associated countries not enjoying any special or more favourable treatment in their trade relations with the EEC. It is an attempt by the EEC to counterbalance in favour of the non-associates the preferences granted to the associated countries in Africa and the Mediterranean basin. In the context of the commercial and development policy, the European Community has given, according to a different degree of links (free-trade areas, association agreements, co-operation and preferential trade agreements), different treatment to the various groups of countries. In viewing the variety of types of preferences one can find that the GSP as to its limited scope, has a relatively limited preferential status. The GSP has been seen as a device for partial compensation to the non-associates, but in practice its actual effects are very limited. (A comparative analysis of the EEC's GSP and of the other preferential schemes is later made in the conclusion.)

Differences, however, exist even in the main EEC preferential systems, despite the efforts for harmonisation of the numerous Community agreements within the framework of the Lomé Convention and despite the attempts towards an implementation of a common policy towards /

towards the Mediterranean states. In considering the different preferential systems, the European Community preferences are granted under different means such as tariff cuts, or exemptions provided by agreements on industrial, technological, socio-political, financial and co-operation aspects or by stabilisation of export schemes for export earnings, within certain limits. In the context of the EEC preferential systems it is indicated that the EEC's GSP provides only for tariff preferences and does not include any other arrangements. Therefore, it can be seen as a "subordinate or inferior preferential system".²⁸

With due regard to the fact that the GSP is granted to all LDCs, two preferential systems may apply; e.g. the association arrangements with the ACP countries and the GSP, may overlap each other. Therefore, when a country belongs to two preferential systems such as an ACP country, she can choose whichever of the systems she prefers to apply in respect of the advantages offered. Moreover, if a product is not covered by the ACP preferences, but is covered by the GSP, utilisation of the second scheme may be available.²⁹ In fact, the ACP countries or the Mediterranean basin countries enjoy greater preferences than the non-associated countries (including not only tariff preferences but also financial and technological transfers). The GSP is actually applied by the associates only when products are not covered by their arrangements. The EEC was very careful not to include the main exports of its associated states in the GSP, and only a very small percentage of special preferential exports was affected. However, through other preferential schemes the associates have received additional advantages in new markets.³⁰ As a consequence of this, the non-associated states are very unhappy of the existence of the various preferential schemes applied by the Community and therefore they have made, and are still making efforts, particularly in UNCTAD, towards their abolition.

However, since discrimination could not have been avoided due to various preferential systems, in the third UNCTAD Conference in 1972, it was proposed in the Charter of Algiers that countries which enjoyed special preferences (AASM, later Lomé, and Commonwealth) could receive compensation if they agreed to abandon their preferences and thus lose their privileged position as a result of the introduction of the /

the GSP.³¹ Nevertheless, the UNCTAD's main objective was that all industrialised countries should treat all LDCs in the same way if possible, and that uniformity of the various preferential systems should be achieved. But this is extremely difficult to achieve. Certainly, the LDCs wanted to include in the GSP as many as possible of their primary commodities, whereas some developed countries wanted to compensate those LDCs who might have lost their special preferences. Also some other LDCs insisted on the maintenance of special relations with certain countries; e.g. the ACP associates, because the GSP alone did not offer sufficient compensation to them. Likewise, the AASM, later ACP countries, wanted to retain preferential provisions instead of the GSP.

Finally, we may conclude that despite the UNCTAD's efforts the objective of achieving a uniform treatment for all LDCs has not been fulfilled. It is not only because of the existence of several preferential systems, but also mainly because the GSP has not worked as envisaged in order to abolish discrimination among the LDCs with varying levels of economic development. The continuous existence and application of other preferential schemes such as the Lomé Convention or the Mediterranean policy, constitute obstacles to the improvement of the GSP, in particular to the benefit of the economically most backward LDCs, and to the liberalisation of third world trade.

The more advanced countries have benefited most by virtue of their marketing ability, the ability to know the developed economies' markets and their ability to comply with the complexities of the GSP and the other requirements. On the other hand, the LLDCs have not derived any noticeable benefit from the operation of the GSP, mainly because they are agricultural countries and their products are subject to the restrictions and protectionist measures of the EEC's CAP.

From the legal point of view the GSP has been legally waived from the MFN clause of Art. I of the G.A. The efforts of the LDCs to provide part IV of the GATT concerning the "Trade and Development" of the developing countries, as the legal basis for the GSP, have not succeeded. When in 1965 and 1966 special treatment was provided for the developing countries within the GATT framework and an attempt was made to include the GSP, the contracting parties did not accept such a demand.³² Especially during the Tokyo Round MTNs, the main objective of the third world countries was to obtain a permanent legal basis for /

for the GSP into the GATT. If such a demand had been accepted, there is no doubt that the existing degree of discrimination and preferential treatment in favour of some LDCs would have not existed.

Agreements with non-associated countries

The EEC has concluded a great number of non-preferential bilateral trade agreements with most LDCs outside the framework of its association policy. What is really notable in this policy towards third world countries is that the EEC has concluded bilateral agreements with individual countries and not groups of countries mostly in Asia and Latin America; the only exception being the ASEAN (Association of South-East Asian Nations) Group.³³

Interdependence between the Community and the third world is vital for both sides. For the EEC the security of supplies of raw materials and oil³⁴ is essential for its further economic growth and well-being of its people. The LDCs constitute in addition a rapidly developing market for EEC exports, even in periods of economic recession.³⁵ The LDCs need in turn to import technology from the industrialised countries for expanding and diversifying their industrial production. Likewise, LDCs need export markets for their raw materials and for their limited, but essential, production of their industrial products. Their export revenues would enable them in turn to import more goods so essential for their development and economic growth. Therefore, both partners need export markets for their economic expansion and this can be made possible by the liberalisation of trade.

Non-Associated LDCs in broad terms fall into two categories: those with relatively developed economies, which produce similar kinds of products as the EEC (the Asean countries, Hong Kong, South Korea), and those whose level of development requires financial and technical assistance, such as India, Bangladesh, some Latin American countries.³⁶

(a) EEC and Asian Countries

Community relations with Asian countries stem from the time when Britain had to abandon her Commonwealth preferences with the Asian countries and acceded into the Community in 1973. On Britain's insistence preferences, notably with India, Pakistan and Bangladesh, were retained and a declaration of intention with respect to Asian countries of the Commonwealth was annexed to the Treaty of Accession stating that the Community wished to expand its trade relations with these /

these countries, and to examine jointly any problems in this area taking into account the Generalised System of Preferences (GSP).³⁷ Consequently, bilateral trade agreements of a non-preferential character were signed with Pakistan, Bangladesh and Sri Lanka in 1975, and an economic co-operation agreement with India in December 1981 which supersedes a previous bilateral trade agreement signed in 1974.³⁸ During this time relations with South Korea were encouraged and discussions took place on the question of trade relations. Hong Kong, being considered as a dependent territory of the U.K. has not signed any agreement with the Community.³⁹

Likewise, the Asean group has signed a co-operation agreement with the Community and it is the only group of non-associated countries so far to have negotiated as such with the Community. However, the Asean group countries, which can be classified as New Industrialised Countries (NICs) involve both challenges and opportunities for international trade. Their potential growth has been very impressive and they present very good prospects for trade. They are well endowed with natural resources, in particular oil, and constitute a big market approximately the size of the EEC in terms of population.⁴⁰

EEC-Asean trade is relatively small, but under the GSP there are great hopes for its increase. It has since 1977 increased by 88%. This is mainly attributable to the GSPs, under which the largest beneficiaries are the Asean group, and India. The GSP is especially designed by the Community for the non-associated countries, and it gives them the opportunity to export their commodities free of almost all tariff barriers. (Further discussion on the GSP is provided earlier in this chapter.) It is worth noting, however, that most LDCs, notably the Asean group, are unhappy with the GSP, since it retains all NTBs, which constitute today the main obstacle to the free movement of goods at the international level. During the MTNs, the Asean countries have argued with the Community that differential and more favourable treatment is needed within the GSP for themselves as well as for the other LDCs. They have further pointed out that a system similar to STABEX for their commodity exports is fundamental for their economic growth and expansion.⁴¹ In particular, during the 1977 negotiations for the renewal of the MFA, concern had been expressed over the growing EEC protectionist policy over textiles and clothing. It was also pointed out that Asean countries have attached great importance to international /

international agreements on raw materials and stabilisation of export earnings.⁴²

On the other hand, the Community has pointed out that the GSP is a key instrument towards development and trade expansion of the third world and gives the LDCs better access to its markets for their manufactured goods and that, in any case, the GATT rules are equally applied to all countries in Asia.⁴³

The importance of economic exchanges and development for both the EEC and Asian countries is great. For the Community a vast market, with more than eight hundred million (800,000,000) people is opened up, irrespective of the enormous economic and development problems facing them. Already a large amount of Community's exports are going into this area. For example, trade between the Community and India has been increased during the 1973-1980 period.

The Community's external trade policy in this direction is, however, not without criticism, particularly with reference to protectionist tendencies. This claim is not far from the truth. In the case of Bangladesh (which belongs to the least developing countries), the Community has negotiated with the former a so-called voluntary export restraint agreement over fabrics and jute.⁴⁴ Therefore, this protectionist policy pursued by the Community has deprived Bangladesh from export earnings, so essential for her further growth and economic expansion, in particular as textiles is the most successful manufactured industry and so vital for the development of an LDC.

(b) EEC and Latin American countries.

Despite a great number of similar agreements between the Community and the developing countries, no overall Community policy has yet been implemented towards the LDCs or, in this case, towards the Latin American countries. The Community, after the experience of the Asean group relations would have preferred to have negotiated with Latin America as a group, and it has claimed that it was the Latin American countries who were unable to elaborate an overall proposition for mutual co-operation.⁴⁵ There is no doubt, whatsoever, that Latin America is a heterogeneous region, and it is difficult to deal with the Community as a group. However, several attempts in this respect have been made. Notably, since 1966 several Latin American /

American countries acting as a group suggested the establishment of a joint committee with powers to bind the EC Commission to matters concerning Latin America, but it did not fulfill its role. Eventually a collective body was set up to monitor relations between the two sets of countries. Although this body has met relatively few times, its contribution is positive. It was able on some occasions to voice its objection to the Community's association policy and to the GSP.⁴⁶ Also, the Latin American countries participated in the group of 77 at the U.N. and contributed to the definition of the LDCs' common position on the North-South issues.⁴⁷

However, the Community has tried to stimulate trade and development in Latin America through bilateral contacts. Agreements, based on the MFN clause concept, of a non-preferential and co-operation character have been signed between the EEC and Latin American countries, in order to balance Community trade with the preferred countries in Africa and in the Mediterranean basin. A co-operation agreement was signed with Mexico in 1975 and a similar one with Brazil the same year.⁴⁸ A co-operation agreement with the Andean Pact⁴⁹ is currently being negotiated, but it has not yet been concluded because it has been suspended since July 1980 for political reasons, relating to the coup d'etat in Bolivia. Bilateral trade agreements with Argentina (1971) and Uruguay (1973) are in force.⁵⁰

Within the context of the MFA as well, bilateral agreements applicable since 1st January, 1978, for textiles have been concluded between the EEC and Argentina, Brazil, Colombia, Guatemala, Mexico, Peru and Uruguay. They include a great number of textile products with a view to maintaining stable exports to the Community.

Apart from the trade agreements mentioned the Community, since 1976, has been running a programme of financial and technical co-operation with non-associated countries, including those in Latin America. Specifically, in February 1981 the EC Council adopted a Regulation on financial and technical co-operation to non-associated countries, concerning mainly development projects in agriculture.⁵¹ The interest of the Community in the Latin American countries appears to have grown over the last few years. This is partly due to the Community interest in finding new markets during the economic crisis and /

and partly due to the EEC's desire to ensure a regular supply of raw materials coming from countries outside Africa. Therefore alternative links with Latin America have been considered to be a wise proposition for the Community.

It is worth noting that Latin America is of all the Community's trading partners the least successful, in penetrating its (EEC) markets. Decline in the Latin American agricultural exports have been disappointing, partly because the EEC is self-sufficient in the agricultural sector, and partly because the structure of the Community's CAP has a protectionist effect. Decline also is evident in Latin American exports in manufactured goods throughout the 1970s, notably clothing and leather products, because of the EEC's protectionist policies in these sectors as well. Thus Latin America has suffered a decline in exports to the EEC; particularly Brazil who constitutes the largest Latin American export market for the Community. Nevertheless, the trade balance is in favour of the Latin American countries with the exception of 1974 and 1975.⁵²

All Latin American countries are covered by the Community GSP (Brazil is the second largest beneficiary of the scheme) about which many complaints related thereto have been voiced. The Latin American countries have especially claimed that it is difficult to understand the system concerned and put it into practice. Furthermore, they argue that its coverage is too limited. They urge the Community to expand it and include processed products too. The Latin American countries hope to stimulate their trade with the Community, get helped to industrialise and diversify their economies and specialise in sectors where they have clear structural advantages, by being complementary to the major world markets.

The Community on the other hand, should adjust its industries to face increased competition from the outside world. In view of the level of competitiveness attained by Latin American countries, especially an advanced country like Brazil, the question of reciprocity has been raised by the EEC, pointing out that full respect to the GATT rules in trade liberalisation should be accorded.

(c) The Euro-Arab Dialogue

Europe and the Arab world have increasingly become close partners as far as both imports and exports are concerned.⁵³ Fifteen Arab countries /

countries are linked with the Community bilaterally by co-operation trade agreements or preferential agreements through the Mediterranean policy or the ACP framework. The EEC's imports from the Arab countries in 1972 represented 14% of its total imports. In 1974, following the oil price increase, the figures went up to 22% and the percentage remained quite high for 1979 that is now 19%, 90% of which represented fuel imports. Europe is dependent on Arab countries' oil for more than 50% of her needs.⁵⁴ Also, because of the huge trade surplus with the Community, the Arab countries have the power to increase their imports and thus to become attractive trading partners for EEC exporters. For the Arab countries, their relationship with the Community is crucial. Europe has a tremendous potential in technology and services, which the Arabs need for their industrialisation and development. They also need agricultural products and foodstuffs from Western Europe. This interdependence, therefore, is mutually vital.

A dialogue between the Arab League and the EEC⁵⁵ was launched in 1973. The energy crisis of 1973 gave the EEC the impetus to open negotiations with the Arab League. The Dialogue has passed through very difficult stages. Successive meetings were held but different approaches were followed by each side. Representatives of both sides met in Brussels in November 1973 and in Copenhagen in December 1973. During these meetings the main question which was put forward by the Arabs, concerned the participation of Palestinian representation. This question met with a poor response by the Community, primarily because of pressure from Israel. Finally, in 1974 the two parties reached the "Dublin Compromise" according to which there will be two delegations, one European and one Arab, without specific reference to the nationalities of the individual members. However, even after this compromise, meetings in Cairo in June 1975, in Rome in July 1975, in Abu Dhabi in November 1975, and in Luxembourg in 1976, did not yield the expected results.

Finally, the General Committee, the highest authority of the EEC-Arab Delegation met in Tunis in 1977. That meeting was claimed by observers to have been the most positive so far, marked by a sense of commitment of most participants. It dealt with such issues as transfer of technology, commercial co-operation, the protection and encouragement of investment, a number of agricultural products, cultural co-operation and the living and working conditions of migrant /

migrant workers.

As far as trade co-operation is concerned, the Arabs asked for a comprehensive agreement with extensive trade co-operation to be concluded between themselves and the Community. A generalised free-trade agreement was proposed by the Arab League, but the Community representatives were not prepared for such an arrangement and argued that the existing bilateral trade agreements were adequate. Moreover, they argued that the two parties had already considered the creation of the "Euro-Arab Trade Co-operation Centre"⁵⁶ and that Arab exports already received sufficiently favourable treatment through the European Community's GSP or through the links with the Community, either through the Lomé Convention or the Mediterranean policy.

The question of tariff-free entry of Arab goods to the Community was for the Community as crucial as the question of imports of oil. An interesting question, however, which can be raised, is whether the Community has adopted a common position in the Euro-Arab Dialogue. As far as the Community's common approach is concerned, the Community was not able to co-ordinate a common policy towards the area, primarily because it did not want to involve political questions in economic issues. The Community's primary concern was the adoption of a Common Energy Policy. For the Arabs the most important part of the Dialogue was the political question. They viewed political and economic questions as indispensable. Nevertheless, despite the great difficulties in dealing with such a multilateral negotiation they showed a relative degree of unity. They particularly wanted the Community to adopt a more sympathetic stance towards the Arab position in the Middle East. In fact, this was not accepted by the Community and therefore in 1979 the European Dialogue was suspended as a result of the various difficulties mentioned, and the refusal by the Community to adopt a more favourable approach towards the Arab question in the Middle East. The paradox was, as Mr Claude Cheysson said, "we entered into the Euro-Arab Dialogue for political reasons ... it is a political exercise and yet we refuse to talk politics there".⁵⁷ The Dialogue was re-opened in November 1980 again with the hope that a possible solution would be found and that peace be established in the region.⁵⁸ For the Arabs, the political dimension was of primary concern. This dimension cannot be separated from the economic one if the Community truly wants to go ahead with a comprehensive commercial co-operation agreement.

Nevertheless,

Nevertheless, the question of the Ten's attitude to the Middle East Question, from the political point of view, (which for the purposes of this thesis is considered irrelevant), is enormously complex and would have to be discussed primarily in the context of the development of European Political Co-operation.

CHAPTER 7.

NOTES

1. Preferences: UN Yearbook, 1964, p.570 ff; the countries included in the GSP have been recently increased up to 147 (123 plus 24 dependencies and territories), 36 of which are classified as least developing countries and which need even more special consideration. The system includes not only countries belonging to the 'group of 77' but also countries belonging to group B, such as Turkey, Portugal, as well as others belonging to Group D, such as Roumania and Bulgaria and also China (which does not belong to any group). The system, however, has been questioned as regards the latter three.
2. Stein, Hay, Waelbroeck, European Community Law and Institutions in Perspective, (1976), p.1020.
3. BISD/GATT 18S/24 (1971) L/3545. The Community was the first of the DCs to implement the "Agreed Conclusion" of the UNCTAD by introducing the GSP for the LDCs in 1971. Other industrialised countries like Japan, the Scandinavian countries, Austria, Canada and the USA responded to the UNCTAD's appeal in 1976. Australia also adopted the GSPs in parallel with a special system of preferences and the Eastern European countries supported preferential access to the LDCs' exports to their markets, but each one to a different degree.
4. Commission EC, Background Report, Generalised System of Preferences 1981, March 1981.
5. The UNCTAD's special Committee on Preferences deals with questions relating to the operation of the GSP.
6. Ibid; Yusuf Abdulqawi, Legal Aspects of trade preferences for LDCs, (1982).
7. GATT; The Tokyo Round of Multilateral Trade Negotiations, Chap.V, Geneva, April 1979, pp.100 ff.
8. Bettina S. Hurni, Evolution of the Generalised System of Preferences of the European Communities: A perspective 10 Journal of World Trade Law (1976) pp. 383-389. Stein, Hay, Waelbroeck, op. cit., in Note 2.
9. Ibid, 10 Journal of World Trade Law, (1976) pp.383-389.
10. The preference giving countries have agreed to harmonise the rules of origin to the greatest possible extent, in order to simplify the system. The EEC tried to apply identical rules of origin to all preferential /

preferential imports from ACP countries or Mediterranean basis countries. The Council EC, has adopted a Regulation (NO.802/68, O.J. L.148/28.6.1968) in order to define the origin of goods coming from LDCs, in assistance with the "origin Committee". The rules of origin as well as all the other requirements and procedures were subject to improvements and adaptation to the requirements of the new economic era of the 1980s; Preferences for Developing Countries, 5 Journal of World Trade Law (1971) pp. 712-714; Rules of Origin for Preferences, 5 Journal of World Trade Law (1971), p.466-475.

11. Trading data from monthly external trade Bulletin special number 1958-1975. Statistical office of the European Community.
12. Bulletin EC. No.3 (1980).
13. Europe Information, External Relations, The Generalised System of Preferences, 18/79 March, 1979, 28/79 Dec. 1979, and 41/81 Febr., 1981.
14. Ibid, 41/81.
15. Council EC. Regulation, 3601/81, O.J L.365/1981, p.1.
16. Bulletin EC, No.3 (1980).
17. Commission EC, op. cit., in Note 4.
18. Ibid.
19. Quoted in Yusuf Abdulqawi, op. cit., in Note 6, at p.160.
20. G. Faber, The European Community and Development Co-operation (1982).
21. Brian Hindley, The UNCTAD Agreement on Preferences, 5 Journal of World Trade Law (1971), pp. 694-702. However, a great deal of criticism has been directed at the Community's policies pointing out that the Community has selected for preferences products which are not competitive in its markets.
22. Ibid.
23. Yusuf Abdulqawi, op. cit., in Note 6.
24. Ibid.
25. R. Cooper, The European Community's Generalised Tariff Preferences: A Critique, 8 Journal of Development Studies, (July 1972), pp.379-394.
26. /

26. Ann Weston, The EEC's Generalised System of Preferences, (1980).
27. R. Krishnamurti, The Agreement on Preferences, 5 Journal of World Trade Law, (1971) pp. 45-60.
28. Alex. and Christine Borrman and Manfred Stegger, The European Community's Generalised System of Preferences, (1981).
29. Ibid.
30. Bettina S. Hurni, Evolution of the Generalised System of Preferences of the European Communities: A perspective, 10 Journal of World Trade Law, (1976), pp. 383-389 at p.389.
31. A. and C. Borrman and M. Stegger, op. cit., in Note 28.
32. Report of the Committee on 'Trade and Development'
BISD/GATT 13 S/78 - 80 (1965) and 14 S/129 - 131 (1966).
33. The Asean group is composed of five countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand; Commission EC, Development, 1978/2.
34. Commission EC, Development 1978/2; In 1976 the Community imported 58% of energy requirements; by 1985 it will have to import 45% and by 1995 this percentage will again approach 50%.
35. At present the EEC's exports to LDCs are expanding, while those to the DCs are falling or coming to a standstill.
36. For further information see also Europe Information, Dev. June 1979.
37. Gerrit Faber, op. cit., in Note 20.
38. Europe Information, External Relations, The European Community and Bangladesh, 45/81 (April 1981); The European Community and Sri Lanka 461/81 (April 1981); The European Community and India, 50/81 (June 1981).
39. Europe Information, External Relations, 60/82, June 1982.
40. Newsweek, November 16, 1981.
41. Europe Information, External Relations, ASEAN and the European Community, 16/79. (Febr. 1979), 27/79 (Dec. 1979), 51/81 (July 1981) and 66/83 (Febr. 1983).
42. Gerrit Faber, op. cit., in Note 20.
43. All countries of the Asean group, apart from Thailand, are contracting parties to GATT.
44. /

44. Europe Information, External Relations, The European Community's Textile Trade, 44/81 (April 1981).
45. The Community, having in mind the ASEAN experience, wanted to negotiate with Latin American countries as a group because this would enable it to strengthen and improve its external relations from political and economic point of view with the whole Latin American region at once, establish rules applicable to all Latin American countries and therefore simplify the procedures. On the other hand, the Community had no reason to object to negotiations with Latin American countries as a group, whereas (as is discussed in the next chapter, chapter 8), it did not want for mere political reasons to negotiate with the COMECON as such.
46. G. Faber, op. cit., in Note 20.
47. Miguel S. Wionczek, The relations between the European Community and Latin America in the context of the international economic crisis, 19 Journal of Common Market Studies (1980) pp.160-174; Diana Tussie, Latin America integration: From LAFTA to LAIA, 16 Journal of World Trade Law (1982), pp.399-413; The transformation from LAFTA to LAIA in mid 1980 made it yet not possible either.
48. Europe Information, External Relations, EEC - Brazil, 22/79 (Sept. 1979) and 36/80 (Sept. 1980).
49. Venezuela, Peru, Ecuador, Colombia and Bolivia.
50. Europe Information, External Relations, EEC and Central America Nov. 1981 and Latin America and the European Community, Sept.1979.
51. O.J. L.48/21.2.1981 15th General Report, EC. (1981).
52. Glenn Mower, Jr., The European Community and Latin America (1982).
53. David Allen, The Euro-Arab Dialogue, 16 Journal of Common Market Studies (1978) pp. 323-342; European Community (in Greek) The Euro-Arab Dialogue, Febr.1981, pp. 7-12.
54. Europe Information, Development, The development of trade between the European Community and the Arab League countries (Sept.1980).
55. The Arab League was formed in 1945 and is composed of all independent Arab nations, in total 21, except for Egypt, which was expelled from the League in 1979 after having signed the Camp David Agreement with Israel.
56. Europe Information, op. cit., in Note 54.
57. Ibid, p.27.
58. D. Allen, op. cit., in Note 53, Financial Times, 6.3.1980.

AGREEMENTS WITH STATE-TRADING COUNTRIES.

Trade relations between the EEC and the Council for Mutual Economic Assistance (CMEA), known as COMECON have become closer over the years, despite the fact that their evolution has passed through difficult stages. In particular, over the last years, i.e. since 1970 trade between East and West Europe has considerably increased. The Community's imports from the CMEA countries, which are mainly composed of raw materials and oil, have multiplied threefold and also its exports display the same trend (the Community is in surplus with Eastern Europe) excluding trade between East and West Germany.¹ The CMEA's share of external trade with the Community has also increased. Although the volume of trade involved in absolute terms is not substantial, yet the growth rates have rapidly increased.² Improved economic relations imply therefore, greater economic interdependence that could be beneficial to all countries concerned for promoting further economic relationships and political stability in Europe.³

In this context, on 11th October 1982, the European Parliament adopted a Resolution on the Community's relations with state trading countries and especially with the CMEA countries. The view which was expressed was that trade should be liberalised and be placed in the context of the Helsinki Act,⁴ which calls on the signatories to take steps to improve commercial and scientific relations.

However, trade relations appear to have developed in a peculiar manner. In particular until 1972, that is the year of the commencement of the implementation of the CCP of the EEC, trade relations were conducted at bilateral level between the EEC member states or companies on the one hand and the authorities of the CMEA states on the other. Initially relations between the two blocs were hostile, but since then, i.e. the early 1970s, they have been characterised by a closer relationship. This hostility arose out of political reasons. The CMEA states had not recognised officially EEC and had refused to accept it as an entity of international law. They denounced it as an imperialistic superpower in its genesis, whose creation have no beneficial effects on the communist states. The fear was expressed that a potential EEC success /

success would create threat of expansion of capitalist ideology to neighbouring Eastern Europe.⁵ Meanwhile, the Eastern European countries could not ignore the economic and political realities deriving from the creation of the EEC. The successful experience of the EEC as a customs union made the CMEA states reconsider their attitude and move gradually away from the policy of non-recognition to a more pragmatic approach towards the EEC. The great economic expansion of the EEC in the course of 1960-1972 period made the CMEA states moderate their position and accept the necessity for closer economic co-operation with the EEC as this was important for an economic reform of their economies.⁶ The Eastern European countries and, in particular, the Soviet Union saw a retardation of growth in their economies, whereas at that period EEC's economic growth and trade expansion was remarkable. Therefore the Eastern European countries wanted to expand their trade growth and international trade could become an important factor in that growth. Improved economic relations with industrialised countries and, in particular, with the EEC member states would be of fundamental importance in that the CMEA countries could acquire technology and other necessary means, such as capital, essential for their growth and development. The Eastern European countries felt increasingly dependent on West Europe for technology and credits and therefore considered that international trade and closer collaboration with West Europe would enable them to expand their trade, modernise their industries and gain access to world markets.⁷ To this end the Soviet leaders in the early 1970s expressed an interest in strengthening integration within CMEA, i.e. in moving towards a common foreign trade policy and in moving towards a closer trade relationship with the Community. Integration with CMEA and consequently the adoption of a common trade policy would help the Eastern European states to put an end to the isolation in which they had found themselves.⁸

In this context, the Eastern European countries promoted the idea of establishing 'co-operation agreements' rather than direct trade relationships with the West and proceeded in joint ventures with Western European industries backed by their governments, in which joint ventures the Eastern European countries would supply the most abundant factors such as raw materials and labour and Western Europe capital and technology. This is a practical acknowledgement of the inferior technological position of the Eastern European countries who increased their efforts /

efforts to diminish the gap, by increased and better use of their own resources and by utilising Western technology. Closer collaboration with the industrialised countries in the West would benefit the CMEA states. The impetus for this closer relationship was facilitated also by the holding of the European Security Conference which helped to play a very positive role towards a changing attitude to East-West relations.⁹

Indeed, a more favourable attitude has been recorded on the East side towards the EEC. Therefore, the CMEA made a proposal to negotiate an "outline global agreement" with the Community, covering all aspects of trade, technological, industrial and scientific co-operation.¹⁰ But the Community turned down this proposal. The objectives of the CMEA were that it wanted to negotiate as a group with the Community. It wanted to take a common stance on economic matters, which would facilitate it in strengthening as a group and further integration, bearing in mind the successful experience of the EEC. The Community in return, however, asked the CMEA states to open negotiations on a bilateral basis, covering the whole range of trade, technological and financial co-operation. The Community pointed out that there was no comparison between the two organisations and it could not negotiate with the CMEA as such. The Community argued that it, itself, constitutes a supranational authority and as such has legal personality in international law under Art. 210 EEC. Therefore, it has the relevant powers to negotiate external trade relations and to take decisions binding on its member states, whereas CMEA has no supranational authority and lacks corresponding powers to represent its members in their external relations.¹¹ Indeed, the CMEA according to its statutes, is not a supranational organisation and lacks such powers. Its member states are free to negotiate with third countries in trade or any other economic matters.¹² CMEA moreover, is a political rather than economic organisation. Its integration level is very low and it might remain so, as long as the Soviet Union plays the dominant role. The level of economic and technological development between the two blocs is also different. A number of existing differences make the negotiations difficult, but above all political differences cause the most evident problems in negotiations.¹³ Therefore, the lack of supranational character of the CMEA provides the EEC with the legal justification for its refusal to open overall negotiations with the CMEA as such. The EEC's viewpoint has been that it can only negotiate trade agreements with the individual CMEA states. However, /

However, the Community refused to open negotiations with CMEA on political matters. Behind these matters, it might be as Peter Marsh¹⁴ says the Community's "wounded pride" that the CMEA had not recognised EEC and had made its approach for global negotiations through the Council and not through the Commission. Peter Marsh further explains that the "basic reason for the Community's reluctance to establish relations might arise in the creation of a countervailing power in the East, capable of thwarting the EEC's economic and political strategies in the area".¹⁵ Nevertheless, it seems that the Community had seen a potential development of contacts between the individual CMEA states and consequently found no reason to adopt a favourable response to CMEA's proposals. A favourable response would strengthen and facilitate integration of the CMEA, which would be capable of extending its economic dominance in East Europe.

As is discussed earlier, since the early 1970s ideological separateness between the two organisations has been shifted and a more progressive and constructive relationship has been remarked. The CMEA had abandoned its hostile attitude towards the EEC and approached it as a body for discussions on matters of common interest. Meanwhile as export markets were of great importance for the maintenance of export growth for both groups of countries, they directed a great deal of attention to each other. In particular, when Japanese and American¹⁶ trade with Eastern Europe started to develop and also when increased competition and protectionist tendencies in Japanese and American markets restricted EEC exports, West Europe felt a growing need for trade expansion and closer co-operation with the East. This need gave the EEC the impetus to the construction and implementation of its CCP towards the CMEA states.

During 1973, as the Community had to implement its CCP towards the state-trading countries, four major issues had to be considered: (1) The Community's role in economic co-operation agreements, (2) the Community's control over commercial policy matters, such as tariffs, import quotas and MFN treatment, (3) the outline for a draft common policy and (4) the future relations between the EEC and CMEA as organisations.¹⁷

Co-operation agreements are one of the most important issues in the context of the CCP. In this respect it is remarkable that there is no clear /

clear provision in the Rome Treaty which would provide for the jurisdiction of the Community to negotiate co-operation agreements. Therefore this legal uncertainty has led to controversies between the EEC member states. France, in particular, objected to the idea that the negotiation of co-operation agreements would be a Community matter. She strongly argued that Art. 113 EEC, the main provision of the CCP, does not cover co-operation agreements. Finally, it was agreed that co-operation agreements between the EEC member states and the CMEA states would remain in the domain of the member states, but the Commission could have a small role to play as a co-ordinator and harmoniser of such agreements.

To this end, when in October 1973, the Commission made its proposals to the Council, it insisted on the need for 'a regular information and consultation procedure' prior to the conclusion of co-operation agreements between the EEC member states and state-trading countries. The Council's decision on 22nd July 1974 to introduce 'a notification and consultation procedure' set up a system whereby members provide information to each other and to the Commission on the substance of the co-operation agreements.¹⁸ This system would contribute to the co-ordination of the member states' policies and would further result in a uniform application of the procedures and rules on co-operation agreements developed therein. The member states, however, should take all the necessary measures so as not to violate the CCP. Meanwhile member states were to notify the Commission of all agreements already concluded and if these agreements included trade matters, to denounce and replace them with co-operation agreements.

Therefore, co-operation agreements are to be adopted by the member states individually provided that the principles and aims of the CCP are respected and also that they do not constitute an obstacle to the future implementation of the CCP. The Commission furthermore, under the procedure of co-ordination and surveillance of co-operation agreements, plays the role of co-ordinator and harmoniser of foreign economic policy towards the CMEA states. This, nevertheless, is the first common action of the member states taken for the implementation of the CCP. This has been seen (from the point of view of the implementation of the CCP) as an important step, in particular as it is taking place at a time of growing crisis, high competitive conditions and search for world markets.

At /

At the same time, the Community moved towards greater control over commercial policy issues, such as import quotas, tariffs and MFN treatment. In this respect, harmonisation of the Community's policy was a decisive step. Accordingly, on 7th May 1974 the Council reiterated the fact that from 1st January 1975, the Community would have jurisdiction over all trade negotiations, and on 17th September it was agreed to take all the necessary measures in order to work out the progressive application of the CCP. Moreover, safeguards for steel and textiles coming from the Soviet Union and the other Eastern European countries, would be included in the CCP.¹⁹

In the context of the third issue that is, the proposal for a draft policy towards state-trading countries, the Commission proposed two lines of action: 1) The creation of a specimen agreement and 2) the definition of "an autonomous policy, which would be applied immediately and would simply put a Community label on existing national trade legislation."²⁰ However, the Commission's proposal that the 'specimen agreement' should also include the potential for developing economic and technical co-operation, raised a lot of controversy. The framework of economic co-operation agreements was not a Community matter and therefore when on 15th October 1974 the Council discussed this proposal concerning the inclusion of provisions on economic co-operation, problems arose. France, again, opposed this proposal maintaining that economic co-operation lay within national competences. Finally, a compromise solution was reached according to which the 'specimen agreement' could contain provisions on co-operation only if a state-trading country requested them,²¹ and it was explained that the Community could not acquire powers in the foreseeable future, but over a long period of time. However, the adoption of this proposal by the Council on 15th October 1974, marked an extremely important era of the evolution of the external trade policy of the EEC. This provides the Community with the legal basis for a CCP towards the East bloc. It is remarkable, nevertheless, that this basis has been laid down in such an extremely sensitive area where political issues prevail over economic ones.

In response to the 1972 CMEA proposal for the negotiation of an 'outline global agreement' however, the Commission (as discussed earlier in this chapter) which wanted negotiations individually with each /

each Eastern European state, sent a letter to each one of them at the end of 1974 asking for the opening of bilateral negotiations on subjects such as MFN treatment, import quotas, agricultural trade. Subsequently a reply came in 1976 from the CMEA which wanted to negotiate with the Community as a bloc. This counter-proposal by the CMEA proposed negotiations on trade between the two blocs, including mainly MFN treatment, quotas, agricultural trade, safeguards and credits. Also, it included matters outside the commercial policy like the environment.²² The Community in turn agreed to negotiate with the CMEA as an organisation on non-trade matters, but it insisted in negotiating with the CMEA states individually on trade matters. Indeed, negotiations on non-trade matters have been opened between the two organisations. The attitude of the Community, towards the CMEA is sui generis indeed. While it promotes contracts and trade negotiations with other regional economic groups, such as Lomé countries, ASEAN, in this particular case its stance is inconsistent with its previous practice.

The issues involved are highly complex. Economic considerations, but above all political ones, have to be taken into account. Legal issues are also involved such as the supranational character of the CMEA. Institutional weakness of the CMEA and in addition non-acceptability on the part of the EEC of the proposals such as MFN treatment and reciprocity create problems.²³ In its latest response, however, the Community had not mentioned the most important issues of the MFN treatment and the principle of non-discrimination. The Community again referred to its earlier proposal of 1974 and requested the CMEA states to conclude individual trade agreements.

Romania, as the most outward looking state-trading country, responded favourably to the Community's request for the conclusion of a trade agreement. The Soviet Union, however, endorsed individual agreements between the Community and the CMEA states, because it acknowledged the need for the CMEA states to co-operate with the industrialised countries in West Europe. The Community, however, by negotiating at first in 1976, an agreement on textiles with Romania, felt that its objectives of contracting individual agreements with the CMEA states had found favourable grounds and therefore that it could successfully pursue its policy. The culmination of the Community's success /

success came in 1977 when the Soviet Union expressed an interest in entering into negotiations with the Community over fishing rights. To this end the Soviet Union entered in February 1977 into negotiations with the Community. That happened when the Community in the context of the adoption of a Common Fisheries Policy proceeded with the adoption of a 200 mile fishing limit round the EEC waters.²⁴ This achievement was twofold for the Community. Firstly, it succeeded in negotiations with the Soviet Union individually and secondly this can be interpreted as an indirect but clear and official recognition of the EEC as an organisation in international law. Also, the Community's growing competence on trade and economic matters and its right to conduct external trade policy has been in practice recognised. On the other hand, the CMEA states, as long as CMEA does not take a common stance and develop a supranational character, have no other choice but to negotiate individually with the Community. When CMEA develops a supranational character and strengthens as a group, only then can it demand bloc to-bloc negotiations with the Community. Nevertheless, it has been suggested that a solution could be found if "general guidelines" for trade relations could be agreed between the two blocs.²⁵ What is needed is that definition of the general guidelines be adopted, which would make trade relations between East and West more fruitful and easier. At the present, however, it is not difficult for the Community to argue that the CMEA states could negotiate individually with the former and thereby dynamically pursue its policy.

However, in the context of negotiation of trade agreements, Romania's case is worth mentioning. Relations between Romania and the EEC date back to 1971 when Romania asked the EEC to include her in the GSP and in this respect she was given a favourable response. Then relations between the EEC and Romania developed smoothly. In 1976 an agreement on textiles was concluded between the two parties concerned, which entered into force on 1st January 1978 for five years and was renewable. This agreement has been negotiated within the GATT framework in the context of the MFA arrangement. It was negotiated during the second MFA in 1976 when the Community was attempting to restrict textile imports. This is the first agreement negotiated between the EEC and CMEA state and therefore its political importance was great for the Community. Romania undertook to reduce its textile exports to the /

the Community. This agreement is very important to the extent that it has become a precedent for Bulgaria, Hungary and Poland, who undertook also to reduce their textile exports to the Community.²⁶ Furthermore, the EEC succeeded in negotiating another sectoral agreement on steel with Romania in 1978 for one year and renewable. Also, similar arrangements between the EEC and Bulgaria, Hungary, Czechoslovakia and Poland came into effect soon afterwards.²⁷

But what is particularly important and of great interest for the evolution of the external relations of the Community is that Romania, in response to the 1974 Community's proposal for individual negotiations with state-trading countries, offered in 1978 to negotiate an overall trade agreement with the Community itself. Therefore, contacts between Romania and the EEC resulted in the negotiation of an agreement on industrial products (other than textiles and steel for which special arrangements had been made) and of an agreement establishing a joint Committee to administer the former. The agreements were signed on 28th July 1980.²⁸ Both agreements were very significant from the legal, political and economic point of view. They provide in particular the legal framework for trade relations between the two parties. The Community had succeeded in negotiating with the individual CMEA states. These agreements constitute a good precedent for the Community in developing its policy towards the East. Within the joint Committee the parties discuss trade problems and also make recommendations for adoption of specific commercial policy measures consolidating and intensifying trade relations. Agricultural products are not included as there have been technical arrangements since the end of 1960s. However, despite difficulties and growing economic crisis, Romania has suggested that a new economic co-operation agreement going beyond the existing trade agreement should be negotiated, provided that the GATT rules are respected.²⁹

The agreement on industrial products has been negotiated under the GATT auspices, (Romania has been a contracting party to GATT since 1971) and therefore the principle of reciprocity of mutual rights and obligations is included. It provides for the highest possible degree of liberalisation of certain products, elimination of tariffs, and opening /

opening of quotas for products which have not been liberalised in the GATT MTNs. This agreement goes beyond the GATT achievements and provides for more trade liberalisation. This agreement, nevertheless, does not constitute a preferential agreement and as such it has not been submitted to GATT Special Committee for consideration. Therefore, no legal issue has been raised in GATT as regards its application. From a political point of view this agreement is significant for both sides. Romania was the country which had objected in the early 1970s to the overall negotiations of the CMEA with the Community, because of her fear of the Soviet Union's dominance. She had resisted the extension of the CMEA's competence on trade with third countries. Romania had made it clear that it wanted the CMEA states to maintain freedom in trade matters.³⁰ The Community on the other hand, had succeeded in exerting its powers in the course of the implementation of its CCP.³¹

The case of China is also noteworthy. China is another state-trading country with which the Community maintains trade relations.³² A non-preferential trade and economic co-operation agreement was signed on 3rd April 1978 for five years, renewable, which accords to each party MFN treatment. The aim of the agreement is to promote trade and each party has tried to attain a balance in their trade. If balance in trade is not achieved, a joint committee can study the way to remedy the situation. Both sides have undertaken trade liberalisation measures and China has undertaken to give favourable consideration to imports from the Community; the latter is committed to increase the liberalisation of imports from China.

China and Romania are the only state-trading countries which can benefit from the Community's GSP. Through this scheme China's overall exports to the Community have increased since 1st January 1980, and the Community has given under it free access for most of China's industrial goods with certain quantitative limits and reduced tariffs for some agricultural exports. In the context of the general framework of trade relations an agreement for textiles has been negotiated between the Community and China. It was signed on 18th July 1979 and came into effect on January 1980 till December 1983. The agreement sets out a five year framework for imports into the Community of Chinese textiles and garments from cotton, wool or synthetic and artificial fibres./

fibres. It provides for an increased access of the products concerned into the Community and at the same time it takes account of the difficulties presently faced by the clothing industry in the Community. Therefore, collaboration and co-operation for closer economic ties has been developed between the two partners, which has resulted in their mutual benefit.

Therefore, we may say that the Community's objective of negotiating itself with the individual CMEA states has succeeded to a considerable extent. The agreements with Romania are the most remarkable examples. But apart from these official agreements informal contacts have frequently taken place between representatives of the Eastern European countries and representatives of the Commission. Fulfilment of this objective means for the Community its official recognition by the CMEA states and consequently strengthening of its position at international meetings and conventions. Trade relations have developed in a remarkable and exceptional manner, however, having regard to the fact that the Community has succeeded in achieving a common external policy concerning commercial matters towards the East bloc countries. In accordance with the CCP provisions the Commission of the EEC has since 1972 the sole power to negotiate with third countries and it can therefore effectively represent its member states on commercial policy issues when negotiating on a bilateral basis with the CMEA states. In fact, since 1972, the EEC member states have not formally negotiated as such with the CMEA states on trade matters, nor has the Community itself with the CMEA as a bloc. The EEC member states or the EEC private companies under the concept of co-operation agreements deal with the authorities of the CMEA states in industrial, technological and financial co-operation. In practice, however, the EEC member states under the auspices of co-operation agreements often conduct trade negotiations with the CMEA states. The EEC member states when negotiating with the other side are obliged to consult with their partners at Community level, but unfortunately this is not always the case in practice. The Community, in order to ensure that co-operation agreements are consistent with common policies especially the CCP and to co-ordinate the policies of the member states, has set up a special procedure for information and consultation. Through this co-ordination process attempts have been made to apply the Community principle of a CCP, the implementation of which /

which is both essential and extremely difficult.³³

However, from the legal point of view the achievement of the EEC in negotiating individual trade agreements with the CMEA states is great, but in practice this seems to be more apparent than real. In the context of co-operation agreements between individual member states of the EEC and individual East European states, which replaced trade agreements between them, significant areas of economic activities are regulated. Therefore, major areas of economic relations remain outside the Community's competences. The EEC member states still reserve for themselves important part of their foreign economic relations with the East bloc countries and are not willing to transfer to the Community real negotiating power over trade matters. The Community has succeeded in having control on CET matters, but on most other matters such as trade and industrial policy bilateral East-West arrangements have been the rule. In practice, therefore, a real CCP has a long way to go until the Community can claim its full and effective application and implementation. The reasons, however, are complex; political, legal and economic issues are involved. Indeed, the EEC member states do not really want to give up their competence over trade policy matters and to transfer them to the Community. Because of these reasons and of the sui generis nature of East-West relations the situation is unlikely to change, at least for the time being and it seems probable that the EEC will fail to bring commercial policy under central Community control.

The successful conclusion of the Kennedy Round, especially as far as the substantial reduction of world-wide tariffs and the liberalisation of international trade is concerned, gave the CMEA states the impetus to move away from the policy of isolation and to collaborate closer with the industrialised countries. Thus, GATT membership would provide them with this opportunity. In this context, however, it is worth mentioning that state-trading countries as such are not accommodated in principle within the GATT system.³⁴

Czechoslovakia was a founding member of GATT in 1947. The accession of Poland into the GATT system provisionally in 1967 and fully in 1973 was not easy. The most important question raised at that time was of what form should the 'reciprocal concessions' of countries with centrally-planned economies take, since the trade measures implemented by these countries, either may have no direct equivalents in market-type economies or may be similar to trade measures in market-type economies."³⁵

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As Poland had no customs tariff system special provisions for accession had to be worked out. Poland agreed to commit itself to an annual 7% increase of its imports from the other GATT contracting parties.³⁶ Romania also which acceded to GATT in 1971³⁷ undertook commitments in addition to those already undertaken by the other contracting parties to GATT, in particular to increase imports from other contracting parties. The Accession Protocols of Poland and Romania included furthermore safeguard actions beyond the relevant GATT provisions. On the other hand Poland and Romania demanded the total abolition of all QRs applied to specific products, and also committed themselves to periodic reviews of their trade development.³⁸ The Protocol of Accession negotiated by Hungary³⁹ in 1973 is similar to those negotiated by market type economies, but in addition contains elements from the Polish and Romania protocols. Hungary had pressed hard too, for the elimination of QRs. This protocol included also a commitment by the Community that special trade arrangements with Hungary and other state-trading countries would have no discriminatory effects.

However the Community, in its trade relations, accords MFN treatment to those CMEA countries which are contracting parties to GATT,⁴⁰ and even to the Soviet Union which is not a contracting party to GATT, with the usual exceptions. Indeed for the Soviet Union the situation is more favourable than for any other CMEA state. Tariffs are not an obstacle in trade relations, because most of the Soviet Union exports constitute raw materials and fuels for which no tariffs or very low tariffs are levied.⁴¹ But the Community maintains QRs against East European countries' exports and introduces a specific safeguard mechanism. On the other hand it argues that despite the existence of some QRs on some sensitive products, they are steadily being eliminated.⁴²

Many aspects of trade continue to be currently negotiated mostly at a multilateral rather than a bilateral level. Restrictions have also been eliminated at a multilateral level. Thus the CMEA states apart from the Soviet Union and East Germany, as GATT parties, negotiate with the Community within this framework on the major trade issues. These issues include sensitive products such as textiles and steel.

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The Community's tariffs do not cause problems for Soviet exports of which the bulk are raw materials which can enter the Community without obstacle. The remainder are mainly industrial products of the type on which very low tariffs can be imposed. In particular, in the context of MTNs, tariffs are negligible for most exports of the CMEA states.

Restrictive quotas and other NTBs are the factors which affect most exports from the Eastern European countries. In this respect the EEC claims that quotas for Eastern European and Soviet Union products coming into the Community markets have been increased with the only exception thereto being a limited number of some sensitive industrial and some agricultural products. For the Eastern European countries restrictions of this kind involve a problem, since a quarter of their exports are agricultural products which have to face restrictions applied by the CAP. Also, up to one half of their exports to the Community are manufactures mostly of sensitive products, such as clothing, footwear and china products, which have to face the most restrictive policies of the Community. With particular reference to the latter products, the Community has tried to deal with imports of these sensitive products which face structural difficulties by negotiating VER agreements.

The East bloc states, therefore, aiming at economic growth and expansion and ultimately at the liberalisation of trade, have demanded the removal of quotas, reduction of tariffs and import levies and other restrictive measures of trade. On their part they claim that they have taken measures for trade liberalisation and they have contributed to this end by spending their exports earnings on buying products from West Europe, especially technology.

With particular reference to GATT, it contains provisions initially intended to regulate trade undertaken by state-trading enterprises in market-type economies. However, when state-trading countries acceded to GATT the relevant GATT provisions were to apply to this category of states as well. The principal GATT provision relating to state trade is provided for in Art. XVII. Also Arts. II:4⁴³ and III:4,8⁴⁴ and an interpretative note to the Articles relating to QRs should be taken into account. These rules establish the non-discriminatory treatment /

treatment of trade and in accordance with commercial considerations, provide for limitation of QRs and also provide for exchange of information. Therefore, as the state-controlled enterprises in market-type economies, similarly state-trading countries in terms of their external trade, should respect the same GATT rules and should take into account commercial considerations.

Art. XVII of the GATT is the only article which provides for an additional obligation on the state-trading enterprises and consequently on state-trading countries than that provided in Art. I of the MFN principle. That is because state-trading enterprises should treat all trade in a non-discriminatory manner and behave in accordance with commercial considerations.⁴⁵ But when an enterprise acts in accordance with commercial considerations, is an extremely difficult question. That is why when Poland, Romania and Hungary acceded into GATT, these countries had to commit themselves to special and additional obligations, so as to facilitate their accommodation within the GATT system. The different functional structure of their economies, differences in prices, tariff rates, the non-convertibility of most Eastern European currencies, differences in the way state-trading enterprises in market type economies and industries in centrally-planned economies operate, are factors which make the accommodation of the centrally planned economies difficult in the GATT system.⁴⁶

Therefore, trade relations between the EEC and state-trading countries who are contracting parties to GATT, are subject to GATT rights and obligations and in particular to additional obligations provided for in Art. XVII. It is remarkable that trade relations between the EEC and the CMEA states - contracting parties to GATT, have not raised any single complaint before the GATT and consequently Art. XVII in respect to those relations has never been invoked. The only case (involving the USSR) before GATT concerned a system of preferential tariff quotas which the Greek government granted to the USSR in 1969. The relevant question concerned the provisions of the special protocol signed by the Greek government in December 1969, which provides for special tariff treatment of certain products imported from the USSR within specific quota limits.⁴⁷ But bearing in mind that the USSR is not a contracting party to GATT and that Greece was not an EEC member state at that time this case has no major importance for discussion /

discussion in the context of this thesis. It is worth noting that state-trading activities have not caused any particular problems and although state-trading activities could be classified as an NTB to trade, yet no particular problem has arisen. The relative absence of GATT activity in the area of state-trading can be interpreted as indicating that state-trading does not constitute a significant barrier to trade. This view is supported by the fact that state-trading was not a major issue in negotiations during the Tokyo Round and also that during the last GATT Ministerial Conference of November 1982, this issue was not even raised.

However, this absence indicates another limitation and shortcoming of the GATT system. No special provisions are included in the GATT concerning state-trading in centrally planned economies and therefore state-trading countries are not adequately accommodated within the GATT legal system. This relative absence supports the conclusion once again that GATT is designed to accommodate only the industrialised countries' interest and that therefore an improved GATT taking into account the interests of all world countries is essential for further trade liberalisation.

East-West relations constitute an interesting area of study from political, legal and economic perspectives. A short move away from ideological differences and the acknowledgement of the necessity for closer economic co-operation has led to the improvement of East-West relations and has helped therefore to reduce the risk of conflicts. Bilateral contacts and good will on both sides is an important step for further improvement of relations. Nevertheless, it is difficult to improve trade relations at a bilateral level. Such an improvement would be easier in the framework of multilateral negotiations. Therefore an improved GATT system to work out existing differences and to provide sufficient accommodation of the interests of the state-trading countries, would be beneficial to both groups of countries and would eventually lead towards greater trade liberalisation.

CHAPTER 8

NOTES

1. Roger Broad and R. Jarrett, Community Europe today (1972); For East and West Germany special provision has been made in an exceptional protocol attached to the Rome Treaty, according to which preferential access is accorded to East Germany's products to West Germany.
2. For the Community it represents around 4% of its total external trade, whereas for the CMEA states the corresponding figures are much higher. It represents a large part of their external trade, i.e. in excess of 25% including mostly imports of highly priced technology and capital; also see Friedemann Müller, Mutual Economic Dependence between the EEC and the CMEA, in Avi Shlaim and George N. Yannopoulos (eds.), The EEC and Eastern Europe, (1978), pp. 207-226.
3. For further information see Roger Morgan, West-East Relations in Europe: Political Perspectives, 49 International Affairs, (1973) pp. 177-189.
4. Bulletin EC. Nos.1-10 (1982).
5. G. N. Yannopoulos and Avi Shlaim, Economic relations between the EEC and Eastern Europe: an introduction, in G.N. Yannopoulos and A. Shlaim (eds.), The EEC and Eastern Europe, (1978), pp. 1-24.
6. Ibid.
7. Friedemann Müller, op. cit., in Note 2.
8. Objections were raised to this approach by the other CMEA states, specifically by Romania, which was concerned about the Soviet Union's dominance over Eastern Europe and resisted the extension of CMEA's competence into trade with third countries. Romania made it clear that it wanted the states of the CMEA to preserve their autonomy in trade matters; John Pinder, Economic Integration and East-West Trade. Conflict of interest or Comedy or Errors? Journal of Common Market Studies, (1977-1978), pp. 1-21.
9. Peter Marsh, The development of relations between the EEC and the CMEA, in Avi Shlaim and G. N. Yannopoulos (eds.), The EEC and Eastern Europe, (1978), pp. 25-69.
10. John Pinder, op. cit., in Note 8.
11. Peter Robson, The Economics of International Integration, (1980).
12. /

12. Max Baumer and Hanns-Dieter Jacobsen, International Organisations and East-West economic relations, in Avi Shlaim and G. N. Yannopoulos (eds.), The EEC and Eastern Europe, (1978), pp. 227-245.
13. John Pinder, Integration in Western and Eastern Europe: Relations between the EEC and CMEA, 18 Journal of Common Market Studies (1980), pp. 114-134; Symposium 23, 24 and 25 March 1982, The External Economic Policy of the Enlarged Community (1973), Chap. re. The Enlarged Community and the Socialist Countries, pp. 42 ff.
14. Peter Marsh, op. cit., in Note 9.
15. Ibid. p. 56.
16. In May 1972, the Nixon-Brezhnev Summit Meeting in Moscow led to the signing of a trade agreement and the promise of export-import bank credits provided that the USA Congress would consent.
17. Peter Marsh, op. cit., in Note 9.
18. Bulletin EC. 7/8 (1974).
19. Peter Marsh, op. cit., in Note 9.
20. Ibid. p. 50.
21. Ibid.
22. John Pinder, op. cit., in Note 8.
23. Max Baumer and Hanns-Dieter Jacobsen, op. cit., in Note 12.
24. Peter Marsh, op. cit., in Note 9.
25. John Pinder, op. cit., in Note 8.
26. Bulletin EC, 7/8 (1980), Trade Agreement between the EEC and Romania, p.16.
27. Ibid.
28. Bulletin EC. 2-1980/2.2.70, 3-1980/2.2.63, 6-1980/2.2.75, 7/8 - 1980/1.4.1. and 1.4.9.
29. Bulletin EC. 7/8 (1980), p.16; Financial Times, 1.7.1980.
30. John Pinder, op. cit., in Note 8.
31. /

31. ECOSOC EC., The EEC's External Relations - Stocktaking and consistency of Action, (1982).
32. Symposium 23, 24 and 25 March 1982, op. cit., in Note 13, Chap. re China, pp. 57 ff.
33. Commission EC., The Economy of the European Community E. Doc., 1-2/1982.
34. In the ITO Charter there were special provisions for state-trading countries, but they were not transferred into GATT, since the countries concerned - apart from Czechoslovakia, before being transformed into a centrally-planned economy at that time - did not participate in the GATT negotiations.
35. BISD 15 S/46-52 (1968).
36. Accession of Poland into GATT BISD 15 S/46, 60 109, (1968).
37. Accession of Romania into GATT/BISD 16 S/67 (1969).
38. Poland. Periodic Reviews, BISD 16 S/67, 17 S/96, 18 S/188, 201, 19 S/109, 205/209, 21 S/112, 22 S/63, 24 S/139. Romania 20 S/217. Yugoslavia, acceded provisionally to GATT and became a full contracting party in 1966. Yugoslavia's economic structure is similar to that of market-type economies. It has gradually shifted from a centrally-planned economy to a market-type economy. Cuba is a contracting party to GATT, while China along with the USSR and East Germany remain still out of the GATT framework.
39. Accession of Hungary into GATT. BISD 20 S/ 3, 17, 34 (1974).
40. Financial Times, 15.2.1983.
41. ECOSOC EC., op. cit., in Note 31.
42. BISD/GATT 15 S/46, 60 (1968), 18 S/5,23, 24 (1972).
43. Art. II:4 of the GATT deals with tariffs and other concessions.
44. Art. III:4, 8 of the GATT provides that imports should be accorded national treatment; for further details see K. Dam, The GATT law and International Economic Organisation, Chap. 18, pp. 321 ff.
45. Roy Baban, State Trading and the GATT, 11 Journal of World Trade Law, (1977), pp. 334-353.
46. K. Dam, op. cit., in Note 44, Chap.18, pp.316-332.
47. BISD/GATT, 18 S/179 (1972). Report of the Working Party adopted on 2 Dec. 1970, L/3447.

PART IV

CHAPTER 9.

VOLUNTARY EXPORT RESTRAINT AGREEMENTS

Voluntary Export Restraint (VER) agreements are negotiated bilaterally between exporting and importing countries, outside the concept of international trade rules. They concern the restriction of the volume of exports of a particular product which may cause 'market disruption' to the importing country. The term 'voluntary' is somewhat misleading. Export restraints are actually imposed on an exporting country which may well prefer to restrain its exports, instead of facing unilateral quotas, that otherwise would be imposed against it. If VERs were really voluntary, not only the exporting countries would be better off under the system of VERs, but the international community as well. From the legal point of view VERs and quotas may produce the same effects, having regard to the fact that both are NTBs to world trade. Nevertheless, from the economic point of view, quotas produce more adverse effects than those 'voluntarily' agreed upon by an exporting country. The most notable example of VER agreements, is the Multi-Fibre Arrangement (MFA) which regulates trade in textiles and textile products and covers agreements negotiated between developed and developing countries.

Despite the fact that VER agreements were initially accepted as measures regulating trade between DCs and LDCs, they have lately proliferated between developed countries. The recent practice shows that quite a number of VER agreements are being negotiated between the leading economic powers, i.e. the EEC, the USA and Japan,¹ and in the last few years VERs have regrettably occupied a large part of their external trade. Despite the short-term beneficial effects for the countries involved, if VERs continue to proliferate they will have far-reaching dangerous consequences for the whole GATT edifice. They are negotiated outside the scope of the international trading system and, as such, are not permissible under the established international trading system, nor under any rules of customary international trade law, nor even under contract law.

VERs are negotiated in areas where the shift of production and the export expansion is so rapid and unforeseen that it causes market disruption and there is not sufficient time for the industries to adjust and meet /

meet the foreign competition. VERs are designed to deal with 'substantial shifts in trade patterns in short periods of time'.² Therefore, the problem is the rapid expansion of newcomers in the international trading scene and their penetration into established markets, where penetration may cause market disruption. Unfortunately, GATT is not capable of dealing with this problem. GATT should move with some speed in order to be able to deal with current events. During the ITO negotiations no extensive reference to VER agreements was made, but they were discussed in the context of Art. XIX. Of course, VER agreements existed at that time, e.g. between the USA and Japan but it is worth mentioning that their wide proliferation was not foreseen. Also when the GATT was established in 1948 penetration of the markets had not reached current levels and it was not thought that such penetration would be capable of causing serious economic problems to the importing countries.. That is why VERs were left out of the GATT system.

VER agreements are thus justified when 'market disruption' is caused in the importing country's market, especially in case of a too rapid expansion of exports of a particular product coming from newcomers. They mainly include the most sensitive sectors, such as textiles, footwear, leather goods, electronic goods, automobiles and steel. The most characteristic example of them all is the MFA - the Multi-Fibre Arrangement. This is the only agreement negotiated within the scope of international trade rules. Already in 1961 and 1962 its predecessors, the Short Term Arrangement (STA) and the Long-Term Arrangement (LTA) on textiles were negotiated, under the auspices of GATT, although they were in principle contrary to the GATT rules.³

VERs, however, bring to some extent a benefit to all partners involved. On the part of the exporting country there is the advantage that it is involved in the negotiation process and it can maintain some control and influence on the development of the VER agreement during periodic reviews to which it is subject, whereas quotas can continue to be imposed unilaterally by the importing country for a considerable length of time. The exporting country is involved in the determination of quotas and it is up to the importing country to reduce these restrictions.⁴ Quotas are, of course, subject to international control and especially to GATT rules /

rules (Arts. XI, XII, XIII), but nevertheless growing disrespect of the GATT rules makes the negotiation of the VER agreements more attractive. The exporting industries as well benefit by not losing markets altogether. Industries in the importing country gain relief from foreign competition, and the government in the latter can succeed in curtailing imports, without having to impose quotas that can lead to retaliation by other trading partners. The importing country, therefore, protects its domestic market and satisfies its interested groups by curtailing its imports, without having to resort to the extreme of the imposition of quotas, and above all can advocate free world trade. For a powerful country, nevertheless, it is not difficult to impose its will on a less developed country, by 'negotiating' a VER agreement. There is no need to show that its balance of payments position is in such a condition to justify QRs (Art. XI of GATT), nor that there is serious injury to its domestic market in consequence of increased competition.

However, whatever the beneficial effects of the VERs for the countries involved might be, the consequences for the world trading system as a whole are not positive to the extent that the international trading system, thereby, becomes less competitive. VERs draw their origin back to the 1930s when the USA negotiated a number of VER agreements with Japan, which had preferred to negotiate her own restraints instead of having to face restrictions imposed by the USA. Jackson⁵ says that "these agreements resulted from American pressures and threats of unilateral, permanent and possibly more restrictive action and nothing indicates that this pattern has changed since". Other countries such as the UK and Canada soon followed the American practice, but VERs proliferated mainly during the late 1960s and to a much greater extent during the 1970s. The main shortcomings of these agreements are the complete absence of international surveillance and of consultation procedure that could take into account the interests which third countries might have in these bilateral agreements. The lack of a notification and of a consultation procedure is a great disadvantage for third countries and their industries, especially for LDCs which are affected by the trade diversion caused by these bilateral agreements. This is a particular complaint of the LDCs which are pressing for a multilateralisation of the VER agreements.⁶

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Only textiles have thus far been put under multilateral control. It is quite desirable, however, that VERs might be replaced by "improved safeguards operated within an agreed framework".⁷ This is not only the view of the LDCs acting as a group but also that of the DCs. A report produced by the OECD,⁸ the "Rey Report", supports the view that VERs are contrary to the GATT rules, in particular to the MFN clause, and should be subject to multilateral control. The Report furthermore states that "there has been a recent tendency to increase quantitative controls, particularly in the form of 'voluntary' export restrictions introduced outside the context of international rules and even sometimes as in the case of joint agreements within industries outside the responsibilities of governments". The Report thereafter concluded that VER agreements are of discriminatory nature and inadequate in dealing with difficulties in particular sectors, leaving aside the question of their legality.

VER Agreements and Art. XIX of the GATT.

Art. XIX which is a safeguard clause and the main escape clause of the GATT provides for specific emergency action (increased tariffs and higher level of quotas set) in critical circumstances. Imports may be reduced when there is evidence of 'serious injury' caused to a domestic market by an unregulated and too rapid expansion of foreign exports. The principal factor for the application of this article is the presence of 'serious injury' caused to a domestic market. The definition of the term 'injury' and when the injury is serious enough to justify the emergency action and consequently the application of Art. XIX is a very difficult question. Until the terms 'injury' and 'serious injury' are exactly defined by the CONTRACTING PARTIES the correct use of Art. XIX is impossible. Although attempts have been made since 1959 when a GATT Working Party on 'market disruption' was established, no concrete acceptable definition has been reached.⁹ Practice, however, reveals that both an actual injury and a mere threat of damage fall within the scope of this article.

As far as the procedure for the application of Art. XIX is concerned, it is as follows: when a party feels that it has suffered a 'serious injury' as a result of a sudden surge of imports of a particular product, it /

it may request safeguard action under Art. XIX. To this end it must notify the GATT contracting parties, so that a consultation can take place. Such consultation may lead to the granting of compensation to parties injured by the protective measures by the country contemplating action. However, the normal consultation procedure and thereafter the dispute settlement procedure under Arts. XXII and XXIII of the G.A. (discussed in Chapter 2 p. 43.) can be applied. Multilateral surveillance is not largely developed in the case of Art. XIX compared with other safeguard clauses either provided for in the G.A. or in other arrangements.¹⁰

Art. XIX as a safeguard is contrary to the fundamental principle of free trade and trade liberalisation. But it had been included in the GATT agreement in order to prevent abuse. It is worth mentioning that until the 1970s recourse to this article was requested about fifty times, whereas during the 1970s and the early 1980s, Art. XIX has been considered as incapable of solving the problems arising from a too rapid expansion of exports. It has become more and more evident that application of the article in question was difficult in this critical stage of economic development and therefore recourse to safeguards such as OMAs and VERs has been increasingly made. Although in legal terms we may say that Art. XIX is preferable to VERs because any protective action for the injured domestic industry can be taken within the GATT framework, in practice VERs have prevailed despite the fact that they have been negotiated outside the GATT legal system. In fact, it is the weakness of Art. XIX that has led to a proliferation of VERs.¹¹

Nevertheless, Art. XIX authorises emergency action, when there has been actual or threatened serious injury to a domestic industry and for a reasonable length of time in order to help the country facing serious injury to overcome the situation. The temporary nature of the protection should be made clear from the beginning so that domestic and foreign suppliers may be informed.¹²

VER agreements are bilaterally negotiated outside the GATT framework, when the domestic market is suffering "market disruption". Recently VER agreements have proliferated to a dangerous extent and even to an extent that GATT is not even informed of their existence. In principle /

principle VER agreements are contrary to international trading rules, but in practice the system has tacitly accepted them as measures regulating trade. There has been a trend that VER agreements be preferred to any other substitute restrictive practices which would have been invoked, e.g. QRs.

However, contradictory opinions have been expressed as regards the position of the VER agreements within the multilateral trading system. Quite a number of authors support the view that once VER agreements authorise selective measures, they are as such contrary to the GATT legal system and especially to Art. XIX which prohibits selective measures. Among them Arthur Dunkel (the present Director of GATT) has expressed the opinion that VER agreements should be distinguished from the MFA because of its multilateral negotiation and that they fall "wholly outside the rule of law".¹³ On the other hand some others support a different view. i.e. VER agreements are negotiated within the purview of the GATT legal system. They strengthen their argument by adding that many VER agreements have been notified to GATT contracting parties under the procedure of Art. XIX.

Marco Bronckers, emphasises that "we could not agree with the inference that the GATT (including Art. XIX) does not cover bilateral VER agreements. In our opinion these arrangements fall well within the grasp of the GATT rule of law, though inadequate enforcement may have obscured its full scope. One has to respect the notion that Art. XIX does not govern the negotiation of VER agreements because of their 'voluntary' or 'consensual' nature. Such formalism unduly conceals the object of these arrangements which is identical to that of unilateral safeguard measures to wit protection against what are perceived to be injurious imports".¹⁴

A solution to the problems can be found in the reform of Art. XIX in order to bring VERs under multilateral surveillance, to the extent that no import competing industry or its government would choose VERs instead of Art. XIX. The reform should aim at making Art. XIX preferable to VERs, which consequently should be reduced. At the present Art. XIX is cumbersome and difficult to apply and therefore the exporters seem more willing to accept VERs instead of Art. XIX action. As regards the volume of trade moving through VER agreements, the GATT Secretariat estimates /

estimates that only 3.5% is affected by them.¹⁵ But, if this practice continues to proliferate and occupy a larger part of world trade, there will be great danger for the whole international trading system. Therefore, some measures should be taken in order to extend the application of Art. XIX to cover VERs, which, at the present remain outside the scope of multilateral surveillance. They should be negotiated after consultation and multilateral control, taking into account also the interests of third countries. The present attitude of the international community is that VERs should be controlled at international level, subject to consultation and multilateral control. LDCs, and particularly the NICs, are making efforts so as to bring VERs within the orbit of Art. XIX. The USA Congress too, accepted the view that Art. XIX should be extended to cover every form of restriction concerning injurious competition and it proposed the extension of the MFA example to other industries. On the contrary the EEC, since the beginning of the Tokyo Round MTNs, has suggested that Art. XIX should be maintained but it should be supplemented by a system of 'selective measures' without compensation schemes and including as well, adjustment assistance and multilateral supervision. The EEC wanted revision of Art. XIX to the extent that it would permit 'selective application' against a country which is the source of injury. Japan supported the upholding of Art. XIX and even advocated strengthening it.¹⁶ All leading DCs as being the principal users of the system had, however, a different approach to the problem. Even the principle of MFN was under attack by the EEC, although great support has been extended to it and to the principle of reciprocity by the other DCs. These differences have worsened the situation. The multilateral supervision machinery has been, however, clearly supported by the DCs and there has been clear support for the view that bilateral restraints should be eliminated.

It has been pointed out already that the USA was the first country to negotiate VER agreements, e.g. with Japan. The Community as the first trading bloc in the world has followed the USA practice and has contributed to the proliferation of VER agreements. It has negotiated various types of restraint agreements mainly with the NICs' governments or with the industrialised countries' governments or their industries. Already since the Tokyo Round the EEC has supported selective safeguard measures and in the light of the fact that VER agreements authorise selective /

selective measures one can conclude that the EEC's practice in this particular case is favourable to the creation of VER agreements, when special circumstances are present.

In fact, a sui generis situation has been taking place as VER agreements are a new developing area of law in which the Community has played a major role in supporting the application of selective measures and their submission to Art. XIX, i.e. the multilateralisation of VER agreements.

VER agreements have developed in the context of the EEC's commercial policy, but the view of the Commission is that the negotiation of such agreements is part of the function of the public authorities. When they are negotiated on an industry-to-industry basis or more specifically on an enterprise-to-enterprise basis the Commission's view is that such agreements may violate the Community competition rules.¹⁷ Therefore the effects of VER agreements internally within the Community legal system are not seen in the same light as their effects externally.

VER Agreements and the Tokyo Round

During the Tokyo Round MTNs a Committee on safeguard measures was established to study the situation. But no progress was made although the Committee continued its work on the revision of Art. XIX. Differences of opinion between the leading trading nations made the situation difficult: in particular differences between the EEC and Japan grew even worse. It was at that time the Director General of the GATT introduced a draft decision of the Council of Representatives. Accordingly, negotiations would take place within the GATT framework and a new negotiating committee would be established to deal with the supervision of actions under Art. XIX. It is regrettable, however, that even this new committee produced no results. The different approaches of the DCs to multilateral supervision have been very wide, although there has in principle been agreement to it.¹⁸ Also, another subordinate committee established within the GATT committee on 'Trade and Development' with the task (according to UNCTAD Resolution 131 (V)) of reviewing safeguard actions /

actions taken by the DCs, has not produced substantial results. Likewise, at the last Ministerial Meeting of the GATT in November 1982, the CONTRACTING PARTIES stressed the need for an improved and more efficient safeguard system which 'would provide for greater predictability and clarity and also greater security and equity for both importing and exporting countries', on condition that the general principles of the GATT were respected and the result would be greater trade liberalisation, avoiding the proliferation of restrictive measures.¹⁹

Voluntary Export Restraint Agreements

The Specific Cases.

During the 1970s various types of VER agreements have emerged as an instrument for regulating international trade, in the absence of an effective restraint policy either at national or multilateral level. In the EEC various types of VER agreements, recently termed "safeguards" have been negotiated between governments or industries and third countries or industries. These VER agreements relate to both industrial and agricultural products, such as chemicals, lambmeat, sheepmeat, motor vehicles, electronics, steel, footwear, video, tape recorders, television sets and tubes, and above all, textiles. For other products too apart from the above-mentioned examples, several bilateral restraint arrangements have been established between exporting and importing countries.

In the following discussion, the Multi-Fibre Arrangement, the reasons leading to its conclusion, its impact on the world trading system and also some other bilateral restraint agreements, notably agreements in electronics, steel, motor vehicles and footwear, are analysed in an attempt to examine and evaluate their effect on the GATT legal system. The EEC approach constitutes the central part of this analysis, but the USA approach is also discussed in particular because of its leading role in negotiating the Short-Term Arrangement (STA), Long-Term Arrangement (LTA), and Multi-Fibre Arrangement (MFA), as well as in negotiating other voluntary export restraint agreements.

1. Textiles

Trade in textiles has a unique characteristic.. Textiles is the only developed manufacturing sector in the LDCs and it is the first and the only sector thus far that has been put under international surveillance. Both the Short-Term Arrangement (STA) and the Long-Term Arrangement (LTA) on Textiles negotiated in 1961 and 1962 respectively on a USA initiative within the GATT framework have had the ultimate objective of increasing international trade in cotton textiles in an 'orderly' manner. Their aim was to promote growth of LDCs' markets from unregulated and too rapidly expanded exports from low-cost suppliers /

suppliers. According to these arrangements quantitative restrictions could be imposed when imports 'cause or threatened to cause market disruption'. Market disruption is considered to exist when serious damage to domestic producers occurs or threat thereof.²⁰

A Working Party on 'Market Disruption' was established within GATT, with a permanent committee to facilitate consultation between all interested parties and to "suggest multilaterally acceptable solutions consistent with the principles and objectives of the G.A."²¹

The LTA was a multilateral arrangement operating within the GATT Textiles Committee. Although it was hoped to regulate international trade in cotton textiles temporarily, it lasted until the end of 1973 when it was replaced by the MFA (Multi-Fibre Arrangement) which extended the product coverage to include all textile fibres. The LTA was designed to give the importing countries "a breathing space" necessary to carry out structural adjustments such as replacement of plant and equipment necessary to help domestic markets to meet foreign competition. The participating countries (not necessarily contracting parties to GATT) agreed that quotas would be imposed instead of tariffs to safeguard the textile industry. The quota was to be increased by 5% each year, with the ultimate objective of achieving free-trade in cotton textile products.²² Therefore, quotas within the GATT framework were allowed as an exemption to the GATT rules quasi as a waiver, although the procedure of Art. XXV was not employed.

The Multi-Fibre Arrangement (MFA) and the GATT

The MFA is an exceptionally interesting case from a legal point of view. It is an international arrangement concerning regulation of trade in all textile fibres (cotton, wool, natural and man-made fibres) and clothing. Its objective is to avoid unilateral import controls, unfavourable to exporting and importing countries alike, and to legalise an action which violated the most basic principle of the GATT, the MFN clause of non-discrimination. Its ultimate objective was to adjust the industry and return to liberal trade. The MFA is actually an agreed framework which has been put under international surveillance, that is operating within the context of the GATT Textiles Committee, under which bilateral agreements on textiles can be negotiated, outlining when that might /

might be possible and the nature of the permissible restrictions.²³ From the legal point of view, although inconsistent with the GATT rules, especially with Art. I, it has been exempted from these rules, despite the fact that no waiver has been sought. It was agreed to operate within the GATT framework, thus being subject to multilateral surveillance. It legalises quotas and restrictions - through which international trade in textiles is operating - contrary to the GATT obligations.

The main points of conflict with the G.A. are primarily :-

(1) Art. I of MFN clause of non-discrimination. The non-discriminatory treatment inherent in the GATT rules is replaced by discriminatory treatment against the LDCs' suppliers of low-cost exports. The MFA is designed to regulate trade in textiles between developed and developing countries, and therefore can be considered as included in the wider concept of North-South relations. It is designed to protect the markets of the industrialised countries from low-cost supplies coming from the developing world. It does not apply to trade relations between the developed countries themselves, where the principle of reciprocity applies. (2) The MFA allows quotas to regulate trade and therefore contradicts the relevant GATT Articles XI, XII, XIII, which permit quotas only in exceptional circumstances.²⁴

Textiles have been taken out of the GATT system and are treated as a special case. Trade in textiles is regulated through bilateral agreements negotiated within the MFA, operating within the context of GATT. Keessing and Wolf,²⁵ in an authoritative analysis on textile quotas against the LDCs, say that "the decision which was taken by the GATT contracting parties to authorise the operation of this arrangement by imposing QRs on imports of textiles from low-cost suppliers, was momentous".

Bilateral restrictive agreements between industrialised countries and low-cost suppliers constitute the heart of the system. Art. 4 of the arrangement provides for export restraint agreements.²⁶ Such agreements had been negotiated, even before the establishment of the MFA. The USA, the main protagonist of such arrangements, had negotiated bilateral agreements before the 1973 MFA with its main suppliers. The EEC followed later, however, because of lack of co-ordination of its internal policy. Japan and Switzerland have no bilateral agreements and yet they have thriving textile industries.

For /

For the LDCs, textiles is a vital industry for their economies, since it is their only successful manufacturing sector, but they had no other choice but to accept bilateral restrictive agreements or face unilateral import quotas by the developed importing countries. It was recognised by some LDCs that an unregulated and sudden increase of imports into the DC's markets would create problems, and therefore bilateral agreements were preferred instead of unilaterally imposed quotas that would have certainly damaged the low-cost suppliers exports.

As far as the EEC is concerned, it had at first to co-ordinate its Common Textile Policy - arising out of the working of the Common External Tariff - and then to negotiate with its main suppliers. The different national interests and the interest of the preferential countries outside the EEC delayed the conclusion of a common position. In accordance with the CCP provisions the Community had to reach a common position in order to participate in the Multi-Fibre Arrangement (MFA) under the auspices of GATT. The Community had to show its coherent common policy in the external field by exercising its CCP.

The 1973 Multi-Fibre Arrangement (MFA)

The first MFA, put into effect from 1.1.1974 until the end of 1977, allows a 6% annual growth of quotas compared with the LTA, which permitted a 5% annual increase and it represents a substantial extension not only in terms of product coverage and improvement but also in terms of procedures and institutional arrangements.²⁷

The EEC, due to internal differences and difficulties in co-ordinating its Common Textiles Policy, did not manage to negotiate bilateral agreements restricting its imports with its main suppliers before the 1973 MFA negotiations. It was only in the Summer 1976 when the Community had succeeded in organising its policy on textiles that it was in a position to negotiate bilateral restraint agreements with each one of its main suppliers which, in the main, were NICs, that is, some twenty six (26) agreements.²⁸ It was agreed that the growth of textile exports would be 6% per annum in most products, but in some sensitive products there was to be no growth at all.²⁹ These twenty six agreements have the same legal structure, but they however differ as to the /

the level of quotas set and as to the different kind of imported products. Some of them incorporate safeguard clauses or special consultation clauses, which can be initiated when the level of imports might disturb Community markets.³⁰ The relevant negotiations took place before the MFA was due to be re-negotiated. A number of Mediterranean and Lomé countries under preferential agreements remained completely unrestricted and benefited from tariff preferences.

Germany, the Netherlands and Denmark were of the opinion that free trade should remain as the rule and imports must not be restricted. They were concerned about the Community's development policy. On the other hand, Britain, France and Italy were in favour of the adoption of protectionist measures. The Community textile industry had to face difficult times due to the inability of the Community to co-ordinate its common position on textiles, and to the USAs' ability to conclude bilateral restrictive agreements before the 1973 MFA, and furthermore to some other factors, such as the 1974-1975 world recession.

Certainly quotas already existed and high levels of tariffs on textiles were imposed on an emergency basis, but they were unable to alleviate the Community's difficult position.³¹ The USA had already negotiated bilateral agreements. Japan, although she had no restrictive agreement, yet imposed very many quotas and NTBs which had made its market impenetrable.

The Community, therefore, had on several occasions to resort to safeguard action, and some of its member states, like Britain and France, had to take unilateral measures to protect their industries in summer 1976.³²

The EEC, compared with the other major industrialised countries, had followed quite a liberal policy. It had alone introduced a three-year programme for the elimination of restraints, but the large number of agreements with different supplying countries, made it difficult to draw any firm conclusions as to the Community's stance. The Textiles Surveillance Body (TSB) which was introduced under the GATT Textiles Committee, was not in a position to decide whether or not the Community had opened up its markets.³³

The Community had given however special consideration to the LLDCs' needs. It proposed that "tariff preferences must be granted to genuine /

genuine LDCs and should be withdrawn from these countries which no longer need them"³⁴

It is notable that the Community has not included textiles in its GSP, although it claims that it is the only major economic bloc to grant substantial tariff preferences for textile products. Considering the effects of the 1973 MFA on the Community, they have not proved beneficial. The provisions of the MFA were loose. They did not provide for measures of checking the flow of imports, either because the quotas had been set too high (e.g. in relation to Hong Kong), or because they exceeded those fixed (e.g. in relation to South Korea). The Community for some sensitive products could depart in certain cases from the normal MFA rules, but despite import restrictions set, e.g. quotas, or departure from the GATT rules or tariffs, it had not been able to preserve all branches of its industry, especially clothing.³⁵ Moreover, within the Community the lack of internal co-ordination of a common position, before 1973, had unfavourable effects on its trade balance.

The 1977 Multi-Fibre Arrangement (MFA)

The main objective of the MFA to allow the textile and clothing industries to restructure and adjust themselves had remained unfulfilled, when it came up for renewal in 1977.³⁶ Having regard to the unfavourable consequences of the first MFA, the EEC had first of all to co-ordinate its internal position and negotiate bilateral restraint agreements with its main suppliers. Therefore, all internal differences had to be sorted out, particularly those of export aids and state aids (Art. 92, 93 EEC Treaty). All measures, e.g. the removal of trade barriers and the avoidance of distortion of competition, had to be taken into account.³⁷ (Arts. 85, 86 EEC Treaty).

The EEC approach to a common policy on textiles was not an easy process. Apart from the differences between the member states, some other persisting differences made the achievement of a common policy a very difficult matter. Despite this the Community succeeded however in formulating a common policy which can be considered as a major achievement of its external trade relations, when we consider the highly /

highly sensitive nature of this declining sector.³⁸

The Community also negotiated with the Mediterranean countries on restrictions of their textile exports, but under 'fierce protest'.³⁹ With ACP countries no restrictive measures were taken, but it was made clear that actions would be taken if their exports constituted a threat to the EEC's textile industry.⁴⁰ For the Community, the negotiation of bilateral restrictive agreements, particularly those with the preferential countries, was not an easy process at all. The USA had negotiated before the first MFA bilateral restraint agreements with the world main suppliers, and the EEC had to face the hardest pressure and demands in bargaining with those low-cost world suppliers.

However, the situation was becoming more and more difficult for the textile and clothing industries in the DCs. Rising productivity, weak demand and rising unemployment, made necessary the adoption of protectionist measures in the industrialised countries.⁴¹ The EEC sided with the USA on the imposition of global quotas instead of the selective approach favoured earlier. Thus, on both sides of the Atlantic, a common position was reached for the need for protectionist measures to help the ailing textile and clothing industries.⁴² The New Arrangement, however, on an EEC initiative incorporated an innovation negotiated under a protocol providing for 'jointly agreed reasonable departures' from the MFA, which leaves room for more restrictive actions for some seven sensitive products. The EEC had insisted that the 1973 MFA provided no efficient protection and it therefore wanted the 'Reasonable Departures' clause to be applied when necessary. This clause has changed the arrangement fundamentally. "It is a departure from a departure - a waiver of the provisions of an agreement which itself was a derogation from the GATT principles".⁴³

From the LDCs' point of view, they wanted no extension of the protocol of the MFA, and they were concerned at the extent of the duration of the arrangement. They agreed to the 'Reasonable Departures' clause provided that the industrialised countries would restructure their industries and adapt to the new changing economic environment.⁴⁴ The LDCs were unable at this stage to maintain a common position and they particularly complained that the EEC had engineered this situation, negotiating with each one of them. They were not happy with the arrangement, but in case of collapse of the MFA, there were fears of imposition /

imposition of unilateral import controls by the DCs.⁴⁵

The 1977 MFA was not favourable to their exports, the volume of which had seriously diminished, compared with the years up to 1976. The 'Reasonable Departures' clause applying to the most sensitive products has led to a serious cut of global quotas. Moreover, whenever no specific quotas were determined, an import threshold was established in each case and for each exporter which, once reached, might lead to the establishment of a quota. This is the so-called 'basket procedure' designed to defend the Community and applies to countries which have signed the MFA and have no preferential links with the Community, and also for Eastern Europe.⁴⁶ For the EEC the second MFA, which was quite restrictive, was reported to be a success. As a result of the bilateral restraint agreements from 1976 to 1979 textile imports showed an average annual increase of 4% of volume compared with an increase of 25% in 1973-1976. For eight sensitive products the annual increase was 1.9%.⁴⁷ But, despite that trend, the Community had continued to face difficult times as a result of faster growth of imports over exports.

The 1981 Multi-Fibre Arrangement (MFA).

As the second MFA was to expire, the industrialised countries, including the EEC, were pressing forward for the MFA renewal for at least five years, whereas the LDCs resisted its renewal, or at least the latter would accept it for no more than four years. Finally in December 1981 the GATT Textiles Committee agreed by consensus to extend the arrangement for 1.1.1982 to 31.7.86 - (4½ years) under 'fierce protest' however from the LDCs.⁴⁸

As far as the EEC is concerned the clothing and textile industries are facing even more difficult times. The effect on employment has worsened. Notwithstanding all the other difficulties inherent in this sector, the EEC's position moreover has deteriorated owing to disagreement among its member states over the terms attached to the Community's acceptance of the renewed MFA. France, Italy and the UK wanted restrictive /

restrictive agreements, while W. Germany, the Netherlands and Denmark were opposed to it.⁴⁹ Britain and France warned that they would take unilateral measures if the EEC Commission was unable to curb cheap imports.⁵⁰ G. Shepherd in his Thames Essay on textiles argues that Germany and Italy could survive competition but France and Britain could not.⁵¹

The bone of contention, however, was the bilateral agreements to be negotiated during 1982 between the EEC and its main suppliers. The EEC, in the light of the difficulties experienced in this sector, demanded the right to introduce certain changes in the bilateral agreements. It particularly wanted to cut imports of the most sensitive products from its main suppliers, Hong Kong, S. Korea and Taiwan. It wanted to introduce an anti-surge clause, in order to prevent a sudden increase of imports from the low-cost countries, and also to strengthen certain existing provisions such as the 'basket extractor mechanism' and the provisions against fraud.⁵²

On the other hand, the LDCs were uneasy about the protectionist measures taken by the industrialised countries and demanded freer trade in textiles. They expressed concern about the 'Reasonable Departures' clause which was supposed to be a temporary feature of the MFA. Furthermore, they emphasised the even more discriminatory character of the MFA against the LDCs' exports, pointing out that it helped the developed countries to increase trade among themselves.⁵³ The hard and continuous negotiations with the industrialised countries caused the LDCs to adopt a common stance on the MFA re-negotiation. This is an important development in the third world stance, to face difficulties and to press for freer trade and elimination of the restrictions put by the industrialised countries.⁵⁴

However, the Commission had to negotiate hard during 1982 for re-negotiation of the bilateral restrictive agreements with its main suppliers with the view to obtaining a reduction in the global quotas. Both sides followed a very tough line. Fourteen (14) LDCs out of twenty-six (26) were opposed to the 1982 bilateral agreements.⁵⁵ In November 1982 Brazil was the first of the remaining to negotiate with the Community an import restraint pact, followed by Singapore, Malaysia and the Philippines the same week.⁵⁶ Nevertheless, the dominant suppliers /

suppliers (e.g. Hong Kong, South Korea, Taiwan) remained behind. The Community had repeatedly said that if no agreement were reached, that would mean that it would pull out of the MFA by the end of 1982 and it would impose unilateral import controls.⁵⁷ Finally, after hard bargaining under the internationally agreed MFA, a compromise formula was agreed with Hong Kong.⁵⁸ The Community had originally sought a 12% import cut, but finally 6.3% and 8.3% import cuts were agreed on five sensitive products (T-shirts, trousers, blouses, sweaters and shirts). Consequently, only Argentina was left and the EEC, after intense and often bitter negotiations, signed the MFA to run until the end of July 1986.⁵⁹

Although the Community succeeded in achieving the reduction of global quotas, yet the situation in the textile and clothing industries is far from ideal. The consumers organisations complained that the bilateral agreements would result in higher prices for the consumers. The COMITEXTIL also complained against the Commission for the deteriorating situation in the sector. It made it clear that the single renewal of the MFA is not enough to cope with the increased competition.⁶⁰ The European Parliament also stated that "there is need for imports to be controlled from low-cost suppliers, according to the quotas agreed", and it furthermore requested "the renewal of the quotas agreed from time to time so that imports must not exceed demand", pointing out the disruptive effects which the USA exports particularly cause to the European market.⁶¹

As has been pointed out above the MFA covers trade on textiles and textile products between DCs and LDCs. This means that trade relations in this sector between the EEC and the USA are regulated outside the MFA framework and are subject to the GATT rules, in particular to the principle of reciprocity. Therefore, bilateral restraint agreements similar to those negotiated between the EEC and the developing countries have not been negotiated between the EEC and the USA.

However, after extensive negotiations no one is pleased with the New MFA. The LDCs see their only manufactured sector excluded from the developed countries' markets, while their exports are replaced by the DCs' exports. Likewise, the EEC is unhappy because its industry faces very critical times, despite increased restrictive measures imposed under the 1981 MFA.

Evaluation /

Evaluation of the Multi-Fibre Arrangements.

The MFA can be considered as a VER agreement, although it greatly differs from other VER agreements. While VER agreements are negotiated outside the concept of international trade rules, the MFA is the only one which remains within the orbit of the GATT rules. It is a departure from the normal GATT rules, although no waiver has been requested. It functions within the GATT Textiles Committee, whose body, the Textiles Surveillance Body (TSB) controls QRs imposed and all kinds of restraints imposed by industrialised countries, and also the bilateral agreements stipulating that all existing QRs on textiles unilateral or negotiated should be notified in detail to the TSB.⁶²

The DCs, when they established the MFA, paid attention so as not to conflict with other GATT rules such as Arts. XIX, XII, VI and XVI. They started out from the position that there is need to safeguard their domestic markets in case of market disruption from unregulated and too rapid expansion of low-cost exports. They did not intend to violate any rules of international trade law. The peculiarity of the arrangement is that it sets quotas for textiles, in contrast to tariff regulated trade for all the other products, under the GATT provisions. It regulates trade in textiles among DCs and LDCs, but leaves aside trade among the industrialised countries themselves. In this way the MFA has sought to balance the interests of the LDCs and DCs alike. While stressing the need for further economic and social development of the LDCs by allowing gradual expansion in trade on textiles, at the same time attempts to safeguard the industrialised countries' textile and clothing markets from sudden and unregulated import penetration from low-cost suppliers, with the ultimate objective of liberalising trade in textiles.

The original MFA of 1973 was more liberal than the subsequent ones. The second 1977 MFA mainly due to the EEC's insistence became more restrictive and the third one even more. Although it was hoped that the MFA would be a temporary arrangement to help the textile industry to adjust, twenty years have already passed and still the industry has not restructured and faces further more critical times.

There is no doubt, that restrictions grew worse under the second and third MFA. Instead of moving towards opening quotas and the liberalisation /

liberalisation of trade, even more and more restrictive measures applied. Imports permitted under the third MFA are considerably lower than those permitted under the previous ones. Therefore, the impact of the MFA on the LDCs' trade does not seem to be favourable. The LDCs, in particular the NICs, point out that the MFA is very restrictive and discriminates against their exports. On the other hand they recognise that they would have to face unilateral import controls justified under the provisions of Art. XIX of the G.A. if the MFA did not exist. In fact, the NICs are those most affected because they are the most competitive suppliers and because the set quotas can be reached very quickly.⁶³ Therefore, the MFAs have primarily worked against the NICs, but they have also affected the LLDCs, which could follow the path of industrialisation, as did Hong Kong or South Korea, since trade in textiles and particularly clothing, is the most advanced manufactured sector of their economies. The impact on employment in the LDCs is even more unfavourable than that in the industrialised countries. This is because the clothing industry is a labour intensive industry and there has been a considerable shift in production from industrialised countries to developing countries. The jobs lost in LDCs are more than those gained in industrialised countries.⁶⁴ Finally, the most harmful effect on the LDCs is the restriction of exports in products, e.g. clothing, in which they have a comparative advantage. What is the impact of the textiles and clothing exports of the LDCs on the developed countries economies, is not very clear. Several studies undertaken have shown that imports from low-cost countries with whom the EEC has negotiated bilateral restrictive agreements, today reach the level of around 45% of its total imports. It is clear, however, that exports from industrialised countries are more disruptive to the Community market. For example, the USA exports are, in fact, twice as great as those from Hong Kong, the biggest of all suppliers from LDCs.⁶⁵

Keesing and Wolf, in an excellent analysis on textile quotas against LDCs,⁶⁶ argue that if increased penetration from LDCs had not occurred between 1973 and 1978, domestic apparel in North America might have grown a little over 15% instead of 10% that it did. In West Europe, the corresponding figures would be 11% instead of 6%. For textiles, given that the textile industry still remains in the hands of the /

the DCs, that figure would be much lower. They also considered the question of what would have been displaced by the growth of imports from LDCs in recent years. In answering these questions, they also relied upon the results of a study undertaken by José de la Torre, on behalf of the Georgia World Congress Institute in the USA, concerning the clothing industry in the USA and in West Europe.⁶⁷ The latter study revealed that net changes in the trade balance with all countries between 1970 and 1976 led to a loss of about 67,000 jobs in the clothing industry in the USA, and about 76,000 jobs in the EEC. The study points out that the productivity growth is a much more important cause of job losses than changes in net trade.

Nevertheless, the Community spokesman in the GATT Textile Committee said that between 1973 and 1979 the lost jobs in both industries are well over 700,000 and the situation is getting even worse.⁶⁸ Thus, imports cause grave concern for the Community's textile and clothing industries. They are not only imports from LDCs, but they are primarily imports from the DCs, especially the USA. The latter are more disruptive and they are the greatest threat to the EECs industries. In 1979 alone, imports from the USA went up to 74.5%. Of course, imports are not the only factor for the grave problems which the textile and clothing industries face today. Numerous studies show that the losses of jobs are due more to productivity growth pursuant to technological advances than to changes in trade. In fact, productivity competitiveness in the textile and clothing industries in the industrialised countries have improved considerably since the negotiation of the bilateral restrictive agreements.⁶⁹⁷⁰

In addition to the accelerated growth of imports and the productivity growth, weak demand in the Community has resulted in difficulties in the industries concerned and it has led to the displacement of a great number of workers. As a consequence, COMITEXTIL, national governments, pressure groups, are all pressing the Community for more import restrictions. In view of this situation protectionist measures have been taken by DCs. These protectionist measures, however, have accelerated the rise in productivity and have certainly imposed a substantial cost in higher prices for consumers. Rising in productivity, creating unemployment, involves a "vicious circle" from which no one is likely to escape.

Therefore, restrictions imposed under the MFA and the bilateral agreements /

agreements negotiated under it have not proved beneficial to DCs either. Jobs have not been secured: unemployment has been rising, as well as prices for the consumers. Adjustment and not restrictions seem to be the commendable effort for the EMC and the other industrialised countries in general. The STA, LTA and MFAs subsequently were all established with the view to giving the DCs 'a breathing space' to adjust their industries, and to enable them to meet foreign competition. Currently, after two decades of "managed trade" in textiles and textile products, the DCs have proved unable to tackle the problems of adjustment and competitiveness. The Commission EC has made efforts to help the industries to adjust and overcome the difficulties. Thus, aid programmes have been launched and consultations with industry frequently take place.⁷¹

Adjustment, certainly, is not an easy process in the Community, as long as protectionist attitudes prevail and diversification into new areas of economic activity proves to be a complex matter. If adjustment had taken place, there would have been more hope for an orderly return to more liberal trade. The importance of adjustment in the textile and clothing industries for the developed and developing countries alike has been emphasised in the first Report of the Brandt Commission,⁷² which states:

"The great challenge for the North is to cope with the difficulties of adjustments so that world trade can expand to see its trade with the South as an opportunity, to see it not only as part of the problems, but as a part of the solution. In the end the failure of the mature industrial economies to adjust to the realities of international competitiveness may deprive them of their prosperity and impose a costlier and more disruptive adjustment than those which their current measures of protection attempt to postpone".

After all, neither the LDCs, nor the industrialised countries are happy with the MFA. For the LDCs it has curtailed the export growth of their most developed sector with detrimental results to their economies as a whole. Their serious concern, indeed, is of how long it would last. It has been accepted by them in preference to unilateral import controls, which might have been imposed by the industrialised countries and in view of its supposedly temporary character.

On /

On the other hand, the EEC has sought to improve its textile and clothing industries and to alleviate unemployment. The problems however, in the industry are more acute today than they were twenty years ago. Imports have increased, in particular from the developed countries (e.g. USA), covered by the concept of reciprocity. Closures are more frequent, and unemployment is higher than ever. Consequently, the MFA has not proved sufficient to stop imports into the Community because it only covers trade in textiles between DCs and LDCs leaving aside trade in textiles between industrialised countries. The ultimate objective of the Community, that is the adjustment of its industry, has met with numerous difficulties. In the EEC the effects of the MFA are less beneficial than for the other industrialised countries because it fails to co-ordinate quickly enough its internal common position. Because of different national interests and different structures of the national industries, a two-way approach seems likely to continue as far as the MFA exists. The protectionist policy led by Britain, France and Italy and the liberal policy followed by West Germany, Denmark and the Netherlands, is likely to arise again if the EEC is called on to re-negotiate the MFA.

The next questions, however, are as to what would have happened in the absence of the MFA and what should be done now. In the absence of the MFA it is probable either that the GATT rules would have changed in order to allow the introduction of quotas or any other kind of restrictions in textiles and clothing, especially after the 1974-1975 world recession, or unilateral import controls would have been imposed by importing countries to safeguard domestic markets. As far as the second question is concerned, that is what should be considered as more commendable; it might be possible to liberalise trade in textiles according to a timetable, according to which quotas would be then liberalised and eventually eliminated, similar to the kind of timetable that was used in liberalising tariffs during major rounds of international trade within the framework of an agreed international agreement. Therefore, bilateral agreements under the MFA could be replaced by a Safeguard Code pursuant to the GATT rules.

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In conclusion, restrictions on international trade are in no one's interest and they benefit neither the LDCs, nor the DCs. A programme for /

for the liberalisation of quotas should be progressively substituted by liberal trading rules. Reduction of LDCs' exports means in retrospect nothing else, but reduction of their imports coming from DCs and stagnation of the world economy as a whole. Legal rules derived from such a situation cannot be beneficial to the international community of trading states as a whole.

2. Motor Vehicles.

Largely expanded exports of motor vehicles, particularly from Japan and other industrialised countries, have caused grave concern in the Community and in the USA as well. In the USA, due to domestic pressure, an agreement with Canada was negotiated on automobile products in 1965, with the object of liberalising trade. For this agreement the USA was granted a waiver under Art.XXV:5 of GATT in respect of Art.I:1.⁷⁴

In the USA growing tension in trade of motor vehicles led the USA Administration to take anti-dumping actions, which finally resulted in the conclusion of a three-year USA-Japanese VER agreement in 1980, which is liable to be extended for another three years.⁷⁵ Domestic producers and Trade Unions pointed out that imports were causing substantial injury to the USA industry and they therefore exerted some pressure on the Japanese, under a threat of retaliatory action.⁷⁶

In the EEC, the automobile industry suffered the most. Exports from Japan and East Europe had flooded the Community market and low-priced automobiles had made domestic products uncompetitive. Dialogue with its trading partners had often taken place, but the situation was still difficult. This situation was worsened by the lack of a common approach to the problem. Italy maintains QRs. The UK industry holds regular contacts with the Japanese automobile manufacturers association with the aim of reducing sales to the UK market, or of establishing joint ventures of the type, for example, between Honda and British Leyland (a co-operation agreement has already been signed). France also announced import quotas on cars coming from Japan. Co-operation agreements relating to trade in the vehicles sector have recently been sharply increased, (e.g. /

(e.g. Honda and British Leyland, Nissan and Alfa Motor Iberica and Volkswagen) with the object of technological co-operation and development of techniques which "would enable everyone to play the free-trade game and comply with the GATT rules".⁷⁷

Meanwhile, the Community has already introduced a system of surveillance of imports of certain motor vehicles and some other products, which system was extended in December 1982. Furthermore, the Community intends to extend the system to imports of motor cycles, video tape recorders and light commercial vehicles, originating in Japan.⁷⁸ In view of this situation domestic pressure groups and national governments are constantly asking for some kind of arrangement with Japan. The Commission EC, after several efforts, found it hard to persuade Japan to agree on voluntary export restraints. Instead, in 1981, the Japanese committed themselves to limit exports, in particular in Belgium and Germany and also in the EEC as a whole. Nevertheless, at the end, i.e. on 14.2.1983, a voluntary export restraint agreement concerning ten (10) sensitive products, including cars, was negotiated between the EEC Commission and Japan.⁷⁹

3. Footwear.

Another sector which has been hard hit by low-cost exports into the industrialised countries is the leather footwear industry. In the USA the industry found it difficult to compete with the low-priced imports. The International Trade Commission (ITC) in 1975-1976 after investigations recommended tariff increases and quotas against low-cost imports, especially those coming from Italy, South Korea and Taiwan. The President instead preferred to negotiate bilateral restrictive agreements in the form of Orderly Marketing Arrangements (OMAs) with South Korea and Taiwan, which, however, terminated in 1981. An informal VER agreement was also negotiated with Italy, although the Italian government made no specific commitment to limit exports to the USA market, and the only official Italian government position was that it placed exports of shoes under a system of surveillance.⁸⁰

In the EEC, decline in the industry is attributable partly due to cheap /

cheap imports from developing countries, notably Hong Kong, South Korea, Taiwan and China, and partly due to restrictions imposed by Australia, Canada, the USA and Japan. In addition to this, no common approach nor common safeguard measures have been applied. Member states have resorted to various methods of protection. Certain member states apply QRs and others like the UK and France have had informal bilateral restraint contacts with several exporting countries, such as South Korea, Taiwan, Poland, Czechoslovakia and Romania.⁸¹

4. Electronics

Successful expansion of Japanese external trade in the electronics sector and other advanced consumer goods, has also caused grave concern to certain importing countries. Multilateral agreements do not exist, but only some bilateral restrictive agreements.

In the USA, the ITC in 1977 found that the domestic industry had been injured by increased Japanese exports and recommended introduction of quotas or increase on import duties.⁸² in accordance with the provisions of Art. XIX of the GATT.

In the EEC, the huge trade imbalance with Japan has caused anxiety in the Commission and the member states. Since the 1970s several plans for tackling the problems have been prepared.⁸³ Individual member states in the Community want their own way. France and Italy already imposed restrictions and in the UK the industry had applied safeguard measures against particular exporting countries, notably South Korea. A common defensive position of all industries seems to be the only answer to the question. To this end a common European front is the only answer and it is encouraging that a common approach between Grundig and Philips has been considered.⁸⁴

Having regard to the critical situation of the electronics industry, the Community has repeatedly requested Japan to make her markets more accessible by cutting tariffs and extending quotas and by restraining her exports to the Community. The EEC, however, threatened that in case of no response by the Japanese it would bring the matter before the GATT and take unilateral measures. Also, the EEC Commission has made several efforts to help European industries penetrate the Japanese market.

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To this end the Commission made an investigation and asked the European companies operating already in Japan, about the prospects of new entrepreneurs wishing to establish a company in Japan. Answers varied and the Commission has begun preparations for a new inquiry.⁸⁵ In parallel with the Commission's initiative European manufacturers and unions are fighting to make their goods more accessible to the Japanese market.

The major European electronic industries, Grundig and Philips asked the Commission for an anti-dumping investigation into the activities of Japanese producers of video tape recorders. Likewise, the confectionery manufacturers are fighting for tariff cuts given that tariffs on confectionery products in Japan are the highest compared with those imposed by any other industrialised country.⁸⁶ Even more pressure on the Japanese government was exercised by the EEC, which in December 1982, decided to launch official proceedings within the GATT in order to intensify international pressure on Japan to liberalise imports and eventually to press Japan into concluding VER agreements on some sensitive products.⁸⁷ These efforts resulted in high level consultations between the Commission and the Japanese government, with the object of removal and reduction of import tariffs on eighty-one (81) items and especially on certain sensitive products, such as video-tape recorders, television sets and tubes, cars, certain types of machine tools and fork-lift trucks. Also, simplification of import procedures on the part of Japan on several items and VER agreements on items that are likely to cause 'significant' problems, was considered.⁸⁸ Special consideration was given to the conclusion of a voluntary export restraint agreement on video-tape recorders and at the GATT Ministerial Meeting of November 1982, Japan committed itself to make determined efforts to avoid measures which would limit or distort international trade. Japan seemed ready for export restraints on the condition that anti-dumping charges brought by Grundig and Philips against video-tape recorders (VTRs) manufacturers, under Art. XXIII:2 of GATT, would be withdrawn and French measures of checking all video-tape recorder imports at the small port of Poitiers would be cancelled.⁸⁹

Finally, after long consultations and conflicting views expressed by Japanese officials and European Commission representatives, Japan agreed /

agreed on 14th February 1983 to cut their exports to the EEC on ten (10) highly sensitive products, including video-tape recorders. This is the first VER agreement signed between the European Community and Japan in this sector; it also includes a provision, according to which the Japanese will facilitate the imports of European products especially video-tape records, although the implementation of this provision is uncertain.⁹⁰

As this VER agreement is yet to be implemented, the EEC has exerted more pressure on Japan to liberalise its policies and has re-requested the GATT to establish a Working Party to examine whether existing Japanese practices are too restrictive. Further rounds of talks between the two parties have taken place within the G.A. and a Working Party is currently examining the relevant trade problems and the reasons for the huge trade imbalance between the EEC and Japan.⁹¹

5. Steel.

Friction over trade in steel products between industrialised countries often takes place and international trade in steel has been on several occasions regulated through bilateral restrictive agreements. (The row over steel between EEC and USA is considered earlier in Chapter 6, p.192). In the USA domestic pressures leading to successive threats for retaliatory action and imposition of quotas has resulted in announcements by the EEC and Japan to limit exports to the USA.

However, agreements between EEC and USA industries on 'voluntary' limitation of steel exports were not welcome by the EEC governments as they constitute a bad precedent. They have supported the view that difficulties in the USA steel industry were not attributable to EEC exports, which constituted a very small percentage of total steel imports into the USA.⁹²

After a conclusion of a VER agreement in Autumn 1982, between EEC and USA, which will run until the end of 1985, the Community national governments have been urged by the Commission to cut down steel output and to fix minimum prices. This was the new Davignon approach, urging less /

less output, more courageous closure programmes and sets of minimum prices. However, on the other hand, the national steel industries were urging import cuts and have been asking their governments to take steps to protect them against cheap imports.⁹³

Complaints from USA steel producers were directed mainly against subsidies, although it was doubtful if subsidised steel in the EEC caused injury to the USA. But existence of subsidies gives the American producers a powerful political weapon. These complaints in accordance with the GATT rules lead to consultations and, most likely in the end, to the possibility of a political settlement. The legal and political procedures run in parallel. In this particular case, the aim of the USA producers is to conclude a VER agreement, which will have legally binding effects.

Despite limited exports of steel by Japan and the EEC, and the arrangements made therewith, fresh threats of retaliation has been subsequently directed by the American producers against the exporting countries concerned. Accusations in the USA have been made against the EEC and the Japanese steel industries of applying "discriminatory and illegal trading practices" and of "flagrantly victimising" the steel industry by carving out the world steel market into spheres of influence.⁹⁴ They criticised the EEC and Japan for having negotiated a world-wide market sharing agreement in 1978, according to which the Japanese would limit their exports west of the "Suez Canal" and the Europeans to the Far East, India and Pakistan. They said there are no quota limitations in this area but Japan and Europe operate a price-fixing agreement. A particular complaint from the USA steel makers, that the MFN principle has been violated, was filed with the USA government. Individual steel makers cannot complain directly to GATT because the notion of direct effect of the GATT has not been recognised by the USA government. Instead, when the USA government considers it necessary it can file a complaint to GATT. However, no further proceedings were followed, because it was agreed in the USA Steel and Iron Institute, that this would further deteriorate the already tense international trade relations.⁹⁵

As has been discussed throughout the present chapter several VER agreements, apart from the MFA, have been negotiated on a bilateral level, between governments or industries and outside the GATT framework. The agreements /

agreements are contrary to the GATT rules and in particular they violate Art. I, the MFN principle, of the GATT. In fact, VER agreements have proliferated to a dangerous extent by shifting international trade from a multilateral to a bilateral concept or to so-called 'managed trade'. Their contribution to solving world trade problems is, however, under question. Have VER agreements achieved the purposes for which they were established? Have they removed friction between states? Recent history has shown that these measures have done little to remove friction. The EEC-USA row over steel illustrates the fact that friction can, in the immediate future, arise again. In fact, their proliferation leads to increased protectionism. There is no doubt that some sensitive industries should be protected for some period of time in order to be given a "breathing space" to adapt to the new economic environment, to adjust and compete, but it is not certain if these arrangements provide the correct safeguards.

Art. XIX of the GATT, which constitutes the main safeguard of the G.A., has unfortunately been unable to cope with current world trade problems. The Contracting Parties to GATT have accepted that MFAs operate under its auspices without the parties to the Arrangements having to secure a waiver in accordance with Art. XXV:5, but for no other VER has any formal arrangement been made. For the time being, no other VER agreement, apart from the MFA, has been negotiated within the GATT system, but it is certain that if a similar case were to be brought before the GATT, it could do nothing else but accept it. Thus while VER agreements are contrary to international trading rules, specifically to the G.A., in practice the international Community has tacitly accepted them as measures regulating trade.

The situation as described illustrates that the GATT agreement and specifically Art. XIX, has proved increasingly ineffective to deal with current problems. International trade in various sectors, except textiles, has moved out of the GATT system, that is from a multilateral level to a bilateral one. As such, VER agreements have weakened the international trading system. In fact, the way world trading problems are regulated today is markedly different from that provided in the G.A. Practice is markedly different from the law. Support has been expressed for revision of Art. XIX, in particular to incorporate VER agreements within /

within the scope of multilateral surveillance and control whilst taking into account the interest of third countries not involved in a particular VER agreement. The currently prevailing situation further strengthens the view that the GATT system is obsolescent and increasingly ineffective to deal with current world trade problems.

CHAPTER 9.

NOTES

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For some countries like Hong Kong, South Korea, Taiwan, exports in textiles constitute half of their total exports. For India 17% and Brazil 10%.
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The contents of Chapters 2 - 9 in the present thesis raise a number of legal questions of both general and specific nature. Questions of a general nature refer to the basic assumptions underlying the legal framework of international trade and its effectiveness which is constituted by GATT, while questions of specific nature relate to the contribution which, for example EEC practice in its external trade relations is making towards the progressive evolution and adaptation of the system which currently exists. These specific legal problems, i.e. the EEC's external trade relations were examined in the context of the general legal framework of international trade, i.e. of the GATT agreement, and their discussion and analysis constituted the main body of the present thesis.

Specifically, in Part I, the thesis analysed the legal basis of the General Agreement, evaluated its contribution to the development of international trade and pointed out the weaknesses of the system, with particular attention to the role of GATT in resolving international trade disputes. Also the external trade law and practice of the EEC were analysed with due regard to the CCP's effects on the evolution of the GATT legal system and therefore on the international trading system. Part II discussed the participation of the EEC as a customs union in the GATT and the legal questions it raises especially relating to the crucial question of compatibility with the GATT legal system. In this context the legality or otherwise of the EEC preferential agreements within the international trading framework was analysed, while in Part III the EEC trade agreements with third countries, industrialised and developing countries alike, was surveyed. Particular attention was paid to the EEC's preferential network with the ACP and Mediterranean countries. The legality of the preferential agreements, their compatibility with the GATT provisions and their effects on the non-associated countries were examined. As shown, EEC's relations with the industrialised countries and in particular with the USA, has raised one of the most problematic questions, i.e. the legal question of the impact of the EEC subsidised exports of agricultural products on the GATT rules; the question of the legality of the CAP with its export refunds has been a major bone of contention. In the last part, Part IV, the EEC's role in negotiating VER agreements and their legality under the GATT rules, in particular Art. XIX, were considered. Absence of international surveillance on VER agreements, with the only exception of the MFA arrangement and the failure of the VER agreements to take account /

account of the interests of third countries were pointed out.

The GATT agreement deriving its economic rationale from liberal trade theories and in particular from the theory of comparative advantage and specialisation postulated by Adam Smith and his followers, has been seen, since its inception in 1947, as the central international trade institution, under the auspices of which a large part of international trade is conducted. The remarkable expansion of trade in the 1950s and in particular in the 1960s resulted in the relative prosperity of postwar economies. The economic growth experienced mostly by developed countries, including the EEC member states, has been remarkable. Industrial and agricultural goods produced in the developed countries were needed by DCs and LDCs alike. In particular LDCs which had, meanwhile, gained their independence from colonial rule, started to develop an outward-orientated policy and imported a great volume of goods essential for their economic growth and development. Energy and raw materials were supplied at cheap rates to the DCs and labour in DCs was relatively cheap. But above all no controversies arose about the security of export markets. During this period GATT, despite its institutional weakness, worked relatively well. This could be explained in two ways, either because GATT was capable of responding to the needs and economic realities and therefore to the problems which arose at that time, or because no major problems arose as a consequence of conflicts between the contracting parties. The second alternative explanation is, however, more plausible, i.e. that no major problems had arisen as states were engaged in trade expansion and further economic growth. When problems did arise or disputes came before the GATT, they did not present serious difficulties in their settlement. Economic problems were not so pressing and governments were able to co-operate. Tariffs, which constituted the major obstacle to the free movement of goods, had been gradually reduced.

The GATT agreement, as part of the doomed ITO, was designed to deal primarily with tariff matters but, in view of the failure to establish an ITO, GATT became the single multilateral international trade organisation, which was called on to deal with a considerable number of trade matters other than tariffs arising at international level.

At this point it may be helpful to refer again to the discussion in Chapter 2 relating to the fundamental question with respect to the legal nature of GATT. What is the legal nature and above all the legal /

legal quality of GATT? Does the functioning of GATT imply that it, the GATT, constitutes a legal instrument? This question may seem, at least formally, justified in the light of the argument that GATT is not, after all, a formally ratified instrument and hence not binding; it is not, in strict legal terms, a legally relevant instrument. Such a radical or simplistic answer is not easy to defend with reference to what constitutes or does not constitute law in the sphere of international law. GATT is, formally, an international agreement, and has been treated as an international organisation by the contracting parties irrespective of the fact whether it is ratified or not. Is GATT a normative framework of reference? In answer to this question it is best to refer both to the intentions and to the practice of the contracting parties to deal with GATT as if it were a normative system. This, despite the fact that the system is incomplete, for example it lacks detailed methods of settlement of disputes and penalties for breaches of the Agreement.

After adopting the view that GATT, by virtue of the customary practice of its contracting parties, has to be treated as a normative framework of reference, i.e. as the de facto International Trade Organisation, constituting the foundation for international trade conduct, the next question to be dealt with is whether it is an adequate system on which the system of international trade can rest. The answer to this question is not definitely affirmative or negative. The fact that new dimensions in the practice of the contracting parties have developed, in the form of trade restrictions, may be interpreted as an indication that its effectiveness is open to question. Nevertheless, the contracting parties have sought to strengthen, improve and enhance it, so as to cover major areas of economic activities, which have been left out of the scope of the G.A.

However, since the monetary crisis of 1971 and the oil embargo of 1973, international trade has slowed down. World recession, unlimited production, reduced demand, expensive energy and raw materials, expensive labour in DCs, agricultural self-sufficiency, the tremendous expansion of the Japanese external trade in industrial goods, relatively cheap labour in the New Industrialised Countries (NICs) and the emergence of the latter as competitors in the international trade scene, have put free-world trade under severe restraint.

Unforeseen /

Unforeseen and too rapid changes in world trade patterns have had an unfavourable impact on the legal assumptions underlying the world trading system. The GATT agreement, designed to accommodate gradual changes in international trade patterns, has been unable to cope with substantial shifts of trade patterns in short periods of time. The fundamental GATT principles, i.e. the MFN principle of non-discrimination and the principle of reciprocity have been challenged as to their significance. Their application to states at different levels of economic development has become, therefore, a very complicated matter.

There is no doubt whatsoever that the MFN principle has contributed to the liberalisation of trade, in particular to the extent that it has permitted the system to evolve from a bilateral to a multilateral system. Nevertheless, continuous deviation from its application under the current economic climate makes it extremely difficult to accept that the MFN principle is still held to be as important as it once was. Exceptions to its application, notably included in Part IV of the G.A. which accords differential and more favourable treatment to LDCs, in Art. XXIV, permitting the formation of customs unions and free-trade areas and the establishment of the GSP for the benefit of the LDCs have all undermined the basic GATT principles and in consequence the GATT legal system as a whole. All these circumstances lead us to consider whether the twin principles of the MFN and reciprocity are the dominant tenets on which international trade should currently be based. In theory they have been seen as the most important means for establishing equality and achieving free non-discriminatory world trade. In practice, however, the extent to which they can apply has been questioned. To date experience has shown that they have been unable to be applied even with the greatest degree of flexibility. The MFN objectives may be questioned in the light of the fact that its application today is becoming the exception rather than the rule. The principle of reciprocity has been supplemented by the principle of non-reciprocity in particular in favour of the LDCs, but it is worth noting that after the Tokyo Round a drift back towards reciprocity has been developing, promoted by the EEC and the USA with respect to certain NICs. The Community has been, however, a leading force in moving towards non-reciprocity.

Therefore, in the light of these developments, the GATT provisions are not always respected, and the GATT has consequently been deprived of the basis on which it has relied.

As /

As has been discussed throughout this thesis, the G.A. was initially established to reduce and eventually eliminate tariffs and in this respect GATT has been quite successful. Through MTNs' Rounds, tariffs have been substantially eliminated. The GATT agreement based on the assumption that world trade should be based on a free non-discriminatory trading system has prohibited in general the use of barriers to trade, in particular NTBs, as the most serious obstacles to the free movement of goods. However, exceptions permitting quotas have been made possible either through reference to corresponding terms written into the GATT Articles or later permitted under a waiver or another arrangement, such as the MFA, when special criteria are met. Moreover, the G.A. has permitted the imposition of some restrictive measures to safeguard domestic industries or producers, provided that special reasons exist, e.g. as those permitted under Art. XIX (Emergency Action on Imports of Particular Products), or negotiated through the MTNs.

Despite this general prohibition, however, various restrictions of a non-tariff character have emerged. Under various forms restrictions of a semi-legal or illegal character are frequently applied today and have replaced tariffs. NTBs are used to a dangerous extent in one form or another and have, therefore, undermined the GATT legal system. Protectionist measures by DCs have multiplied, directed not only against LDCs' exports, but also against DCs' exports. Quotas or other restrictive practices, either authorised or not under the GATT system have been extensively used and their proliferation has had negative effects on the system. For areas of conduct which are not covered by the G.A. the use of NTBs has taken unprecedented dimensions. (For further information see Chapter 2).

NTBs were the main item of the agenda during the Tokyo Round, but the complexity and sensitivity of the issue gave no great hope for their liberalisation. The Agreements, or the so-called Codes, established during the Tokyo Round and the revised Anti-Dumping Code established during the Kennedy Round, whilst being an improvement of the GATT system, have proved insufficient to further trade liberalisation. The Code on Subsidies and Countervailing Duties, as the most important, has not been capable of limiting subsidised exports which distort international trade. A major limitation in the system lies in the fact that there is lack /

lack of an efficient mechanism to interpret and define concisely vaguely formulated legal terms, such as "material injury", "equitable share", "market disruption" et al. It is certain that as long as those terms are not multilaterally interpreted, problems will continue to arise and to cause tension. In particular, as far as subsidised exports are concerned, major disputes will arise between developed countries, despite the existence of the subsidies Code. This is mainly due to the inability of the Subsidies Code to tackle the problems, notably define and interpret with precision, and on an agreed multilateral level, disputed norms of legal ambiguity and give them a more concretely applicable and possibly enforceable effect in practice.

The disputes settlement mechanism is another area which deserves special attention. Consultation has been seen as the first step and the necessary prerequisite for the settlement of disputes, until a satisfactory solution has been reached. The importance of the consultation procedure has been frequently stressed, as one of the most fundamental factors in the settlement of disputes, not to say perhaps the best method for achieving the best results. There is growing need amongst trading countries to consult and co-operate especially in emergency situations until a satisfactory solution has been found. The contribution of the consultation procedure may prove to be remarkable in the sense that it may potentially be capable of dealing with disputes. However, consideration of the concrete cases of disputes reveals that the existing dispute settlement machinery is not capable of coping with the disputes which have arisen. In the GATT the only articles concerning dispute settlement are Articles XXII and XXIII. As they had been designed to deal with trade disputes at their early stages, they are incomplete and consequently they have proved unable to settle certain disputes. Growing criticism over the inadequacy of the dispute settlement machinery is currently more than evident.

Working Parties and Panels constitute the principal bodies before which disputes are brought for consideration. However, the inadequacy, in particular of the Panels, is acknowledged. This is due to the fact that the role of Panels or Working Parties is not well defined. Throughout this thesis we have, in many cases, observed their ineffectiveness and inadequacy. Their findings and recommendations are characterised by /

by inconclusiveness and indecisiveness. Disputed legal terms have not been defined and interpreted definitively. In almost all cases considered by Panels or Working Parties, no concrete conclusions have been reached. For example, the ineffectiveness of the GATT Panels is illustrated in the sugar subsidies cases, brought against the EEC's sugar policy by Australia and Brazil (discussed in Chapter 6). Panels have proved to be ineffective and they often have referred the cases to the CONTRACTING PARTIES. They, Panels, usually play the role of a mediator or conciliator. In principle their members are appointed as independent of their governments, but in practice they cannot act in isolation of their own government policies. Accordingly, Panels are vulnerable to political influence which leads them to reach no definite conclusions or recommendations. In the light of this situation confidence in the system is lacking. In consequence, enforcement of weak decisions or findings cannot be expected.

Therefore, an effective mechanism for the settlement of disputes is of fundamental importance for the proper functioning of the GATT system. Such a mechanism, either in the form of a Court or some form of independent evaluation, is the heart of every system at every level, national or international. At the Public International level, the International Court of Justice, or at European level the European Court of Human Rights have been established with the ultimate objective of defining and interpreting disputed legal norms and finding solutions to the problems. In a highly sensitive area, such as international economic relations, the lack of an adequate mechanism to settle disputes constitutes a serious shortcoming of the international trading system and there has been acknowledged the need for the establishment of an effective mechanism whose decisions should have binding effects. The GATT rules (Arts. XXII and XXIII) are not adequate and therefore improvement is necessary. The ITO contained detailed provisions for establishing Panels for the settlement of disputes. A reference to those provisions might guide us, so as to improve and further elaborate the system. However, establishment of a respectable dispute settlement system which would provide for an adequate enforcement procedure is needed, in order to give effect to the relevant decision or findings and furthermore make the whole GATT system applicable and effective.

Furthermore /

Furthermore, it is worth noting that no sanctions of any kind (apart from retaliation) are provided. It is believed by most authors, as an example, Jackson, that sanctions at international level are inappropriate but it is submitted that sanctions at international economic level can work and in particular make the weak states feel security and trust in the system.

However, some improvement in the dispute settlement system was made during the Tokyo Round. It is significant that individual procedures for the settlement of disputes have been established in the Subsidies Code and in the Code on Government Procurement. Furthermore, it has been proposed that a separate dispute settlement code be established. But for the time being so many conflicting interests are involved so as to make the establishment of such a code an extremely difficult, if not impossible, matter.

Notwithstanding the limitations of the dispute procedure, it is important to point out one of its benefits. It may provide the weak state with the opportunity to present its problems at multilateral level and gives greater hope for a more equitable and just settlement, than would be the case if the dispute were solved at bilateral level.

The question of whether the GATT legal structure is suitable to accommodate DCs and LDCs' interest alike is of fundamental importance. The GATT agreement in principle accommodates both DCs and LDCs. The text of the agreement, as it was envisaged in 1947, makes no particular reference to favourable treatment for LDCs, with the exception of Art. XVIII which placed weak states in a more favourable position. In paragraph 4 it provides that a contracting party which is in the "early stages of development can deviate from the provisions of this Agreement". However, gradual preferential treatment has been accorded to LDCs. This has been achieved, through Part IV added to GATT in 1964, and providing for a more favourable and differential treatment to LDCs. The introduction of the GSP under a GATT waiver and also the Enabling Clause established during the Tokyo Round MTNs have, in fact, been seen as a permanent legal basis for differential and more favourable treatment for LDCs. But despite this move, a great degree of disparity exists today between developed and developing countries. The EEC, the USA and Japan are those countries which dominate /

dominate GATT affairs and are the major beneficiaries from the operation of the GATT. They have sufficient bargaining power to achieve their objectives. On the other hand, LDCs do not have the same bargaining and political power as that exercised by DCs, nor do they have the power to retaliate, nor to push for liberalisation of trade in products in which they have particular interest. The LDCs position is still very inferior. Despite preferential treatment, LDCs have not greatly benefited from membership of GATT. Protectionism in the developed countries has had detrimental trade effects on the LDCs. Protectionist measures have been introduced at a time when LDCs had started to develop outward orientated economies. Protectionism, combined with reduced demand, has had very negative effects on the LDCs' export growth. The particular example of textiles illustrates this problem. There has been some beneficial effects on the LDCs' trade, but they are not sufficient to help LDCs to develop further and compete with the industrialised world. In this context some LDCs, the most advanced, i.e. the NICs have emerged as competitors on the international trading scene. This shows the gradual shift of economic power from developed to developing countries and a change in the pattern of world trade. It is imperative that the NICs should use their competitive power in international fora, participate fully and assume more responsibilities, in order to gain a more advantageous position. Their political influence and increasing bargaining power should be used to the greatest possible extent so as to bridge the gap between developed and developing countries.

The existing legal system, based on the principle of equality and non-discrimination and the principle of reciprocity has been challenged by the participation of the LDCs. The principles concerned have lost their dominant importance and therefore, the GATT system has been deprived, to some extent, of its legal foundation. In fact, the GATT system, despite the preferential treatment embodied in it and accorded to LDCs, does not seem suitable to sufficiently accommodate LDCs' interest, and enable them to meet the expectations for greater economic growth and industrialisation.

Products which are included in the liberalisation process during the MTNs under GATT auspices are mainly those produced in DCs, whereas products which are of interest to LDCs are mainly excluded from the /

the liberalisation process (e.g. textiles and footwear in which LDCs have a comparative advantage). Tariff cuts are greater on products traded among DCs. For textiles and footwear, apart from the quotas imposed, there are in addition higher tariffs. Although special favourable treatment is provided for LDCs, the higher tariff rates applied on LDCs' exports are, nevertheless, inconsistent with the spirit of the "special and more favourable treatment" that is expected to be granted to LDCs.

For Least Developing Countries (LLDCs) their participation in GATT has yielded minimal benefits. Their voice has not been strong enough during MTNs. Even in Part IV of the G.A. no mention is made of the very particular needs of the LLDCs. However, LDCs and primarily the NICs should take the lead and increase their voice at international level, with the ultimate aim of changing the GATT legal structure and bringing it up to date. LDCs, although unhappy with the existing legal system have not made any proposal to replace it. In general terms LDCs have to a limited extent benefited from their participation in GATT and they want the principal provisions to be maintained, provided that exceptional treatment for them should be permanently established within GATT.

One cannot deny that the GATT system, despite the shortcomings and limitations has, to some limited extent, helped the LDCs to develop and diversify their economies. It has, at least, assured the LDCs that there is a multilateral body to which they can resort against the abusive power of other powerful parties. What is fundamentally important for the LDCs is an assurance that the rules and principles of the system are observed by the major trading partners.

Finally, despite the shortcoming of the GATT system, it is of fundamental importance that the LDCs participate in it. If LDCs were altogether excluded from the system, it may be possible that their economic position would be far worse, because bilateral dealings to which LDCs would be exposed are not preferable to multilateral negotiations.

A possible improvement might be to develop the international trading system in such a way as to incorporate different economic groupings and diversify them in accordance with their geographical position /

position and above all the stage of their economic development. For example a classification of countries as industrialised, advanced developing countries, developing countries and least developing countries according to their GNP could prove beneficial. Common rules and principles could be established applicable to the greatest possible extent to all countries and also separate provisions suitable to each particular group, could be provided in accordance with each group's particular needs and interests. This consideration stems from the assumption that NICs cannot be given the same treatment as LLDCs, or leading industrialised countries, equivalent treatment to weak states, because of their classification as DCs.

GATT was created by the major trading nations and its rules reflect the attempt to accommodate their particular needs and interests, failing to take account of the particular problems of the LDCs. The DCs views and in particular that of the EEC's on the world trading system and the rules governing it have turned into a demand expressed by the DCs to see it accepted and applied by the LDCs. The addition of Part IV to the G.A. has alleviated the harder economic problems of the LDCs to some extent, but it has not established a different legal position for them. The legal structure of GATT has not yet been amended so as to establish a permanent differential treatment, whenever needed, for the developing world. More favourable treatment which is essential for their growth and industrialisation and for ensuring stability and world peace, should be accorded to LDCs. Thus, it is imperative that the DCs should make the concerns of the LDCs their own, discuss their problems and grant more concessions to countries in need. In the light of the uncertainty and lack of clarity related to the GATT rules, uncertainty related to economic problems will continue to prevail.

In the context of the existing international trading system as described throughout this thesis, and specifically in Chapter 2, the EEC has been called on to submit to multilateral trading rules the operation of its common external trade policy and should make every effort to observe those rules and principles when negotiating with third countries or participating in Multilateral Trade Negotiations (MTNs).

In the implementation of its CCP the EEC has to take into account /

account the interests of third countries, whether contracting parties to GATT or not. The area which undoubtedly comes under the Community's competence is the area of control over the CET. On most other matters such as trade, industrial, monetary and technological matters the Community has no real competence. Beyond the Community's competence, the member states may negotiate bilateral friendship trade agreements with non-member states, provided that the agreements concerned will not constitute an obstacle to the implementation of the CCP. That is due to the limitations inherent in the Treaty of Rome which omits consideration of several aspects of commercial policy.

Difficulties arise in the application and implementation of the CCP because of the ambiguity of certain EEC Treaty provisions and in particular Art. 113. Art. 113 is written in general terms and no details are given for the adoption of a CCP. In fact, the common application of the CCP is extremely difficult. Many issues and conflicting interests are involved sometimes inside the Community and sometimes outside it, so that the commercial policy cannot be a common one in the sense of the CAP, but remains rather a co-ordination of policies exercised by the member states based on uniform principles and taking into consideration the interests of third countries. Even the founders of the Treaty had found it difficult and they had not agreed on the concept and application of the CCP. The uncertainty over legal issues and its high vulnerability to political influences make the implementation of the CCP an extremely difficult matter.

We have seen throughout the present thesis that a CCP has not been implemented on several occasions. For example, when the EEC had negotiated with Japan on various issues, a common Community stance was not achieved. In the Euro-Arab Dialogue, for purely political reasons, no common approach has been achieved. In the EEC's relations with the Eastern European countries although a CCP in principle had been adopted, yet in practice it is more apparent than real. In the latter case co-operation agreements are concluded on a bilateral basis by member states with the Eastern European countries in accordance with a consultation procedure. Also, when the Community was negotiating for the first MFA no common Community approach was attained at that stage. The same appeared in negotiations with some other countries or groups of countries. Certainly it is not always the Community which /

which is responsible for this approach. The CCP falls within the area of international economic relations and it is affected by their regulation. A common approach on commercial matters is extremely difficult to achieve. This may be attributable to the fact that the CCP is addressed to the outside world and therefore it is fragmented in view of the different legal, economic, political and social conditions, governing international economic relations. For example different conditions exist for the Associated states, for industrialised countries, for non-Associated countries, for state-trading countries and so on.

Within the GATT framework, the Community is presumed to have exclusive competence over commercial policy issues. In this context it, the Community, has taken a common stance on tariff matters and also in some other areas of commercial activity negotiated within its context. On tariff matters, the G.A. and the Community have both contributed to the reduction of tariffs. The EEC, by taking a common stance on CET matters, has contributed to the liberalisation of tariffs. It might be possible that if GATT had succeeded in negotiating effectively in other commercial policy issues such as NTBs, this would have a favourable effect on the evolution of the Community's Commercial Policy. Nevertheless, having regard to the inadequacy and the ineffectiveness of GATT the CCP could not be very successful. This is one reason which explains the Community's inability to implement its CCP. On the other hand if the Community had succeeded in formulating a CCP towards the outside world that would be favourable to the evolution and development of the GATT. Therefore, both the EEC and the GATT are highly interrelated and the behaviour of the one has an immediate impact on the other.

Nevertheless, the CCP is important in regulating trade among states, despite its fragmentary character and lack of uniformity. It might be useful if common principles could apply to all countries, but separate provisions should be established applicable to different categories of countries according to their economic position. The founders of the Treaty realised how difficult the implementation of a common policy was and therefore in Art. 113, EEC, they did not provide detailed rules for the implementation of a common policy. It seems that they had perceived and understood the implications which a common commercial /

commercial policy could have had in recent years, but they could not agree on rules especially in the external sphere.

So far, the Community's embryonic commercial policy has not proved beneficial to the evolution of the GATT system. In particular, the Community's as such and its member states' protectionist tendencies in recent times have had unfavourable effects. As each country and each industry tries to protect itself from foreign competition, the CCP can hardly reach the level of a common policy in many respects. Individual interests and political forces involved in a so highly important area of international economic relations make a common approach extremely difficult.

One important question to be asked is whether the EEC external trade policy has contributed to integration or disintegration of GATT. The answer to this question is very difficult. It is clear that the Community's policy has not helped GATT to integrate. If the CCP had been implemented applying common rules and principles to the outside world that would mean for GATT that it could be in a position to benefit from the implementation of the CCP and therefore in the long-run broaden its objectives and fulfil its aims.

In general, however, the Community's policy can be beneficial on the GATT system as long as the Community pursues liberal trade policies towards the outside world. If the Community follows protectionist policies then we cannot expect its contribution to the GATT system and to the world economy as a whole, to be beneficial.

In the EEC, the ECJ has recently dealt with some cases and opinions concerning the external relations of the Community, (see Chapter 3). In this context, it will gradually build up a system of Community common law applicable to the Community's external relations which, in the course of time, can become more precise and detailed. Thus the ECJ will build up a body of case law, which may contribute to the general development of law at the international economic level.

One of the most problematic areas in the context of the EEC's external trade relations falling within the jurisdiction of the GATT system, which has been considered in the present study concerns the EEC's approach to the third world, i.e. the EEC's Association policy. Since /

Since the establishment of the EEC this issue has been one of the most disputed and controversial. The GATT agreement and in particular Art. XXIV provides that customs unions or free-trade areas are permitted to operate within its framework, provided that their aims and objectives are not contradictory to its (GATT rules). In fact, regional arrangements were to be included within the GATT system. Although in the late 1940s few regional arrangements existed, they have been encouraged within the multilateral framework in order to increase freedom of trade, integration between economies, to accelerate development and promote rational allocation of world resources. Regional arrangements had been seen as gradual steps towards freer non-discriminatory world trade and therefore Art. XXIV was included in the GATT. It was envisaged that free world trade would be, at first, achieved gradually through smaller international economic groupings and later would take place at international level. Art. XXIV was seen as an important attempt to increase world trade and help the world trading system develop. Art. XXIV has put regional arrangements under multilateral control and has tried to maintain a balance between those countries participating and those not participating in regional arrangements.

Apart from customs unions or free-trade areas however, no other regional arrangements have been permitted within the GATT system. With particular reference to preferential agreements they are forbidden, except those previously in existence. Instead the G.A. provides for the system of a waiver from its rules, which can be obtained when a certain action is not in conformity with the GATT rules. It is worth noting that the EEC is the only bloc which has negotiated a large number of preferential agreements. In the case of the early preferential agreements a waiver could have been obtained by the EEC, but felt that there was no need to do so. The existence of the preferential agreements and their further proliferation has raised several questions however. In particular their application and their submission to the concept of regional arrangements and their impact on the GATT legal system has been examined. In accordance with the GATT rules, when regional arrangements are formed they should be submitted to GATT for approval. Therefore, all preferential agreements should be submitted to GATT, although there is no need to do so in the case of other agreements, such as commercial agreements. The particular aspects /

aspects of the regional arrangements should be examined in the light of the GATT rules. So far the GATT has approved all regional arrangements which have been submitted to it, although they were not in full compliance with its requirements.

The EEC, which is based on a customs union, was submitted for scrutiny to GATT. The EEC which is considered to be the only complete customs union so far had been subjected to a great deal of criticism. Its CET, its QRS provisions, its agricultural provisions and in particular its provisions concerning association with overseas countries and territories of the member states were the main legal issues, which were discussed by the Working Party. But the question which became the bone of contention concerned the EEC's association policy. Long and arduous discussions took place concerning this issue, and different opinions were expressed by the contracting parties. The interests of the EEC and of the LDCs had to be taken into consideration. The EEC had pressed hard that the association provisions be considered as being in compliance with the GATT rules. The LDCs outside the associated policy framework were at that time either under colonial rule or too weak to react. The USA supported the EEC in its arguments and so did the other major industrialised countries.

The GATT Working Party tried to reconcile the interests of both the EEC and the LDCs and interpret the relevant issue very broadly. Some members of the sub-group strongly criticised the EEC association policy as being contrary to GATT. During the negotiations and "in several instances reconciliation of interests was brought about by adopting measures that were in violation of the GATT rules or at least close to the line". (See above Chapter 4, p. 113.). The statement of the Working Party that "it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Art. XXIV of the G.A." was very characteristic of the adherence to the practical problems and to their potential influence which has marked the future of the preferential agreements. In the end the Working Party, despite controversies on the various issues involved, did not explicitly approve the EEC as a customs union consistent with the GATT rules, neither did it recommend any measure to be taken, nor disapprove the arrangement as it stood.

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An important legal question which can be raised at this point of the discussion is whether Art. XXIV makes the formation of a customs union or a free-trade area dependent upon an approval on the part of the CONTRACTING PARTIES to GATT. From the foregoing analysis it is obvious that Art. XXIV does not empower the CONTRACTING PARTIES to set the necessary conditions for a legal formation of a regional arrangement such as a customs union. The contracting parties are only competent to find out whether such arrangements are compatible with Art. XXIV or not. This means that it has been the CONTRACTING PARTIES which have determined the compatibility of the EEC Treaty with the provisions of the G.A., without having examined whether the EEC as a customs union meets the necessary requirements or not. In particular, the issue of preferential agreements was accepted within the GATT system in practice as a measure regulating international economic relations. The Working Party's report was characterised by its vagueness and inconclusiveness. The report, however, has constituted a precedent on which all subsequent preferential agreements have relied to justify their position as measures complying with the GATT rules. This case illustrates the fact of how the leading trading powers (EEC, USA) have influenced GATT affairs and how the GATT system gave way to the EEC's demands. In consequence the GATT's legal structure has been weakened by the EEC's participation and gradually become ineffective to deal with these particular problems.

Thereafter the EEC negotiated a great number of preferential agreements, e.g. with AASM, later Lomé countries, and with the Mediterranean countries. In every case when an association agreement is negotiated it is submitted to GATT for consideration. Specifically the Yaoundé Conventions, the Arusha Convention, the Lomé Convention, the association agreements with Greece and Turkey, the association agreements with all Mediterranean countries were submitted to the appropriate procedure in GATT. No definite conclusion was reached in any single case. The provisions concerning the association agreements of the EEC Treaty have been tacitly accepted within the GATT system and they have constituted a precedent for following association agreements. In all cases pragmatic considerations had to be taken into account. The EEC's point was that the essential principles of free-world trade have been maintained and that its association agreements /

agreements have not violated the spirit of GATT, In particular after the GATT amendments in 1955 and 1964 the EEC had maintained that the principle that LDCs should receive differential and more favourable treatment was accepted by the international Community and has been contained in a number of important issues of the CONTRACTING PARTIES. The Community had strongly supported the maintenance of preferential agreements especially after the application of its global Mediterranean policy. It further maintained that preferential agreements aim primarily at the economic and social benefits of the LDCs and therefore the objectives and aims of the agreements coincide with the objectives and aims of the G.A. and the EEC. Treaty. In fact, after the amendment of GATT and the addition of Part IV, preferential agreements are accorded more sympathetic treatment in GATT. Furthermore, it seems that the aims and objectives of Part IV coincide with the Lomé Convention which aims at the improvement of standards of living and at the economic development and industrialisation of the LDCs.

In this context an important question which can be treated concerns the effects of the preferential agreements on the countries involved, on those not involved and on the world trading system. There is no doubt that the countries involved have benefited from preferential agreements. Even the hardest critics cannot deny the beneficial effects. Nevertheless, there are complaints for example in ACP countries about the EEC's sugar policy and the limited effects of the STABEX system, but the overall impact is beneficial. On the other hand the non-associated countries are unhappy because they feel discriminated against and point out that the association agreements have worked to their detriment. There is no doubt that preferential agreements cause distortions in favour of the preferred countries, especially for the most advanced of them as against LDCs' and LLDCs' interests. The citrus fruit case discussed in Chapter 5, which ended in a compromise between the EEC and the USA, has illustrated the disadvantageous trade position in which a third country (Brazil) found itself, because it did not have links with the EEC in any kind of preferential agreement. Comparing the EEC's preferential agreements, notably the Lomé Convention and the association policy with the Mediterranean countries, with the agreements with the non-associated countries or those outside the preferential framework we may reach the following conclusions :

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The associated countries enjoy more benefits than any other LDCs or groups of LDCs. They have duty-free access to the EEC. Tariffs and QRs have been substantially reduced. For example, the Lomé Convention is more generous in trade co-operation in agriculture where practically all GSPs schemes are relatively weak. The associated countries want the maintenance and improvement of the association agreements. Even for sensitive products like textiles the association agreements contain no additional restrictions.

Financial and technical support is provided for the associated countries. The Lomé Convention which is the most favourable arrangement provides the STABEX system for the stabilisation of export earnings and furthermore it, the Lomé Convention, establishes the principle of non-reciprocity.

For the non-associated countries on the other hand financial and technological aid is not provided on the same basis as applicable to associated partners, and their exports to the Community are relatively limited. Furthermore, no scheme parallel to STABEX has been established, which could provide for security of their export earnings. Of course it is not easy to assess exactly the advantages enjoyed by associates, but it is certain that the EEC is not prepared to make similar concessions to the non-associates, nor is it prepared to establish a global policy towards the LDCs. The EEC, however, being aware of the fact that links with the LDCs are essential for its progress and economic prosperity and that some kind of balance should be attained between associates and non-associates, was the first to implement its GSP in 1971, obtained in a form of a waiver from the GATT obligations. The GSP grants all LDCs a relatively limited preferential status. It does not include financial transfer or measures for industrial and technological co-operation, nor does it include provisions for reduction of NTBs, and it cannot counterbalance the benefits given to the associates. Further, the GSP is of uncertain continuance and its reductions can be withdrawn unilaterally, without any reference to multilateral procedures. Also reductions at an MFN basis cannot be promoted.

Therefore, the GSP has not proved sufficient to offset the advantageous position attained under preferential agreements. The non /

non-associated countries consequently criticise the preferential agreements for the fact that they cause significant distortion of trade in favour of the preferred countries. The discriminatory character of the preferential agreements is stressed by many critics who believe that even if justified as FTAs, they would still be discriminatory. On the other hand the EEC has been criticised for its attempts to follow the tactics of "divide and rule" towards the LDCs and therefore, to prevent them from uniting. This is a particular problem in the light of current depressing economic problems.

A global approach for all LDCs is favoured by UNCTAD. However, this demand for uniform treatment to all LDCs has met with a lot of difficulties. The Brandt Report I, also supports a global approach towards the LDCs, facilitating thus their export opportunities in a uniform manner. It envisages that the industrialised world including the EEC should help the poor and it argues for the adoption of a radical change in their relations so as to open their markets to LDCs' exports. This could be achieved within the framework of the North-South Dialogue or within the GATT framework. In the GATT a separate approach for LDCs has already been achieved but the classification of the LDCs as advanced developing countries, developing countries and least developing countries, might help the establishment of a more fair and equitable world trading system, according to which each particular group should be accorded different treatment, in accordance with its economic development. This would seem a rational way of proceeding particularly if the GNP of each country were to be taken into account.

The Community has not reached a common external trade policy in respect of all LDCs, but deals separately with each group. That approach has been criticised as weakening the negotiating position of the LDCs within GATT. Such a common position is extremely difficult to achieve, since the LDCs' degree of development varies and therefore a common approach to the problem might not only be difficult but might prove unfavourable to the LLDCs. For example, as the EEC maintains, LDCs should not be given the same treatment as NICs. The latter's exports which are advanced and competitive should be more tightly regulated. Therefore, it is submitted that a change in trade rules with the third world is needed. With particular reference to NICs, the EEC Commission urges that they should assume some kind of responsibility and that differential and more favourable treatment should be granted to remaining LDCs.

A global approach towards LDCs should focus on the social and economic progress of the LDCs and particularly the least developed countries. A global approach can be achieved by granting more preferences to the non-associates and by not extending them to associates, in particular to the ACP countries. Such an approach would be beneficial to the Community's external trade relations to the extent that controversies arising would be solved and criticism against its development policy would be diminished.

Nevertheless, the global approach forwarded by UNCTAD is difficult to achieve and implement. The EEC is not prepared to grant other LDCs the same preferences as to the associates in particular for the time being under the depressing economic climate of deepening recession and growing unemployment.

The EEC is the only trading bloc in the world which has developed thus far the system of preferential trade agreements. Whatever the limitations of these arrangements might be, there are certain beneficial effects for the countries involved. For the EEC, in particular, there are certain economic (e.g. security of supplies of raw materials), but above all political gains. The USA now proposes to offer to a number of countries in the Caribbean basin, non-reciprocal and preferential treatment access.

However, these preferential agreements pose a dilemma to the world trading system. Preferential agreements are not incorporated in Art. XXIV and therefore are not legal under the GATT system and in particular Art. I of the MFN principle. In practice, however, they have proliferated and have been accepted as measures equivalent to free-trade areas. Their existence in practical terms creates no problems in GATT. Dam has expressed the view that preferential agreements should be subjected to the same treatment under Art. XXIV as customs unions or free-trade areas. It seems that today this is the best proposition that can be made about the specific problems of preferential agreements and their position in the world trading legal system.

As we have seen throughout Chapter 5 association agreements involving a preferential character or any other preferential agreements concluded by the Community have been submitted to the GATT appropriate procedure /

procedure for consideration, according to its rules. The EEC's approach is that they constitute free-trade areas and therefore are in full compliance with the GATT. This approach has not been explicitly accepted nor rejected, however, by the GATT Working Parties. Preferential agreements have been tacitly accepted as measures regulating trade within the GATT system. In fact, their proliferation has made the GATT increasingly ineffective and its legal machinery of Art. XXIV inadequate to deal with the relevant problems arising from these agreements. In consequence, the MFN principle has been violated by preferential agreements. Although the GATT system in principle prohibits preferential agreement, in fact it has encouraged the formation and proliferation of such agreements. In consequence it is the GATT system itself which did not adhere to the rigid application of Art. I.

The EEC in the course of time has shown a preference for the conclusion of preferential agreements. As we have seen during the negotiation of the first agreements, i.e. the association agreements with Greece and Turkey and the first agreement with Israel, the EEC was very concerned about the respect for the GATT rules, whereas later it showed a clear preference for preferential agreements and therefore, it did not act in full compliance with the GATT rules. GATT, however, has shown its institutional weakness, when it was called upon to consider the first preferential agreements. Already, since the consideration of the EEC compatibility and in particular the compatibility of its association provisions with the G.A. and thereafter in the consideration of all the preferential agreements presented to GATT (e.g. association agreements with Greece and Turkey, association agreements with the Yaoundé countries, the Arusha Convention, the Lomé Convention and association agreements with Mediterranean countries), it was always the GATT which gave way to the EEC. As the proliferation of preferential agreements has weakened the MFN principle, the GATT system as a whole has consequently been undermined. Art. XXIV as it stands now has proved insufficiently capable of coping with existing economic and legal issues and therefore needs to be revised and updated, in order to have more control over regional arrangements. Therefore, an amendment of Art. XXIV in order to embrace all regional arrangements is recommended. The incorporation of preferential agreements into the GATT /

GATT framework (i.e. Art. XXIV) would sufficiently safeguard the interests of the non-associated countries, whose interest should be taken into account. Such an incorporation within the GATT system, however, might guarantee uniform preferential treatment to all LDCs. Already LDCs favour this approach. UNCTAD is pushing forwards for the adoption of this approach. The Tokyo Round has recognised that preferential treatment to LDCs should be accepted as a permanent feature of the world trading system, rather than as a temporary solution.

However, extreme caution is needed in drawing conclusions in such a highly sensitive issue. In fact, preferential agreements have fragmented the GATT legal system and in general the world trading system. As a consequence of the proliferation of preferential agreements the EEC faces the allegation of wrecking the GATT trading system. But the blame cannot go altogether to the EEC. It is the GATT which has tacitly allowed preferential agreements to operate within its framework and has deprived itself of its legal background, the MFN principle and the principle of reciprocity.

Therefore, the EEC with its extensive preferential framework has weakened the GATT system. On the other hand it, the EEC, has been a powerful force in regulating world trade and it has contributed to changing the GATT system, so that there is need to be adapted to the new conditions and new economic realities. Thus the EEC has contributed to the establishment of the differential and more favourable treatment to LDCs, in particular to the associated countries and to the establishment of the principle of non-reciprocity towards the ACP countries, incorporated in the Lomé Conventions.

In considering the compatibility issue of the EEC with the G.A. and in particular with Art. XXIV, a very important legal question can be raised relating to the legal status of the EEC Treaty within the GATT legal system. This question has never been raised or considered by GATT bodies, while it is open to question whether a customs union could accede to GATT under Art. XXIV. (Art. XXXIII admits accession of customs territories into the GATT provided that a customs union is recognised as "a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement /

Agreement"). The fact, however, remains that the GATT, despite the existence of a large number of customs unions, free-trade areas and interim agreements has not as yet developed precise rules for the interpretation of Art. XXIV and for the legal status of those arrangements in GATT. In this context, the EEC has gradually replaced its member states in their external relations, although member states still have some role to play by concluding jointly with the Community the so-called 'mixed agreements' or by exercising the voting power. The EEC since the Dillon Round has been accepted as a separate entity to conclude tariff and non-tariff matters within the GATT framework. The contracting parties to GATT have raised no question as regards the EEC's participation and have tacitly accepted the EEC's right to exercise rights and fulfil obligations under the GATT. The EEC is not a full contracting party to GATT and therefore its position is sui generis. While it has been integrated ipso jure as a de facto contracting party within the GATT, the question of gradual substitution of the member states in terms of the general principles of Treaty law or in terms of customary law has remained purely theoretical in GATT practice. For example, since the early 1970s, the EEC has substituted its member states in the dispute settlement procedure. Disputes are directed against the EEC as a customs union and not against its member states. At the same time the EEC member states have not been deprived of their legal membership status. Double participation by the EEC and its member states have been effected without the need for following a formal procedure. The GATT has avoided any precise and legal definition concerning the legal status of the EEC in GATT, as practical considerations have prevailed.

It is a fact, however, that international law has not yet developed generally accepted rules on the legal issue of succession of international organisations to the rights and obligations of their member states and on their participation in other international organisations (e.g. the EEC in GATT). This sensitive legal issue has been tackled not by the establishment of relevant legal rules but by adherence to pragmatic approaches. There are these pragmatic considerations, nevertheless, in GATT and in MTNs committees which have resulted in the difficulty of determining precise legal rules. As a consequence of this, in GATT practice most of the legal issues raised since the creation of the EEC and thereafter during MTNs have remained theoretical.

As /

As has been discussed in Chapter 6 agricultural trade has been one of the most disputed and controversial issues. The G.A. makes no distinction between industrial and agricultural products, neither does it make explicit reference to agriculture. The EEC Treaty provisions, on the one hand, apply to both industrial and agricultural products, but particular reference to the latter is made including special provisions relating to agriculture in Arts. 38-47. In practice, however, identical treatment is not accorded in GATT for both categories of products. Agricultural products are treated as a separate sector more or less outside the GATT system. When the G.A. was drafted it was felt that there was no need to include separate provisions concerning agriculture. Later when agriculture started to cause problems the USA obtained a waiver in 1955 and thereafter it, the USA, was neither in a strong position to negotiate over agriculture, nor wanted to give up its agricultural waiver. The EEC on the other hand attached greater importance to the development of the CAP and obviously wanted to limit its international commitments. This attitude might be attributable, however, to the sensitive nature of agriculture. The need to stabilise farm incomes, to ensure national security in difficult periods, to secure food supplies in case of fluctuations due to weather, disease, etc., have made the regulation of trade in this sector an extremely complicated matter. However, due to the sensitive nature of agriculture, protection has become inevitable. The EEC's CAP has stemmed from this perspective, and established a system of high guaranteed prices, in order to stabilise incomes and secure food supplies. Agriculture has caused concern since the EEC's establishment. When in 1957 the GATT Working Party was established, with the aim of examining the most important areas which might be in conflict with the G.A., agriculture was one of the four main legal issues for consideration. The inconsistency or not of the provisions concerned (i.e. Arts. 38 - 47 EEC.) with Art. XXIV:4 had specifically to be examined. Sub-group C which was appointed to examine this issue, had to examine minimum import prices and the development of long-term agreements of the EEC Treaty and the problems that might arise as a result of their implementation. Therefore, the argument put forward by the EC that no barriers to trade had been raised by the EEC's CAP to other contracting parties had to be taken into consideration. The USA, the major protagonist in GATT affairs had /

had a similar support system mechanism and therefore was not in a position to press for free agricultural trade nor did it desire to do so in products covered by its own support system. The voice of the LDCs was non-existent at that time and no other country or group of countries was a major agricultural producer and therefore in a position to criticise the EEC's agricultural policy.

Under these circumstances the majority of the sub-group considered that it was impossible to determine the compatibility of the agricultural provisions with the G.A. In particular it considered that "neither the EEC provision as such, nor the Community institutions had acted contrary to their international commitments".

Nevertheless, the agricultural policy has been the most controversial issue throughout the history and life of GATT. Several of the major disputes in GATT have arisen over agriculture and especially between the EEC and the USA. Some cases illustrate the high involvement of the EEC's agricultural policy in the most difficult disputes which have arisen within the GATT framework. For example, the "cheese war" case, the only case which resulted in retaliation known as the "Netherlands retaliation", involved agriculture. The citrus fruit waiver case involving agriculture was directed against the EEC. The sugar complaints by Australia and Brazil involved agricultural products and were also directed against the EEC. Currently most of the trade disputes involve agriculture (e.g. Egypt wheat flour case). It is remarkable, however, that all those disputes involve one or another way the EEC. The consideration of the above and other cases throughout the present thesis, has illustrated the fact, that the EEC's agricultural policy has disturbed world markets. This disturbance is due to the price support system, established with the purpose of stabilising domestic markets and incomes. The CAP to this end has encouraged high prices which have led to increased output by exceeding its domestic requirements. Surpluses have had to be disposed of with the help of the required subsidies.

The CAP with its high subsidised exports has, therefore, created strains not only in the industrialised countries but also in some LDCs as well, which produce competitive agricultural products (e.g. the Mediterranean countries). Even in the Lomé Convention there is some restraint on agricultural products. The GSP also does not allow duty-free /

free access into the Community of agricultural products.

Although the GATT provides for the same treatment for industrial and agricultural products, agriculture is the sector which has not sufficiently been subjected to the liberalisation process. In practice it is not included in GATT. In particular the EEC has not accepted within the GATT framework similar treatment for industrial and agricultural products. It proposes that agriculture be treated separately. Agricultural committees have been established within GATT but no progress has been made towards trade liberalisation. The EEC attaches great importance to its CAP and in the GATT Conference in November 1982 it made it clear that nothing can be agreed which might adversely affect its CAP. The EEC refused to accept any commitment to include agriculture in the working of the procedures of the multi-lateral trading system. The USA supported the view that agriculture should be included in the negotiations, but any common approach was upset by the EEC's separate declaration over agriculture in the Conference.

Trade in agriculture is a peculiar case within GATT. The structure of the Community's agricultural policy, with its high price support system mechanism is contrary to the GATT approach to free-world trade. Therefore the agricultural policy as such does not fit within the GATT system. Agriculture is a peculiar sector by its nature and remains such in the way it has developed and functioned thereafter. The EEC and the USA both have high protection systems in agriculture. In the USA indirect payments to farmers, indirect subsidies, restrictive import policies, subsidised exports and in the EEC the high price support system mechanism, heavily subsidised exports, variable import levies, produce the same results. For the USA the 1955 waiver is still in existence. Consequently the USA is not in a position to push towards trade liberalisation in agricultural products, unless it is prepared to give up its agricultural waiver, an action which is unlikely to take place. The EEC on the other hand with its high protective mechanism and with its powerful political machinery does not intend to accept the regulation of agricultural trade within the GATT system. The GATT failure to liberalise trade in agriculture is due to these two trends: the insistence of the USA to retain its waiver and of the EEC to treat agriculture as a separate sector.

Agriculture /

Agriculture is a highly important area for all countries for many reasons. For the EEC its CAP is even more important because it provides one of the bases for its continuance and unity.

In the major agricultural producing countries and notably in the EEC many forms of protection have been employed, which are damaging to world markets. Alternative measures are also difficult to apply, as long as agriculture is excluded from international scrutiny. In particular subsidies as discussed in Chapter 6 distort international trade and also production in the sense that production is discouraged in countries with lower costs. According to Art. XVI of GATT, export subsidies for primary products are explicitly allowed under the GATT rules, provided that export refunds are not used to obtain "more than an equitable share of world markets". The EEC maintains that agricultural products, as primary products, can be subsidised and has often been accused of subsidising its exports. It resorts to Art. XVI to justify its actions. However, many legal questions have arisen as regards this issue, for example, when are the subsidies unfair? What constitutes an 'unfair subsidy'? What is "equitable share"? Lack of an appropriate body to interpret these ambiguous terms constitutes a very serious shortcoming of the system. The Australian and Brazilian complaints against subsidised EEC sugar exports illustrate the ineffectiveness of the Panels in reaching definite conclusions as to whether the EEC had obtained "more than an equitable share in world markets". Therefore, more concrete rules on subsidies are required. As we have seen, neither Art. XVI of the G.A., nor the Subsidies Code have proved sufficient to deal with particularly difficult legal problems. The interests of third countries are not sufficiently taken into consideration. Furthermore, recession has made the task harder. Subsidies are now used for the same purposes as tariffs and other trade restrictive devices which GATT was established to reduce. Common understanding and co-operation is fundamentally important. Adoption and implementation of a common position about interpretative problems is a delicate and very difficult area. In particular in agricultural issues adoption of a common position is extremely difficult. Many interests are involved both in the EEC and the USA, where powerful farm producer lobbies influence foreign economic policy-making of the relevant governments. /

governments. The USA tends unilaterally to interpret important terms, such as what are 'equitable shares', which the other countries do not accept.

The EEC's point is that its subsidies on agricultural products are not illegal under GATT Art. XVI:3 and the Subsidies Code. For example in the sugar cases no inconsistency of the CAP with international trading rules has been found. The Panels did not definitely conclude whether or not the EEC had obtained more than an 'equitable share' of world trade in sugar and therefore, whether or not the EEC's action was compatible with Art. XVI:3 and the Subsidies Code. But, nevertheless, they concluded that the EEC sugar policy had disturbed world markets.

Recently, however, a number of complaints have been raised by the USA against the EEC's CAP. Since 1980, in particular, the number of complaints directed against the CAP have multiplied. The USA maintains that the EEC has deviated from the principles and aims as set out in its preamble and Arts. 110 and 38-47 of the EEC Treaty, and that the CAP contradicts the GATT rules and in any case violates the spirit of the GATT. On the other hand, the EEC maintains that its agricultural practices are in conformity with the GATT rules and the Subsidies Code and the other relevant agreements reached during the Tokyo Round have only recently been put into operation. The EEC furthermore stresses that subsidies on agricultural products are permissible under GATT Art. XVI:3 and Art. 10 of the Subsidies Code.

However, USA complaints against the CAP illustrate the fact either that the EEC's practices violate the rules of GATT or that this revival of complaints gives the Reagan Administration the hope that the EEC farm policy might change through direct pressure and official complaints to the GATT. Obviously the USA's aim is to oblige the EEC to make more concessions and that is why it, the USA, maintains that the EEC's agricultural trade has distorted world trade. The USA is not blameless in this matter, since it has long had a waiver for its agricultural protectionism and it is now threatening retaliation.

The main problem today, however, is over-production and self-sufficiency in all the leading world trading powers. Therefore, uncertainty and confrontation at world level are unavoidable. Restrictions result from this practice. Problems are aggravated by the fact that agriculture /

agriculture has long been kept away from any form of international surveillance. It is worth noting in this context that the EEC in economic terms seems to win the cases brought against its CAP before the GATT in the sense that the conclusions of the Panels tend to a more favourable treatment to the EEC than its adversaries. It is argued that this is because the Community is a powerful trading power making excellent diplomatic representations and preparing its documents in such a way so that no one can overturn its arguments. The major question remains as to the impact of the CAP on the world trading system. Although export subsidies on primary products are permitted under Art. XVI:3 of the GATT and the Subsidies Code (Art. 10:3) there is no indication whatsoever that the EEC in subsidising its agricultural exports is acting illegally within the GATT framework. In practice however, the situation is quite the contrary. There is no doubt that some sort of uncertainty has been introduced into world markets and to some extent distortion of world trade has resulted. Such practices have not contributed to liberalising international trade in agriculture and therefore are contrary to the spirit of the G.A. and depress world markets. The EEC should exercise some kind of restraint over export subsidies, with a view to liberalising agriculture within GATT in a manner satisfactory and acceptable to the greatest possible extent to all contracting parties.

Another very important area which has been the subject of study in the present thesis relates to the EEC's involvement in negotiating VER agreements, which have had a great influence on world trade law. Most of the VER agreements are negotiated outside the scope of the GATT framework with the only exception being the MFAs. This means that all VER agreements, apart from the MFAs, have been negotiated bilaterally outside the concept of international trade rules, outside multilateral surveillance.

VER agreements are negotiated outwith the rule of GATT law and constitute a derogation from the basic principles of GATT, in particular the MFN principle, to the extent that they have shifted international trade from a multilateral to a bilateral level. Nevertheless in practice they have tacitly been accepted as measures regulating trade and they are preferable to other restrictive measures or to quotas. But although their practical importance cannot be denied /

denied, in particular as far as sensitive industries are concerned, yet their legal basis raises many questions. VER agreements are designed to deal with "substantial shifts in trade patterns in short periods of time". They are negotiated in areas where difficulties arise due to the unforeseen and too rapid expansion of exports which cause market disruption and where the domestic industries are unable to meet foreign competition. They aim at the reduction of imports which disturb markets.

VER agreements result from the weakness of the GATT system which does not provide sufficient safeguard provisions preventing or discouraging resort to VER agreements outside the norms of the international trading system. The GATT system has not adequately dealt with this specific problem. VER agreements produce to some extent the same results as quotas and they are both NTBs. For NTBs unfortunately, not much progress has been made despite the fact that during the Tokyo Round efforts were made so as to reduce NTBs. In the context of NTBs, VER agreements and OMAs have not even been considered. Multilateralisation of VERs is very important, therefore, as multilateralisation would help the system improve. LDCs complain about the adverse effects of the VERs on their exports (e.g. textiles, footwear) and are pressing that VERs should be subjected to international control.

The main safeguard clause is Art. XIX which provides for regulation of trade in some sensitive areas. Art. XIX authorises the contracting parties to take protective measures for domestic industries, when certain criteria are met. It is designed to reduce imports and to safeguard domestic markets, when there is evidence of serious injury. It is to cover emergency situations and for a limited period of time. In practice, Art. XIX has not proved adequate to cope with emerging difficulties, and has been ineffective in coping with VER agreements.

Multilateral surveillance over VER agreements would certainly benefit all countries involved, but not those outside VERs since the interests of third countries are not taken into account. The proliferation of VERs is detrimental to the world economy. Anxiety therefore, concerning the prospects of international trade and the GATT system /

system is widespread. Absence of multilateral surveillance was evident during the Tokyo Round, where no rules concerning VER agreements were adopted. Also the GATT Conference of November 1982 did nothing to prevent VER agreements, nor to improve the GATT safeguards rules. Therefore, the spread of protectionism and bilateral trade dealings have emerged as a threat to the GATT principle of multilateral trade.

In the light of this situation, an effective safeguards system is needed to face the difficulties, either through the revision of Art. XIX or by the establishment of a Safeguards Code. A Safeguards Code is currently under discussion within the GATT system, but it has proved difficult to establish a suitable legal framework. It is recognised that a multilateral control system of VERs is needed, although the major trading powers are not keen to move in this direction. Multilateral surveillance needs to be strengthened in order to prevent the abuse of both selective and global safeguard measures. This system should include an agreed framework of rights and obligation.

It is worth noting once more, that one of the most serious obstacles in the development of liberal trade rules is the absence of an interpretative machinery for the definition and interpretation of certain legal norms, such as "market disruption", which today remain unresolved within the GATT system. An improved safeguards system is needed, whether in the form of a revised GATT Article or a Code which would be capable of dealing with emerging difficult situations, so as to enable industries to adjust. For the LDCs especially, an effective and open safeguard system is so important for the further growth of their exports. Therefore, adjustment should be the task ahead and not protective measures. Protection is not an alternative to adjustment. Nevertheless, certain sensitive industries need protection in order to adjust and compete, but unlimited use of VERs leads to different results. Protection whenever necessary should be brought within the GATT system, where it would be under pressure of international control and subject to bargaining. This is the rationale behind introducing safeguard clauses into any multilateral economic text. VERs in fact represent the inability of industries to adjust to competitive pressures and to co-operate. This tendency towards bilateralism and sectoralism is a great danger to order and prosperity in /

in the world economy. The negative consequences of VERs are more depressing, when the governments having already used VERs and having overcome the difficulties, are unwilling to make the necessary adjustments which the system demands, and for which VERs are normally adopted. Protective measures within the context of Art. XIX or within the appropriate codes should therefore be established as an exception and not as a rule, aiming at helping the sensitive industries to cope with current difficulties.

The particular example of textiles deserves, however, special attention. Textiles is the most developed manufacturing sector in LDCs and they attach great importance to this sector as the basis for their industrialisation and export growth. Since the early 1960s the need for an orderly arrangement of trade in textiles has been recognised. The MFAs have been negotiated within the GATT system as a legal basis for regulating trade in textiles. Therefore, respect for the GATT rules and for multilateral surveillance has been acknowledged. Having regard to the fact that the MFAs are the only arrangement negotiated within GATT, their significance on the world trading system is remarkable. The MFAs are an exception and it can be said an unavoidable exception and derogation from the GATT rules. In fact, no waiver was requested, but these arrangements constitute measures equivalent to waivers. On the other hand if no such arrangements had been negotiated, MFAs either would have been negotiated outside the GATT system, as with other VER agreements, or an amendment to the GATT rules would have taken place or import quotas would have been established unilaterally to reduce imports. The MFA came into existence in order to avoid unilateral import controls, unfavourable to importing and exporting countries and to legalise an action which would violate the most basic principle of GATT, the MFN principle of multilateral trade. Accordingly, trade in textiles is regulated through bilateral agreements, which are subjected to multilateral control. However, particular attention was paid to the MFA when it was negotiated, in order to bring it into line with the other GATT rules, such as Arts. XIX, XII, VI and XVI. The participating countries stressed the need to safeguard their domestic industries in case of "market disruption" arising out of unregulated expansion and too rapid influx of imports from low-cost suppliers.

The LDCs are unhappy with the MFAs. They restrict imports and /

and prevent LDCs from industrialising. It is regrettable that restrictions in trade in textiles came into being when LDCs had developed export orientated policies in this sector. The DCs, in particular the USA and the EEC have developed very protectionist measures and they have negotiated a series of bilateral restrictive agreements. The EEC has negotiated with its Associated countries (e.g. Mediterranean countries) restrictive agreements and even with some LLDCs such as Bangladesh. Also its GSP does not include textiles in the category of products which can enter the Community duty-free. Despite this the EEC claims that it is the only major economic bloc which grants substantial tariff preferences for textiles. The fact, however, remains that tariffs on textiles are higher than in any other manufactured sector (more than 10%).

The MFAs are designed to protect sensitive industries in DCs and give them "a breathing space" to adjust and also to maintain further economic growth and social development in LDCs, with the ultimate objective of liberalising trade in textiles. Yet in practice the MFAs grew very restrictive in particular the second and even more the third. It was hoped that the MFA would be a temporary arrangement, yet adjustment has not taken place and it has developed as a permanent feature in regulating international trade in textiles. Therefore, so far, the objectives of the MFAs have not been fulfilled as was originally envisaged.

The textiles sector in DCs undoubtedly faces critical times and a kind of protection is even recognised by LDCs as being necessary. This is due to many reasons, primarily to high productivity growth and to reduced demand. The LDCs have strongly protested against the extension of the MFA, in particular when the third MFA was to be re-negotiated. During these negotiations LDCs were uneasy about the protectionist measures taken by industrialised countries and demanded free trade in textiles.

For the LDCs and in particular the NICs, the impact of the MFA is not favourable. MFAs grew more restrictive and discriminated against their exports. This discrimination is more than evident in the light of the reciprocal arrangements applying in trade relations between /

between developed countries. NICs are substantially affected, but the magnitude of the damage done to LLDCs is more detrimental, for it affects a great part of their economy. The impact on employment in those countries has also unfavourable repercussions, having regard to the fact that the clothing industry especially is a labour intensive industry and the most prosperous in LDCs. This damage to exports in products in which LDCs have a comparative advantage in consequence affects the world economy as a whole.

Numerous studies undertaken on this matter indicate that imports from low-cost suppliers in the EEC market do not cause such a market disruption as that created by other factors (e.g. productivity growth). Also imports from DCs are detrimental to the EEC industries and more disruptive than imports from LDCs. The MFAs have not proved beneficial to DCs either, because adjustment has not taken place. Only if adjustment takes place would there be some hope for an orderly return to liberal trade, order and prosperity. Otherwise, as long as protectionist attitudes prevail, there would be no such hope. Consequently, the MFA has not proved sufficiently flexible to reduce low-cost imports into the Community, neither to enable the industry to adjust and compete.

An important point which should be stressed is that the MFAs are designed to control trade in textiles and textile products between developed and developing countries, whereas the respective trade relations between industrialised countries are subject to reciprocal treatment. As far as the other VER agreements are concerned (e.g. agreements in vehicles, footwear, electronics, steel) they have been negotiated between the industrialised countries involving notably Japan. In these areas of economic activities, Japan's success and tremendous expansion of industrial products and the need to dispose of them on world markets, has created stress in particular in the EEC and the USA markets. In consequence, Japan's participation in the GATT is attributable to changing the pattern of world trade law to a certain extent.

The problem of accommodating Japan into the GATT system has raised many questions. A new evolving trading force, which emerged as /

as the most competitive power as against developed countries industrial goods, especially high technology goods, was to participate in the GATT system. A shift from multilateralism to bilateralism in the relations between the EEC and the USA on the one hand and Japan on the other is evident in the discussion of the VER agreements. These bilateral dealings constitute a serious threat to the multilateral trading system.

Another important point which arises in the context of the VER agreements and as far as the EEC is concerned, is that individual EEC member states went their own way and on several occasions have negotiated bilateral restrictive agreements with third countries. For example before the negotiation of the 1977 MFA France introduced unilateral import quotas. Italy also already imposed restrictions. In the U.K. the industry had taken protective measures against imports from South Korea. These bilateral dealings between the EEC member states and third countries are not limited to the textiles sector. In the electronics sector national measures are often taken, especially when a common Community approach is delayed. In the motor vehicles sector similar measures have also been taken, e.g. between the U.K. and Japan and between France and Japan to control trade and thus the respective member states have attempted to protect their own national interests. The national activities of the member states is an expression of bilateralism and therefore have distorting effects on the international trading system in particular on the GATT system. Economic nationalism is a step backwards when what is needed is an increasing attempt to find multilateral solutions to common trade problems.

Finally the question of what is the impact of the VER agreements on the GATT legal system deserves special attention. VER agreements produce the same results on the GATT system as do preferential agreements, although their legal perspectives differ. And in this case it is the GATT system and in particular Art. XIX which has not proved able to cope with the current situation and has tacitly accepted VER agreements as measures regulating international trade in some sensitive sectors. The relevant agreements have been evolved as a permanent feature of international trade and as such have weakened the GATT legal system to a great extent. Bilateralism has gained at the expense of multilateralism. VER agreements are negotiated outside the rule of GATT law and therefore the GATT law is not respected. Waivers have not been /

been requested and an orderly and efficient safeguards system has not yet been established, mainly because the major trading nations are not prepared to accept any changes in the international legal trading system. VER agreements have not only weakened the legal system, but have been unable to remove friction. Instead their proliferation has led to increased protectionism. The international trading system has become less competitive and VER agreements do not take into account the particular interests of third countries which do not participate in these arrangements.

As is evident throughout the present thesis, there is a gap between the international legal trading system, as it was envisaged in 1947 and as it now operates. The problems discussed in GATT meetings in 1948 were different than those discussed today. For example, discussions on market disruption were very rare. The GATT in the course of time has not proved capable of responding to new needs and challenges. The legal structure of GATT was designed to deal with limited issues, and it has not been considerably extended in order to cover significant areas of economic activities which today need to be considered in the context of the international trading system. Such areas include direct foreign investments, intra-firm trade, trade in services and other features of modern trading relationships. The legal structure of GATT as initially set up cannot cope with the current complex problems of adjustment. The GATT Articles are concerned with trade problems without taking into account the need for adapting the rules to the new realities. The GATT is narrowly based in tariff and trade issues and leaves aside any broader issue of international economic policy.

Despite real changes in world trade, limited progress has been made in rule-making. The GATT has not adapted its rules to the changes in new economic conditions. The change in rules has not followed the flow of economic activities. The Codes, although an improvement to the GATT system, do not really represent an effective mechanism to overcome acute trade problems. During the Tokyo Round no substantial improvement to the system has been made. Also during the GATT Ministerial Conference of November 1982, legal problems have not been discussed. The mechanism which deals with trade disputes is not adequate to deal with disputes arising. The lack of an interpretative machinery or a Court /

Court to define and interpret ambiguous legal norms has been pointed out. The need for an effective and adequate system is therefore something which has repeatedly been pointed out. Such a system should make any effort to stop distorting activities and any action, which causes immediate damage to the cause of free world trade, which is still accepted as a virtue.

The weakness and the inability of the G.A. to meet the new challenges is mainly due to the fact that the leading trading nations are not ready to accept any change which might affect their immediate interests. With particular reference to the EEC, it makes insufficient efforts to change the international legal trading system. In fact, it wants to preserve it, otherwise concessions should be made in favour for the LDCs. A very characteristic example is the refusal of the EEC to include agriculture in the system. The LDCs and the weak DCs are inadequately represented in the GATT negotiating process. Despite the fact that considerable part of economic power has passed to certain NICs, the advanced DCs are not prepared to make concessions and resist any change in the international trading rules.

In the light of the present degree of malfunction of the international trading system, greater attention should be paid so as to allow the system to adapt itself to evolving circumstances and to give some practical effects to GATT declaration. Multilateral procedures and rules are preferable to bilateral negotiation. Arthur Dunkel, the present Director General of GATT has repeatedly stressed the importance of multilateral rules and the respect for those rules. Every departure from the rules, as has been discussed earlier, weakens the system and destroys the confidence which the contracting parties should have in it. Multilateral trading rules, sufficient to cope with current difficulties are essential to the improvement of well being and peace. An efficient system, based on multilaterally accepted rights and obligations should be developed to such an extent so as to ensure credibility and discipline and providing the basis for abstaining from any bilateral dealings. Such a system is of interest to both developed and developing countries.

Therefore GATT, despite its limitations and shortcomings, remains the key multilateral trade organisation, which should be preserved and improved, preparing the grounds for the emergence of a sufficient /

sufficient international trading system, accepted by the International Community and being the product of joint efforts made by GATT and UNCTAD. NICs should play a major role and continue their efforts towards this purpose. DCs, such as the EEC member states should respond to LDCs demands for the establishment of an efficient system.

To sum up, the effects of the EEC, as an international entity in terms of international law, on the GATT legal system should be pointed out. Throughout the present thesis it has been evident that the Community, together with its member states, exercises an external trade policy which in most cases is characterised by common action, in the form of 'mixed agreements'. The EEC (together with its member states) as the most important trading bloc in the world is a principal factor influencing GATT affairs and contributing as such to evolving the GATT legal system. The EEC is, in addition, the first complete customs union submitted to GATT, and has raised as a result many legal questions. In this context the compatibility of the EEC Treaty with the GATT agreement has been examined. In particular the concept of preferential agreements has raised legal questions still unresolved, but constituting precedents for future arrangements. Consequently particular attention needs to be paid to the fact that crucial legal questions have been left undetermined and became of secondary importance, whereas practical considerations prevailed. Many questions raised in this respect have remained academic and purely theoretical, since it has been considered 'more fruitful' that practical approaches be adopted. Problems have not been resolved through legal procedures, as legal rules have consequently not sufficiently developed. The CONTRACTING PARTIES have remained the main authority to determine crucial legal questions by attaching particular importance to practical considerations. For example, the EEC's determination as a customs union in GATT in the light of Art. XXIV, preferential agreements and subsequently ambiguous legal norms have been treated with reference to practical considerations.

The EEC as a dominant factor in GATT affairs has exerted a major influence on the GATT system. The Most Favoured Nation (MFN) principle, the main pillar of GATT has been to a noticeable extent substituted by the principle of differential and more favourable treatment for LDCs. The EEC was the first to accord the LDCs more favourable treatment /

treatment through preferential agreements and it might be considered as having been instrumental for the incorporation of Part IV in GATT in 1965, which provides for differential and more favourable treatment for LDCs. It is thus realistic to say that the MFN has been weakened as a result of the EEC's trade practices, such as the negotiation of numerous preferential agreements and also the proliferation of VER agreements to which the EEC is a party. Also the GATT principle of reciprocity has been substituted to a certain extent and as far as the LDCs are concerned, by the principle of non-reciprocity incorporated in the Lomé Conventions. Thus the two fundamental principles of GATT have been affected, and one may even say weakened, as a result of the EEC practices. As is indicated, the EEC in its external trade field has adopted different types of agreements in accordance with the economic situation of each country or group of countries. The EEC has recognised the problems inherent in different situations and therefore has contributed to developing different forms of trade rules or international legal rules (e.g. the principle of non-reciprocity), which are more in accordance with the problems that actually exist. That is, the EEC's practice has contributed to evolving international trading rules in a practical direction.

In particular, the EEC has contributed to changing the legal structure of GATT, although limited progress in rule-making has been made. A great development in international trade relations has taken place since 1947, but the respective legal rules have not sufficiently kept pace with them. GATT should not, however, remain indifferent to this development and evolution which is partly attributable to the creation and practice of the EEC. It should adapt its rules more completely to economic realities and challenges of modern times. In this respect, it is noteworthy that an adequate interpretative machinery in GATT has not been developed to interpret and consider ambiguous legal norms; pragmatic considerations cannot be dominantly applied and lead to legally satisfactory results.

The EEC has contributed to the revision and to some extent improvement of the GATT legal system by participating in the MTNs. These negotiations have led to the establishment of agreements or codes that regulate some modern features of international economic relations, e.g. subsidies /

subsidies. With particular reference to agriculture, the EEC however, has played a rather adverse role by refusing to negotiate within the GATT framework on this sensitive sector of the international economy.

Another very important legal question raised in the context of the GATT is the legal status of the EEC in GATT, that is, the participation of an international organisation in another international organisation. This involves in the case of the EEC, three legal systems, national, Community and international. As indicated in the present thesis, the external trade policy of the Community is determined not least by mixed agreements; therefore, the common external policy of the Community is the product of co-ordination of national and Community policies. On the other hand, the effects of an international organisation (GATT) on another organisation (EEC's) legal order and the determination of the direct effects of the former on the latter is an extremely important legal question which is currently still developing within the Community legal system. The ECJ has during the last years examined this question in several cases, and it has manifested a tendency to uphold the notion of direct effects of GATT within the Community legal order, thus contributing to the development and improvement of international trade relations by co-ordinating the GATT system with that of the Community.

The EEC has helped in evolving the GATT legal system more than any other international entity or group of countries. However, this underlines not least the need to adopt within the GATT a machinery necessarily capable of promoting the emergence of new rules and interpreting and adapting the old ones. A major shortcoming and limitation of the system is therefore the lack of an appropriate machinery to interpret and develop new rules systematically. In this context, the EEC, in possession of the greatest experience and traditions in international trade relations, should take the lead in adopting the necessary measures to improve the legal machinery of the GATT system and thus improve it. The Community and its member states are to a great extent capable of influencing the success or weakening of the GATT. They should initiate measures promoting stronger international rules adaptable to changing international circumstances. The need for an improved multilateral trading system is beyond any question, therefore the Community should, and could, proceed towards this end.

APPENDIX

RELEVANT GATT ARTICLES

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, * any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

- (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
- (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
- (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
- (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5 † of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

† The authentic text erroneously reads "sub-paragraph 5 (a)".

4. The margin of preference * on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

- (a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;
- (b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraphs (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined

by consultation among the contracting parties substantially interested in the commodity concerned that:

- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article XI *

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

Article XII *

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

- (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
- (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

- (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*
- (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and
- (iii) not to apply restrictions which would prevent the importation of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2(a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying restrictions.*

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balances of payments of which are under pressure or by those the balances of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

Article XIII *

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions:

- (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;
- (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;
- (d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this sub-paragraph.

(c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors * affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

Article XIV *

Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

- (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or
- (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

Article XVI *

Subsidies

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B—Additional Provisions on Export Subsidies *

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Article XVII

State Trading Enterprises

1.* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in government use and not otherwise for resale or use in the production of goods * for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutual advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.

(b) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up * on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Article XVIII *

Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development

of their economies, particularly of those contracting parties the economies of which can only support low standards of living * and are in the early stages of development. *

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry * and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries * with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party the economy of which can only support low standards of living * and is in the early stages of development * shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(b) A contracting party the economy of which is in the process of development, but which does not come within the scope of sub-paragraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry * with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in sub-paragraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES, which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned

have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of sub-paragraph (c) (ii) or (d) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry * with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to

* See Preface.

this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with the provisions of paragraph 18; *Provided* that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so,* the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur * in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur * in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or

- (b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence* of the CONTRACTING PARTIES.*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove; * *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of sub-paragraph 4 (b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party

and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

Article XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

¹ See Preface.

Article XXIV

Territorial Application—Frontier Traffic—Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

- (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
- (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that:*

- (a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and
- (c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties

to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a) (i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

Article XXV

Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

- (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
- (ii) prescribe such criteria as may be necessary for the application of this paragraph.†

Article XXXVI

Principles and Objectives

- 1.* The contracting parties,
- (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;
 - (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;
 - (c) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;
 - (d) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
 - (e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures—and measures in conformity with such rules and procedures—as are consistent with the objectives set forth in this Article;

- (f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

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Basic Instruments and Selected Documents (BISD).

	Session	Year	Abbreviation
Volume II	First to Sixth and		
	First Special Session	1948/1951	II/
First supplement	Seventh	1952	1S/
Second supplement	Eighth	1953	2S/
Third supplement	Ninth	1954/1955	3S/
Fourth supplement	Tenth	1955	4S/
Fifth supplement	Eleventh	1956	5S/
Sixth supplement	Twelfth	1957	6S/
Seventh supplement	Thirteenth	1958	7S/
Eighth supplement	Fourteenth to Fifteenth	1959	8S/
Ninth supplement	Sixteenth to Seventeenth	1960	9S/
Tenth supplement	Eighteenth to Nineteenth	1961	10S/
Eleventh supplement	Twentieth	1962	11S/
Twelfth supplement	Twenty-first	1963-1964	12S/
Thirteenth supplement	Twenty-second and Second		
	Special Session	1964-1965	13S/
Fourteenth supplement	Twenty-third	1965-1966	14S/
Fifteenth supplement	Twenty-fourth	1966-1967	15S/
Sixteenth supplement	Twenty-fifth	1967-1968	16S/
Seventeenth supplement	Twenty-sixth	1968-1970	17S/
Eighteenth supplement	Twenty-seventh	1970-1971	18S/
Nineteenth supplement	Twenty-eighth	1971-1972	19S/
Twentieth supplement	Twenty-ninth	1972-1973	20S/
Twenty-first supplement	Thirtieth	1973-1974	21S/
Twenty-second supplement	Thirty-first	1974-1975	22S/
Twenty-third supplement	Thirty-second	1975-1976	23S/
Twenty-fourth supplement	Thirty-third	1976-1977	24S/
Twenty-fifth supplement	Thirty-fourth	1977-1978	25S/
Twenty-sixth supplement	Thirty-fifth	1978-1979	26S/
Twenty-seventh supplement	Thirty-sixth	1979-1980	27S/
Twenty-eighth supplement	Thirty-seventh	1980-1981	28S/

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